



**Frustration of Performance of Contracts: A comparative and Analytic Study in Islamic Law and English Law.**

**Thesis for the Degree of Doctor of Law**

**By**

**Ibrahim Saad Alhowaimil**

**Supervisor**

**Prof. Dr. Holger Sutschet**

**Brunel University School of Law**

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## **Declaration**

I declare that the work presented in this thesis is my own except where it is stated otherwise.

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## **ABSTRACT**

This thesis is an assessment of the position of Islamic law and English law regarding the doctrine of the frustration of the contract. The thesis gave in the first general view about Islamic law and Saudi legal system, also about the contract in Islamic law in general. This study provides a detailed and critical account of the principles of frustration of contract law which operate under Islamic law and English law, where appropriate, identifies and critically evaluates the differences between the principles of frustration of contract which operate respectively under Islamic law and English law and to recognize the effect of the frustration on the performance of the contract.

In the case of the absence of theory of frustration of contract in Islamic Law, an attempt will be made to create a complete doctrine of frustration of contract. Researcher discussed the frustration of contract in Islamic Law. In the case of the absence of theory of frustration of contract in Islamic Law, an attempt will be made to create a complete theory of frustration of contract in Islamic law.

This is recognised owing to the fact that most cases of the application of frustration fall under the doctrine of impossibility. Impossibility can be regarded as taking place ‘when there supervening events without default of either party and for which the contract makes no sufficient provision which so significant changes the nature, if the cases where impossibility relates to the subject-matter of contracts or relates to the parties, subjective or objective impossibility. This study discusses the issue of Frustration of contract due to external factors covering cases of legal impossibility. This study examines the discharge of contract if there is circumstances do not make the performance impossibility but became difficult to perform such as impracticability and frustration of purpose.

It will also look in some detail at the limitations and narrow scope of the doctrine of frustration, and also discuss contractual parties’ sometimes preferred alternatives, such as drafting force majeure clauses and hardship clauses.

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# CHAPTER ONE

## General Introduction

### 1.1 Preface

Civil liability is considered one of the most important legal topics due to its continuous practical applications, and at the same time research into civil liability is considered the most accurate and difficult. Civil liability is composed of two main divisions: contractual liability and tortious liability. Contractual liability occupies a prominent place in the field of civil liability because it is a guarantee of the performance of obligations. The laws around the world, including Islamic law and English law, place great importance on the law of the contract and civil liability. The reason for the role of contract being at the heart of law is that it crosses a number of disciplines and industries, because it stems from covenants (i.e. promises). Contracts can be seen in family law with the marriage agreement, pre-nuptial agreements, parental rights and child custody agreements. These factors indicate that the contract is wider than the commercial realm and clearly part of the domestic sphere. In fact there are cases where contract law crosses the commercial and the domestic, such as renting, purchasing and the family law. The law of contract also applies to higher levels of law, such as treaty law, where the state signs and then ratifies a treaty to indicate that it confirms itself bound by the contractual obligations within . The implication of this is that contract law is an intrinsic set of principles that underlie the legal system. In fact, the legitimacy of criminal law stems from the citizen breaking their “contract” with the state to act in a “good manner”. Thus, it is essential to understand that the nature of contract law is not only based on a formulaic test, but crosses so many areas that there will be an erosion of formulas in the interests of fairness (and morality?). The result of this is that it is necessary to examine the concept of contractual obligations in order to understand the nature of contract law.

It is clear that the law of contract is not a self-standing area of law; rather, it provides an underlying set of principles across all areas of law. A fundamental principle that underlies contract is *pact sunt servanda* (all promises must be kept). This is the nature of a covenant in English law, albeit there has been erosion to a more formulaic model in the law of modern contract. The concept of *pact sunt servanda* is in its clearest form within French Civil Law, in which promise and obligation have been codified. There is a clear moral element with this framework, which is reflective of the historical model of contract in common law, i.e. this is the application of contract as promise.

The starting point of contractual obligations across all jurisdictions is that the rule of law will not interfere with a consensual agreement between individuals. This is then tempered by what the state identifies as the ingredients to create a valid promise, which will include capability and intention between the parties to make the said agreement. The tests that have been created point to binding contractual obligations based on party autonomy, and consensual agreement to be bound by the promise. The rule of law should not become involved, unless the contract is based on illegality. The primary way to discharge a contract in both English and Islamic law is through performance. However, there are four forms of discharge, which are: performance; agreement; operation of law; and breach of contract. The rationale for supporting performance is that it maintains the fundamental principle of *pact sunt servanda*. Failure to meet these obligations results in a breach of the law of contract and damages are payable. The same is true if there is not full performance of the contract, because the point of consideration is that the detriment is matched through the performance. The approach in English law will result in a situation where the performance and breach are the primary applications, because party autonomy requires that the contractual obligations are fulfilled. Under Islamic law the operation of the law will discharge the contract, so long as it is clear that such a contract is not valid in the first place. The impact of this is that a similar approach to the English model is present. This is not necessarily true, because sharia non-compliance should be treated as illegality of contract under English law (i.e. a form of discharge). This means that there is a lax approach under the Islamic model to discharge and operation of the law. The question still to be considered is whether the latter system has a lax system for frustration, which is bound by a high threshold under English law. The answer will be determined by the treatment of contractual obligations and the role of the

parties. This means that discharge of contract will be briefly examined under English law to set up the final discussion on frustration.

Discharge is a simple concept, which is the identification that the contractual relationship has ended. The ending of this relationship may or may not have a breach depending on the nature of performance or intervening factors. The English courts will rule for damages in the case of breach and only in exceptional circumstances force specific performance, because an arm's length to the contract has to be taken. To order specific performance (i.e. refusing discharge through breach and demanding discharge through performance) requires that there will be systemic injustice (i.e. damages will not remedy the harm). The same will be true for the court to rule that the law will discharge the contract (i.e. there has to be illegality, such as corruption or duress that cannot be remedied by altering the contract).

The approach to frustration can be identified in a similar manner under English law, because the contract has imposed obligations on the parties and the court will only intervene by imposing damages for any breach. This is because the parties have agreed to the terms, which means it is for the parties to discharge the contract and claim the appropriate remedy for failure of full performance. The Islamic approach illustrates that there is a high degree of intervention and relaxing of formalities, in order to provide for sharia compliance and meet the moral requirements of Islamic society. Hence, on this basis, is that the approach to frustration will illustrate the extent that the discharge of contract on fairness will take place within the Islamic system.

Contracts are made by the parties which are intended to be kept until they have been completely performed. The principle of sanctity of contract is another facet of the parties' intention. As such every party to a contract enters into the contract on the assumption that there will be a reasonable balance between the reciprocal burdens and benefits of the parties and both intend to gain from the performance of the contract. The occurrence of changed circumstances may have various detrimental effects on the contract, ranging from full impossibility to perform to the situation where performance remains possible but either becomes excessively onerous or ceases to be of any use to one of the contracting parties. According to the requirements of the principle of sanctity of contract, change in the circumstances of a contract is not regarded as relevant as long as it is within the normal range of events which the parties intended to allocate their

consequential risks by the contract. Thus two situations are to be regarded: one is when performance of the contract becomes impossible and the other when performance of the contract becomes so excessively onerous for one of the parties that it was beyond the contemplation of the parties when they made the contract. These two types of situations are clearly distinguishable in theory. In the case of impossibility, the contract cannot be performed because supervening events make the performance of the contract totally impossible and the solution for this situation is discharge of the contract. In a case of economic hardship, performance of the contract is still possible, but the disadvantaged party will bear an excessive difficulty if he/she is compelled to continue with the performance of the contract in accordance with its original terms.

It is in the field of such commercial contracts that the subject of impossibility of performance gains its prime importance. In the changing world of today, endangered by wars, riots, rebellions, revolution and natural disasters, and faced with many economic uncertainties caused by currency fluctuations, inflation and other economic factors, the contractors may frequently find themselves in a situation which they could never have foreseen when entering into the contract. To find relief in such circumstances, they usually invoke the doctrine of impossibility of performance.

This study will consist of an attempt to analyse the doctrine of frustration and its operation in relation to contracts. It will look closely at both the concept of initial impossibility arising from a common mistake on the part of both parties as to the state of things before the contract was agreed and the concept of subsequent impossibility and frustration. The latter deals with a situation whether the parties enter into agreement on terms both express and implied and then a supervening event renders the performance of that agreement radically different from that which was envisaged by both parties at the outset. These themes will be discussed in greater detail in the first section and will run throughout the work. The research will examine the concept of objective and subjective impossibility, and the rules relating to discharge of contractual obligations and allocation of risk. It will look at the situation when either the subject matter or a thing essential for performance is destroyed or unavailable, either partially or completely. It will then look at how the death or supervening incapacity of a party will affect a personal contract. Towards the latter part of the dissertation, it will discuss the problems that arise when a method

of performance becomes impossible or a particular source becomes unavailable. It will conclude by looking at the effect of delay and temporary impossibility on a contract.

Parties, while entering into a contract by their free will, share the risk attendant on the transaction, essential of the contract, and while doing so, voluntarily and willingly define their reciprocal obligations under the contract. It is up to the parties to incorporate in the contract any saving or restrictive clauses regarding their defined obligations. Such clauses have been termed as exemption or exception clauses. Under Islamic and English law, if any unforeseen or unforeseeable supervening events make the performance of the contract impossible through no fault of the party concerned, the contract may be frustrated. Frustration is an operation of law. It results in automatic involuntary discharge of the contract, relieving both parties of their liabilities from the point of time of occurrence of that event. However, in Islamic law not all cases of frustration are discharged automatically, but the party of the contract in some cases has the right to perform the contract or discharge the contract.

Sometime the supervening events do not render the performance of contract impossible, but make the performance onerous for the party. This is dealt with under the doctrine of impracticability of performance of the contract. Impracticability applies when the performance of the contract is still possible but economically very difficult.

Frustration of contract law is in general limited, because its contractual model is based on the knowledge of accepted risks that the parties pursue regardless. This means that the potential for frustrating acts should be built into the contract or clearly make the whole purpose of the contract impossible. The Islamic approach, on the other hand, is based on fairness and known risks. This means that the doctrine of unforeseen circumstances can frustrate the contract. The implication of this is that the concept of *pact sunt servanda* is based on the narrow framework of what is conceived in the contract (i.e. the knowledge of the parties) in the Islamic model. The result of this is that the English and Islamic approaches to frustration set an exceptionally high threshold to frustration.

It is important to note that in both systems the sanctity of contract is the prima facie rule, which is aptly expressed in *Liamco v. Libya*. This case held that:

“The principle of the sanctity of contracts [...] has always constituted an integral part of most legal systems. These include those systems that are based [on] Roman law, the Napoleonic Code (e.g. article 1134) and other European civil codes, as well as Anglo-Saxon Common Law and Islamic Jurisprudence ‘Shari’ah’.

This means that the use of frustration will be the exception to the norm, which is illustrated in the Islamic law of obligations. A Muslim must “be true to the obligations which you have undertaken... Your obligations which you have taken in the sight of Allah... For Allah is your witness”. The fundamental difference is that the obligation of the contract will not impose undue hardship or illegality<sup>1</sup>, because this will be in breach of sharia law.

The fundamental principle in English common law is that frustration will not occur unless there is a contractual obligation or the whole purpose of the contract has completely slipped away. This is an exceptionally high threshold to meet. The Islamic system is based on hardship, in which an intervening act of Allah will allow the contract to be discharged. The Islamic element of fairness also infers the right to discharge the contract in unforeseen circumstances that create hardship on the basis of just cause. This is confirmed in the Qur’an, which identifies that:

“O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent. And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful”.

This means that once the social or religious element comes into play the contract can come into play, which indicates that there will be discharge in a similar manner as adapting the contract in Islamic law.

On the other hand, the English model will not allow discharge on undue hardship. Rather, there has to be a contractual provision or the purpose of the contract can no longer be upheld. Therefore, the main distinction that is present is that the English model will adapt the contract to

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<sup>1</sup> There are two types of illegality in Islamic law: the first case of the invalidity of the contract at the beginning before the formation of the contract, such that the subject matter of the contract is prohibited in Islamic law, such as the sale of alcohol or contract includes a usury, also the government issued a law prohibits dealing with the types of thing. So contracts which are absolutely null and void due the kind of this illegality. The second type is illegality, come after the formation of the contract because of the supervening events make the contract impossible to be performed because of this kind of illegality we will discuss that in later chapters.



meet the intention of the parties and enforce the contract even if it creates hardship, i.e. the parties have agreed to the risk. This illustrates a formalist model of contract. The doctrine of frustration will only provide the parties with limited application and will only apply if there are circumstances beyond the parties' control which rendered the performance impossible. Force majeure is a clause commonly found in commercial agreements – which clauses have been drafted to cover a wider range of circumstances that may have an effect on the commercial benefits of the parties to the contract – states that one or both parties will not be liable for performance of its obligations or allows a party to suspend performance upon the existence of certain extraordinary events.

This study will distinguish between some doctrines. For example, the doctrine of frustration, and the doctrine of impracticability contain elements of hardship, although it is important for the purpose of the study to make an obvious distinction between a force majeure clause and a hardship clause.

## **1.2 Methodology**

The study is of a library type and relies heavily on the writings of the classical Muslim jurists and English writers. For the supplementary data, the study refers to modern writings including books, reports, journals and seminar papers. In alignment with the information electronic resources, the study also, involving an analysis and comparative study of a range of documents.

Taking a comparative approach the thesis aims to consider and explore the similarities and differences between the legal systems being studied. To the extent that the differences between the legal systems under study are traceable and recognisable this thesis aims to examine the legal and factual reasons for such differences. This study will require a wide-ranging search through documents, such as legal sources and dictionaries, in order to collect the required data. Thus, there are two steps in the research: the collection of the data and the examination of these data according to comparative jurisprudence. The study initially requires a review of the literature of Islamic law and an explanation of its history, sources and principles. The study of legal matters

requires the use of special terms and expressions, which require particular definition and discussion. This literature will provide the reader with a background to the concept of Islam, its methodology of making law and an explanation of the ambiguous terms that it uses in discussing law. Sources which have been selected for analysis in this paper include primary sources, such as legislative enactments and case decisions, as well as secondary sources, including academic journal articles, academic textbooks and practitioners' legal guides. While this author has imposed no jurisdictional constraints upon the source selection criteria utilised, this researcher has only been able to analyse those sources which were either authored in English or which were authored in Arabic but later translated into English. There have not been enough references written in English regarding the study of Islamic law, where most of them have been written in Arabic, thus, all texts quoted from references are translated by the researcher.

The methodology of this study takes the form of a literature review. To some extent, the research depth of this study is unavoidably limited by the fact that there exists very little English research on the differences between the way that Islamic contract law is applied and enforced by each of the four main schools of Islamic jurisprudence. With this limitation in mind, this researcher has chosen to treat all four schools of Islamic contract law as being identical, except where there is evidence, in the academic literature, of a divergence in approach between them. As far as a study of Islamic law is concerned, the discussion of the views of schools of legal thought is essential. Amongst the well known schools of legal thought are the Hanafis, Malikis, Shafiis and Hanbalis. Therefore, the discussion could be so broad that it would be almost impossible to cover all the schools of law due to time constraints. As a result, this study employs a selective approach, rather than examining every Islamic school of legal thought. In fact, even in a particular school, there are sometimes several opinions about a particular problem and it is quite difficult to study every single opinion of the school concerned. In such a case, the study restricts its focus to the most dominant view within those selected schools that can be considered as representing the view of the school as a whole. This study is neither influenced by a particular school nor discredits any of them. The selective approach only aims to identify how a particular school of legal thought works on legal problems, and what sources of law it refers to in its attempts to provide solutions for those problems. By doing this, the selective study can be regarded as the means to identify legal issues, whilst the final result will trace the discussion back up to the

original sources of law. If the final finding favours the view of a particular school of legal thought, it should not be interpreted that the study discredits the remaining schools.

For the purpose of extracting legal issues, the study mostly refers directly to Muslim classical literature. As most of the classical writings had no clear headings and indexes, this research has taken every possible care to extract all the issues that are so related to its scope of discussion.

The case of law study is taken as one of the important and reliable methods for legal research. Case study can be defined as a method of research where the facts and grounds of each legal issue are dealt with by taking an individual case. The study focuses upon the decisions of the courts in English Law which has a large amount of published cases, so in studying English law the main focus was on primary sources, while scholarly commentary writings were of help in analysing the specific issues relating to the subject of the study, as well as there is some of the court cases from Saudi Arabia that the researcher has got them personal by visiting the courts in Saudi Arabia.

In this study, the issues relating to Islamic law have been discussed separately, then the following chapters discuss issues of English law. In conclusion, there is a comparative study between Islamic law and English law, the aims of the method because Islamic law differs from English law in many aspects, such as the sources of law. Also there is a different method of writing legal books between Islamic law and English law, as well as Islamic law in general is not known to Western readers, so the discussion of Islamic law separately will give the reader a clearer picture about Islamic law's view. So the method is useful for the Western lawyer not only because, like every other comparative study, it will help him enrich his/her knowledge of the law, and understand his/her own legal system better, but also because there is evidence showing a cross-cultural influence between Islamic law and the Western legal systems.

### **1.3 The Aims of the Study**

- The primary aim of this paper is to provide a detailed and critical account of the principles of frustration of contract law which operate under Islamic law and English law. A secondary aim of this study is to identify and critically evaluate the differences between the principles of Islamic contract law which operate respectively under the four schools of law.
- To comprehensively analyse the set of rules and legal opinions which control the frustration of the contract, and examine how these might be integrated into and reconciled with the judicial practices. It is also intended to show how Islamic law and English law may be adapted.
- To examine the current concept and legal nature of the doctrine of frustration in Islamic law and English law. The aim is to examine this concept in the four main law Schools of Islamic law to find out the extent to which they recognise this problem and what kind of legal effects they consider for it.
- The fact that Islamic law is not known to the Western world in its full details has been the main reason for emphasising it in this thesis.
- To build a theory of frustration in Islamic law by collecting the issues and data relating to the doctrine of frustration of contract from different chapters in jurisprudence books and different nominated contracts.
- To assess the effects of frustration on the performance of the contract and to determine the effects.
- To realise the similarities and differences relating to the doctrine of frustration among Islamic law and English law to help jurists and lawyers across the world.

#### **1.4 Difficulties Facing the Study**

- The nonexistence of a theory of frustration in Islamic law which is a result of the non-theory of contract law; this adds to the researcher the burden of collecting the data from many places in the legal books, which leads to more time and effort.
- The lack of previous studies covering the frustration of contract in Islamic law in general, and some of the cases in English law.
- The difficulty of getting the judicial judgement in Saudi Arabia because the cases are not published and not classified, so the researcher had to go some cases personal, there is attempt to publish some cases, but still in the preparation stage.

## **CHAPTER TWO**

### **Introduction to Islamic law and Saudi Legal System**

#### **2.1 Introduction**

Whilst it has been seen, historically, that Islamic law was somewhat reserved within the Islamic state, it has become increasingly mainstream and recognised in jurisdictions that would not traditionally have been viewed as having an Islamic root. Islamic law—the product of Islam's centuries of stored experience—is the embodiment of ideal Islamic life. Essentially, it is the framework of Islam itself. Although the religion describes what ideal life should constitute, the law indicates the right path to follow in order to arrive at the desired outcome. It is important to stress that the existence of laws for the regulation of society is extremely necessary once such a relationship is established. In reality, social life requires various transactions between individuals, and it creates various relationships. For instance, in recent times, commercial transactions between Muslim nations—as well as between other nations—have been extended considerably. Therefore, it has become necessary to have fundamental principles and rules that determine the rights of every individual in relation to the others.

This chapter will consider the various aspects of Islamic law, including definitions associated with Shari'ah, as well as the legislative system that exists and the various sources and principles associated with Islamic law. Firstly, however, a brief introduction to the epistemology associated with Islamic law is provided in order to understand from where such various factors have evolved, and to provide an understanding of the nature of Shari'ah, as well as its sources and objectives. This is important as this thesis will discuss areas of law mainly in the light of Shari'ah—again, in order to understand Islamic law.

Islamic law can be seen as largely rooted in the religious concepts associated with Islam. As this chapter progresses, there is consideration to the various sources with which the underlying ethos of Islamic law is associated and the religious concepts that should be applied. Moreover, this chapter is also intended to provide a brief account of the Saudi legal system in which Islamic law

is applied, and reference will be made to Saudi law cases. The aim of the chapter is to enable us to understand contracts in Islamic law as understanding of the basis of the contract and source of the law of contract will lead to better knowledge of how such a contract works.

## 2.2 The Concept of Shari'ah

The word Shari'ah literally refers to a path trodden by camels to a water source. It also means the path to the watering place. In the Islamic sense, it refers to the path to be followed and the path that the believer has to tread in order to obtain guidance in this world and deliverance in the next.<sup>1</sup> The definition of Shari'ah is central to Islamic law. In its broadest sense, Shari'ah law is a body of law that is custom-based, and which has its root in the religion of Islam. Shari'ah law is potentially very far-reaching, and covers both the criminal and civil justice systems, as well as dealing with personal conduct and moral conduct, in addition to a number of other spheres, such as political, social, and economic, although the set of rules has been developed so that they can be applied to any relevant situation as it arises. As Muslim states operate as theocracies, the religious text is effectively the law, and therefore the application of these religious texts is referred to as Shari'ah. Thus, Shari'ah refers to a set of rules, regulations, teachings, and values governing the lives of Muslims, Shari'ah is a system of belief that encompasses not only people's relationship with God, but also provides Muslims with a code that regulates their whole life.<sup>2</sup>

Whilst Islamic law is part of Shari'ah, Islamic law generally is used in reference to the system of law associated with the religion of Islam. Some writers use the terms Islamic law, Shari'ah or Islamic jurisprudence (*Fiqh*) interchangeably. This could easily result in confusion for readers seeking to determine the significance of each concept. However, in the context of this research, the term 'Islamic law' is used in conformity with modern usage, and thus refers to the entire system of law and jurisprudence. Owing to its breadth of scope, the term Shari'ah cannot be rendered in English by any single word. The closest approximation may be 'religion', although Shari'ah implies a focus on the prescriptive side of religion.<sup>3</sup>

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<sup>1</sup> Abdurrahman Doi, *Shari'ah Islamic law* (2ed edn, Taha Publishers Ltd 2008) 23

<sup>2</sup> John Esposito L, *What Everyone Needs to Know about Islam* (2ed edn, Oxford University Press, 2011) 178

<sup>3</sup> Kamali Mohammad, *Shari'ah law An introduction* ( Oneworld Publications 2008) 40

Notably, Shari'ah is divided into three wide categories: the first deals with ritual or religious matters that regulate worships, like prayers or fasting etc., referred to as *Ibadat*; the second category deals with transaction matters, such as civil and other legal obligations, called *Muamalat*; and the third is one that deals with criminal matters or punishment, namely *Auquobat*. The second and third categories are also called Islamic law.<sup>4</sup> As far back as the ninth century, there has been the opportunity to interpret texts as well as to refine the rules that apply in terms of Islamic societies; this was an opportunity afforded to scholars in the area of Islamic religion. Essentially, separation of power was put in place in order to ensure that the ruler could not simply reinterpret these decisions made by the scholars. Over the years and through successive empires, the separation has developed, although there was never any formal separation laid down in writing. Over time, the way in which the Shari'ah law has been interpreted has enabled the Muslim world to become modernised in its approach, and thus has become more able to react to the challenges of modern society, thereby making it much more likely to integrate with the Western world and its legal systems.<sup>5</sup>

Interestingly, the Dictionary of Islam defines Shari'ah as God's eternal and immutable will for humanity, as expressed in the Qur'an<sup>6</sup> and Sunnah<sup>7</sup>—Muhammad's example. This does not necessarily assist greatly when it comes to determining how it should apply in the legal context, but does reaffirm the fact that Shari'ah law is very much based on religion, and applying this latest belief to more traditional legal concepts. Although Islamic law is based on eternal principles or frozen wisdom, the law itself is mutable.<sup>8</sup>

Despite the seeming ambiguity of the definition, Shari'ah law seems to be applied across approximately 50 of the Islamic states and countries; however, the degree with which it is

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<sup>4</sup> *ibid* 42.

<sup>5</sup> Mumisa Micheal, *Islamic law Theory & Interpretation* (Amana Publications 2002) 2

<sup>6</sup> Arabic word is the holy book of religion of Islam also sometimes transliterated as Quran, Kuran, Koran, Qur'ān, Coran or al-Qur'ān. Qur'an is the word of God as revealed to the Prophet, Muhammad (peace be upon him) through the Archangel Gabriel as the circumstances and situations so demanded. This is the foundation of Islamic jurisprudence. Even though the *Quran* is written, it does not appear in a legal code. It deals with faith and belief, morality and rules of conduct, spirituality, worships, and social life and legal matters.

<sup>7</sup> The term Sunnah is Arabic word refers to the statements and actions of the Prophet Muhammad, as well as statements and actions of others done in his presence, with his knowledge and approval, it come as second source of law.

<sup>8</sup> Noel J Coulson, *A History of Islamic Law* (Edinburgh University Press 2006) 36



applied is variable, and there are also different interpretations placed on the religious text, which can result in different legal applications, depending on the state.

The argument that arises here is that, despite this, it should be noted that, as Islamic law has become integrated into the justice system, it still bases itself on religion, and therefore the courts are religious courts, which are often officiated on by religious men or clerics. In fact, the interpretation of Islamic law is not limited to the religious men, but in Islam is allowed to any one of the law scholars or researchers in this field so as to interpret the law and give their opinion about any case. Markedly, the law scholars could be academics at the university, judges, lawyers, or anybody capable of and qualified to give a sound opinion on matters of Islamic law. He/she is entitled to understand Islamic law and its methods of the inference the rules from sources of Islamic law and applies the rule on the present case. Moreover, non-Muslims are able to apply Islamic law, such as that which is happening in some banks or finance institutions in some Western countries: for example, the applications of Islamic finance standards or Islamic contracts in some banks of the United Kingdom.<sup>9</sup>

### **2.2.1 The differences between Shari'ah and Fiqh**

The development and applicability of Islamic Law today, interpretation is a fundamental constituent of ensuring an ever-evolving, ever-organic Islamic Law which is able and willing to keep up with an ever-changing society. It is through Fiqh that this is to be achieved.

Fiqh 'literally means knowledge or understanding.'<sup>10</sup> In the context of Islamic law, Fiqh refers to the 'human understanding or comprehension of ... [the] divine law.'<sup>11</sup> In addition, Shari'ah constitutes the source from which Fiqh is developed through *ijtihad*, the latter meaning 'to exert all one's effort to know, against all odds, what God's law is.'<sup>12</sup>

As noted by countless experts, there exists a hazy grey ground between Shari'ah and Fiqh with the 'undefined borderline between revealed law and jurist formalities.'<sup>13</sup> In quantitative terms,

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<sup>9</sup> For example HSBC Amanah bank, applies Islamic law sander in mortgage.

<sup>10</sup> Mohammad Kamali, 'Fiqh and adaptation to social reality' (1996) 1The Muslim World 62,68

<sup>11</sup> Frank Vogel, 'An introduction to Law of the Islamic world' (2003) 31 International Journal of Legal Information 357

<sup>12</sup> *Ibid.*

<sup>13</sup> Ayla Karmali, 'Sharia and Muslim Legal Thought in the 21<sup>st</sup> Century: The Paths Ahead' (2006) 13 Y.B Middle E.L. 3

there exists a difference between Shari'ah and Fiqh given that there has always existed one Qur'an and Sunnah.

Furthermore, Shari'ah includes general provisions and principles whilst Fiqh tackles more specific issues. A good illustration for this distinction is the prohibition of cigarette smoking. Whilst the Qur'an forbids believers from taking their own life, it is Fiqh, which, as an extension of this principle forbade cigarette smoking when it was discovered that it was potentially deadly.

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In addition, there is also a very significant qualitative difference which is also the most problematic when dealing with the confusion in question. A Shari'ah principle is established by 'the Great Legislator or what the Prophet spoke of in well-proved Sunnah, whereas a Fiqh principle is rationale by a Muslim or a jurist.' As a result, 'should not be an obstacle before new thinking or...creativity and renovation.'<sup>15</sup> Thus, the divine framework that constitutes the backdrop of the Shari'ah renders it sacred and primary and, thus, not to be meddled with, but it is the human characteristic of Fiqh which allows significant interpretations to be made in a more flexible manner. Nevertheless, it must be noted that Fiqh is to remain within the letter and spirit of the Shari'ah. The important qualitative distinction between the two lead to Dr. Said Ramadan promoting the term Muslim jurisprudence rather than Islamic jurisprudence when referring to Fiqh because 'an incorrect legal conclusion rendered under Fiqh, of which there have been many, properly should not be classified as Islamic.'<sup>16</sup>

In conclusion, Shari'ah is divine and general whereas Fiqh is human and specific. Notwithstanding the significance of understanding the differences between the two, their interrelated, interconnected nature cannot be undermined given that Fiqh allows for the 'practical application of the Shari'ah'<sup>17</sup> It enables Shari'ah to be everything that many argue it is not, that being a source of law that responds to the needs and wants of societies through time and space. Nevertheless, the interpretation and application of Fiqh is not universal given that schools of

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<sup>14</sup> Muttaqi Ismail, 'Shariah and Fiqh. Do you know the difference?' <http://islamiclearningmaterials.com/shariah-fiqh/> accessed 5 January 2014

<sup>15</sup> *Ibid.*

<sup>16</sup> *ibid*

<sup>17</sup> Kamali (n10).

thought vary across the regions of the Muslim world which are characterized by different cultures and customs.<sup>18</sup>

## 2.3 Islamic Legislation

Islamic legislation and the ethos and history behind the various rulings and principles are not a straightforward issue. The actual vast body of Islamic legislation is often referred to as Shari'ah law as this is thought to encompass all of the various strands of this body of law. It is actually quite interesting to note that the direct translation of Shari'ah is a 'way' or path which suggests that, rather than being a body of law in the strictest sense of the word, it is actually more a way of being or guidance. This ethos is reflected in the fact that, although Islamic law is now regarded as a body of legislative rules, it remains the largest body of religious law and, as such, is based on Islamic jurisprudence to a large extent.<sup>19</sup> Shari'ah, in the widest sense, also dictates the way in which other aspects, such as social and economic issues, are dealt with within the Muslim community. For the purpose of this paper, focus is placed on the legislative background and sources, although it is recognised that other social and religious factors have a direct bearing on many of the legislative issues raised. There is little or no distinction between the religion and the law, in this context, with religious texts being viewed as law, although the application of legislation and religious texts may prove to be different when a close examination is undertaken.

The foundation of Islamic law and the jurisprudence that develops these legislative requirements is referred to as Fiqh. Fiqh is seen as slightly different from Shari'ah whereby the Fiqh refers to the inferences and ideas drawn by Muslim scholars and the Shari'ah refers more to the principle underlying the processes that the scholars follow. This should mean that, in the main, Shari'ah and Fiqh are in harmony, although this is inevitably not always the case, and conflicts will arise occasionally. The two key sources of Shari'ah law are the Qur'an and Sunnah. Under Shari'ah law, it is noted that some laws and rules are regarded as divine and will be relevant regardless of

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<sup>18</sup> M. Cherif Bassiouni & Gamal M. Badr, 'The Shari'ah: Sources, Interpretation and Rule-Making' (2002) 1 UCLA J. Islamic & Near E.L 135,139

<sup>19</sup> Doi (n1) 28.

the situation or timeframe, whereas other sources have been developed over the years by scholars applying Islamic legislation. For this reason, the history of Islamic legislation is critically important to the understanding of the modern-day applications of this religious law.<sup>20</sup>

Fiqh has a particularly long history with many of the Fiqh thoughts dating back to very early Muslim communities. Particularly influential was the jurist, Muhammad ibn Idris ash-Shafi`I, from the late 8<sup>th</sup> Century, who laid out the Islamic jurisprudence principles, which remain central to this day. In this very early book, four key roots of Islamic law were identified: the Qur'an and Sunnah, mentioned previously, as well as the Ijma and Qiyas. The ideas proposed in this book were developed considerably by the Islamic jurists between the 8<sup>th</sup> Century and the 13<sup>th</sup> Century. In actual fact, this period was so influential that it was known as the Islamic Golden Age. The body of law, known as Shari'ah, is actually rooted in the teachings of the Prophet of Allah and the corresponding sayings of Muhammad, which were stated in the Qur'an and Sunnah. This is largely why Islamic legislative roles are said to be founded in the two key areas of Qur'an and Sunnah.<sup>21</sup>

It was not until around 1,400 years ago that Islam began to take a more structured and formal approach that could be aligned with standard legislative processes. Throughout the period of development, Shari'ah was seen as so much more than a simple body of law, and was viewed as a way of life, thus making the exact legislative conditions difficult to ascertain or pinpoint.

There is no denying that the scholars of Islam have been extremely influential in the development of Shari'ah law, and for many centuries it was the scholars who were responsible for upholding the laws and who were also responsible for developing new ones where necessary—all of which were related back to the key texts. In the time of the Ottoman Empire during the early 19<sup>th</sup> Century, Shari'ah law was codified. The codification not only had the effect of making Islamic law more legalistic in nature, but also meant that it was more regularly compared with other legal systems, and was increasingly viewed as a body of law rather than a religious matter.<sup>22</sup>

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<sup>20</sup> Irshad Abdal-Haqq, 'Islamic Law: An Overview of Its Origin and Elements' (1996) 1 *Journal of Islamic law* 1,60.

<sup>21</sup> Abdurrahman Doi, *Shariah in the 1500 Century of Hijra Problems and Prospects*. ( London. Ta-Ha Publishers 1981) 43.

<sup>22</sup> Hallaq Wael, *The origins and Evolution of Islamic Law*. ( Cambridge University Press 2005) P 124.

Such codification was not undertaken lightly, which was largely as a result of military activity within the Ottoman Empire and overall reforms that were occurring internally. This codification was also quite clearly a step towards westernising the country. Moreover, by adopting a body of principles or doctrine that could be relied upon, it was considerably easier for those studying Islam to identify with it as a legislative body. Using the thoughts and ideas of scholars as the basis of legal principles was a foreign concept to westernised society, and it was much easier for them to understand one codified system that could be referred to in regard to any legal matter. Once such codification had taken place, the power of the scholars disappeared immediately as they were no longer able to have a final say in terms of what should be law or how the law should develop; thus, the power shifted to the state itself, as is normal in westernised society.<sup>23</sup>

Multiple sources of Islamic law are pulled together to form the body of legislation, known as Shari'ah. Historically, the sources have been somewhat fluid, coming from individual scholars, as discussed above. However, over time, such legislative sources and processes have become more formalised, partly due to internal need and partly due to the need to implement a greater degree of alignment with western society.<sup>24</sup> Throughout history, one of the key sources of legislative conditions and rules has come from the Qur'an and the Sunnah, and this is where those studying Islamic legislative systems will look in order to gain guidance in the first instance. Qur'an actually is a direct transcript from Allah.<sup>25</sup>

The various different schools of Islamic jurisprudence place different levels of importance on the sources in terms of deriving legislative guidance. For example, the Sunni schools of law will look at multiple secondary sources, such as customs or general judicial consent, as key sources of legislation. They argue that the independent reasoning of both theorists and judges are vital in the interpretation of legislation and the codification of Islamic law. This is not a uniformed opinion; rather, the codified legislation is used differently by different Islamic schools of law.

For example, the Maliki and Hanbali schools of law rely much more heavily on the Hadith, or the codified principles, arguing that there is no place for analogy or independent reasoning, and that the letter of the law should be followed at all times. When drawing an analogy with the

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<sup>23</sup> Liebesny Herbert, 'Stability and Change in Islamic Law' (1967) 21 *Middle East Journal* 16,34.

<sup>24</sup> Liaquat Khan 'Jurodynamics of Islamic Law'(2009) 61.2 *Rutgers Law Review* 231,293.

<sup>25</sup> Hallaq Wael B. *A history of Islamic Legal Theories* (. Cambridge University press 2008) 142.

English legal system, such different opinions could be seen as an analogous with the different methods of statutory interpretation, albeit on a slightly more inflexible basis.<sup>26</sup>

Although these various approaches may be very different, in reality, the actual practical application varies very little between the various schools. Regardless of which approach is implemented, the Qur'an remains the primary source of Islamic law and the overall foundation underpinning all legislation. Despite the fact that Islamic legislation is now being codified, the Qur'an is seen as the Word of God, and is therefore highly influential—not only in the legal sphere but also in terms of political and social issues. In Medina, the issue of social economic legislation is given prevalence and remains central to the Islamic legislation system. Although it is recognised as important, it is not a legal code as western society understands it; it is based more on relationships and the way in which individuals should interact with each other. There is, however, a range of approximately 500 verses that deal exclusively with the rules of human conduct; these are relatively close to a body of law and legislation as those in the UK would understand it.<sup>27</sup> Throughout history, the interpretation of the Qur'an has been undertaken by companions of either Muhammad or Imam, and is thought to be amongst the most authoritative interpretations of the basic code.

The other primary source that is recognised as being heavily relied upon in terms of legislative sources is that of the Sunnah. This is slightly less formal in terms of legislation or code, and relies on the traditions and customs of Muhammad himself. The two are interlinked with each other, with the Sunnah being a justified source of law according to the Qur'an itself. The Qur'an encourages all Muslims to follow the Prophet Muhammad; therefore, his traditions are considered to have been intertwined and as justifiable as the Qur'an as a source of law, and thus part of the legislative body of rules.

Although there is a slight difference in the treatment of the Sunnah amongst Muslims, the vast majority do see the Sunnah as a vital piece of legislation alongside the Qur'an, and is required for supplementation and clarification as necessary. This supplemental nature is more useful in the area of religious practices; however, Islamic law is so inherently linked with religious

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<sup>26</sup> Coulson (n8). 544

<sup>27</sup> Isam Ghanem, *Outlines of Islamic Jurisprudence* (Riyadh Saudi Publishing and Clearing House 1983). 22

practices that the Sunnah is seen as a reliable and formative source of law and thus a body of quasi-legislation to be followed by all Muslims.

Naturally, there is some difficulty in considering the Sunnah as a form of legislative source due to the verbal nature of the guidance and the likelihood that emphasis will have changed as it has been passed through the companions. That said, however, these have been largely recorded in the Hadith, and are viewed as conclusive by most Islamic lawyers.<sup>28</sup> As is the case with other legislative sources seen in the western society, the Hadith has been developed in such a way that the strength of the rule is determined based on a range of criteria, such as the size of the report and the way in which it has been transmitted.

As well as the key legislative sources of Qur'an and Sunnah, there are multiple secondary sources drawn on to assist with the interpretation or understanding of these primary legislative sources. Different Islamic schools have different opinions regarding the overall validity of the use of these sources, although they are generally recognised to be at least partially useful in areas where the primary legislative style sources are silent or ambiguous.<sup>29</sup>

Consensus is one of the strongest secondary sources, and is once again linked back to the primary sources, thus giving it greater weight from a legislative point of view. Essentially, consensus or 'Ijma' is the process whereby all jurists have come to the same conclusion on a subject. Where there has been unanimity of decision from Muslims, this is deemed to be persuasive towards the way in which the Islamic rules are interpreted going forward. Inevitably, there are differences in opinion in terms of whether or not consensus is deemed a reliable source of law, with Sunni jurists being prepared to accept it as equally important (in terms of legislation) as the primary sources. Shiite jurists, on the other hand, recognise consensus as valid, although it is viewed very much as secondary to the primary sources. Regardless of the level of acceptance, however, in modern Muslim practices, the process of consensus and practice is viewed not as much as a legislative authority but rather as a way of ensuring democracy and adaptability for necessary reforms.<sup>30</sup>

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<sup>28</sup> Nicholas Heer, *Islamic Law and Jurisprudence* (University of Washington Press 1999).

<sup>29</sup> Arabi Oussama, *Studies in Modern Islamic Law and Jurisprudence* (Kluwer Law International 2001).

<sup>30</sup> Bernard Weiss, 'Interpretation in Islamic Law: The Theory of Ijtihad' (1978) 26 *The American Journal of Comparative Law* 199,212.

As seen in traditional western society, there is also the process of analogical deduction (or Qiyas) ,which is simply deducing rules and processes based on all of the available sources.<sup>31</sup> This is rather akin to statutory interpretation and, whilst it does not add to the legislative body itself, is a key example of how willing the Islamic system is to allow for interpretation of the core rules. In all cases, even where this type of analogy is accepted, it is necessary for the judgments to be based on logic and not to be arbitrarily determined.

Regardless of the sources of the legislative body of rules and the various degrees of acceptance that each source attracts, there are several key principles that run throughout the primary legislation and the supporting secondary legislation. There is a strong misconception surrounding Islamic law which suggests that the judiciary applying Islamic rules are bound by the ancient rules of the Qur'an, with no flexibility at all to account for modern situations.<sup>32</sup> There is also the notion that there are fixed penalties for every crime, meaning that any sentencing flexibility is also withdrawn. This is not, in reality, the case, and certain serious crimes are controlled by the Qur'an, with a wide flexibility afforded to the judiciary when it comes to lesser crimes. Nevertheless, when considering the sources and the way in which Islamic legislation has developed and operates, it is easy to see from where such notions derive. Without doubt, the matter is not that straightforward.

Some of the key principles surrounding Islamic legislation can go a long way towards explaining how Islamic law operates in the modern setting. Firstly, it is important to recognise that, despite the developments, Islam and the state remain inherently linked. Muslims are bound by the will of Allah, which is a view is reiterated throughout their legislation; this link cannot be eroded when determining the way in which Islamic legislation operates. Due to the sheer volume of Muslims across the world, the Islamic legislative cannot be ignored, and is commonly discussed alongside more traditional legal systems, such as English common law.<sup>33</sup>

Unsurprisingly, Islamic principles are largely founded in religion and follow guiding principles in their application. For example, one of the key principles is that every action should be

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<sup>31</sup> Muhammad Masud, *Islamic Legal Philosophy*, Pakistan: Islamic Research Institute, Reprint 1984.

<sup>32</sup> Al-Thakeb, Fahed & Scott Joseph E, 'Islamic Law: An Examination of its Revitalization' (1981 ) 21 *British Journal of Criminology* 58,69.

<sup>33</sup>Hisham Ramadan, *Understanding Islamic Law: From Classical to Contemporary* ( Lanham AltaMira Press 2006)



considered in light of the underlying motive and the intent behind such an action.<sup>34</sup> This is clearly stated by the Prophet's statement:

'Actions are but by intentions, and a man will have only what he intended. So whoever emigrated for Allah and His Messenger, then his emigration was for Allah and His Messenger. And whoever emigrated to attain some worldly benefit or get married, then his emigration is for what he undertook it to achieve'.<sup>35</sup>

Secondly, there is the notion that harm needs to be removed, and that no harm should be done or initiated against another individual. A third principle is that, when it comes to social transactions, customs and norms can become a deciding factor in terms of what is considered acceptable (and what is not). Fourthly, there is the ability given to the law to make allowances where the accused faces particular difficulties or hardships. For instance, although it is forbidden to show one's body to a member of the opposite sex, if this were done in pursuit of necessary medical treatment, then no crime would be committed. Finally, there is the principle that, where something is established with certainty, for example, laid down clearly in the Qur'an, only other evidence which is as certain would be sufficient to refute this rule.<sup>36</sup>

It is clear to see that the Islamic legislative body is not as rigid or complex as it would initially appear. Whilst it differs fundamentally from other legal systems due to the fact that it is so strongly linked with religion, the reality is that the development and interpretation is not wildly different from that seen in the common law system of English law.<sup>37</sup> Legislative sources remain paramount, with support from guiding principles and secondary sources where necessary.

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<sup>34</sup> Anwar Qadri, A Sunni Shafi'i Law Code, Sh. Muhammad Ashraf, (Lahore Sh. Muhammad Ashraf 1999).

<sup>35</sup> Sahih al-Bukhari Hadeeth No 1

<sup>36</sup> United Nations Social Defense Research Institute, The Effect of Islamic Legislation on Crime Prevention in Saudi Arabia, Proceedings of the Symposium held in Riyadh. 16-21 Shariah 1396 A.H. (9-13 October, 1976) Riyadh, Saudi Arabia. Ministry of Interior, Kingdom of Saudi Arabia, 1980.

<sup>37</sup> Gamal Badr, 'Islamic Law: Its Relation to Other Legal Systems' [1978] 26 The American Journal of Comparative Law 187,198.

## **2.4 The Sources of Islamic Law**

There are, of course, many different sources of Islamic law in the same way that there are multiple different sources in other legal systems. Such sources are broadly split into primary and secondary sources, each of which will be discussed in turn. In reality, there is a wide range of different secondary sources that can be drawn upon; this will depend largely on the court applying the law; however, the main secondary sources will be considered here.

### **2.4.1 Primary Sources**

The scholars agree that the Qur'an and the Sunnah constitute the primary sources of Shari'ah. These two sources are discussed as follows.

#### **2.4.1.1 Qur'an:**

The clear primary source of Islamic law is that of the Qur'an, which is defined in the Qur'an itself as being 'a sending-down from the Lord of all the worlds'.<sup>38</sup> Essentially, the Qur'an is viewed as a text sent down from God and put into words by the Prophet Muhammad. The Qur'an is the Holy Script of the Muslim and the foremost source of the law of Islam. The Arabic term Qur'an literally means 'reading' or 'recitation'. It may be defined as the book containing the speech of God revealed to the Prophet Muhammad in Arabic and transmitted by continuous testimony. The Revelation was conveyed to the Prophet by the Noble Angel Gabriel, who took

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<sup>38</sup> Qur'an 56:80

the Divine Words directly from Allah and transmitted them to the Messenger of God (the Angel acting as an intermediary between Allah and His Messenger). The authenticity of the Holy Text is proven by universally accepted testimony. It has been protected from any alteration, and has remained intact in memory and in written record throughout the generations.

The Qur'an is composed of more than 6,200 verses,<sup>39</sup> divided into 114 chapters.<sup>40</sup> Its individual verses were pronounced over roughly 23 years of Muhammad's Prophet-hood. Of these verses, less than one-tenth relate to law and Jurisprudence, whilst the remainder are largely concerned with matters of belief and morality, the five pillars<sup>41</sup> of the faith, and a variety of other themes.

Despite this seemingly strong source of law, there are some difficulties that need to be interpreted, particularly when the social context changes. Typical difficulties associated with the Qur'an include whether or not an expression within it should be looked at in the general form, or whether there are exceptions that could be drawn upon in certain limited circumstances. For example, there has been considerable discussion regarding whether or not the statement in Chapter 24—which states: 'A woman who fornicates and a man who fornicates flog them both a hundred times'<sup>42</sup>—refers to all men and women, or simply free men and women. When looked at in conjunction with Q4:25, it can be seen that a different punishment exists for slave<sup>43</sup> men and women and, thus, it has been interpreted that Q24 is only to apply to free individuals.<sup>44</sup>

The difficulties of interpretation can also be seen when it comes to an expression that remains unqualified in one clause, but which has been qualified later on in the text. Accordingly, the question, in this context, becomes concerned with whether or not this qualification can be applied throughout the text. Furthermore, there may also be contradictions throughout the text and decisions that have to be made as to which interpretation should be used. This will invariably result in judges having to take into account the facts surrounding the decision that they are making. In many cases, therefore, secondary sources will have to be drawn upon in order to

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<sup>39</sup> It is called *ayah* in Arabic

<sup>40</sup> It is called *surah* in Arabic

<sup>41</sup> They are, profession that there is no God but God (*Allah*, in Arabic), and his Prophet (the last of the prophets, the 'seal of the prophets') is Muhammad; the five daily prayers, paying the poor-rate, fasting during Ramadan, and performing pilgrimage.

<sup>42</sup> Qur'an 24:2

<sup>43</sup> In Islamic law as Qur'an mentioned that the slave in this case is given half punishment of free person.

<sup>44</sup> Laila Ahmed, *Women and Gender in Islam, Historical Roots of a Modern Debate* (New Haven: Yale University Press, 1992) 127

make the most appropriate decision; however, there are qualifications required for scholars seeking to interpret Qur'an, so the judge may be the scholar or has to refer to the opinions of scholars of the Qur'an interpretation. Essentially, the judge has wide range to apply any interpretation he considers adequate and/or suitable for the case under examination.

As the Qur'an is written in Arabic, a detailed knowledge of the language is also necessary in order for interpretation to be possible. Over the years, the Qur'an has been systematised slightly, and there are now five different statements types recognised from which judgements can potentially be drawn.

Firstly, there is the unambiguous judgement or text contained within the Qur'an, and where there is no ambiguity this should be applied as it stands. Secondly, there is the apparent meaning which is overt within the text, and the expressions within the Qur'an should be taken at face value unless there can be some sort of evidence produced that should be taken to the contrary. Thirdly, and less persuasive, is the indication that exists within the Qur'an that suggests that, where implications can be drawn from the text, these should be used unless there is indication to the contrary that this is not what was intended. Fourthly, there is the use of what is understood as part of the Qur'an; this can refer to the softer aspect of implications drawn from the Qur'an. This may be particularly useful where the social or economic context needs to be taken into account. Finally, there is the concept of likeness, and where the judges are struggling to find interpretation, they can look for similar situations in order to draw information and to accordingly assist with the interpretation.

The Qur'an is the first and most important source of Islamic law. However, this does not mean that the Qur'an provides a direct and specific rule governing every issue, nor does it give all details for every case. Rather, the Qur'an has laid down broad guidelines that cover, in a general sense, every conceivable matter.

It should be noted here that there are cases not mentioned in the Qur'an; there are general provisions to maintain justice amongst people, and engorge to search for truth. As such, we can understand that, if the Muslims jurists, legislators and judges do not find in Islamic law any law that applies in the case, they can take from any law in the world if it does not conflict with

Islamic law standards. Thus, the applications of some other laws that achieve justice are required by the Qur'an.

#### **2.4.1.2 The (Sanah) Prophetic Traditions:**

A second primary source is that of prophetic traditions, referred to as Sunna or Sanah, which considers the way in which the Qur'an operates in reality. Prophetic Tradition is considered one of the absolute sources of law.<sup>45</sup> When looking at the Qur'an, as described above, the focus is always exclusively on the actual text; in practice, this text does not operate in its own vacuum, and it is necessary to consider the surrounding circumstances and the way in which it applies to the day-to-day life of those following the law of Islam.

It is noted here, in accordance with Islamic law, that the Qur'an and its application is delivered through human messengers. As recognised in the Qur'an itself, 'The Noble Spirit brought it down onto your heart for you to be one of the warners, in a clear, Arabic tongue'.<sup>46</sup> Clearly, where there is any form of interpretation in this way by human messenger, there is likely to be a further source of legislation that needs to be considered.

Once the message has been transferred to the human messenger, it can then be acted upon with the written source noted down in a Hadeeth,<sup>47</sup> a collection referred to as the Sunna. This resource is derived from various different prophets, with a prophet being described by A'isha<sup>48</sup> as 'the Qur'an walking'. Therefore, although this primary source also finds its roots in the Qur'an itself, the prophet often adds additional information, meaning that it becomes its own source of legislation distinct from the Qur'an.

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<sup>45</sup> Apart from a few jurists who indicate that the Qur'an is the only source of the law and voided the validity of the *Sunnah* as a source. For further

<sup>46</sup> Qur'an 26: 193, 194,195

<sup>47</sup> *Hadith* and *Sunnah* are generally taken as synonymous terms.

<sup>48</sup> (614-678) Third wife of Prophet Mohammad.

Unsurprisingly, therefore, the two primary sources are heavily interlinked, and it is quite common for judges, when looking at the Qur'an, to also look towards the relevant Hadeeth in order to gain a greater understanding of the appropriate interpretation. It is these two primary sources that are used as the basis of law; however, other schools of law associated with Islam are also relevant.<sup>49</sup> Ultimately, however, although the various different sources of Islam may interpret the meaning of the text differently, they are all derived from the same text. Therefore, although these two sources are viewed as independent, they are, in fact, so interlinked that they are largely considered one primary source of legislation, working with each other to assist with the interpretation across the various schools of Islamic law.<sup>50</sup>

## 2.4.2 Secondary Sources

As well as the primary resources listed above, there is also a wide range of secondary resources that may be drawn upon by judges when attempting to apply the various different aspects of the Qur'an to the decisions brought before them.

### 2.4.2.1 Consensus of Opinion (*Ijma*):

When considering the way in which Islamic law should be interpreted and practically applied, it has been noted that *Ijma* or consensus is seen as the most valuable of the secondary sources. As a legal term, consensus is defined as agreement amongst the jurists<sup>51</sup> of the Muslim community in

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<sup>49</sup> Seyyed Nasr, *Islam: Religion, History, and Civilization*. (Harper San Francisco 2003) 59

<sup>50</sup> Mawil Dien, *Islamic Law: From Historical Foundations to Contemporary Practice* (Edinburgh University Press 2004) 38

<sup>51</sup> According to this definition only Muslim jurists have a voice in *Ijma*. Great diversity of opinion exists regarding who may participate in *Ijma* and who are qualified as eligible jurists, which can be found in the specialised textbooks. It is out of the scope of this paper to examine all of these opinions and it is sufficient to indicate two of the widely known arguments and more opinions can be seen in the available Islamic jurisprudence textbooks. Some legal doctors hold the view that the entire Muslim community must take part in consensus for it to be legally accepted. This view might be, in theory, conceivable, but in practice it is impossible to achieve. The most widely accepted view in this respect indicates that the qualified jurists are those who are in any given period the acknowledged Muslims of Islamic law and that these who are eligible to participate in the council agreement. Goldziher describes them as those 'who are the men with the power to bind and to loosen; it is their office to interpret and deduce law and theological doctrine, and to decide whether law and doctrine are correctly applied'. See

a particular age, after the death of the Prophet Muhammad, on a legal question. There is some dispute as to whether or not consensus is a local or universal concept; however, on the whole, it has been recognised by al-Shafi that the consensus is seen as universal. Ijma developed as a valid source in the law on the authority of the Qur'an and the Sunnah.<sup>52</sup>

One of the most frequently quoted proofs for the authority of Ijma is the Prophetic Saying, 'My followers (or community) shall never agree upon an error'.<sup>53</sup> This statement is not clear in terms of legitimising consensus as a source in the law, and yet shows that, when there is agreement amongst the Muslim community, falsehood cannot occur and has to be implemented.

When looking at the analysis undertaken by Malik, it is clear that practice and custom were seen as being particularly important when considering the source of Islamic law, and that the people of Madina had previously accepted that there was general agreement when applying these consensus, whereas a more specific concept of consensus has also been developed in relation to the Amal of Madina,<sup>54</sup> which deals with differences of opinion in custom and practice, and which should also be considered when it comes to the consensus of opinion. Therefore, although consensus is generally seen as a universal concept, there is still some dissent in relation to this view, and more localised customs can potentially be taken into account. A local Amal is not simply a local custom, and often represents the way in which the primary sources are practically applied in a non-textual way. Whereas the Hadith is often transferred from one person to another, the Amal is a much more generalised transmission of information relating to the operation of the Islamic legal texts. It can, therefore, be somewhat harder to interpret, yet nevertheless can offer flexibility when applying the text in the modern context, and is therefore viewed as an important secondary resource.<sup>55</sup>

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Goldziher, I. (1981) *Introduction to Islamic Theology and Law*, translated by Andras and Ruth, H., Princeton University Press, Princeton, New Jersey, p. 52. Therefore, the non-Muslims are excluded from such juristic agreements because the power is held to be vested, by the texts, in the Muslims alone. Minors and lunatics are also excluded on account of their immature or defective understanding and those who are not learned in the law are also barred from participation in the unanimous agreement.

<sup>52</sup>Jamila Hussain, *Islam: Its Law and Society* (Federation Press 2003) 32

<sup>53</sup> Imam Ibn Majah, *Sunnan hadeeth* no. 3950

<sup>54</sup> Amal is action, Madina is city in the west Saudi Arabia, It is the second holiest city in Islam, and the burial place of the Prophet Mohammad '*Amal*' was the established practice of the people of Madina.

<sup>55</sup> Dutton Yasin, 'Sunna, Hadith and Madina Amal' (1993) 41 *Journal of Islamic Studies*.

In the first centuries of Islam, there is consensus Ijma about many cases in Islamic law. However, at the present time an occurrence of Ijma became rarely, it is in fact logically and historically possible. However, Ijma still considered as a source of Islamic law in the old issues, but there cases in the modern time we found consensus among scholars, such as drugs prohibition, eating or dealing, money laundering and computer and network crimes.

#### **2.4.2.2 Analogy Qiyas:**

Analogy is also seen to be important as a source of Islamic law. It was most fervently put forward by Abu Hanifa when he showed that he was particularly keen to exercise analogies in attempting to establish new judgements where the Qur'an or other textual sources do not provide sufficient clarity. In this way, he referred to analogies in order to reach a conclusion. This technique was also favoured by other Islamic schools of law, which viewed analogies as the fourth source, following on from the primary sources and use of custom. Typical analogies accepted as part of this analysis include the belief that being intoxicated by wine is considered to be Haram; this could be extended to the analogies with being intoxicated by any other substance.

Analogies are actually becoming increasingly important in the modern context, and have been central to the judgements reached by both Malik and Abu Hanifa, despite being rejected by others, such as Al-Shafi,<sup>56</sup> for all but the most obvious of situations.

Although these four sources—namely the two primary sources mentioned above and two secondary sources—are seen as central to the operation of Islamic law, there are, in fact, other sources that need to be mentioned, and which can be drawn upon, either to supplement a previous resource or to otherwise assist where there is excessive ambiguity or difficulties associated with a decision before the court.<sup>57</sup>

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<sup>56</sup> A few jurists deny the authority of analogy as a valid source of the law. They relied, in supporting their views, upon certain general texts. However, their views have no significant impact on the validity of analogy as a source and did not obtain wide audience.

<sup>57</sup> Hallaq Wael B, *The Origins and Evolution of Islamic Law*( n 13).



### **2.4.2.3 Considerations of Public Interest (Maslaha):**

One of these additional sources is that of consideration of the public interest, directly translated as ‘something of benefit’.<sup>58</sup> When applied in the context of interpreting Islamic legislation, this refers to situations where there is no definitive statement in the text, and there has been no judgement that can be relied upon. Maslaha relates to a situation where there is no other reference made to a given issue. It allows jurists to refer to their own analysis and reasoning in order to introduce juridical decisions, which give benefit, taking into account their historical and geographical contexts. In order for maslaha to be upheld as a valid source in the law, it must not contradict or conflict with the primary sources of Islamic law, namely the Qur’an or the Prophet’s Traditions (Sunna).<sup>59</sup>

Maslaha is not mere utilitarianism, maslaha created from the conception that Shari’ah is for the promotion of the social good and utility and the avoidance of harm and corruption. So one of aims of maslaha is utilitarianism.<sup>60</sup>

Where this is the case, the basic provision is that a decision can be made for the general benefit of the community or the public—provided it does not go directly against a previous or existing judgement. One of the main supporters of this approach is Malik, although others have also shown indication that they are prepared to accept consideration of the public interest in certain circumstances. For example, this can be seen where it was necessary to demolish a building next to a mosque in order to allow more people to use the facilities. Again, this was seen as a consideration of public interest, and was not something that was expressly allowed under the

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<sup>58</sup> Al-Ghazaliy defined maslaha: ‘considerations which secure a benefit or prevent harm but which are, simultaneously, harmonious with the objectives of the Shari’ah.’ These objectives, al-Ghazaliy stated, ‘consist of protecting the Five Essential Values, namely religion, life, intellect, lineage and property. Any measure which secures these values falls within the scope of public interest, and anything which violates them is evil, and preventing this is also for the public welfare, maslaha.’ see Al-Ghazzaliy, Abu-Hamid, *Al-Mustasfa fi Ilm al-Usul*. Revised by Muhammad Abd al-Salam Abd al-Shafi. (1993 Beirut: Dar al-Kutub al-Ilmiyyah)

<sup>59</sup> Rahman Sayeed S ‘Reviewed work(s): Islamic Law: From Historical Foundations to Contemporary Practice’ [2006] 22 Journal of Law and Religion 295,298

<sup>60</sup>Hashi Abdurezak ‘Islamic Ethics: An Outline of Its Principles and Scope’ [2011] 3 Revelation and Science 122,130.

Qur'an but which was decided to be in keeping with the underlying text. A more practical example is establishing a prison as a place of detention for certain well-defined purposes. In the time of the prophet and Abu Bakr<sup>61</sup> there were no jails; rather, people would be detained such as, for example, by being tied to a pillar in the mosque and kept there until such time as judgement was made about them. Umar<sup>62</sup>, however, bought a house in Makkah which he made into a prison.

Maslaha is frequently used in the modern world to meet new situations and challenges. One example is the prohibition to sell firearms during a civil disturbance, as this may intensify the struggle.

#### **2.4.2.4 Custom and the Law (Urf):**

Finally, there is the custom or Urf, which refers to the general pattern of day-to-day life, and which includes factors such as food, language, and clothing. For example, when attempting to interpret the Qur'an, there are times where the strict definition, in accordance with the dictionary, is simply not appropriate. Where this is the case, the customary meaning should be considered and taken into account if this is deemed appropriate.

As is evident from its definition, custom must be good and beneficial for people in order for it to constitute a valid basis for legal decisions. Hence, any practice considered harmful or which may bring about no benefit to the community cannot amount to a valid basis—even though it may be commonly practised amongst the people. Furthermore, in order for custom to be considered legally, it must not contradict the principles provided in the Holy Book and Prophet's Traditions.<sup>63</sup>

Examples of valid custom include the use of commercial advertisements to sell products, and the use of card facilities for payment. These commercial practises are deemed valid because of the benefit they give to people and their adherence to the basic rules of Islamic doctrine. In contrast,

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<sup>61</sup> Abdullah ibn Abi Qahafa (573 -634) was a senior companion (Sahabah) and the father in law of the Islamic Prophet Mohammad. the first khalifa of in Islam

<sup>62</sup> Umar ibn al-Khattāb, (586 – 644) was close companion and father in law of prophet Mohammad, the second Khalifa in Islam.

<sup>63</sup> Ayman Shabana, *Custom in Islamic Law and Legal Theory: The Development of the Concepts of `Urf and `Adah in the Islamic Legal Tradition* ( Palgrave Macmillan 2011) 49

obtaining of a bank loan based on interest is not considered a valid commercial practice. This commonplace transaction by the community does not validate the type of custom as it contradicts the fundamental principles of Islamic rules.

Drawing all of these factors together, it can be seen that there are multiple different sources of Islamic legislation and, whilst the Qur'an and the words of the Prophets form the primary base of the legislation, there are multiple secondary sources that can be drawn upon to assist, where there is ambiguity. Different judges will tend to favour different approaches, particularly with it comes to using secondary sources to support their decision; this can offer a degree of flexibility that is necessary in any legislative system, but can also establish ambiguity, which is an on-going challenge for all legislative systems, including that of Islam.<sup>64</sup>

## **2.5 The Principle of (Ijtihad) in Islamic law.**

Having assessed the various different sources of Islamic law, the next principle deemed relevant to this discussion is which legal decisions are made and processes followed, namely that of Ijtihad. This involves the independent interpretation of the various different legal sources available. Ijtihad<sup>65</sup> is the making of a decision in Islamic law by personal effort to reach independent interpretation or opinion not precisely covered by Qur'an or Sunnah.

On the whole, this principle is generally associated with the Islamic jurisprudence, and there has been some dispute as to whether or not this principle remains valid, with some Western scholars believing that Ijtihad is no longer practised, although there is also an important body of law that suggests that the principle is still very much a part of Islamic law.

The history of the principle can be seen back in early Islam; it then became slowly integrated into more mainstream Islam principles, although it did also have difficulties during the 12<sup>th</sup>

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<sup>64</sup> For further information, see, Mawil Izzi Dien, M., *Islamic Law from Historical foundation to Contemporary Practice* (Edinburgh University Press 2004) 60, and Mohammad Kamali , *Principles of Islamic Jurisprudence* (Islamic Texts Society 2003) 291-295.

<sup>65</sup> Taqlid is opposite of Ijtihad it mean: copying or following opinion or decision of scholar without examining it.

Century, at which time several errors of judgement brought into question whether or not it was a valuable principle going forward.

Central to the application of this principle is the educated Muslim who applies the interpretation; therefore, the qualifications of these key individuals are seen as critically important to how well it is recognised and how readily it is applied in the modern world.<sup>66</sup>

The Islamic scholar responsible for this interpretation needs to meet with a specific set of requirements regarding their qualifications. Fundamentally, this means that they are competently able to interpret Shari'ah law based on the situations put before them. It is possible for the individual scholar to specialise in a specific area of law, such as family law, but more commonly, they are seen as generalist experts. The exact qualifications were laid out by Abu al Husan al-Basri, which briefly states that the individual needs to understand the overall objectives of Shari'ah law, and also that they have a complete understanding of the various different sources of Islamic law.

One of the key points deemed particularly relevant to the use of this principle is the fact that God is considered to be all knowing and all powerful, and that only God has the power to create laws that will apply to humans. Humans are used as messengers when it comes to applying these laws, but it is not the role of the humans to alter this basic law in any way whatsoever.<sup>67</sup>

In order to achieve this objective, it is clearly vitally important that there are well-respected scholars who are able to interpret the various different sources associated with Islamic law to ensure that God's will is transcribed, accurately, and applied by the relevant humans during any court cases brought before the Islamic courts. Essentially, therefore, this principle centres on interpreting and transcribing God's will, based on all of the sources mentioned above, so they can be applied to any practical situation put before the court, and only the most well respected scholars are able to undertake this role with any authority.

In Modern times, Islamic law is needed to Ijtihad as there are many new issues that need a legal opinion, with this lacking in Islamic jurisprudence. Moreover, it is acknowledged that there are legal problems arising, with waiting needing prior to solving the issue: for example, electronic

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<sup>66</sup> Frank Vogel, *Islamic Law and Legal System Studies Of Saudi Arabia* (Leiden Brill 2000) 29

<sup>67</sup> Muhammad Masud & others, *Dispensing Justice in Islam: Qadis and Their Judgements*( Leiden Brill 2006) 361

commerce has various legal problems, such as the formation of e-contracts. Another example is that of air transportation contracts, which did not exist in past and which engorges jurists to apply in a broad sense the theory of Ijtihad.<sup>68</sup>

Ijtihad, in modern times, occurs through governmental legislation; in the form of legal opinions and judicial decisions by Islamic judges or committees, as well as through scholarly writings. Modern society often presents a more challenging prospect for Ijtihad compared to its medieval counterpart when issues pertaining to marriage, divorce, property, and inheritance, for example, were more predictable due to the slower pace of social change. The unprecedented diversity and scope of knowledge today make it impossible for any one person to acquire the mastery of all the disciplines relevant to Ijtihad. Hence, it becomes necessary to turn Ijtihad into a consultative process that utilises the skills not only of jurists of Islamic law but also of experts in other disciplines, with vital importance to society, such as science, technology, economics, and medicine.

In addition to addressing some of society's needs, collective Ijtihad may also build a greater spirit of unity and consensus amongst Muslims. Although Ijtihad often served, in the past, to widen the scope of disagreement more so than to bring about unity and consensus, there is a great need now in regard to unity on issues that could be addressed more effectively through 'collective' Ijtihad and legislation.

The Saudi Courts apply Ijtihad in cases which are brought before them. In this regard, markedly, Saudi judges apply Ijtihad to reach decisions concerning cases that fall outside of the provisions provided by the Shari'ah. However, it remains that the application of this principle is not based on a clear view, with some judges possibly issuing a judgement differing from a precedent in the same case as a result of the new Ijtihad. Without doubt, this is a misunderstanding of the nature of Ijtihad. The law of Judiciary dealt with the departure from an interpretation or Ijtihad adopted by the court in previous cases.<sup>69</sup>

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<sup>68</sup>Liaquat Khan, *Contemporary Ijtihad: Limits and Controversies* (Edinburgh University Press 2011). 17

<sup>69</sup> See The Law of Judiciary issued by royal decree No, (M/78), October 2007. Article 24

## 2.6. The Concept of Hisbah (or Hisba) in Islamic law

The term *hisbah*, literally translated, means “...the commanding of the good, when it has become neglected, and the forbidding of the evil, when its practice becomes manifest.”<sup>70</sup>

At one level, the term is used to describe the religious and moral obligation which Islam confers on all Muslims to do what is good and to avoid what is evil<sup>71</sup> and, importantly, to enforce this principle in society by holding ‘un-Islamic’ Muslims to account<sup>72</sup>. The extent to which this collective obligation is conferred on an individual depends upon the extent of that individual’s ability to enforce *hisbah*. The primary texts of Islam make it clear that the obligations of individual Muslims are proportionate to their abilities; for example, Allah says, ‘So fear Allah as much as you can...’<sup>73</sup>

However, the most common usage for the term is to describe the religious institution, under Islamic law, which is tasked with the official supervision over the markets and the religious, moral and social affairs within the Islamic city<sup>74</sup>. The state officials tasked with this role are called *muhtasib* or ‘inspectors’, and are among the most highly respected *religious* officials within the organizational hierarchy of Islam<sup>75</sup>.

While the office of *muhtasib* and the institution of *hisbah* are *religious*, their function is primarily *economic*. Historically, the Prophet and, later, his *caliphs* used to roam the markets,

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<sup>70</sup> Hussein Ali Agrama, ‘Sovereign Power and Secular Indeterminacy: Is Egypt a secular or religious state?’ In Winnifred Sullivan, Robert Yelle and Mateo Taussig-Rubbo (eds.), *After Secular Law* (Stanford University Press, 2011) 182.

<sup>71</sup> Ahmad Gabin, *Hisbah, Arts and Craft in Islam* (Otto Harrassowitz Verlag, 2009) 11.

<sup>72</sup> Udo Schaefer, *Bahá’í Ethics in Light of Scripture: An Introduction*, Volume 1 (Udo Schaefer, 2007) 141.

<sup>73</sup> N Ibrahim, A Maajid and E Darbaalah, *In Pursuit of Allah’s Pleasure* (Islam House, 2010) 71.

<sup>74</sup> *Ibid.*

<sup>75</sup> Aziz Al-Azmeh, *Islamic Law* (Routledge, 2013) 207.

giving instructions to market traders for fair and just dealings. However, as the nature of government affairs became more complicated and time-demanding, it was deemed necessary to delegate this important public function to non-caliphs, or *muhtasib*. Historians suggest that the first *muhtasib* were appointed under Abbasid caliph al-Mahdi, the third Abbasid caliph<sup>76</sup>.

### 2.6.1 The role of the Hisbah (or Hisba) in Islamic law

By empowering each and every Muslim to use their best endeavours to enforce Islamic law within their homes and communities, *hisbah*, in its guise as the religious and moral obligation of all Muslims, was a mechanism for the self-reinforcement of Islamic law principals in Muslim society. In short, it sought to create a culture of whistle-blowing, that would encourage the least religious Muslim members of society to desist from engaging in immoral conduct and to be more compliant citizens in their public (and, to some extent, private) lives.

Historically, the role of the *hisbah*, in its guise as a religious office or institution, was to create a system for the public enforcement of the principle of *hisbah*. The role of the *muhtasib* under this system was intrinsically flexible. In fact it has been argued that one of the functions of the *muhtasib* was to regulate those areas of conduct which the other public officials did not enjoy competence or jurisdiction to regulate<sup>77</sup>. Nevertheless, core areas of early *muhtasib* competence were well-established. Abdul Azim Islahi lists the following functions of the *muhtasib* as officers of *hisbah*: “Works related to al-hisbah generally discussed socio-economic control, moral and market supervision, prevention of monopolies, check on cheating and fraud and such other

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<sup>76</sup> Abdul Azim Islahi, ‘Works on market supervision and shar`iyah governance (al-hisbah wa al-siyasah al-shar`iyah) by the sixteenth century scholars’ (2006) *Islamic Economics Research Center* <[http://mpra.ub.uni-muenchen.de/18445/1/MPRA\\_paper\\_18445.pdf](http://mpra.ub.uni-muenchen.de/18445/1/MPRA_paper_18445.pdf)> accessed 7 January 2014.

<sup>77</sup> Philip O’Hara, *Encyclopedia of Political Economy: L-Z* (Psychology Press, 1999) 721-2.

corrupting practices, standardization of products [and] facilitation of the supply of necessities...<sup>78</sup>”

This list is non-exhaustive, and over-simplistic, but nevertheless gives a good indication of the types of role that the *muhtasib* played in Islamic society. Key omissions from this list include the enforcement of prayer and fasting<sup>79</sup>, the supervision of industry (which included product standardization, minimum wage regulation and arbitration), the regulation of professional service providers such as doctors and teachers, the supervision of trading practices (which included the standardization of units and measures and product quality control) and various civil functions (such as the enforcement of environmental regulations and public safety ordinances)<sup>80</sup>.

The *muhtasib* enjoyed virtually limitless discretion in discharging their religious functions, although they were guided by certain principles derived directly from primary Islamic texts. One of these principles pertained to the function of *muhtasib* as regulator of market-generated injustices; if the injustice could not be eliminated by the adoption of special measures, then the task of the *muhtasib* was to limit or mitigate that injustice to maximum extent possible<sup>81</sup>.

It has been argued that one of the most useful functions of the *muhtasib* was to foster a direct connection between Islamic law and the Muslims that were subjected to it. As Roy Mottahedeh and Kristen Stilt explain, “[T]he muhtasib would patrol public spaces and enforce “laws”

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<sup>78</sup> Abdul Azim Islahi, ‘Works on market supervision and shar`iyah governance (al-hisbah wa al-siyasah al-shar`iyah) by the sixteenth century scholars’ (2006) *Islamic Economics Research Center* <[http://mpr.ub.uni-muenchen.de/18445/1/MPRA\\_paper\\_18445.pdf](http://mpr.ub.uni-muenchen.de/18445/1/MPRA_paper_18445.pdf)> accessed 7 January 2014.

<sup>79</sup> Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari`a* (Harvard University Press, 2009) 69.

<sup>80</sup> S M Ghazanfar, *Medieval Islamic Economic Thought: Filling the Great Gap in European Economics* (Routledge, 2003) 240.

<sup>81</sup> *Ibid.*



wherever he saw a violation. The muhtasib therefore gave Islamic law an immediate presence in public space and was an important face of the law in society.<sup>82</sup>”

As new laws on taxation were implemented, under the *Ottoman* rule, it has been argued that the function of collecting taxes from market traders was added to this list<sup>83</sup>. Some authors have argued that the addition of tax collecting as a function of the *muhtasib* evidences the increasingly *political* nature of their role. This extension, they argue, represented a corruption of the religious principles upon which the office of *muhtasib* and the institution of *hisbah* were founded<sup>84</sup> and undermined the confidence that ordinary Muslims placed in these officials as guardians of Islamic morality.

The intrinsic conflict between the religious and political functions of the *muhtasib*, and the inappropriateness of this encroachment, is well-illustrated by Hallaq, who argues the one of the historic functions of the *muhtasib* was to bring government officials to court on charges of *corruption* or abuses of the powers<sup>85</sup>; if this was the role of the *muhtasib* and the *muhtasib* were also tasked with the collection of taxes—an intrinsically political function—then it begs the question, who would be able to bring a corrupt *muhtasib* to court?

Support for the view that the *muhtasib* became a predominantly political office can be gleaned from the fact that the role of *muhtasib* continued to exist even under non-Muslim rule; *muhtasib* were deemed to play a sufficiently important non-religious function that there was sufficient work to keep these individuals in public office.

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<sup>82</sup> Roy Mottahedeh and Kristen Stilt, ‘Public and Private as Viewed through the Work of the Muhtasib’ (2005) 70 *Social Research* 735-48, 735

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> Wael Hallaq, *Sharī‘a: Theory, Practice, Transformations* (Cambridge University Press, 2009) 210.

## **2.7 Four Schools of Islamic Law**

The largest branch of Islam is that of Sunni and, as part of the Sunni Islam theories, there are four schools of thought which are followed. These four legal schools represent four distinct schools of thought associated with mainstream Islam and although they differ substantially, they are all accepted by each other as potentially valuable successors of the Prophet Mohammad and his companions. All four schools will be discussed briefly below.

### **2.7.1 Hanafi School**

The Hanafi School is the oldest surviving school of Islamic law, and one with the largest following. This was established and developed by Abu Hanifah,<sup>86</sup> who founded a school to study this train of thought. The main regions that follow this school of thought include Muslims from India, Afghanistan, Pakistan, Bangladesh, and is also recognised as quite popular in the United Kingdom.<sup>87</sup>

This school of thought is one of the oldest in terms of Islam, and places significant emphasis on using reason when interpreting the main sources. Essentially, this is the most popular approach to interpreting Islam, and aims to apply the text in a reasonable manner, thus allowing flexibility to deal with changes in society; this flexibility has resulted in it being one of the most followed schools of Islam.

### **2.7.2 Maliki**

This school of thought was developed by Malik,<sup>88</sup> and is recognised the oldest student of Abu Hanifah, and is therefore seen as an evolution of this basic school of thought. Approximately 25% of all Muslims follow this school of thought, which is considered to be particularly popular

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<sup>86</sup>Nu'man ibn Thabit (699-767) born in Kufa, in Iraq

<sup>87</sup> Lau, Martin, *The Role of Islam in the Legal System of Pakistan*(Martinus Nijhoff 2006)

<sup>88</sup> Malik ibn Anas al-Asbahi ( 711 – 795) born in Madinah

in the Western world. It differs from the other three schools of thought based on the way in which it relies heavily upon customs and principles—much more so than strict rules and regulations based on the primary source; this may explain, to a certain extent, why it is more readily accepted by the Western world.<sup>89</sup>

### 2.7.3 Shafi'i

The Shafi'i school of thought was derived from al-Shafi,<sup>90</sup> and is a student of Malik, showing yet a further layer of development associated with the four schools of Islam. It is primarily followed by Muslims in Malaysia, , Jordan, Lebanon, and Indonesia, as well as many of the Kurdish regions. As part of this school of law, the acceptable sources are stated as being the Qur'an, the Sunnah, Consensus, and Analogy only, and they are ordered in this way. This school of thought is particularly keen on academic rigour, and does not readily accept conjecture. A large body of precedent is also seen as being relevant to this school of thought, to an extent that it is not with the other schools of thought, thus making analogical deduction a particular favourite task of this school of thought.<sup>91</sup>

### 2.7.4 Hanbali

Finally, there is the school of Hanbali, which was developed by bin Hanbal,<sup>92</sup> which is particularly prevalent in the Arabian Peninsula region. This school of thought moves back to the more traditional Islamic viewpoint that places God as an external source that is not manmade in any way, and which must be viewed as an external jurisprudence that cannot be altered by manmade interpretation. As well as relying heavily on the primary sources, consent is seen as very important with this school of thought.

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<sup>89</sup> Bernard Weiss , *The Spirit of Islamic Law* (Alta Mira Press1998) 84

<sup>90</sup> Muhammad ibn Idris al-Shafi(767 - 820) He was born in Gaza, Palestine

<sup>91</sup> Murad Abdal Hakim, *Understnding the Four Madhhabs* (Islamic Publication International 2001) 10

<sup>92</sup> Ahmad bin Muhammad bin Hanbal (780-755 ) born in the city of Baghdad in Iraq.

## 2.8 The Categories of Islamic Law (Figh) Jurisprudence

The reference to Figh is the terminology used when discussing Islamic jurisprudence in its entirety, and is further acknowledged as an extension of Shari'ah law, which is based entirely on the primary sources of the Qur'an and the words of the Prophets. When considering Islamic jurisprudence, these principles are extended to look at the way in which interpretation is involved with the various different jurists over the years. In reality, this extension of Islamic jurisprudence works alongside the traditional approaches, but does imply much deeper understanding, and therefore requires individuals who are specifically trained in the art of jurisprudence.<sup>93</sup>

Essentially, jurisprudence associated with Islamic law involves gaining a particularly deep understanding of the issues associated with the law, drawing not only on the primary sources but also on any other source that may be appropriate, depending on the question at hand.

Figh has been described by Ibn Khaldun as being the 'knowledge of the rules of God which concern the actions of persons who own themselves bound to obey the law respecting what is required (wajib), forbidden (haraam), recommended (mandūb), disapproved (makrūh) or merely permitted (mubah)'.<sup>94</sup>

Of course, there are occasions where the Qur'an is very clear and will offer a concrete way of dealing with the specific issue, such as, for example, when it comes to the way in which the ritual prior to daily prayer is undertaken. However, this is not always the case and, at times, much deeper interpretations are required; this is where the Islamic jurisprudence may come into play. Consider the situation where there are statements in the Qur'an that indicate that an individual needs to undertake daily prayer during the period of Ramadan, but the actual processes are not described, and it is therefore necessary to look at the workings of the Prophets in order to determine how such prayers should be undertaken. Therefore, whilst Islamic jurisprudence recognises that the divine law comes from the Qur'an and the workings of the Prophets, there is nevertheless a crucial need to interpret these and the use of Fiqh.<sup>95</sup>

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<sup>93</sup> Oussama Arabi, *Studies in Modern Islamic Law and Jurisprudence* (Kluwer Law International 2001)

<sup>94</sup> Reuben Levy, *The Social Structure of Islam* (Routledge 1999)150

<sup>95</sup> Hallaq Wael, *A History of Islamic Legal Theories* (n 16) 84

This jurisprudence falls into two broad areas: the first looking at the rules relating to actions taken, and the second relating to the various different circumstances that may surround these chosen actions.

When it comes to the rules surrounding action, the jurisprudence incorporates the notion of obligation, permissibility, recommendation, and prohibition. The other rules relating to such factors surrounding actions include cause, permit, enforcement, and condition. Based on this, the rules are broadly split into worship and dealings so as to allow for a suitable analysis.<sup>96</sup>

Due to the specialist nature of Islamic jurisprudence and the complexity often associated with the in-depth analysis, Islamic jurisprudence of this nature has been split into multiple different fields, with experts specialising in one area. These fields include economic, political, criminal, theological, marital and etiquettical. When undertaking various different approaches to jurisprudence, the four schools of Islam, as noted above, will draw on this jurisprudence to at least some degree, with both aspects of the interpretation of Islamic law used in combination so as to obtain a complete view of the Islamic system.

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<sup>96</sup> Kamali, *Principles of Islamic Jurisprudence* (nv24) 289

## 2.9 The legal system in Saudi Arabia

Because the Saudi Arabia good example of adoption of application of Islamic law, and in this research there are many court cases from Saudi courts, also the judicial system is unknown to many western readers and lawyers. Therefore, it is very important to give an overview of the judicial system in Saudi Arabia.

### 2.9.1 General Background about Saudi Arabia

King Abdulaziz Al- Saud<sup>97</sup> united the huge area of the Arabian Peninsula to form the Kingdom of Saudi Arabia. The first contact with another nation was with Great Britain in 1915. King Abdulaziz entered into negotiations with the British government, and signed treaties confirming the complete independence of the country. Later, ‘[i]n September 1932, the Kingdom of Saudi Arabia officially acquired its present name’.<sup>98</sup>

The population of Saudi Arabia was approximately nineteen million in 2010; such a small number occupying a land area of approximately 2.3 million kilometres gives the country a very low population density.<sup>99</sup> Prior to the discovery of oil, most of the people lived in the southern and northern parts of the country in which the majority of the farms were located. However, following the discovery of oil in 1938 in the eastern part of Saudi Arabia, many people migrated to Dahrn, Dammam, and some other eastern cities to work in foreign oil companies, particularly the Arabian Zmerican Oil Company (APJNCO);<sup>100</sup> however, with the beginning of the new Saudi policy of diversification of the economic sources and reduced dependence on oil, and also following the establishment of several agricultural and industrial projects throughout the Kingdom, people have been living in most parts of the country.

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<sup>97</sup> King Abdul Aziz bin AbdulRahman Al Saud( 1880- 1953) the first king of the third Saudi State, he returned a kingdom of his family which was known later as Kingdom of Saudi Arabia.

<sup>98</sup>Fouad, Al-Farsy *Saudi Arabia, A Case Study in Development Jeddah* (KPL Ltd 1986 ) 72.

<sup>99</sup> A1-Riyadh Daily Newspaper, issue. No. 14581, 28/5/2008

<sup>100</sup> Anthony Cordesman, *Saudi Arabia Enters the 21st Century: The Political, Foreign Policy, Economic, and Energy Dimensions* (2003 Greenwood Press) 467

The law of Saudi Arabia is Islamic law, which, although based on Quatic precept and tradition,<sup>101</sup> nevertheless easily adapts itself to the changing conditions of the modern world. Islam has covered the commercial and civil laws in order to maintain peace and order based on justice and respect for the obligations arising from contracts; the Qur'an, however, does not discuss commercial and civil matters in detail, but rather gives general principles that may be applied in every place and time. When one of the Prophet's companions asked him about non-religious matters, the Prophet said, 'You know better about your civil non-religious matters'.<sup>102</sup>

Saudi Arabia is a monarchy. The King is the religious leader, 'Imam', and he is the source of political power in the country (Hokum). The power and duties of the King are defined in Islamic law.<sup>103</sup> Importantly, the King serves for the good of the people, and he has been given full authority to issue or approve any law provided it does not contradict Islamic law. Moreover, a Council of Ministers, presided over by the King, was established in 1953. This Council possesses both legislative and executive powers in the Kingdom.<sup>104</sup> The Council of Ministers is responsible for controlling all the government's affairs, such as economic, legal, industrial, and regional policies. On March 1, 1992, King Fahad bin Abdulaziz issued a series of Royal Decrees establishing a constitution for the country. One decree establishes the basic system of the government of the Kingdom of Saudi Arabia,<sup>105</sup> whilst another decree provides for the creation of a 150-member Consultative Council (Majlis Al-Shura), which has the power to review the government's regulations and policies.<sup>106</sup>

The influence of the Shari'ah in Saudi Arabia has been apparent since the formulation of Islamic jurisprudence in the 8<sup>th</sup> Century. In Saudi Arabia, the dominance of Islamic law is indisputable; thus, some have claimed that Saudi Arabia is the only country 'which bases its legal system on pure Shari'ah and practises it in its entirety. It is true to say that Shari'ah is the main source of law in Saudi Arabia, but there are other sources, i.e., a parallel body of secular State Regulations (nizam) issued by Royal Decree as well as custom and practice.' Markedly, 31 Certain decrees, rules and regulations have been promulgated in the Kingdom of Saudi Arabia during the last four

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<sup>101</sup> The Basic Law of Government issued a Royal Decree No. (A/90), March 1992 article 1

<sup>102</sup> Sahih Muslim, Hadith No 2363

<sup>103</sup> The Basic Law of article 5

<sup>104</sup> Mohamed Ramady, *The Saudi Arabian Economy: Policies, Achievements, and Challenges* (Springer2010) 21

<sup>105</sup> Royal Decree, No. A/90, (27 Sha'ban 1412 A.H.), 1992.

<sup>106</sup> Royal Decree No. A/91 (27 Sha'ban 1412 A.H.), 1992

decades. With great effort, the Kingdom has built its own legal system and a modern structure of government.

## **2.9.2 Legal Judiciary System (General Guardianship)**

Saudi law is based on Shari'ah (Islamic) law, a judicial system is based on Islamic law (Shari'ah) for both criminal and civil cases. Moreover, the courts apply the laws issued by government, but the laws must not contradict Islamic law. The basic law states, 'The courts will apply the rules of the Islamic Shari'ah in the cases that are brought before them, in accordance with what is indicated in the Book and the Sunnah, and statutes decreed by the Ruler which do not contradict the Book or the Sunnah'.<sup>107</sup>

The original principle is that Shari'ah courts are the sole judicial authority in all cases; the courts enjoy a general jurisdiction to try all cases, except those exempt by law. The law of the judiciary declares '...Courts shall have jurisdiction to decide with respect to all cases according to rules for the jurisdiction of courts forth in the Law of Procedure before Shari'ah Courts and Law of Criminal Procedures'.<sup>108</sup> When looking at the Law of Procedure before Shari'ah Courts and the Law of Criminal Procedures, we find that such laws define the jurisdiction of the courts in a number of types of case, although there are cases not identified. This has created some kind of conflict between the courts as well as with the Judicial Committees. Regardless, however, there is now the re-drafting of these laws in order to comply with the new law of the judiciary.<sup>109</sup> It is considered that the re-drafting may deal with the problem.

The legal judiciary system is considered the normal judicial system dealing with all types of dispute occurring within the country. The Law of the Judiciary 1975<sup>110</sup> declares in Article 5 that Shari'ah Courts consist of the following:<sup>111</sup>

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<sup>107</sup> The Basic Law of Government issued a Royal Decree No. (A/90), March 1992. Article 48

<sup>108</sup> The Law of The Judiciary issued by royal decree No, (M/78), October 2007. Article 25

<sup>109</sup> Because the Law of Procedure before Shari'ah Courts is issued in 2000 and the Law of Criminal Procedures is issued in 2001, while the law of the judiciary is issued in 2007 there are articles based on the two laws of procedures.

<sup>110</sup> See the Saudi Law of Judiciary decree No, (M/64), 23 July 1975

<sup>111</sup> See Article 26 of The Saudi Law of Judiciary.



- 1- The Supreme Judicial Council.
- 2- The appellate Courts
- 3- The General Courts
- 4- The Summary Courts.

Each court has its own field of specialty according to the system of organisation. The law of judiciary in Saudi Arabia was issued in 1975, but is no longer valid for work in this time because of the inadequacy to deal with new cases and the criticisms it faced, such as it did not include three degrees of litigation. There are courts of first instance and the Court of Appellate, but in fact the court of appellate in Saudi Arabia is considered as a court of cassation, the parties did not appear before the court of appellate. Also, in 2005, Saudi Arabia became a fully-fledged member of World Trade Organisation (WTO), and in 2007, King Abdullah issued royal decrees to reform of the judiciary, including a new law of the judiciary that aims to reform the judiciary system and provide for an improved two-degree appeals process. This is being implemented in stages during the next few years; however, the stages have not yet been implemented as the government planned.

The new Law of the Judiciary organises the Court System in the following hierarchical structure, notably in descending order:

1. Supreme Court
2. Courts of Appeals; and,
3. Courts of First Instance, which are composed of:
  - a. General Courts;
  - b. Criminal Courts;
  - c. Personal Status Courts;
  - d. Commercial Courts; and
  - e. Labour Court

## 1. The Supreme Court

The Supreme Court in Saudi Arabia came as the highest authority in the judicial system instead of Supreme Judicial Council's main function. The Supreme Court has several legislative, consultative, and judicial roles. In addition to the function set forth by the Laws of Procedures, before Shari'ah Courts and the Law of Criminal Procedure, the Court will supervise the implementation of Islamic law and regulations enacted by the King, which are consistent with the issues that fall within the general jurisdiction of the judiciary.<sup>112</sup> The Supreme Court will review rulings issued or upheld by the Courts of Appeals, including those relating to cases punishable by death and other certain major crimes. In addition, the Supreme Court will review judgments and decisions issued or supported by the Courts of Appeals on matters not mentioned previously.<sup>113</sup> These include questions of law or questions of procedure—not questions of fact—if the objections to judgments are based on:<sup>114</sup>

1. A violation of the of Islamic Shari'ah provisions and regulations issued by the King that does not contradict with Shari'ah rules;
2. Entry of judgment from a Court not properly constituted as provided for by the Law of the Judiciary and other regulations;
3. Entry of judgment from an incompetent Court or Circuit Court; and
4. Fault in the framing of an incident, or impropriety in its description of said case.

In the current time, the Supreme Court does not take its new jurisdiction, but still performs the judicial function of The Supreme Judicial Council in the old law, consequent of the delay in implementation of judiciary reform plan.

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<sup>112</sup> See The Law of Judiciary, 2007. Article 10

<sup>113</sup> Ansary Abdullah F 'A Brief Overview of the Saudi Arabian Legal System'(Hauser Global Law School Program 2008) < [http://www.nyulawglobal.org/Globalex/Saudi\\_Arabia.htm#\\_edn189](http://www.nyulawglobal.org/Globalex/Saudi_Arabia.htm#_edn189)> accessed 9/05/2012

<sup>114</sup> See The Law of the Judiciary, 2007. Article 11

## 2. Court of Appeal

The new reforms announced by King Abdullah are aimed at introducing safeguards, such as Courts of Appeal, which can overturn decisions by lower courts. The new law established Courts of Appeals in each of the Kingdom's provinces. Each court comprises function through specialised circuits, made up of three three-judge panels, except for the Criminal Circuit, which reviews judgments involving certain major crimes, including those that bear the death sentence. It is composed of five judge panels.<sup>115</sup> Courts of Appeal comprise the following circuits: 1- Labour Circuits, 2- Commercial Circuits, 3- Criminal Circuits, 4- Personal Status Circuits, and 5- Civil Circuits. Importantly, it will also be possible to establish specialised Appeals Circuits in the counties of each province where a Court of Appeal is established. The Court of Appeals are known to hear appealable decisions from lower courts; they render their judgment after hearing the litigants' arguments in accordance with the Law of Procedure before Shari'ah Courts and the Law of Criminal Procedure.<sup>116</sup>

## 3. The Courts of First Instance

The new Law of Judiciary established new courts of first instance in Saudi Arabia's provinces, counties, and districts in accordance to the needs of the system. The courts of first instance consist of the following courts:<sup>117</sup>

- a. General Courts
- b. Criminal Courts
- c. Commercial Courts
- d. Labour Courts

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<sup>115</sup> See The Law of the Judiciary, 2007. Article 15

<sup>116</sup> Ibid Article 16

<sup>117</sup> Ibid Article 18

e. Personal Status Court.

General Courts are established in provinces, and consist of specialised circuits including Implementation and Approval Circuits, and Traffic Cases Circuits. General Courts are composed of one- or three-judge panels, as specified by the Supreme of Judicial Council. The Criminal Courts consist of the following specialised circuits: Qisas (Retaliatory Punishment) Cases Circuits, Hudud Cases Circuits (Prescribed Punishment), Ta'zir (Discretionary Punishment) Cases Circuits, and Juvenile Cases Circuits. The Criminal Courts are composed of a three-judge panel. Other cases (offences) specified by the Supreme of Judicial Council will be heard by one judge. Other Personal Status, Commercial, and Labour Courts will consist of specialised circuits, as needed, and are composed of one or more judges as specified by the Supreme of Judicial Council.<sup>118</sup>

There has been the criticism of the judicial system in Saudi Arabia, with the point raised that there are types of dispute falling under the jurisdiction of specialised huge numbers of committees for the settlement of disputes.<sup>119</sup> The special committees have been created to implement the law outside the judicial branch. The committees fall under different Ministries or Administrative departments, such as the Ministry of Commerce and Industry, Ministry of Business, Ministry of Information, or Saudi Arabian Monetary Agency. The members of the committees do not subject to judges' appointment conditions or qualifications. Chief Judge Nasser Al Dawood,<sup>120</sup> for example, thinks that the commissions in the current situation will lead to the dispersing of judiciary in Saudi Arabia. Importantly, he has called for the incorporation of these jurisdictions into The Ministry of Justice. In actual fact, it is true to state that the huge of numbers of committees or commissions for dispute settlements are unacceptable in the current time, and effect justice in Saudi Arabia; they create a conflict between the principles. However, more recently, the Saudi Arabian government has enacted a new judiciary law aiming to reform the judiciary system with the plan to be implemented several stages,<sup>121</sup> one of which is concerned

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<sup>118</sup> See the Law of Judiciary, 2007. Articles 19, 20

<sup>119</sup> There are about fifty committees and commotions for settlement of disputes, such as The Negotiable Instruments Committee, Committee for the Settlement of Labour Disputes. Committee for the Settlement of Banking Disputes and Insurance Disputes Settlement Committee.

<sup>120</sup> Nasser Al-Dawood 'Alejan Algadaih' *alwatan newspaper* ( Saudi Arabia 7/05/2011)

<sup>121</sup> The Implementation Mechanism of the Judiciary Law and the Board of Grievances Law, Royal Decree No. M/78, (19/9/1428H, Oct. 1, 2007), O.G. Umm al-Qura No. 4170 (30/9/1428H, Oct. 12, 2007).

with transferring the jurisdictions of the committees to the courts; however, there is delay in the application of the plan.

In Saudi Arabia, there is no concept of judicial precedent in many cases, which means that the decisions of a court or a judicial committee have no binding authority with respect to another case. In general, there is also no system of court reporting in the Kingdom, and there are also no publishing of judgements. Thus, often, it is not possible to reach a conclusion on the way in which a Saudi court or judicial committee would view a particular case. Even though the Ministry of Justice in Saudi Arabia recently began to publish cases, that does not meet the standards of cases published in other legal systems in the world as there are only a small number of selected cases, which will not soundly reflect judicial principals.<sup>122</sup>

#### **2.9.4 Administrative Judicial System (Board of Grievances)**

As mentioned previously, the Saudi Judicial system adheres to Islamic law, and dealing with grievances was conducted in the time of the prophet and Muslim rulers who came after prophet. Historically, the purpose of the Grievance Board (Diwan al-Mazalem) was to deal with disputes between individuals or citizens and administrators. In the early days of Islamic law, disputes were settled by the caliph (ruler), or later by his appointees. In the book *al-Ahkain al-Sultaniyya*,<sup>123</sup> by Al-Mawardi, the differences between the ordinary judges and the Grievance Board members (inazaliin or nazir al-mazalim), who were not actually called judges, were highlighted.

Scholars have found it difficult to define the nature of the Grievance Board. Is it an executive or a judicial body? If it is judicial, is it a regular court, an equity court, an administrative court, an appellate court, or some combination? Some scholars see it as a judicial body; some see it as an administrative tribunal that existed long before the modern French administrative court system; and some go as far to assert that Islamic law was, in fact, the precedent for the French administrative judicial system. However, at the present time in Saudi Arabia, the Grievance of

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<sup>122</sup> Ayoub Al-Jarbou, 'Judicial Independence: Case Study of Saudi Arabia' [2004] 19 Arab L.Q 5,54

<sup>123</sup> Al-Mawardi, *al-Akham al-Sultaniyya*, (2004 Beirut: Lebanon, Dar al-Kutub Al-Imiyah),213

Board is considered an administrative court according to new Law of Grievance Board.<sup>124</sup> The Board of Grievances Law organises the Board according to the following hierarchical structure:<sup>125</sup>

- High Administrative Court
- Administrative Courts of Appeals; and,
- Administrative Courts

The new law establishes one or more Administrative Courts. Each court will function through specialised circuits, such as Administrative Circuits, Employment, and Disciplinary Circuits, and Subsidiary Circuits, and will be composed of either a one- or three-judge panel. The Administrative Courts will have jurisdiction to decide the following:<sup>126</sup>

- a. Cases related to the rights provided for in the Civil and Military Service and Pension Laws for government employees and hired hands, and independent public entities and their heirs and claimants;
- b. Cases of objection filed by parties concerned by administrative decisions, where the reason for such an objection is lack of jurisdiction, a deficiency in form, a violation or erroneous application or interpretation of laws and regulations, or abuse of authority. The rejection or refusal of an administrative authority to take a decision that it should have taken pursuant to laws and regulations is considered to be an administrative decision;
- c. Cases of compensation filed by parties concerned against the government and independent public corporate entities resulting from their actions;
- d. Cases filed by parties regarding contract-related disputes where the government or an independent public corporate entity is a party;
- e. Disciplinary cases filed by the Bureau of Control and Investigation;

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<sup>124</sup> The Law of the Board of Grievances, Royal Decree No. M/78, ( October. 1, 2007)

<sup>125</sup> Ibid Article 8

<sup>126</sup> ibid. Article 13, 14.

- f. Other Administrative Disputes; and,
- g. Requests for implementation of foreign judgments.

The Board of Grievances Law also comprises a restructuring and rearrangement of its courts and their jurisdiction in an aspect that maintains dedication of the Board to its duty as mainly an administrative judiciary relieved of the burden of commercial and penal cases.

Manpower is the focus of the development process for the judiciary, and the essential means for its development; therefore, it is necessary to pay attention to the selection, qualification, training, monitoring, and encouragement of its personnel. Furthermore, it must benefit from experts in business, labour, and banking regulations, as well as other specialised fields working in the judiciary.<sup>127</sup>

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<sup>127</sup> Ayoub Al-jrbou, *Judicial Review of Administrative Actions Under The Saudi Law* (King Fahd National Library 2011) 150.

## Chapter Three

### The Theory of Contract Law in Islamic Law

#### 3.1 Introduction

The essential principles at the root of all commercial operations and trade transaction in any legal system—not just Islamic law—are the regulations of the principles governing the law of contract and the regulations of obligations arising wherefrom.

Unlike English contract law, which is very much based upon general legal theory and doctrines, contract law within Islamic Law tends to be highly specialised in that different sets of rules have been developed in order to regulate different types of agreement. As Saudi Legal explains, ‘The Islamic Law texts do not set out an all-embracing theory of contract law which applies to all types of contracts. Rather, the texts deal with certain contracts, such as sales, hire, loans, agency and guarantees, in individual chapters. Accordingly, certain rules which apply, for example, to contracts of sale do not necessarily apply to guarantees, and vice versa’.<sup>1</sup> Whilst the various schools of Islamic Law, in the main, share their principles of contract law, different schools have nevertheless developed their own nuances and idiosyncrasies. Islamic contract law has won legal principles that are not known to many of the specialists in the law, particularly in English law. It is the purpose of this presents the chapter to explore these nuances through a critical analysis of the approach of Islamic law to the validation and enforcement of contractual agreements and before discuss the frustration of contract we have to write about the theory of contract in Islamic law to let the reader especially the English and western readers know and understand the principals of Islamic contract law to understand principals of frustration of contract.

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<sup>1</sup> Saudi Legal, Islamic Contract Law (Saudi Arabia, Hatem Abbas Ghazzawi & Co., 2010) <[http://www.saudilegal.com/saudilaw/02\\_law.html](http://www.saudilegal.com/saudilaw/02_law.html)> accessed 30<sup>th</sup> April 2011.



### 3.2 The Definition and Concept of the Contract under Islamic Law

It has been argued in the academic literature that, up until the 19<sup>th</sup> Century, no definition of the term ‘contract’ could be found in any treatise on Islamic law<sup>2</sup>. In part, the reason for this is that Islamic jurisprudence is not dogmatic; as noted previously, principles are preferred to general theories, and definitions therefore tend to rely on general theories<sup>3</sup>. The definitions of contract came under the contract of sale, or when scholars write about a sale of goods, although it remains that there is no legal theory of contract in old traditional Islamic law; however, in some old Islamic law books, definitions of contract may be seen as separated from a sale contract<sup>4</sup>. The word contract is *aqd* which, literally translated, means the tying together of two or more things by rope<sup>5</sup>.

In Islamic legal literature, a contract is used in two senses<sup>6</sup>. The first is in a general sense, where the contract is applied to every act undertaken in earnestness, and with firm determination—regardless of whether or not it emerges from a unilateral intention such as trust, remission of debts, and grivet. Importantly, the word is used not only to refer to covenants, but also to refer to oaths and other types of promise, such as marriage vows<sup>7</sup>. Furthermore, the term is also referenced in the Quran to refer to personal obligations<sup>8</sup>. The second, in a specific sense, results from a mutual agreement, such as sale, hire, and agency. It is pertinent to note that modern Muslim scholars are inclined to apply the contract to bilateral contracts as is the case in English law<sup>9</sup>.

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<sup>2</sup> N Saleh, Definition and Formation of Contract under Islamic and Arab Laws (1990) 5 Arab Law Quarterly 2, 101,116

<sup>3</sup> *ibid*

<sup>4</sup> See for example Aljassass Abu Baker, *Ahkam al-Qur'an* (Beirut Dar al-Kutub al-Ilmiyya, 1993).

<sup>5</sup> Ala Eddin Kharofa, *Transactions in Islamic Law* (2nd edition, Kuala Lumpur, A.S. Noordeen Press, 2000) 1-7.

<sup>6</sup> In fact, the term contract under Shari'a law covers all types of obligation in all aspects of life such as religious obligations to God, the interpersonal obligations marriage, the political obligations expressed in treaties, and the commercial obligations.

<sup>7</sup> Kharofa (n5).

<sup>8</sup> J Hussein, *Islam: Its Law and Society* (2<sup>nd</sup> edition, Australia, Federation Press, 2004) 178.

<sup>9</sup> Muhammad Mansoori, *Islamic law of Contracts and Business* (4<sup>th</sup> edn, Islamabad Shari'ah Academy 2008) 19.

There are many Quranic verses that regulate the principles of contract through different terms, such as ‘contract’, ‘covenant’ and ‘promise’, with such verses supporting the opinion that a contract involves all aspects of life, including faith and obligations. For example:

‘Oye who believe fulfil the contractual obligations’<sup>10</sup>, ‘and fulfil you covenant with me and as I fulfil my covenant with you’,<sup>11</sup> and, ‘and they who keep their promises whenever they promise’<sup>12</sup>.

The closest thing to a general definition for a contract, within the context of Islamic law, are those conceptions that have been proffered respectively by the Maliki School, Hanbali School, Hanafi School and Shafi’i School—schools of Islamic jurisprudence—in an attempt to explain the sale of goods contract. The emerging definitions of these four schools each revolve around the idea of valuable property being exchanged between two persons: within the Hanafi School, for example, a sale of goods contract is through the exchange of one coveted article for another coveted article by words or by deed<sup>13</sup>; within the Hanbali School, a sale of goods contract is seen as a mechanism for exchanging possession in physical property. Under this conception, one party relinquishes the possession of an item of property to another in exchange for the other party relinquishing the possession of another item of property<sup>14</sup>.

There are indeed other meanings of the term afforded by different scholars: for example, the contract is defined as a legally binding agreement between two or more parties in which, for a consideration, one or more parties agrees to do something. However, Ibn Qudamah provides a slightly different definition to a sales contract, which is referenced as an exchange of a property against another property, conferring and producing possessions<sup>15</sup>. In Islamic modern law, there are numerous definitions taken from classical Islamic jurisprudence and modern law, such as through Alsanhury, where the term contract is noted as being, ‘a connection of an offer emanating from one parties with the acceptance of the other party in a manner which marks its effect on the subject matter of the contract’<sup>16</sup>.

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<sup>10</sup> The Quran 5:1

<sup>11</sup> The Quran 2:40

<sup>12</sup> The Quran 2:177

<sup>13</sup> Saleh,(n2)

<sup>14</sup>ibid.

<sup>15</sup>Abdullah Ibn Qudamah. *Almughni* (velume4, Egypt Dar ahia altorath alarbi 1985) 3.

<sup>16</sup> Abdul Razzaq **Alsanhury**, *Masadir al Haqq fi al Fiqh al Islami*. (volume1 Beirut. Manshorat alhlabi 1998) 73

The above meanings make it clear that a contract includes two parties in Islamic law; the contract *aqd* is usually used for two parties' transactions, by offer from one party and acceptance from the other. However, it is also used for guarantees and gifts concluded by an offer only. There must be a legal union between the two declarations regarding the subject matter or the contractual obligations<sup>17</sup>.

### 3.3 The Development of Contract Law under Islamic Law

The principal role of Islamic contract law is not to build a new system of commercial contract law but to re-evaluate or approve existing institutions of contractual obligations laws, either completely or partially. Before Islam, Quraish<sup>18</sup> used to engage in trade, and Makkah was a commercial city. Quraish had journeys by winter to Yemen and summer to Syria, as is proclaimed in the Quran<sup>19</sup>. Many Arabs had to obtain their livings from selling camels, horses, cattle and sheep, whilst the rest worked in commerce, their caravans set out around commercial cities in their countries. The Jews of Madinah held the leading position as far as trade and commerce, and carried out transactions contracts with Arabs living in Madinah. The practice of contract has been popular amongst Arabs since the pre-Islamic era, during which time commercial transactions existed as a sale of goods contract, a partnership contract, and contract of mortgage<sup>20</sup>. Many contracts in the period were not written, although some important contracts were.

In Makkah and Madinah during the pre-Islamic period, there were certain customary commercial and agricultural contracts enforced through law by businessmen amongst themselves, and a

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<sup>17</sup> Muhammad Ayub , *Understanding Islamic finance* ( Sussex John Wiley & Sons Ltd 2008) 104

<sup>18</sup> Quraish or Quraysh is the tribe which lived and ruled Makkah upon the appearance of the religion of Islam, and still exists until the present day, Quraish is a tribe of prophet Mohammad.

<sup>19</sup> Qur'an 106.

<sup>20</sup> Mohd Billah, *Shari`a standard of business contract* ( Kuala Lumpur. A.S.Noordeen 2006) 14

number of legal procedures for loans with interest contracts. Some laws were issued in Makkah by *Dar al-Nadwah* (Grand Council), although its authority was purely moral<sup>21</sup>.

Following the rise of Islam, Arabs continued their commercial and business transactions. It has been argued in the academic literature that, as opposed to being characterised by general theories of contracts, Islamic contract law is characterised, conceptually, by general principles of law<sup>22</sup>. Such principles commonly take the form of legal maxims or detailed statements surrounding the specific goals and objectives of Sharia law. Whilst some of these maxims are derived directly from the Quran or from other primary Islamic texts, others are derived from the writings of eminent jurists and Islamic scholars. As Kamali explains, ‘The fiqh [the discipline of studying law as a science] has generally been developed by individual jurists in relation to particular themes and issues in the course of history... The actual wordings of the maxims are occasionally taken from the Quran or Ahadith but are more often the work of leading jurists and that have subsequently been refined by others throughout the ages’<sup>23</sup>. Importantly, there were Quranic injunctions, guiding Muslims to behave in trustworthy ways; these were consolidations with a supplement number of the prophet Hadiths, acting either as explanations or as new injunctions about contracts. Both types of injunction have been interpreted under schools of law. Such schools did not discuss the rules of contract as a separate body of law, but rather through certain nominated contracts, such as the contract of sale, the contract of company, or the contract of hiring.

The majority of Muslim jurists have focused on the contract of sale when discussing the rules of contract. It is very fair to state that, although the scholars do not focus their work on establishing a general theory of contract, by analysing their great work in nominate contracts, however, it seems that they are fully aware of the basic concept of contracting. The evidence shows that, in almost all of their treaties, they have presented the discussion on every nominate contract in a standard form, which covers, inter alia:

1. the discussion on the contracting parties,
2. the discussion on the doctrine of offer and acceptance, and

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<sup>21</sup> Abdullah Hassan. *Sales and contracts in early Islamic commercial law*. (Malaysia The Academic Art and Printing Service 2007) 3

<sup>22</sup> H Hassan, *Contracts in Islamic Law: The Principles of Commutative Justice and Liberality* (2002) 13 *The Journal of Islamic Studies* 3, 257-297.

<sup>23</sup> Mohammad Kamali, *Shari'ah Law An Introduction* ( Oxford Oneworld Publication 2008) 144.

### 3. the discussion on the subject matter of the contract.

Various attempts were made by Ibn Taymiyya to generate theory of contract in the 13<sup>th</sup> Century, who separated rules of contract and contract stipulations, discussing them separately from the contract of sale, although it was not full theory; it was the first attempt<sup>24</sup>. Nevertheless, the first Islamic theory of contract as a theory in modern-day law took place in the 19<sup>th</sup> century, during which time the Ottoman's Majallah Al-hkam Al-adliyyah was published by Hanafi scholars in Turkey. Murshid Al-Hayran's Egyptian version of the Ottoman's Majallah considered Islamic civil law, including the contract theory, with Muslim jurists subsequently starting to develop a general theory of contract and writing text books on the subject<sup>25</sup>; this is believed to have been owing to the influence of modern law—particularly Western laws, although money of new Islamic contract theory books still refers to the rules of contract of sale as a prototype and analogy for all other contracts.

### 3.4 Freedom of Contract under Islamic Law<sup>26</sup>

The concept of freedom of contract is not given much attention in the classical Islamic law books, either as diverse principles or as separate doctrine, although the freedom of contract operates. The main question that gives rise to controversy in this context is whether or not contracts are presumed to be lawful in the absence of a specific prohibition to the contrary, or indeed whether they are presumed to be unlawful unless provided for by Islamic law. With this in mind, there is consideration towards whether one may create a new contract or add to or vary the terms prescribed by Islamic law. In Islamic law, there is argument in this. Zahir School<sup>27</sup> sees that only contracts expressly provided for by the primary texts of Islam can be deemed valid, as all other types of contract purport to change the divine legal status of things, without the affirmative authority of Islam. This opinion is seen to oppose any freedom of contracts or terms,

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<sup>24</sup> Oussama Arabi, Contract stipulation in Islamic law the Ottoman Majalla and Ibn Taymiyya 1998 30 International Journal of middle East Studies. Cambridge University press 29,50.

<sup>25</sup> For example Mohamed Abu Zahra he wrote a book in theory of contract is called *Al-Milkiyah Wa Nadhariyat Al Aqd*. And Abdul Razzaq Alsanhury wrote this book *Masadir al Haqq fi al Fiqh al Islami*.

<sup>26</sup> There is relation ship between frustration of contract and the freedom of contract, because the freedom of contract is includes not only the freedom to contract, but also the freedom from the contract, absolute contract is against the freedom of contract.

<sup>27</sup> The founder of this school was Daud al-Zahiri it is not from main Islamic law School it does not have many followers. Zahir School is not one of the main four school, but it is another school has its approach.

and thereby annuls any new form of contract and terms besides those nominate contracts and established stipulations in the Islamic law of contract.

Another school<sup>28</sup> of Islamic law takes the opposite view and rejects the narrow view, believing that all contracts are lawful unless they are specifically prohibited by the Quran, or another Islamic source, according to the view parties are free to make transactions outside the scope of the nominate contracts established by early jurists, and are therefore also able to enforce stipulations that are not mentioned in the Quran and the Sunnah. Ibn Taymiyya strongly supports the opinion, writing, ‘The general principal in contracts and stipulations is permissibility and validity. Any contract or stipulation is valid unless there is an explicitly text from the Quran, the Sunnah, the consensus or analogy proving its prohibition and voiding’<sup>29</sup>.

The first opinion<sup>30</sup> relies on the Prophet’s view that, ‘Every stipulation which is not in the book of Allah is void, even if it be one hundred stipulations’<sup>31</sup>. In actual fact, the majority of jurists understand the Prophet’s statement as denoting every contract or condition that is contrary to the Quran and traditions of the Prophet, rather than being a blanket rejection of every contract or terms not cited by such texts. The statement relates to any contract and stipulation prohibited by Islamic rules; thus, this saying, in essence, does not limit the liberty of the general Islamic principles. Moreover, the Prophet highlights that ‘Muslims are bound by their stipulations except for a stipulation which makes the unlawful lawful or makes the lawful unlawful’<sup>32</sup>. Such a viewpoint provides parties with the capacity to put forward any stipulations in any contract, stating that parties shall be permitted to carry out all the transactions they need if they do not conflict with Islamic law<sup>33</sup>.

The term ‘freedom of contract’, in many respects, means the same thing under Sharia law as it does under English law, namely that parties are free to choose their own terms and conditions of contract, and that the law will rarely intervene to frustrate a lawful contract that has been formed

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<sup>28</sup> Hanafi, Maliki, Shafi and Hanbali

<sup>29</sup> Ahmad Ibn Taymiyya Ahmad, *Majmu al-Fatawa* ( Vol 29 Saudi Arabia King Fahd Printing Complex 2006) 127

<sup>30</sup> Which is adopted by Zahir School

<sup>31</sup> Sahih Bukhari Hadith No 2579

<sup>32</sup> Sunan Abu-Dawud Hadith No 1419

<sup>33</sup> Vogel Frank and Hayes Samuel, *Islamic Law Finance* (Boston BRILL 2006) 98

consensually between two parties with sufficient capacity to contract<sup>34</sup>. Both doctrines are subject to the perceived need to protect weak parties from the superior bargaining strengths of their counterparts.

Within the context of Islamic law—where one party coerces another into entering into a contract—the contract is deemed unlawful; this is owing to the fact that coercion upsets the balance of equality between the parties, and accordingly stifles the operation of the principle of liberality upon which Islamic contract law is based.

Under Islamic law, this interference with freedom of contract is not limited to cases where one of the parties exerts undue influence or duress upon the other; it applies equally to contracts that have been concluded by innocent or inexperienced parties or where there has been a misrepresentation by the more experienced party. This aspect of Islamic contract law is generally interpreted in the same way by the main schools of Islamic jurisprudence; as MacCormack writes, ‘The Maliki and Hanafi schools [both] believe a contract is void if one of the parties is inexperienced or innocent and there also needs to be misrepresentation or disproportionate obligations. In the Shafi’i and Hanbali schools, the obligations must be grossly disproportionate and there must also be fraud<sup>35</sup>.’

Where this conception of freedom of contract differs substantially from English notions, the doctrine is in relation to the freedom of parties to choose applicable law; in the West, it is commonly accepted that contracting parties should be free to choose for themselves which laws regulate their agreement and which Courts or arbitrators preside over any dispute that arises; under Islamic law, the parties to a contract are neither entitled to select an alternative applicable law to govern their agreements nor entitled to nominate the Courts of another jurisdiction to preside over their disputes; Islamic law applies to all Muslims, irrespective of the terms and conditions of their private contracts. This is a point that appears to be routinely misunderstood. The academic literature is rife with sources that allege that freedom of contract, under Islamic law, includes the freedom to choose applicable law and jurisdiction. As Atai writes, ‘Islam recognises the concept of freedom of contract therefore the parties can choose Sharia principles

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<sup>34</sup> N Shaeh, Freedom of Contract: What Does It Mean in the Context of Arab Laws? (2001) 16 Arab Law Quarterly 4, 346,357.

<sup>35</sup> J MacCormack, ‘Commercial Contracts in Muslim Countries of the Middle East: A Comparison with the United States’ (2009) 37 International Journal of Legal Information 1, 24.

as the governing law of the contract. They can also choose the jurisdiction of the courts of a designated country as the forum for resolving disputes between the contracting parties. However, the application of Islamic principles by the selected forum depends on the laws of the country in which the enforcement is sought.<sup>36</sup>

Saudi courts recognise the validity of the freedom of parties to choose applicable law. The courts in Saudi Arabia<sup>37</sup> refuse to hear any case relating to dispute in contracts that include choice of applicable law or arbitration agreement because the case is out of the jurisdiction of the court. The case surrounding dispute a between a Saudi company and a Swedish company was owing to the supplementary contract appended to the main contract: as the main one has an arbitration agreement, a commercial court ruled to refuse to hear the disputes relating to the supplementary contact as there is an arbitration agreement in the main contract.<sup>38</sup> Another case was concerned with a dispute between Saudi company and a British company, with such an agreement for arbitration before the London Chamber of Commerce. The Commercial Court of Appeal refused to hear the case before Saudi courts as there was agreement between the parties to choose another law<sup>39</sup>.

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<sup>36</sup>Ardeshir Atai, 'Overview of Islamic Financial Investments' (Atai Associates, n.d.) 8-9 [Online] <[http://www.ataiassociates.com/pdf/overview\\_of\\_islamic\\_financial\\_investments.pdf](http://www.ataiassociates.com/pdf/overview_of_islamic_financial_investments.pdf)> accessed 2<sup>nd</sup> May 2011.

<sup>37</sup>Spicily in Grievance Board.

<sup>38</sup>Case No 110/1419 on 26/04/1994 Riyadh Grievance Board.

<sup>39</sup>Case No 54/1420 on 30/11/1999 Riyadh Grievance Board. Also for similar case see case No 93/1420 on 13/02/2000 Riyadh Grievance Board



### 3.5 Formation of Contract

Under Islamic law, a contract is recognised as valid if the elements of the contract are fulfilled<sup>40</sup>. A valid contract can be formed if there are the elements laid down in Islamic law, and which must exist in order for the contract to be considered lawful. The majority of Muslim jurists hold that the essential elements of a contract are threefold: the formation (offer, acceptance), subject matter, and parties. Hanafi jurists hold that there is only one element of a contract, namely the formation. This, however, implies the existence of other elements. From a practical point of view, there is no difference between the opinion of the Hanafi jurists and that of majority<sup>41</sup>.

In Islamic law, the notion that agreement depends on the mutual assent of parties finds expression in the Quran in various traditions attributed to the Prophet. The verse of the Quran reads, 'O ye who believe squander not your wealth among yourselves in vanity, except it be a trade by mutual consent'.<sup>42</sup> The formation *is* required in order to establish whether or not two contracting parties really intend to create a contract. It is necessary to consider the declared intention of the parties or its kernel objective rather than any hidden ones. The consent of the two contracting parties is the main element in the conclusion of the contract; thus, without such formation, the contract will not come into existence as the intention and consent will remain concealed. As with other contracts, the parties must give their consent free of the impediment of fraud, duress, misrepresentation or mistake<sup>43</sup>. The formation of contract is an expression comprising two essential elements: offer *Ijab* and acceptance *qabu*. Both are normally made in the same meeting *majils al 'aqd* between the contracting parties<sup>44</sup>.

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<sup>40</sup> The early Islamic jurists discuss the formation of contract under the names of contracts such as sale of goods contract.

<sup>41</sup> Zuhayli Wahbah, *Alfiqh Alislami Wa adillahtohu* (vol.4 Damascus, Dar Alfikr 1984) 94

<sup>42</sup> Quran 4:29

<sup>43</sup> Razali Siti, *Islamic Law of Contract* (Singapore Cengage Learning Asia Pte Ltd 2010) 4

<sup>44</sup> Mansoori (n 9)25.

### 3.5.1 Offer Ijab and acceptance Qabul

Whilst the Islamic doctrine of offer and acceptance is very similar in several key respects to the doctrine of offer and acceptance that prevails in English law, it has been argued in Islamic law that offer and acceptance play a more important role in the Islamic than in the common law of contract<sup>45</sup>; this is the same for all four schools of Islamic jurisprudence, as noted by Nasir: ‘The Hanbali, Shafi’i and Maliki’s also insist on both offer and acceptance, on the ground that no ownership of property can be transferred to and become binding on another person without the latter’s acceptance’<sup>46</sup>.

Under Islamic contract law, once an offer has been made by one party, it must be accepted by another in order for a legally binding agreement to be deemed constituted. Acceptance must be effective in that it must actually be communicated to the offeree. Again, this view is supported by all four schools of Islamic jurisprudence. As Jalil and Rahman argue, ‘An acceptance must be communicated to the offeree to form an effective acceptance. The communication of acceptance is complete the moment it comes to the knowledge of the offeree. If the acceptance does not come to the knowledge of the offeree, it would not be an effective acceptance and no contract will be formed. This is the majority view of the classical Muslim jurists who are also of the opinion that when an offer is made to a person who is not present near the offeror, the *Majlis*<sup>47</sup> meeting will continue until the offeree receives the offer. For example, if the offer is sent by a letter through the post office, the *Majlis* will continue until the offeree receives the letter and he will be given some time to accept the offer, but not for long’<sup>48</sup>.

In Islamic offer and acceptance doctrine, the offer and acceptance must be provided at the same time, within the same meeting. If an offer is made by one party to another at a meeting and acceptance is not provided during that same meeting, the offer is then deemed void within Sharia

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<sup>45</sup> A Zysow, Problem of Offer and Acceptance: A Study of Implied-in-Fact Contracts in Islamic Law and the Common Law (1986) 34 Clev. St. L. Rev. 69.

<sup>46</sup> J Nasir, The Islamic law of personal status (2<sup>nd</sup> edition, Brill Archive 1990) 282.

<sup>47</sup> Majlis is Arabic term means the meeting place of contract where the contracting parties be together in one place and engaged in their business discussion without any distractions unrelated to the deal. See A. Alzaagy, ‘The Contracting Concept of ‘Meeting Place’ in Islamic Law’ (2011) 2 Masaryk University Journal of Law 145,160.

<sup>48</sup> A Jalil and M K Rahman, Islamic Law of Contracts is Getting Momentum (2010) 1 International Journal of Business and Social Science 2, 184.

law<sup>49</sup>. Whilst there are a number of minor differences of opinion between the four main schools of jurisprudence on this issue, their respective approaches are substantially identical<sup>50</sup>.

This aspect of Islamic contract law has been criticised heavily for forcing Muslim businessmen to enter into contracts without being given proper time to reflect or the time they need to finalise the terms and price of their contracts. As Jalil & Rahman argue, ‘In a commercial contract sometimes extra time is needed to finalize the terms of the contract and to fix suitable price through bargaining. The requirement of simultaneous offer and acceptance at the same *Majlis* (meeting), thus, creates some problems to a business transaction in terms of making a wise decision in a time frame constraint. It is therefore highly recommended that the Muslim scholars should view the ridiculously time constraint concept of acceptance of offer in the same *Majlis* whereby if the offeree fails to accept the offer in the same *Majlis* (meeting) in the time allocated, the offer will automatically become void and unenforceable once the time limit has lapsed. This legal anomaly should be reviewed for the interest of legitimate execution of business transactions in the Muslim community currently prevailing when business has exponentially expanded.<sup>51</sup>’ In the opinion of the author, this argument is over-stated; there is nothing preventing businessmen from preparing their contracts over an extended period of time and then, when they are ready, concluding their contract at a single meeting; after all, if key terms—such as price—have not yet been agreed, it cannot sensibly be argued that a firm offer to contract has been made. In many respects, this rule has the same effect as the rule against the imposition of a duty to negotiate in good faith; until the contract is signed or a handshake is procured, either party should be free to walk away from the prospective deal. That is simply a risk of doing business, and one which does not seem to have prevented Muslim men, thus far, from successfully partaking in business activities<sup>52</sup>.

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<sup>49</sup> Ayub (n17) 107.

<sup>50</sup> Ibid

<sup>51</sup> Jalil and Rahman (n49).

<sup>52</sup> M Al-Zarqa, *al-Madkhal al-Fiqhi al-Aam*, vol 1( Dar al-Qalem Damascus 2004) 432.

### 3.5.2 Formation Phrases

Contracts under Islamic law may be concluded in writing, verbally, or by conduct. As Ramadan explains, ‘Islamic contract law recognized both express contracts as well as what has been described in common law as contract by conduct. It presupposes the making of an offer either orally or by writing or by conduct’<sup>53</sup>. This author was unable to establish any evidence of significant divergences between the various schools of Islamic jurisprudence on this issue, despite there being an extensive search of the relevant academic literature on Islamic contract law.

Whilst it is customary for certain words and phrases to be used when concluding a contractual agreement, generally speaking, there are no special formalities required of contracting parties<sup>54</sup>; however, formality rules apply to certain types of contract, such as the marriage contract<sup>55</sup>; therefore, it is not true to state that formation phrases are optional for all types of contract.

#### 3.5.2.1 Verbal:

There is no dispute amongst jurists in regard to the conclusion of contract through words. The reason for this is that words are recognised as the basis of all kinds of expression, and other things can only take their place in cases of necessity. A basic rule in the context of Islamic law, however, is that the basis to be considered in contract is the meaning, and not words and forms. It is for this reason that jurists do not affix particular words to the formation of particular contracts. Wording should be clear so that the other party can easily understand them. Accordingly, any comprehensible phrase referring to the meaning of formation of contract can be considered. Also, any language—whether standard, local or even slang—understood by all

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<sup>53</sup> H Ramadan, *Understanding Islamic law: from classical to contemporary* (USA, Rowman Altimira Publishing, 2006) 105.

<sup>54</sup> S H Amin, *Remedies for breach of contract in Islamic and Iranian law* (London, Royston Publishing, 1984) 13.

<sup>55</sup> R Eisenman, *Islamic law in Palestine and Israel: a history of the survival of Tanzimat and Sharī'a in the British Mandate and the Jewish state* (USA, Brill Publishing, 1978) 39.

parties is permitted. If in the case that one of the parties speaks in a language not understood by another party, it must be interpreted<sup>56</sup>.

Muslim jurists have agreed that the contract formation should, by both parties, be expressed in the past tense. The first party may say, 'I sold you my car', the second party may say, 'I bought'; the expression in past tense is the clearest phrase. There is no agreement between scholars on the use of another tense, such as the present, indicative, or the imperative. The majority of scholars believe they could be used if there is an indication of the intent barring any other possibility of intending a different contract; meaning the intention of the parties is quite clear<sup>57</sup>.

According to Islamic law, in the case where parties are in the presence of each other, it is not acceptable that an offer is made in one place and acceptance is made in a different place. Consequently, in order for a contract to be legal, the offer and acceptance must be communicated at the same place where the parties stay together. For example, when one party meets another one in a place, such as the place of market, and offers his house for a certain price, but the other party has not issued the offer until both parties have separated from the place, in this case, unless it is agreed that the proposal be extended for a longer time, there would be no legal conclusion of the contract<sup>58</sup>.

In Islamic law, contracts are conducted where parties are at a distance from each other. This can be classified, in a legal sense, as contracting between absentees. Hence, in such a contract, the offering party offers his proposal in one place, and the receiving party receives it at a different site. Contracting between absentees is a contract that is concluded between two contracting parties who are not gathered in one location. Islamic jurists provide an example of oral communication between contractual parties through a messenger. With this noted, it can be seen that when the parties are contracting in the presence of each other, the meeting place is the place at which the offer is made. When parties are contracting inter absents, the meeting place is the place at which the offer is communicated. This conclusion is justified by stating that the messenger is only a conduit pipe for conveying the words of the offeror. Thus, the position is the

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<sup>56</sup> Alaeddin Kharofa, *The loan contract in Islamic Shari'ah* (Leeds Publication. 2002) 11

<sup>57</sup> Kasani Abu Baker, *Badai al-Sanai* ( Vol 1 Cairo Sharikh Almtbuat alilniyyah 1910) 133

<sup>58</sup> Alzaagy Abdulrahman 'The Islamic Concept of Meeting Place and its Application in E-Commerce' (2007) 1 Masaryk University Journal of Law and Technology. 27,42

same as if the offeror himself is present at the meeting place. Moreover, in the case of the formation of contract by telephone, the parties are absent from meeting place, but they have implemented communication by telephone at the same time.

### 3.5.2.2 Writing:

When parties are not contracting in the presence of each other, they can generate a contract through writing a letter sent by the offeror to the offeree. Notably, the words need to be clear and include the pivotal elements of the offer, and should be understood by both parties. An actual unity of the meeting place is not conceivable. Consequently, the offeree has to declare his acceptance in the very place where the offer was communicated to him.

Some Shafi jurists have opposed the opinion maintaining that the one who is capable of contracting through verbal communication must not use writing as opposed to speech. According to these jurists, a contract in writing is permitted just for the person who is not capable of speaking<sup>59</sup>.

There is an important issue for considering in terms of writing a contract, as discussed above, which is the formation of the contract. If we consider the opinions of the jurists of different schools of Islamic law, it can be seen that there is a large number of different opinions surrounding the formation of the contract, but none require the traditional written and signed agreement as a requisite for the validity of the contract.<sup>60</sup>

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<sup>59</sup> Jaber Al-Shafiy, *Majlis al-Aqd fi al-Fiqh al-Eslamy wa al-Qanoon al-Wadhe* (Dar al-Jamea'a al-Jadeedah 2001) 154

<sup>60</sup> Mancuso Salvatore 'Consumer Protection in E-commerce Transactions: a first comparison between European law and Islamic law' (2007) 2 Journal of International commercial law and technology Denmark 1,8

### 3.5.2.3 Gesture or Sign:

All four schools allow a party who cannot speak—deaf and/or dumb persons—to contract through signing because verbal expression should be impossible if one of the parties is deaf or dumb. The intention of contractual parties is to be conveyed by signs. Signs must be clear and understood by all the parties. However, the Hanafi School and Shafi School are of the opinion that the formation of contracts through signs is not a way of interpreting the intention of parties, but it is considered as an interpretation of the intention of a party who is naturally unable to speak or to write. Thus, a party who is able to speak is not permitted to use a sign to interpret his intentions as spoken words and writing serve a more powerful form of expression of willingness than signs<sup>61</sup>.

The Maliki School and Hanbali School permit the usage of signs, even if parties are able to speak or write, simply because they consider this to be a valid form of contract, which has the capacity to fully reflect the consent and intention of parties involved in the transaction as instrumental to expressing the will of contracting parties. The formation of a contract reveals the consent of parties to generate a specific contract<sup>62</sup>.

### 3.5.2.4 Acts:

This is termed as *almuatah* in Islamic law, which occurs by taking certain goods and giving the required money. For example, a seller may say to a buyer, ‘I sold you this food for £50’; the buyer puts the money on the desk and picks up the food. In Islamic law, the majority of jurists allow this form of concluding a contract; some of them are of the view that, in order to form a contract through conduct or act, it is necessary that the subject matter must be of a small value—not expensive, such as a house, land, or gold<sup>63</sup>; nevertheless, Maliki and Hanbali jurists, even in the case of expansive subject matter, permit this. Shafi jurists do not allow the formation of

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<sup>61</sup> Ibn Nujaym Z Ibrahim, *Alsashbah wa alnazair* (Damascus. Dar Alfiker.2005) 197

<sup>62</sup> Mansoori (n 9) 28

<sup>63</sup> Ibn Qudamah M *Al-Sharh al-Kabir* Vol 3 (Beirut Dar al-Fikr 1995) 3

contracts by actions. If research is carried out amongst books, including information about the formation of contracts, it can be seen that the aim of formation of contract in Islamic law is the form indicating to the intention of the parties to conclude the contract; thus, the exchange of goods between two parties without any written document or signature, or the exchange of spoken words of offer and acceptance, are considered adequate for formation. Moreover, silence can be considered a valid tool of expression of the parties' will if the circumstances of the case reflect that the silence of the party receiving an offer or goods can clearly refer to acceptance of the deal<sup>64</sup>.

## **2.6 Classification of Contract under Islamic Law**

At the highest level, contracts under Islamic law can be divided into two categories: those contracts resulting from bilateral agreement, and those resulting from a unilateral agreement. Contracts falling into the former of these two categories are legally binding because of the application of the principle of commutative justice; contracts falling into the latter are legally binding because of the application of the principle of liberality. The significance of maintaining this distinction is that unilateral contracts are not subject to the same set of rules as bilateral contracts, precisely owing to their differing bases. Bilateral contracts cover the remaining transactions in Islamic law, which can be further divided into different classifications according to the very purpose and reason behind the deal and agreement. In this regard, these contracts may be classified into six groups, as follows:

1. Contracts of exchange ('uqud al-mu'awadat)
2. Contracts of security ('uqud al tawthiqat)
3. Contracts of partnership (shirkah)
4. Contracts of safe custody (wadi'ah)
5. Contracts pertaining to the utilisation of usufruct ('uqud al manfa'ah)
6. Contracts pertaining to do a work (e.g. wakalah and ju'alah).

This classification is not intended to be exhaustive as, in the future, many new contracts encompassing different features would possibly come to exist on the basis of the doctrine of

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<sup>64</sup> Ibn Taimiah. Ahmed. *Alfatawi* Vol 29 (Riyadh Ministry of Islamic Affairs 1997)546



permissibility (*ibahah*), as discussed previously; this would render all commercial transactions permissible in the absence of a clear prohibition. Nevertheless, the above classification seems to be relatively comprehensive in terms of covering all existing contracts found in Islamic law books<sup>65</sup>.

Mention should be made to the fact that each of these classifications comprises different transactions, but ultimately contributes to the same purpose and reason behind the underlying contract. For example, the contract of exchange will primarily concern trading as well as selling and buying activities, with the inclusive of their subdivisions, such as cash sale, deferred payment sale, deferred delivery sale, sale on order, sale on debt, sale on currency, auction sale, and so on and so forth. Similarly, other types of contract also include many sub-divisions relevant to respective classification. For example, the contract of security deals not only with surety ship (*kafalah*) but also with pledge (*rahn*) and the transfer of debt (*hiwalah*) as the very purpose of these sub-contracts under contracts of security is to protect the interests of the parties to a contract—particularly the interest of the party in whose favour the respective contracts are concluded. As far as contracts pertaining to the utilisation of usufruct are concerned, it also covers a few sub-contracts, such as *ijarah* (hire and lease) *ariyah* (loan of tangible asset), *waqf* (endowment), and *qard* (loan of money), etc. The contract of partnership (*shirkah*) also includes different types of partnership, namely *mudarabah*<sup>66</sup>, *musharakah*<sup>67</sup>, *sharikah al-abdan* (partnership by contributing effort and skill), *sharikah al-wujuh* (partnership based on credit and reliability), *muzara'ah*<sup>68</sup> and *musaqat*<sup>69</sup> (partnership in fruit trees)<sup>70</sup>.

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<sup>65</sup> Mohd, Billah, *Shariah Standard of Business contract*, *ibid*, p 73

<sup>66</sup> Mudarabah is a contract for sharing the profit of a business in which party contributes with capital and other trade with it.

<sup>67</sup> Musharakah is joint enterprise formed for conducting some business in which all partners share the profit according to a specific ratio while the loss is shared according to the ratio of the contribution. It is an ideal alternative for the interest based financing with far reaching effects on both production and distribution.

<sup>68</sup> Muzara'ah is a contract between two parties in which one agrees to allow his land to be used by the other in return for a part of the produce of the land.

<sup>69</sup> Musaqat is a contract between two parties, by which it is agreed that the one shall deliver over to the other his fruit trees for a specified period of time, , on condition that the other shall take care of them, tends and waters them and whatever is produced shall belong to them both .

<sup>70</sup> Islamic World, *Contracts In Islamic Commercial And Their Application In Modern Islamic Financial System* (Islamic World, 2002) [Online] <[http://www.islamic-world.net/economics/contract\\_02.htm](http://www.islamic-world.net/economics/contract_02.htm)> accessed 2<sup>nd</sup> May 2011.

### 3.7 Effect of Prohibitions on the Contract

Under Islamic law, there are various types of transaction forbidden by Sharia law, which makes contracts in Islamic law different to other contract law; this will affect contract law. Accordingly, it can be seen that there are various different types of contract in Islamic banking exclusive in Islamic law; occasionally, Islamic courts consider various types of contract void because Islamic law prohibits these contracts.

Under this section, some types of contract are briefly discussed, including those prohibited in Islamic law. The scholars of Islamic law are almost unanimous about the prohibition of those contracts below, although there is not necessarily consensus surrounding the details of such contracts.

#### 3.7.1 Usury (*riba*)

The original meaning of the word *riba*, in Arabic, is to increase, mount up, grow and rise. Technically, *riba* refers to an increase in the principal in the case of a loan transaction. Accordingly, anything chargeable, in addition to the principal amount as a contractual obligation, falls within the purview of *riba*, and is therefore prohibited. Muhammad Ala Thanwi defines *riba* in following words: ‘Riba is an increase without any corresponding consideration which has been stipulated in favour of one of the two parties, in a contract of exchange’<sup>71</sup>. In the Quran, this word is used several times to convey just such meanings. For example, in the following verses variations of the word *riba* have been used to connote the idea of growth and height:

And among his signs, that you see the earth barren, but when We send down water (rain) to it, it is stirred to life and growth [Ar. *ribat*] (of vegetation) Verily, he who gives it life, surely is able to give life to the dead (on the day of resurrection). Indeed He is Able to do all things.’

And in another verse,

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<sup>71</sup> Muhammed Ala Thanwi, *Kashshaf Istilahat alfunum* vol 3 (Beirut, Sharikat al-Khayyat le al-kutub, 1998)592

‘And the likeness of those who spend their wealth seeking Allah's pleasure while they in their own selves are sure and certain that Allah will reward them (for their spending in his cause), is the likeness of a garden on a height [Ar. rabwa]<sup>72</sup>.

Scholars agree that usury is prohibited in Islamic law, and is regarded as being one of the major sins in Islam; thus, it is not permitted to take it or pay it. In addition, it is not permitted that an individual be a witness of such a contract that includes usury.

There are two types of *riba*. Riba AI Nasiah can be defined as the amount the lender receives from the borrower over and above the principal amount. It can be regarded as the interest that the borrower pays for the use of the lender's money. Riba AI-Nasiah is also known as Riba AI-Quran, as has been mentioned specifically in the Quran. This is often referred to as Riba AI-Jahiliyah pre-Islam, for this was the type of *riba* most prevalent in Arabia and considered to be the most abusive form before it was prohibited by Islam. Riba AI-Nasiah may comprise of two different types of interest: simple interest, which is interest calculated only on the initial amount of investment Compound interest<sup>73</sup>. In this type of transaction, the accumulated interest of prior periods is added to the amount lent so as to increase the total amount of debt. Importantly, the proponents of the liberal theory of *riba* suggest that the prohibition in Islam only extends to this particular type of interest as it was commonly used in pre-Islamic times and has the greatest scope for unfairness. Supporters of this point of view often cite the following verse from the Quran: ‘Oh ye who believe! Devour not usury, doubled and multiplied; but fear God; that ye may (really) prosper’<sup>74</sup>. However, it is by no means clear whether or not this is the only type of interest that the Quran prohibits. In other verses of the Quran regarding *riba*, there is no mention of a condition that the prohibition is limited to compound interest<sup>75</sup>. Moreover, there is no such qualification in the traditions of the Prophet. It clearly goes against the spirit of a ban on *riba* if income is earned even as simple interest for it can then be used to give more loans, allowing interest to remain as part of the economic life of a nation. In effect, interest will continue to become part of the principal, which is essentially compound interest.

The second type of interest is Riba AI-Fadl, which is also known as *riba* of the Prophet as he prohibited its use. Riba AI-Fadl may be defined as the excess taken in exchange of specific

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<sup>72</sup> Quran 2/265

<sup>73</sup> Usmani MIA, *hfeezanbank's Guide to Islamic Banking, Karachi* (Danil-Ishaat, Karachi 2002) 40

<sup>74</sup> Quran 3/130

<sup>75</sup> El-Gamal Mahmoud A, *Islamic finance: law, economic, and practice*, (Cambridge. University Press 2006) 41,45

homogenous commodities and encountered in their hand-to-hand purchase and sale. The famous Hadith—where this exchange is forbidden by the Prophet—is as follows: sell ‘gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, like for like, equal for equal, hand to hand. If these types differ, then sell them as you wish’. Several points can be seen to emerge from this text: first, it is apparent that these six commodities should only be bought and sold in equal amounts<sup>76</sup> and on the spot; there cannot be an unequal or a deferred sale as otherwise the transaction would fall under *riba*<sup>77</sup>. There is a difference amongst the various schools of thought as to whether or not the above prohibition is confined to these particular commodities or if they merely serve as examples. The majority view is that the key is the *illa*: i.e. the essential characteristic of a good that must be present and which makes a commodity comparable to the one specifically mentioned, and so within the ambit of the original prohibition. Amongst the four leading schools of thought in Islam, the focus of the *illa* differs slightly. Imam Abu Hanifa considers there to be two defining attributes: he observes that all of the above commodities are sold by weight or volume; thus, all commodities sold in this manner and exchanged with the same good fall under the prohibition. Imam Shafi’i focuses on two different attributes, considering that this law applies to every commodity, serving as a medium of exchange or which is edible. Imam Malik also focuses on the attribute that the commodity be edible or capable of preservation.

Markedly, Imam Ibn Hanbal has a variety of criteria ascribed to him. The first view ascribes to him ideas similar to Imam Hanifa. The second view approves of the Shafi’i approach, whilst the third includes all of the characteristics approved by each school, namely weight, volume and whether or not it is edible<sup>78</sup>. Generally, it has been agreed by most scholars of Islamic law that, if a commodity bears the characteristics of being sold by weight and utilises a medium of exchange, then a deferred sale—or a sale of unequal quantities of the same good—is prohibited.

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<sup>76</sup> The exchange of kind of the commodities was popular in old time not in the present time, there is kind of the exchange of gold for gold between dealers of gold.

<sup>77</sup> Kharofa, *The loan contract in Islamic Shari’ah* (n 57)145

<sup>78</sup> Edana Richardson 'the Shari'ah Prohibition of Interest' (2008)72 Trinity College Law Review 78,102.

### 3.7.2 Gharar Uncertainty

The word *gharar* comes from the root verb *gharara/gharra (Gh.R.R.)* signifying to reveal oneself and one's property to destruction without being aware of it (*'ard nafswa mali-hi ii halak mm ghayr an ya'raf*). the word *gharar* in the Arabic language covers a variety of negative elements such as deceit, cheating, danger, peril, and risk that might lead to destruction and loss.<sup>79</sup>

*Gharar* is one of the major causes of the invalidity of a contract. It is an external prohibited attribute that invalidates the contract. *Gharar* takes place where the consequences of a transaction remain unknown. In this type of transaction, the contract is very risky owing to the percentage of loss being very high. There are many examples of its prohibition in Islamic jurisprudence, including, for example, the sale of birds in the sky or fish in the sea. The reason behind the prohibition of such produce is that the risk is very high, rendering such transactions similar to gambling. A second example is that of the trade practised in pre-Islamic times called *bay` habl alhabla*. This type of transaction relates to a buyer buying a she-camel which is to be the offspring of a she-camel, still in its mother's womb<sup>80</sup>.

Owing to ignorance, *gharar* occurs in two things: money and commodities. The former occurs in some countries where more than one currency is used, in which case the seller has to inform the buyer of the preferred currency type because there is a difference between the value of currencies and these impacts on the cost of goods<sup>81</sup>

Ignorance, in commodities or goods, has two aspects. The first is ignorance of the goods themselves: for example, the seller says, 'I will give you what is in my bag for £10'. The second is ignorance of the characteristics of a commodity, if it has the ability to influence the cost or the desire of the buyer. For instance, the place of production impacts on the price of some goods, therefore, the seller must inform the buyer about that. The difference between this category and the previous one is that, whilst in the former the buyer knows the commodities but is not sure

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<sup>79</sup> Mohammed Darir, *al-Gharar fi al-ugud* ,(Beirut, Muassasat al-Rsalah 1999) 35

<sup>80</sup> Ibn Qudama *al-Mughni* (n15)39

<sup>81</sup> Abd al-Rahman Ibn Rajab, *al-Qawaid al-Al-Fighiyya*, Vol 3 (Cairo, Matbah Hiloan, 1977) 218

whether or not they can be bought, in the latter, the buyer does not have enough information about the goods, or the seller does not have enough information about the property or money. An instance of the first category is where A offers to B goods which are under the table for £10, whilst B cannot see the goods, and so B does not know them, whether they are watches, clothes, or rings. An example of the second category is where A offers a watch to B for £100, but A does not mention the manufacturer of the watch, so B knows the type of the product, but he does not know the brand of the watch, which would obviously impact the price of the product<sup>82</sup>.

## **2.8 Discharge of Contract under Islamic Law**

In this sub-chapter, we examine the rules on the discharge of contract operational within Islamic Law; in particular, the way in which Islamic law deals with discharge by performance, discharge of contract by assignment of debt, and discharge by agreement. We also identify the differences in the rules on discharge of contract, which operate under different views in Islamic law.

### **2.8.1 Discharge of Contract by Performance**

The main aim of contract in Islamic law, as another law, is a performance of contractual obligations; the parties should complete the performance of all their obligations under the contract. Islamic law is very strict about the performance of contract, and the performance of contract is considered, in Islamic Sharia law, a part of faith. People are ordered through Quran injunctions to fulfil their obligations:

‘Oye who believe, fulfil the contract’<sup>83</sup>, and the Quran certifies the conduct believers and compliments them in the following verse: ‘and they fulfil their contract which they have made’<sup>84</sup>. Essentially, the performance must be precise and exact; that is, a party’s performance of an

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<sup>82</sup>Mansoori (n 9) 96

<sup>83</sup> Quran 5:1

<sup>84</sup> Quran 2:117

obligation under a contract must be carried out exactly with the timeframe set by the contract, and exactly to standard required by the contract.

Islamic law emphasises that parties must perform contractual obligations in the exact time. With this in mind, the Prophet Mohammed states: ‘you have to have the worker’s salary before his sweat dries’<sup>85</sup>. Accordingly, the parties must perform the contract and conditions mentioned in the contract depending upon the expression or implied intentions of the parties, judged from the of nature of the contract and the surrounding circumstances, as well as according to the customs of the people in each place. Muslim jurists give an example of someone buying a lock, which includes the key the sale without stipulation in the contract. If, on the other hand, a buyer purchases a house, whether the furniture is considered part of the sale requires review of the contract: if the parties express that the furniture must be with the sale, the seller has to perform the contract and hand out the furniture; if there is no mention of this in the contract, the furniture is then not part of the sale<sup>86</sup>.

There is a case in Saudi Arabia of Ali & Salem: Ali purchased land from Salem when there was crop of corns in the land ready to be cut. The parties did not mention the crop in the contract. Before delivery, the land seller wanted to cut the corn, but the buyer asked Salem to stop cutting the crop and leave the crop in the land because he believed the crop was part of the transaction. The seller believed that this was not within the boundaries of the sale, and the court held that the crop belonged to the seller because of the custom of the people, which follows that the crop belongs to the land, and deliveries of the land belong to the seller<sup>87</sup>.

Every type of a contract in Islamic law has its own method of performance, but there are three kinds of obligations: the first governs the delivery of property, which can be replaced, the second concerns specific items that cannot be replaced, and the third considers the performance of an act.

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<sup>85</sup> Ibn Majah. Headth No 9125

<sup>86</sup> Muhammed Seraj, *Nazarah al-aqd* (Alexandria. Dar al-Matboat al-Gamiih 1998) 214

<sup>87</sup> Balqurn General Court. Judgment No 104/1 in 1419AH

### 3.8.1.1 Delivery of a Non-specific Property (*dayn*):

The word *dayn* means debt in Arabic, and refers to contracts of debt and loan. In Islamic jurisprudence, however, its meaning is broader and extends to the transfer of all non-specific property. In Sharia, *dayn* is considered a contractual obligation to pay a sum of money or deliver fungibles. The principle that applies here determines that the property has to be recovered in kind or by something similar in order to enable the contract to be discharged<sup>88</sup>.

The sources of debt *dayn* in Islamic jurisprudence can be found in the contracts of sale, hire, settlement *sulh*, *Salam*<sup>89</sup>, and loan *qard*. If in the sale contract, for example, the price is to be paid in fungibles or in cash, then that price becomes the *dayn* with all the contractual obligations associated with it. As soon as the sale is concluded, the ownership of the sold property is transferred to the purchaser, who subsequently becomes indebted for the price and under an obligation to pay it, unless it is agreed to delay payment or pay by instalments. If the purchaser fails to pay the price when it is due, he is considered to have failed to perform his obligation<sup>90</sup>.

Likewise, in the case of a hire contract, if a stipulation is made as to immediate or deferred payment, the hirer is held legally responsible until he pays at the exact time set by the parties. In a contract of hire, where the parties did not make time of payment in the contract, it is very important to determine the moment when rent becomes due in order to establish the hirer's liability. The general rule is that the rent does not become obligatory simply because a contract has been concluded, but becomes payable when the property is put to the use for which it has been hired. It has been suggested that equality between the reciprocal obligations requires rent to be paid according to use, measured hourly over a month. However, since specifying and paying rent by the hour is cumbersome, the hirer is obliged to settle up at the end of every day<sup>91</sup>.

In a loan *qard*<sup>92</sup>, the borrower is obliged to return, at the end of the loan period, its equivalent in amount, type, and description. The lender, however, may, according to the Shafi, Hanbali and

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<sup>88</sup> Zayn al-'Abidin Ibn Nujaym, *Ashbah wa al-Nazair* (Beirut Dar al-Kotob al\_almiah 1991) 421

<sup>89</sup> A sale of *salam* is a sale in which advance payment is made to the seller for deferred supply of goods.

<sup>90</sup> Ibn Qudamah A Abdullah. *Almughni*. Vol4 (Beirut Dar Ihya' Al Turath Al Arabi 1998) 18

<sup>91</sup> Ibn Abideem, Muhammad. *Raddul Muhtan*, Vol 6 (Beirut. Dar al-Kutub Alilmiah 1992) 11

<sup>92</sup> The loan ( *Qard*) in Islamic law is a loan which is returned at the end of the laon period without any interest or share in the profit or loss of the business. Islam allows loan as a form of social service among the rich to help the poor and those who are in need of financial assistance.



Hanafi Schools, demand full payment of the loan at any time before it is due to the lender<sup>93</sup>. The Maliki School, on the other hand, holds that any agreed delay is binding and must be observed; the borrower should not have to return the loan before the period time of loan<sup>94</sup>.

### **3.8.1.2 The Delivery of Corpus (ayn) of a Specific Property:**

This obligation concerns the delivery of a specific property. The general principle in Islamic law is that the subject matter must be precisely determined as regards its essence, quantity and value. If the subject matter is an obligation or performance, it must be determined at the time of the contract, otherwise the contract is considered invalid<sup>95</sup>: for example, in a contract of hire, if the customer wants to rent a car, the car must be determined in the contract in terms of its model, quantity, registration number, and colour as the subject matter has to be known when the delivery time is due.

The most common expression of the obligation to deliver in Islamic law appears in the contract of sale and the contract of hire, which are considered models for all bilateral contracts. The contract is concluded, with the ownership of the subject matter transferred immediately to the purchaser who is then obliged to pay its price, with the seller accordingly obliged to hand over the subject matter<sup>96</sup>. The delivery of the purchased subject matter, however, does not necessarily have to be physical. Delivery can be affected when the seller removes all restrictions between the sold goods and the purchaser so that the latter may obtain delivery without hindrance<sup>97</sup>.

The rules of delivery are according to the type of subject matter. In the case of buildings, delivery may be made by handing over the key. If the subject matter of the contract is land or other unlocked real estate, delivery must be effected at or near the property, and the seller must give the buyer permission to take possession. In order for the delivery to be valid, the property must be clear and empty of any belongings; otherwise it is not considered a legal delivery, and

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<sup>93</sup> Ibn Qudamah A Abdullah. *Almughni*. Vol4 (Beirut Dar Ihya' Al Turath Al Arabi 1998) 22

<sup>94</sup> Ayub (n17) 161.

<sup>95</sup> Mansoor (n 9)42.

<sup>96</sup> N Coulson, *Commercial Law in the Gulf State* (CQ Press 1984) 20.

<sup>97</sup> Hussein Hassan 'contracts Islamic law: principles commutative justice' (2002) 3 *Journal of Islamic Studies*. Centre for Islamic Studies. 257-297.

the vendor is in breach of his contractual obligation, meaning the seller has to transfer the property officially by transferring his name, in the official document, to the purchaser's name, and handing over the document to the purchaser<sup>98</sup>.

Under Sharia law, the obligation of delivery in a contract implies the guarantee that the object of the contract is free from any hidden defect (*aib*) and from any right of a third party attached to it. As far as the title is concerned, if it is proved that the sold property is owned by a third person, the seller is deemed to have failed to deliver. Likewise, in regard to quality, the vendor guarantees to the purchaser that the sold goods are in proper condition. *Aib* is defined as any defect existing in the goods at the time of the contract that will call for a reduction in value as recognised by the customary standards of merchants<sup>99</sup>.

### **3.8.1.3 Obligation to Perform an Act:**

This is the third form of obligation recognised by Sharia, and concerns agreements to perform any kind of act. This type of obligation is commonly used to define terms of employment, and includes any kind of work. With this type of obligation, the contractor is deemed to be in breach if he has not performed the act or if the performance was only partial or otherwise recognised as faulty. In the case of an employment contract, the employee is obliged to perform a job. The contract of work or employment in Islamic law is terminated if the employee did his job according to the agreement between the parties and the employer paid the money to the employee; the private employee is different in that his obligation is to present himself in readiness for work for a certain period of time, even if he has not been given a specific job<sup>100</sup>. If he has worked only part of the stipulated period, he is deemed to be in breach of his contractual obligation, and thus will not be entitled to the full wages stipulated in the contract. Rather, he will be paid in proportion to the period of time he has actually worked. Thus, someone who hires himself out to work for one year for fixed wages but who only works for six months is still

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<sup>98</sup> In courts in Saudi Arabia do not consider the performance of contract complete until the party who has to deliver the subject matter gave another party the documents after repatriating them officially.

<sup>99</sup> Nabil Saleh 'Remedies for Breach of Contract under Islamic and Arab Laws' *Arab Law Quarterly* (1989) 4 269,290

<sup>100</sup> A, Lerrick and Q J Mian. *Saudi Business and labour law its Interpretation and application* (London. Graham & Trotman Limited 1988) 37

entitled to be paid for those six months' work, although he has not completed his full contractual obligation to work for a whole year<sup>101</sup>.

The contract of employment can be further subdivided into two categories. The first covers the employees whose work has an effect on the goods upon which he works. Examples of this category include the tailor, the dyer or the carpenter. Such an employee is deemed to be in breach of his contractual obligation if he has not completely finished the contracted work and delivered it. The second category includes employees whose work has no apparent effect on the item given to him to work on, with such examples including the porter or the boatman. Such employees must fulfil the contracted job in order to discharge contractual obligations, but there is no duty to deliver it to the employer<sup>102</sup>.

### **3.8.2 Discharge of Contract by Assignment of Debt *Hawalah***

Assignment or *Hawalah*<sup>103</sup> is an agreement to transfer a debt from the liability of the original debtor to the liability of another person. The debtor is freed from a debt whilst another is responsible for it. Thus, the responsibility for payment shifts to another party. It also refers to the document by which the transfer or assignment takes place, such as a bill of exchange, promissory note, cheque or draft. The mechanism of *Hawalah* is used for the settling of accounts by book transfers, without the need for physical transfer of cash. The debtor who transfers debt is referred to as a debtor–assignor *muhil*, the creditor creditor–assignee *muhāl* and new debtor to whom transfer is made is the transferee *muhāl alayh*<sup>104</sup>.

The nature of the assignment of debt in Islamic law stipulates that there are two views relating to the nature of assignment *Hawalah*. The first view considers the assignment as a method of performance, where the debtor can pay the debt for the creditor directly or by transferring him to the transferee. The assignment is the transfer of demand only whilst the actual burden of

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<sup>101</sup> Muhammad Ibn Rushd, *Bidayat al-Mujtahid wa nihayat al-Muqtasid* Voll ( Dar Ibn Hazm. 1999) 583

<sup>102</sup> Ail M. *Civil liability in the Jordanian civil code a comparative study with the Shari'ah*. PhD thesis unpublished. at the School of Oriental and African Studies, University of London, March 1998.

<sup>103</sup> The word *Hawalah* literally transfer or shifting a thing from one place to another.

<sup>104</sup> Jamila Hussain. *Islam its law and society*. (The Federation Press 2004) 179

payment rests with the principal debtor. In this case, if the transferee becomes bankrupt, for example, the creditor again refers to the debtor to pay the debt because he did not complete the performance of his obligation. The second view considers the assignment as a new contract between the creditor and debtor, and so they apply all rules of contract in such a case, which takes the form of a transfer of debt, terminating the liability of the original debtor to a third party. If the transferee becomes bankrupt, the rules of contract will apply here, such as mistake, frustration, and impossibility<sup>105</sup>.

The assignment of debt in Islamic law emphasises that it is lawful to transfer one's debt to another. In the case of the transfer of debt from a debtor to a transferee, the latter should be asked to pay as he substitutes the debtor. Whether or not the transfer of debt requires the consent of all parties, i.e. debtor, creditor and transferee, remains under question, although the scholars agree that the consent of the debtor is required. The majority of scholars consider that the creditor must accept the assignment in order for it to be considered lawful. However, some consider that, if the transferee is a wealthy person and is able to perform his obligations, the consent of the assignee is then not required simply because the Prophet is reported to have stated the following: 'Procrastination in paying debts by a wealthy man is injustice. So, if your debt is transferred from your debtor to a trustworthy rich debtor you should agree'<sup>106</sup>. The consent of the transferee is not a condition for assignment; the transferee has to accept the assignment and pay the debt<sup>107</sup>.

Normally, the effect of the assignment is to discharge the debtor from the debts owed to the creditor, meaning the contract between parties will be discharged by the assignment.

### **3.8.3 Discharge by Mutual Agreement (iqalah)**

Following the conclusion of a valid contract—which is enforceable and binding—the parties must perform their contractual obligations. If any one of the parties wishes to revoke his part of the obligation in the contract, it is possible to reach the agreement that the contract is considered solved automatically once its commitments are not performed; this would not warrant a court or

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<sup>105</sup>Mansoori (n 9) 306

<sup>106</sup>Muslim. *Sahih Muslim*. Hadith 1564

<sup>107</sup>Ayub (n17)167

judge decision. The two parties may agree that the contract should be considered dissolved when obligations are not met, or because of any other reason, where one party is not permitted to do so without the consent and approval of the other party. This principle may be justified in the sense that a contract, in this case, is made by mutual agreement; thus, it can be dissolved by simply the same mutual agreement. The parties do not have the right to unilaterally dissolve the contract if they cannot unilaterally form it as the contract is a shared right. Islamic law considers it permissible; however, if one or both of the contracting parties want to dissolve the contract with mutual consent, this procedure of dissolution is known in Islamic law as *iqalah*<sup>108</sup>.

*Iqalah*<sup>109</sup> is defined as, ‘termination of contract can come by mutual consent of the parties in order to one of them or both are regretted and want to withdrawal from the contract’<sup>110</sup>. The consent of the other partner is essential; a person cannot do it alone. The binding contract can be dissolved by *iqalah*<sup>111</sup>.

There are two opinions of Islamic scholars on *iqalah*: the first opinion considers *iqalah* as a removal of contract and the discharge of a contract, which means that it brings the parties’ situation to their pre-contract status as if the contract never took place; thus, the contract is annulled, along with all its effects<sup>112</sup>. Accordingly, the contract must be at the same price and conditions of the original contract. This is the opinion adopted by the Shafi and Hanbali School, and various scholars from the Hanafi School<sup>113</sup>.

The second view considers *iqalah* as a new contract as the subject matter is moved to the party by contract, and another party receives the price by the contract, and so they must to return by contract. According to this opinion, parties are allowed to establish a mutual agreement in order to dissolve the contract, encompassing a different price from the original contractual price. This is the view of the Maliki School and Abu Yusuf from Hanafi.

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<sup>108</sup> Islam Muhammad, Wohidul ‘Dissolution of contract in Islamic law, (1998) 13 Arab law Quarterly 336,368

<sup>109</sup> The term *iqalah* in Islamic law is derived from Arabic language, means removal or reversal. So *iqalah* is a means of ending a contract.

<sup>110</sup> Wahbah AI-Zuhayli, *Al-Fiqh al-Islami wa Adiflatuhu* Vol 4( Damascus. Dar al-Fikr 1984) 277

<sup>111</sup> is not permissible in respect of marriage, Talaq (divorce), and ‘Ibra’ (absolving oneself from any responsibility)

<sup>112</sup> Bin Qudamah.(n94) 96.

<sup>113</sup> Such as Muhammad bin Alhassan and Zofar.

A different opinion is given by Abu Hanifa, where discharge by mutual agreement can be seen as annulment in regard to the parties' relations because of the nature of *iqalah*; a new contract relating to the third party protects the rights of the third party<sup>114</sup>.

The formation is the main element of *iqalah* in Islamic law, and is the offer from one of the contracting parties and the acceptance of the other. Therefore, the offer and the acceptance, expressed in words, induce *iqalah*. There is no dispute as to the issue that *iqalah* can be constituted by two words, both signifying the past tense.

### **3.9 Application of Islamic Contract Law in the United Kingdom**

It is perhaps accurate to suggest that Islam has, in recent years, achieved a greater awareness in what has historically been referred to as the Western world. This can be attributed to both positive and negative factors. For those who were unaware of (or at least uninformed about) one of the three great monotheistic religions, such ignorance was shattered harshly on September 11, 2001 when terrorist attacks were perpetrated against the perceived 'West', allegedly in the name of Islam. Awareness in the Western world has further increased for more positive reasons, however, and these have a more direct bearing on the current work. A dramatic increase in trade and commerce between Muslim and Western countries and entities in an increasingly interlinked and interdependent global economy has meant that the Muslim world and its laws have become impossible to ignore. As with all trade and commerce, these Muslim–Western commercial relationships have been underpinned by contract law. It has therefore been necessary for those involved in such trade and commerce to familiarise themselves with Islamic contract law in order to accommodate these commercial relationships. Daily Vatican newspaper, *L'Osservatore Romano* wrote that banks should look at the rules of Islamic finance to restore confidence amongst their clients at a time of global economic crisis. The ethical principles on which Islamic finance is based may bring banks closer to their clients and to the true spirit that should mark every financial service<sup>115</sup>.

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<sup>114</sup> Monzer, Kahf. Service bonds for financing public utilities. Paper is submitted to the seminar on financing government enterprises from the private sector. King Abdulaziz University. Jeddah. 11-13/10/1999

<sup>115</sup> See Brussels Journal, Available at < <http://www.brusselsjournal.com/node/3819>> accessed in 23/10/2011.

Gordon Brown said in his speech at Islamic Finance and Trade Conference, London;

Already, Britain is the largest European trader with many Islamic countries - the largest European investor in Oman, the largest non-Arab investor in Egypt, and second largest global investor in Pakistan and Saudi Arabia; Second, the foundation for making Britain the gateway to Islamic trade, is to make Britain the global centre for Islamic finance. Today British banks are pioneering Islamic banking - London now has more banks supplying services under Islamic principles than any other Western financial centre.<sup>116</sup>

Islamic finance has become extremely popular in UK amongst Muslims in UK and with Muslims doing business in UK. London, as an international centre of banking with the City, means that the UK has also become a centre for Islamic as well as conventional finance. Many international corporate law firms with their head office in London also have strong expertise in Islamic finance.<sup>117</sup> Companies and law firms which can offer Islamic finance are a huge lure for businesses from Islamic countries in North Africa, the Arabic world, and even in the Far East, thus attracting financial benefits to the economy. This means that the UK has been more welcoming of Islamic finance structures and indeed more innovative in developing the services that it offers to Muslims and those who wish to use Islamic financial products.

The UK has a well regulated framework for Islamic finance which operates within the current system alongside conventional banks. All banks are regulated under the Financial Services and Markets Act 2000<sup>118</sup> and regulated under the Financial Services and Markets Act (Regulated Activities) Order 2001.<sup>119</sup> However, there is no specific legislation, although this has been mooted, with the government intending to 'showcase the UK' as a basis for Sharia compliant business.<sup>120</sup> However, the Financial Services Authority (FSA)

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<sup>116</sup>[http://www.islamonline.net/servlet/Satellite?c=Article\\_C&cid=1162385940061&pagename=Zone-English-News%2FNWELayout](http://www.islamonline.net/servlet/Satellite?c=Article_C&cid=1162385940061&pagename=Zone-English-News%2FNWELayout) accessed 23/06/2011.

<sup>117</sup> Norton Rose Islamic Finance UK. <<http://www.nortonrose.com/uk/expertise/banking-and-finance/islamic-finance/>> accessed 06/05/2013

<sup>118</sup> Financial Services and Markets Act 2000

<sup>119</sup> Financial Services and Markets Act (Regulated Activities) Order 2001

<sup>120</sup> Roland, D. 'City in fresh bid to become Sharia finance hub' *The Telegraph* <[www.telegraph.co.uk/finance/newsbysector/banksandfinance/9922440/City-in-fresh-bid-to-become-Sharia-finance-hub.html](http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/9922440/City-in-fresh-bid-to-become-Sharia-finance-hub.html)> accessed 13/03/2013

has voiced concerns, notably about the challenges of allocating risk, and contract and documentation.<sup>121</sup>

The challenges of regulating Islamic finance in the UK and indeed the likelihood that a UK court will not base its verdict on Sharia law was demonstrated in *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd. et al*, concerning a *Murabaha* contract from which a party defaulted. The court held that Sharia would not be a deciding factor because UK law does not provide for the application of foreign law, and because the principles of Sharia law remain under debate even in Muslim countries.<sup>122</sup> Interestingly, however, in *Investment Dar Company KSCC v Blom Developments Bank SAL*<sup>123</sup> the contract was *wakala*. Here, the contract's governing law was English, but because the investor had a Sharia compliance department, the agreement was held to be valid.

Now however, the UK government has launched its first Islamic Finance Task Force, which it hopes will make London and the UK the first choice in the West for Islamic finance.<sup>124</sup> Regulation and case law demonstrate that the UK Government does not wish to either discriminate or to show favour to Islamic finance, but to regulate Islamic banks equally. However, there are signs that the UK is now moving to accommodate the structures of Islamic contract law in finance due to the growth in Islamic banking.

There are Islamic banks in the United Kingdom, and some banks have established Islamic departments, such as HSBC, which founded Amanah bank, and applied various types of Islamic contracts, such as contract of *Musharakah*, contract of *Mudarabah*, and contract of *Murabah*<sup>125</sup>.

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<sup>121</sup> Ainley, M; Mashayaekhi, A.; Hicks, R.; Rahman, A. and Ravalia, A. 'Islamic Finance in the UK: Regulation and Challenges' *Financial Services Authority* (17) < [www.fsa.gov.uk/pubs/other/islamic\\_finance.pdf](http://www.fsa.gov.uk/pubs/other/islamic_finance.pdf) > accessed 07/05/2012

<sup>122</sup> *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd & Ors*. [2004] 4 All ER 1072

<sup>123</sup> *The Investment Dar Company KSCC v Blom Developments Bank SAL*, [2009] EWHC 3545

<sup>124</sup> UK Government launches first Islamic Finance Task Force [www.gov.uk/government/news/government-launches-first-islamic-finance-task-force--2](http://www.gov.uk/government/news/government-launches-first-islamic-finance-task-force--2) accessed in 12/01/2013.

<sup>125</sup> Look for example to the web side of HSBC Amanah banks you will find many kind of Islamic contract they offer them. <http://www.hsbcamanah.com/1/2/hsbc-amanah/> accessed in 08/3/2012.



## CHAPTER FOUR

### Frustration of Contract in Islamic Law

#### 4.1 Introduction

A contracting party is asked to fulfil the promises made, and is therefore not excused easily from his legal responsibility. Initially, the parties are obliged to perform their contractual liability. Although Islamic Law emphasises the need of parties to fulfil their contractual obligations, when circumstances render the performance of contract impossible or headship, this exception of non-performance is referred to as the ‘frustration of contract’.

In this chapter, we will discuss the frustration of contract in Islamic Law. In the case of the absence of theory of frustration of contract in Islamic Law, an attempt will be made to create a complete doctrine of frustration of contract. Thus, the views of scholars will be taken when they discuss the cases and provisions of termination of contract owing to the supervening events in separate, and the sparse details associated with different types of contract. For this reason, there will be the discussion, under many different concepts, of the frustration in the context of Islamic Law as the existence of doctrine and application, such as necessity, excuse, *jawaih* and force majeure; this will be done in order to reach a clear vision about the discharge of the contract due to frustration in consideration of Islamic Law.

#### 4.2 Existence of Frustration as a Legal Term in Islamic Law

It is important to highlight that the majority of legal terms in English law *can* also be found in Islamic Law and Arabic language<sup>1</sup>, such as the term of contract in Islamic Law, which is called *Aqd*, which also has the same meaning and concept. However, there are some legal terms in English law in which there is no translation for the term in Islamic Law or Arabic language; this is referred to as functional equivalence translation, where the theory of translation is based on an

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<sup>1</sup> Qur’an and the prophet Mohammed language.

understanding of two texts: a source text, which is to be translated, and a target text, which is the result of the actual translation process. The task of the translator is to establish a relationship of equivalence between the source and target texts. In examining the word of frustration<sup>2</sup> of contract, we will find that there is no word in Islamic Law opposite frustration of contract as one word; the rules and provisions of frustration exist in Islamic Law without the word ‘frustration’, and so, when discussing discharge of contract by frustration, some writers of Islamic Law use long sentences in place of the term frustration, such as discharge of contract by those reasons beyond the control of the parties. Some writers use supervening events, whereas others use force majeure, excuse and natural disaster, all of which will be discussed later on in this paper.

The term ‘frustration of contract’ is legal English, and thus this will be applied and used in order to establish theory of frustration of contract in Islamic Law.

#### **4.2.1 Classification of Discharge of Contract**

The textbooks, which were written about law of contract in English law, divides discharge of contract into discharge of contract by agreement, performance, breach and frustration, as will be mentioned in the sixth chapter. In Islamic Law, there is a difference in the classification of discharge of contract and the termination of contract.

Discharge of contract comes after the formation of a valid (*sahih*) contract, whereas the annulment (*Ibtal*) of such refers to an invalid contract (*ghayer sahih*).

The discharge of contract according to the opinion of some jurists in Islamic Law is divided into two types:

First type: Cessation (*zawal*) is termination of a contract by performance of contractual obligations. This refers to the truth that a contract usually ends upon the performance of parties’ obligations arising out from it. A contract of loan, for example, ends as a result of the payback of the debt from the borrower to the lender. All obligations should be performed immediately

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<sup>2</sup> Frustration also mean felling annoyed or impatient feeling that you get when you are prevented from doing what you want, there is a word and same meaning in Arabic language.

before the expiry of the time by which their performance is due. A contract bound by strain time may complete with the expiration of a fixed period of time because the period of time in such a contract may be extinguished with the extinction of the period because the period of time in such a contract is a fundamental element. Thus, a contract of work, for example, will be finished with the ending of the fixed period<sup>3</sup>.

Second type: Dissolution (*inhilal*) is the termination of a contract following the conclusion of a valid contract, and before the performance of contract by mutual agreement, by frustration of contract, or by breach of contract. Accordingly, the first type is about discharge of contract by performance of contract, whereas the second type is about discharge of contract by agreement, breach of contract, and frustration.

Dr Sanhuri<sup>4</sup> excludes the ending of contract by extinction (*inqida'*) and annulment (*ibtal*), and focuses on the ending of contract by dissolution (*inhilal*). He suggests that the difference between dissolution (*inhilal*) and extinction (*inqida'*) is that dissolution comes before the performance of the contract or, in other words, before the performance of a contract is completed, and extinction after the contract has been performed. The difference between dissolution and annulment (*ibtal*) is that dissolution arises if the contract becomes valid contract and enforceable. Thus, Dr Sanhuri classifies the dissolution of contract into three types:

1. Dissolution due to non-binding
2. Dissolution by termination (*faskh*)
3. Dissolution by mutual agreement (*iqalah*).

Some Muslim jurists distinguish between the dissolution of contract and discharge of contract, and hold that the dissolution of a contract *faskh* follows the formation of contract but is before performance, but by demand of one party or both, or by judge if one party brings the case before the court. Moreover, discharge of contract *infesakh* is by frustration if a contract be discharged by supervening beyond the control of parties.

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<sup>3</sup> Islam Muhammad 'Dissolution of contract in Islamic Law'(1998) 13 Arab Law Quarterly 336,368

<sup>4</sup>Abd alRazzaq Sanhuri, *Masadir alHaqq fi alFiqh alIslami* ( Manshorat alHlabi Beirut Vol 6 1998) 187

Although these divisions and classifications may, at first glance, show that there is a conflict between laws, these differences of classification lead to one result, and there is no difference in applying relevant law to the facts in each case. Some modern Muslim jurists adopt the new classification of discharge of contract after establishing the total theory of contract law.

### **4.3 The Concept of Doctrine of Frustration**

The doctrine of frustration is in existence in contract law in almost all legal systems around the world. The doctrine of frustration in Islamic Law will be discussed in this chapter, with consideration directed towards English law later. It can be seen that, in many countries, law of contract has similar meaning in terms of frustration. Although the word frustration is not a legal term in Islamic Law, as mentioned previously, when considering the maiming of impossibility in Islamic Law and force majeure, or discharge of contract by reasons beyond the control of the parties, it can then be recognised that the term has been explicitly used in Islamic Law. Accordingly, when jurists use impossibility as wide-meaning, frustration can then be considered as being assigned the same meaning as frustration in English law<sup>5</sup>.

Frustration is commonly used as shorthand for a technical term connoting frustration of a contract by a supervening event, which, without default of either party, renders the contractual obligation incapable of being performed. This may be owing to the circumstances where the performance called for would render it a thing radically different from that which was undertaken by the contract.

Frustration is the main basis upon which to discharge a contract when expectable circumstance occur that make the contract impossible to perform, or otherwise when events take place that radically change the performance of the contract contemplated following the formation of the contract. Accordingly, the doctrine of frustration operates with the aim of discharging a contract where, following formation, something occurs that renders performance of the contract

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<sup>5</sup> Samir Saleh, 'Some Aspects of Frustrated Performance of Contracts under Middle Eastern Law' [1984] 33 International and Comparative Law Quarterly 1046

impossible or illegal, or any circumstance that makes the contract radically different from that which was in the contemplation of parties at the time of entry into the contract<sup>6</sup>.

The term ‘frustration’ is used here to indicate a situation in which a contracting party, through novel and unanticipated circumstances outside of his control, finds the performance of his contractual obligations either impossible to carry out or as otherwise comprising an unforeseen burden in the way of extra work or expenditure<sup>7</sup>.

Every contract contains some risk of an event occurring that ultimately renders performance by one party more expensive or burdensome than originally contemplated. Many of these events are foreseeable when there is some degree of contemplation at the point at which the contract is made: prices may rise or fall, a special currency may devalue, insurance premiums may increase, and general business depression may create financial difficulties. Such ordinary business risks are considered to be insufficient grounds for excusing parties from the performance of their obligations. In respect of such risks, losses simply lie where they fall. The party himself also understands that the risk of such difficulties and expense—even if considerable—is for him to bear. However, following the formation of a contract<sup>8</sup>, there may occur such unforeseeable events that fundamentally disturb the very basis of the parties’ contemplated estimates, and thereby radically change the obligation. In such cases, although performance can hardly be said to have become impossible, it would nevertheless involve something materially different from that for which the parties originally contracted.

The doctrine of frustration addresses the problem of the frustration arising after the formation of contract, and where is no false premise at the time of contracting. However, events change drastically enough following formation to believe the original expectations of the parties. Thus, the frustration of a contract occurs when a contract becomes impossible to perform, or when it is capable of performance only in a manner substantially different from that envisaged originally by circumstances beyond the party’s reasonable control. When there is a circumstance in

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<sup>6</sup> Ewan Mckendrick, *contract law* ( 2<sup>nd</sup> edn Oxford university press2005) 867

<sup>7</sup> Coulson Noel, *Commercial law in Gulf States, the Islamic Legal Tradition* (Graham& Trotman 1984) 82

<sup>8</sup> A Sujana, *Frustration of contract*(2<sup>nd</sup> edn Universal law Publishing 2001 )45

existence before the formation of the contract, this case is not considered frustration but is discussed under the doctrine of mistake<sup>9</sup>.

In actual fact, one can identify this approach in the term *Aqd* (Contract), which is to bind or tie, and identifies all agreements as enforceable, except that which is declared forbidden (in the case of frustration, this will generally be the contract that creates undue hardship). Therefore, this leads one back to the identification that the balance between *pact sunt servanda* and frustration in Islamic contract law will be defined by the specific *fatwa*, even when there is a clear indicator that promise-keeping is paramount, unless the contract does not comply with Islamic legal principles. Nevertheless, the primary principle is that all contracts must be fulfilled outside this, which is supported by the Qur'an itself in the statement, 'O you who have believed, fulfil the contracts.'

#### 4.4 Supervening Events

Bearing in mind the discussion of the concept of frustration, in Islamic Law, the doctrine of frustration is activated when, between the formation of the contract and the date fixed for its performance, there are elements that exist and which need to be considered when the is contract frustrated.

The supervening events must occur following the formation of contract and prior to the performance of the contract, wholly or partially. The circumstances supervene events if the events come before the formation of the contract. Islamic Law considers this as a frustration as it deals with this situation under the doctrine of the mistake *Ghalat*<sup>10</sup>. One example of such a case is in Saudi Arabia in *Yosef Alorini vs. Nadek company*<sup>11</sup> where a contract was adopted between the parties. The plaintiff, as the contractor, promised to import specific types of air-condition system from the USA and install them for the Nadek company; however, the plaintiff delayed the delivery of the subject matter, and claimed that there was a frustration of contract through temporary impossibility owing to invasion in Kuwait and the second Gulf war, which made

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<sup>9</sup> Sir Cuentor, *Frustration and Force majeure* (London, Sweet & Maxwell 2004) 48

<sup>10</sup> Siti Razali. *Islamic Law of Contract* (Cengage Learning Asia Pte Ltd 2010) 97

<sup>11</sup> Riyadh General Court, judgement No 293/22 in 12/7/1414H [1995]

importing the items on time impossible. Nevertheless, the Nadek company refused this reasoning, and applied the penalty clause for delay. The court considered there was no frustration of contract because the contract was made after the war, and there were no supervening events. As such, it was a mistake.

Thus, the supervening event must not occur prior to the agreement being entered into. Indeed, it is logical: if an event occurs before an agreement is finalised, then the agreement can either be abrogated or amended. The doctrine of supervening events provides that the event complained of must have made the contract impracticable as a result of the event. If the contract was impracticable to begin with, then the doctrine cannot be utilised.

The supervening must affect a fundamental or radical change of the neutrality of the contract. The change in circumstances is substantially different from that envisaged originally when the contract was freely concluded between them in the first place. The supervening events are not considered

Perhaps what is more difficult is the requirement that an intervening event has to be general rather than specific. In essence, this means that the event must at least have the potential to affect a wide range of people rather than the person who is arguing the impracticability of the contract alone. Accordingly, a person seeking to escape obligations cannot point to a personal difficulty to escape an undertaking, such as losing money as a result of a bad business deal, which ultimately affects the ability to perform the said undertaking. On the other hand, losing one's money as a result of the bank's collapse is an event that affects all—or at least a wide variety of people—and so would satisfy the requirement of generality allowing the doctrine of supervening events to apply<sup>12</sup>.

#### **4.5 Effect of External Factors on Frustration of Contract in Islamic Law**

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<sup>12</sup> Muhammad Al Amine, *Risk management in Islamic finance: An analysis of derivatives instruments* (Brill, 2008) 174

Frustration of contract, in fact, occurs as a result of reasons that lead to the discharge of contract. Discharge of contract has two main causes: the first cause is the fault of one of the parties of the contract, or both, which has been excluded from this research, and which includes breach of contract; the second cause—which is the subject of this study—is the external factor or events that are beyond the party's control. Some Islamic jurists use the external factor when talking about supervening, which affects the contract.

In order to track the origins sources in regard to Islamic Law—or, to be more specific, the sources of the external factor—in the context of Islamic jurisprudence, the Qur'an is the origin source of all legal rules of Islamic Law. The source of the external factor concept and its impact on the contemporary legal jurisprudence can be identified through various Qur'anic verses, which adopt the form of general rules to be followed, such as 'Allah task not a soul beyond its scope. For it is only that which it hath earned, and against it only that which it hath deserved'<sup>13</sup>. This means that Allah commands us only with things that are within the human ability, and that man will not be responsible for things he cannot control. This verse states clearly that the debtor cannot bear the consequences of not fulfilling his obligations if this failure to perform is caused by something out of his control and his power. Another Qur'anic verse that can be considered as a source for the external factor concept is, 'Allah commands person only within (the limits of) what He has given him'<sup>14</sup>. This verse completes the afore-mentioned verse, and together they constitute the same meaning. What Allah has given person in this verse is endurance and capability. The people are then not obliged to go beyond the limits of capability and endurance, and will not bear the consequences of things outside such capability<sup>15</sup>. The frustration of contract occurs outside the capability of parties through external factors, such as war, natural disaster or a change of law, etc. All of these are considered external factors.

We can also find sources for the concept of external factors in the second origin of the legislation; the *Hadith* (sayings) of the Prophet orders a discharge of the contract by *a-ljawaih*<sup>16</sup>, with scholars agreeing on the interpretation of the word *al-jawaih* as every defect in the crops caused by things beyond the party's control, such as draughts, floods, storms, etc., or things that

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<sup>13</sup> Qur'an 2/286

<sup>14</sup> Qur'an 65/7

<sup>15</sup> Ibn Qudamah, *al-Mughni*, vol 4 (dar ihya al turath al arabi 1995) 96.

<sup>16</sup> *Sahih Muslim* Headth NO 2905



could be controlled but which were overtaken by surprise or supervening events, such as locusts that eat crops, for example. The term used in the Hadith is so extensive and comprehensive that it covers the concept of external factors<sup>17</sup>.

Islamic jurists have not been afforded a comprehensive definition for external factors. Instead, they discuss this in the case of nominated contracts, such as contracts of sale, lease, mortgage, etc. However, external factors have never been considered as a general theory. Nevertheless, the general idea of external factors can still be derived by following the applications and examples assigned to such. Importantly, they did not limit or specify all kinds of factors or supervening events: jurists talk about natural disasters and impossibility, and write about the creditor's fault and the third party's fault as external factors. In Islamic Law, various jurisprudence rules lead to the application of external factors, such as 'No liability for what is not avoidable', which may be used as a base for the application of the external factor. Nevertheless, jurists consider that external factors consist of three different kinds, as detailed below:

- The first, the natural disaster, such as rain, hail, floods, earthquake, fire or hurricanes, etc.<sup>18</sup>.
- The second relates to the third party, such as when the supervening events or external factor is the third party's doing, which renders the contract impossible to perform, such as a thief who steals the subject matter delivery<sup>19</sup>. As well as when the government issues a law that makes the contract illegal, or if the subject matter is destroyed by a soldier in battle.
- The third relates to the subject matter itself, where jurists provide the example of if the subject matter is an animal and destroys itself, such as running for hours until it falls down and dies or of the animal puts its head into a rope or into a very narrow place and dies as a result.

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<sup>17</sup>Abdulwahab Al-Roumi, *Alsthalh wa atharouha fi alaltezam alaqaadi*. (Dar al-Kuteb Al-maserih 1994) 271

<sup>18</sup>Masud al-Kasani *Bada'alsanai fi tartib alsharia*. Vol 4 (Dar al-Kutub al- lmiyya 1986) 247

<sup>19</sup> In such case the contract will be frustrated even the third party bears the loss or not for example if the thief is arrested he will return the subject matter or pay the price , or if he is not known by the parties or police.

#### 4.6 Theory of Frustration in Islamic Law

In early Islamic Law there is no separate exposition of a general doctrine of frustration of contract comparable to that in English law or in western law. The natural result of AN absence of an independent theory of contract in Islamic Sharia law is early Islamic jurists dealing with nominate contracts. Hence, there are no theories that fall under the theory of contract, such as theory of mistake and frustration. Judge Abd elwahab Elhassan, from his point view of the absence of the doctrine of frustration in Islamic Law, makes reference to two key reasons:

- 1- The doctrine of frustration usually exists in contracts that need time for executions, i.e. supply, tenders, hire etc.; these norms were not necessary in early Islamic history, but only after the Industrial Revolution. Early Islamic society was simple, and the transactions were generally far from complex.
- 2- A Muslim, to be described as such, must believe in Allah, angels and *Qada* and *Qadar*. *Qada* means all the willed incidents and actions according to the dictates of the applicable laws and by the will and knowledge of Allah. *Qadar* means the unchanging law of Allah, which includes the Qur'an together with natural law and positive science, and constitutes the command of Allah, who gave them the quality of unchangeability. Thus far, as far as *Qada* and *Qadar* are concerned, people cannot influence events, and so Muslims must accept them and satisfy the law that it is outside the purview of both themselves and the other contracting party<sup>20</sup>.

The reasons provided above by the judge are not true, especially the second reason because there is no interference in Islam between faith and the application of the rules of contract and frustration. It has been observed, however, that in a number of nominate contracts, many rules of frustration have been discussed by Muslim jurists not under full theory, but as separate cases and rules, such as in the contract of sale, for example, when parties agree on a sale of fruit by delivery, which may subsequently be rendered impossible by a misfortune from Heaven or an

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<sup>20</sup> Judge Abd elwahab El-Hassan, 'Freedom of contract, the doctrine of frustration, and sanctity of contracts in Sudan law and Islamic Law' (1985) 1 Arab Law Quarterly 51,59.

Act of God (*Afah samawiya*) that destroys the fruit, such as rain, drought or wind. The Islamic conception of impossibility of performance (*istihalah al-tanfidh*), due to the change of circumstances, is as wide as the common law doctrine of frustration included within it simply as a single rule. Amkhan maintains, ‘It is worth noting that traditional Islamic Law recognised a rule which is very much akin to the common law concept of frustration of purpose’<sup>21</sup>.

However, jurists in Islamic Law have previously discussed specific cases, such as force majeure or cas fortuity, both of which would effect the performance of contract, and the distraction of subject matter. These will be studied later. As a consequence, the approach of Islamic Law towards the contractual effects by frustration is clear. The parties will be held to the contract unless performance has become impossible.

#### **4.7 Basis of Frustration of Contract in Islamic Law**

It has been stated that the general principle rules of Islamic Law—as taken from the Qur’an or the Hadith—can be applied to certain cases. In this vein, there are verses from the Qur’an or sayings of the Prophet that can be applied as a basis of frustration of the contract.

##### **4.7.1 Qur’an Principals**

In the Qur’an, there are verses that place emphasis on the belief that Allah will not put any one through difficulties. When the law enforces parties to perform their obligations in spite of difficulties, it is recognised that there are supervening events or circumstances that may render the performance of the contract impossible or illegal, and will thus mean the parties will experience difficulties. The verses below clarify that no imposed difficulties shall be placed upon an individual:

- 1- Allah intends ever facility for you; He does not want to put to difficulties<sup>22</sup>;
- 2- On no soul does Allah place a burden greater than it can bear<sup>23</sup>;

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<sup>21</sup>Amkhan ‘The Effect of Change in Circumstances in Arab Contract Law’ (n13).

<sup>22</sup> Qur’an 2/185.

<sup>23</sup> Qur’an2/286.

- 3- Allah has imposed no difficulties on you<sup>24</sup>;
- 4- Allah does not burden a person beyond his capacity<sup>25</sup>.

The above verses from the Qur'an explain that any human should not undergo hardships generally as this is consistent with the spirit of Islamic Law and with justice. Islamic Law encourages rulers, judges and scholars to adopt easier ways for people when they apply the law<sup>26</sup>. Accordingly, when the contract becomes impossible or problematic to perform, if the law bind parties to perform the contract, it will be considered as putting people through difficulties. In order to avoid so doing in such an instance, the doctrine of frustration of contract is applied.

Frustration of contract is designed to avoid hardship and harm being inflicted upon the parties of contract. With this noted, the Prophet says, 'la darar wala dirar fi alsalam'<sup>27</sup>, meaning that there shall be neither harm nor the causing of unfair loss. If the parties are obliged to perform the contract even through hardships or in conflict with the hadith above, which is regarded as a general rule in Islamic Law, the frustration of contract should be adopted. Accordingly, a contract may be avoided if its performance becomes extremely burdensome for the parties. Ibn al-Hammam states, 'a contract whose performance becomes burdensome as to involve great loss may be terminated'<sup>28</sup>. The most important legal maxim In Islamic Law relating to hardship is the one that provides that, 'The hardship shall be eliminated (al-darar yuzal)<sup>29</sup>. Accordingly, in order to remove the hardship from the parties when the contract is impossible to perform, there is no better way than adapting a doctrine of frustration.

#### **4.7.2 Necessity Darurah**

Necessity is a new state of danger and severe hardship that comes to face a person and which, as a result, causes fear and injury to his life, his organs, his offspring, his reason, or his property. In

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<sup>24</sup> Qur'an 22/78.

<sup>25</sup> Qur'an 7/42

<sup>26</sup> This principle is well explained in a saying of Aishah. She said: 'Whenever the Prophet had to choose between two options, he always opted for the easier choice.' see *AlBukhari* Hadith No 6404

<sup>27</sup> Sunan Ibn Majah Hadith No 341

<sup>28</sup> Kamal ibn al-Hammam, *Fath Alqadir* (vol7 1<sup>st</sup> edn Dar al kotob al ilmiyah 2003) 168

<sup>29</sup> Ahamad Ibn Najaum, *Alshbah Wal nazair* ( Dar Alkutub Aliilmyha 1984) 94

such a situation, committing an illegal act or neglecting or delaying an obligation becomes obligatory or permissible. On the grounds of strong probability, to commit such an act to ward-off his injury is within the boundaries of Sharia<sup>30</sup>. This is a very important principle in Islamic Law, which surrounds the removal of an unusual hardship that has come to face any person during the implementation of some rulings in a particular situation, or the performance of contractual obligation. Unusual hardship is caused by external factors, and does not derive from natural of rules. Excessive hardship if doing something or performing any obligation induces impassivity unless there is a loss of life, damage to some organ or to another person. The parties must perform their contractual obligation; any breach of contract is forbidden or prohibited by Islamic Law. On the other hand, however, if there are unforeseen circumstances, the performance of contract would be made impossible. Notably, there are legal maxims in Islamic Law, which states, ‘Necessity permits prohibited things’ (*Aldarurat tubih almahzurat*). The necessity in Islamic Law makes unlawful lawful<sup>31</sup>, where the contractual parties must perform their obligation, and non-performance of the contract is considered unlawful. In this case, the doctrine of necessity can apply a frustration of contract, meaning the contract will be discharged by frustration owing to the necessity to allow the party to discharge the contract, and the party then being necessitated to discharge the contract<sup>32</sup>. Necessity is recognised as the exception to the rule of the right to avoid serious harm or hardship.

#### 4.7.3 Excuse *udhr*

The doctrine of *under* (a justifiable cause) was recognised mainly by the Hanafi School<sup>33</sup>, although this does not suggest that other schools of law completely ignore events that might give rise to *udhr*. Essentially, there are many cases and examples given by jurists of these schools<sup>34</sup>. Notably, *udhr* is defined as the circumstance that affects the contract after its conclusion in such a way that a contracting party cannot perform their obligation without harming himself or his

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<sup>30</sup>Wahabah Al Zuhayli , *al-Fiqh al-Islami wa Adilatuh*. (Vol 2, Daar al-Alfikir 1987) 67

<sup>31</sup> For example necessity allows eating the meat of a dead animal if someone did not find food and his body may be harm, so he can eat the meat.

<sup>32</sup> Amkhan, ‘The Effect of Change in Circumstances in Arab Contract Law’ (n13).

<sup>33</sup> Mohammad Ibn Abidin, *Radd al-Muhtar ala al-Mukhtar*(Vol 5 Daar al-Fikr 2000) 78

<sup>34</sup> Ibn Qudamh from Hanbail school an example of *udhr* ‘ a contract of hire someone to dig a well for a month, he does not know the natural of the ground which he is going to dig, the ground may be hard and make the work difficult, or it may be soft, but if the contractor strike hard rock which makes the digging impossible the contract is discharged by *udhe*’ see Ibn Qudamh, *al-Mughni* (n 17) 267

property<sup>35</sup>. The application of the excuse *udhr* traditionally applies to contracts of lease and hire, which comprise the following transactions: the lease of real property, such as buildings and lands; the hire of animals and chattels; and the contract of labour. The explanation for this limitation can be found in the hire characteristic of these transactions, where hire is recognised as belonging to a class of contracts known as bilateral contracts. Importantly, their validity depends on the presence of two commutative equivalents. Its features are established through analogy to the contract of sale, which is considered the model for all commutative contracts. Accordingly, jurists define the term as the sale of ascertained usufruct known to the parties in exchange for specific consideration. However, the contract of hire contradicts the analogy of the contract of sale since benefits derived from leased properties, and hired services are non-existing at the time the agreement is concluded as they happen gradually during the lifetime of the contract. The general rule is that hire contracts should not be permissible owing to a lack of contractual object.<sup>36</sup>

In their efforts to justify the right to rescind for a justifiable reason, Hanafi jurists have, in their interpretation, set out to compare the accidental impediment that affect leases and contracts of service with latent defect that may occur after the sale and before delivery of goods purchased. This constitutes grounds for the rescission of the contract as it leads to an excessive damage not stipulated in the contract. In this vein, al- Kasani reports that, ‘hire is the sale of usufruct; it consists of several contracts which are concluded every time the benefit is realised. If an event occurs which affects what is left of the usufruct, the party which, as a consequence, suffers damage has the option to rescind the lease agreement, as the case when a hidden defect develops in the sold goods before delivery’<sup>37</sup>.

Indeed, according to this tradition, there are three different types of excuse that a person can rely on as *udhr* to escape a contract in a lease contract. The first is where the lessee involved has experienced a change in circumstances to such a significant degree that he is no longer capable of performing the obligation: for example, if the lessee has become bankrupt, then the contract is potentially able to be discharged on the force of *udhr*. Another example of where *udhr* might apply in this instance is the lessor changing his profession. *Udhr* can also apply when hardship

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<sup>35</sup> Saleh, ‘Some aspects of frustrated performance of contract under Middle Eastern law (n 5).

<sup>36</sup> Amkhan, ‘The Effect of Change in Circumstances in Arab Contract Law’ (n13).

<sup>37</sup> al-Kasani ( n 20 )223.

might affect the lessee from complying with his obligations, which is the second type of *udhr*: for example, if the lessee agrees to lease the property with covenants placed upon him, at which point he might sell his lease or the property if he wishes to avail himself of the debts. Importantly, this might be an allowable event in the *udhr*<sup>38</sup>.

The third type of *udhr* applies to the leased object. This is perhaps the category of *udhr* that is the lease controversial as it is subject to less discretionary elements than the other two categories. Article 443 of Al-Majallah provides, ‘If any event happens whereby the reason for the conclusion of the contract disappears, so that the contract cannot be performed, such a contract is terminated’. Indeed, it is this category that appears to be most akin to the common law concept of frustration that applies in English law in the current day<sup>39</sup>. Indeed, Al-Majallah goes on to describe examples of when this category of events can utilise *udhr*. The first of these examples is where a cook is hired for a wedding party, but one of the spouses dies and so the wedding, the subject of the contract, can no longer proceed, thereby automatically terminating the contract concluded with the cook. A second example is a person who has a toothache and makes a contract to remove the teeth, but then finds that the pain has gone. Since the subject of the contract—the pain in the tooth to be removed—is no longer present, the contract is then considered terminated.<sup>40</sup>

Any *udhr* excuse that makes the performance of the contract impossible without damage being inflicted upon the contracting party in respect of either his person or his property constitutes a sufficient reason for the discharge of contract. Under the excuse, the events unforeseen by the contracting parties at the time of concluding the contract, and which ultimately render the performance of the contract dramatically more difficult, allow contractual parties to be released from their contractual obligations.

The existence of a legal *udhr* or legal impossibility resulting in the discharge of the lease or the contract of service means the contract is frustrated. The example given by Ibn Qiam is if a woman hiring herself out to clean a mosque menstruates whilst she is working, then the contract

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<sup>38</sup> Al-Kasani (n 20) 200.

<sup>39</sup> Al-Majallah, The Ottoman Civil Code, available at <[http://www.ummah.net/Al\\_adaab/fiqh/majalla/index.html](http://www.ummah.net/Al_adaab/fiqh/majalla/index.html)> last accessed 15/07/11)

<sup>40</sup> Amkhan, ‘The Effect of Change in Circumstances in Arab Contract Law’ (n13)

is discharged automatically in accordance with Sharia rule that she is forbidden from entering the mosque<sup>41</sup>.

In Islamic Law, the scope of the doctrine of the excuse of *udhr* is not the only impossibility of the performance of the contract, or even the frustration of contract such as in English law: this may also apply when supervening circumstances have been rendered different from the conclusion of the contract<sup>42</sup>. The *udhr* is wider, and the frustration of contract in English law<sup>43</sup>—the *udhr* in Islamic modern law—is used for frustration of contract, such as the doctrine of frustration in Western law. In this context, the judges in Saudi Arabia apply the frustration of contract, although *udhr* is sometimes used instead of the frustration term<sup>44</sup>.

#### **4.7.4 Al-Jawaih Natural Disaster**

Almost all the books of Islamic Law of contract talk about *al-jawaih* in detail, or at least make some mention to it. The Hanbali School, followed by the Maliki School, is the main school that recognises *al-jawaih* as one of the categories of frustration of contract, and which allows parties to terminate agreements without the usual repercussions.

*Al-jawaih* is the discharge of contract between parties after a crop or fruit has been damaged by pest, epidemic or natural calamities. The application of *al-jawaih* is through the sale of the fruit on trees or crops when they are destroyed before they are picked or harvested as a result of no fault of either party. As highlighted previously, a great deal of Islamic Law derives from the early days when trade in crops was common<sup>45</sup>.

*Al-jawaih* means the contract is discharged by frustration when the subject matter of the contract is destroyed for a reason beyond the control of either party. In relation to the Maliki School, *al-jawaih* can only be applied as part of the doctrine of intervening contingencies to terminate a

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<sup>41</sup> Ibn Qiam. *Al-Jawziyya Ilaam ul Muwaqqieen an Rabb il Aalameen*. Vol 4( Dar al-Kutub al- Imiyya 1991) 50.

<sup>42</sup> *Udhr* or Excuse in Islamic Law includes frustration, hardship, impracticability and illegality.

<sup>43</sup> Susan Rayner, *The Theory of Contracts in Islamic Law* (Graham & Trotman 1991)260.

<sup>44</sup> The case of Abdul Latif Jameel Company v Fahd Alshamiry. Judgment No 144/25 on 17/8/1427AH (2007) Riyadh General Court, the judge consider that the contract discharged because of the fire of car he use *udhr* term.

<sup>45</sup> People in past time bought the fruit on the trees before picking the fruit or crop before harvesting, the buyer pays the price to the seller and then the buyer harvest the crop and pick fruit from the trees.



contract if the promisor of a contract has lost at least one-third of the total sum of the contract. Thus, if the promisor has lost a quarter of the subject of the contract, it is not considered sufficient enough damage for there to be reliance on *al-jawaih*<sup>46</sup>. The Hanbali School does not set a minimum level of damage to occur in order for *al-jawaih* to be relied upon; therefore, an event defined as an act of God or epidemic beyond human control might be capable of terminating a contract—even if the damage caused was less than one-third.

The Maliki and Hanbali schools refer to *al-jawaih* by making reference to the Prophet hadith: ‘Allah may prevent the fruit from maturing, so how can you take payment from your brother for it’<sup>47</sup>.

The legal effect of *al-jawaih* means the seller is required to bear the risk of accidental loss of the crops sold. Thus, the value is reduced in proportion to the damaged fruit: if the fruit perished, the contract becomes invalid and the purchaser is entitled to recover the price paid.

In order to understand the position of the different schools of law regarding *al-jawaih*, it is important to analyse the legal status of the sale of crops from its sources and the jurisprudential controversy surrounding its validity. A consensus exists amongst the different schools of law that the sale of fruit that has not yet appeared is void since the object of the contract is not in existence. The said transaction will fall under the forbidden category of uncertainty (*Gharar*). Similarly, all schools recognise the sale of fruit before it becomes ripe on the condition of the immediate harvesting, and provides that the produce is beneficial and constitutes the property of some specific value<sup>48</sup>.

Hanafi and Shafi schools do not recognise *al-jawaih* because, in their views, the sale of fruit on trees is considered delivery of the subject matter as the seller gave the buyer permission to take possession. This is a kind of performance of contract. Thus, the buyer should bear the risk<sup>49</sup>.

#### ***4.7.4.1 Is the application of al-jawaih extended or restricted?***

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<sup>46</sup> Saleh, ‘Some aspects of frustrated performance of contract under Middle Eastern law (n 5).

<sup>47</sup> *Sahih Muslim* Headth NO 2905.

<sup>48</sup> See. al-Jaziri, *al-Fiqh aai-mihzb al-arba'a* VoL (Dar al-Kutub al- lmiyya2003) 384-386

<sup>49</sup> al-Kasani ( n 20)239.

Although *al-jawaih* is not restricted under the Maliki and Hanbali schools to the general phenomena of natural disaster, there are different views amongst schools in regard to when crop damage results from human acts. The first opinion sees that *al-jawaih* is limited to natural disasters to discharge the contract<sup>50</sup>. The second opinion considers that a human destruction as *al-jawaih* means that, if the crops and fruit are damaged by human acts<sup>51</sup>, parties will then be discharged from the contract. One example of this is the destruction of fruit or crops resulting from troops in a war zone, or if the crops are stolen<sup>52</sup>.

The question arises here: is *al-jawaih* limited to fruit on trees and crops or does it include all subject matter of contract? In other words, does it include all kinds of contract or just those in the contract of sale of fruit on trees? Muslim jurists discuss *al-jawaih* where fruit on trees and crops is concerned, stating that *al-jawaih* applies only in the case of the contract of sale of fruit, whilst jurists do not mention limitations of *al-jawaih* in the sense of the contract of sale of fruit. It is true that the majority write just about *al-jawaih* in the context of fruit being destroyed by natural disaster; however, the ruin of any subject matter of contract is considered *al-jawaih*. Accordingly, it may be seen that *al-jawaih* applies in the case of all kinds of contract and all kinds of subject matter, such as contract of sale, hire or work—whatever the subject matters is, i.e. fruits, goods or buildings<sup>53</sup>.

Islamic Jurisprudence Council<sup>54</sup> decided that it is possible for the application of *al-jawaih* in any contract, such as the contract of sale, hiring, construction, tender, and the contract of import.

Moreover, *al-jawaih* is restricted in terms of destroying the subject matter; it does not include the illegality or parties if there is impossibility by death of party in employment contract<sup>55</sup>.

Contracts are distinguish into executed and executory contracts. An executed contract in which both the parties performed their contractual obligation. When a contract has been completely performed, there is nothing remains to be done by either party. , as where an object matter of the

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<sup>50</sup> Mohannad Ibn rushd, *bidayat al-mujtahid* (Dar Ibn Hazm 1999) 547

<sup>51</sup> If the parties did not know the human who destroy the subject matter, buy if they know him then he will bear the risk, while the contract will be frustrated.

<sup>52</sup> Ibn Qudama, *al-Mughni*, vol 4 (n 17) 87

<sup>53</sup> Hamid Ibn taymiyyah, *al fatawa*, vol 30(King Fahd Complex for the Printing 1995) 287

<sup>54</sup> Islamic Jurisprudence Council . decision number 7 on 28/1/2004,

<sup>55</sup> We will in next chapter discuss the frustration of contract by impossibility there are similarities between *al-jawaih* and impossibility particular in destroy of the subject matter before delivery, we discuss *al-jawaih* here to see existence of frustration of contract in Islamic Law.

contract is delivered, and payment therefor is made. An executory contract is a contract in which the contractual obligations of both parties have not performed yet. In other words, where one or both the parties still have to do some future act. Frustration makes sense with respect to an executory contract.<sup>56</sup>

#### 4.8 The Doctrine of Force Majeure in Islamic Law

Traditional Islamic Law does not provide for a unified doctrine analogous to the concept of force majeure<sup>57</sup>; however, Muslim jurists identify certain doctrines, as discussed previously, such as *udhr*, Act of God, and *Al-jawaih* natural disaster, all in a number of contractual clauses that may be viewed as akin to force majeure clauses<sup>58</sup>. Nevertheless, the doctrine of force majeure has been incorporated within modern Islamic Law, and corresponds to the concept of *Quwah qahirah*<sup>59</sup>, although it appears to be wider than the concept of frustration in English law<sup>60</sup>. Generally, Islamic Law may consider a breach of any promise, including that of a contract, as a mortal sin. As the Qur'an states, 'O, ye who have believed, fulfil [all] contracts'<sup>61</sup>. However, this rule is not absolute because Islamic Law also grants relief from liability where the ability of the parties to perform their contractual obligations is undermined by an unanticipated event or an unavoidable disaster<sup>62</sup>. Furthermore, also in the context of Islamic Law, force majeure seeks to establish a balance between the rights and obligations of the contracting parties<sup>63</sup>.

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<sup>56</sup> Ashcroft John, *Law for Business* ( 17<sup>th</sup> edn South-Western 2010) 53.

<sup>57</sup> S. Rayner, 'A Note on Force Majeure in Islamic Law' (1991) 6 *Arab L.Q.* 86

<sup>58</sup> A. Amkhan, 'Force Majeure and Impossibility of Performance in Arab Contract Law' (1991) 6 *Arab L.Q.* 297, 298

<sup>59</sup> Force majeure is present in English law as the doctrine of frustration of contract we will discuss that later. Different legal systems have developed different theories in response to this need, including the doctrines of impossibility and frustration in English law and force majeure in France, almost of Arabic country adopt French law (Civil Law) approach and . So the modern Muslim jurists use the doctrine of force majeure same as the frustration in English law.

<sup>60</sup> S. Rayner, *The Theory of Contracts in Islamic Law* ( N45) 259

<sup>61</sup> Qur'an, 5:1

<sup>62</sup> M.R. Firoozmand, 'Changed Circumstances and Immutability of Contract: A Comparative Analysis of Force Majeure and Related Doctrines' (2007) 8 *Bus. L. Int'l* 161, 164

<sup>63</sup> Rayner, 'A Note on Force Majeure in Islamic Law'(n 58) 87

Islamic Law recognises any Act of God or unforeseen condition as falling within the ambit of the force majeure (*quwah qahirah*)<sup>64</sup>, which includes any unforeseen changes in circumstances that are outside the control of either of the parties and which, through no fault of the parties, may constitute unfair loss or harm to the affected party<sup>65</sup>. Therefore, the failure of a contracting party to perform his obligation may render him liable for breach of contract unless he can prove that the non-performance was due to an event of force majeure<sup>66</sup>. Examples of events that will lead to a force majeure include an unavoidable destruction of ascertainable goods in contracts of sale, a total loss of the subject of pledge which is not attributable to the parties, and death or a permanent incapacitation of either party to the contract<sup>67</sup>. However, this general rule must be distinguished from the specific laws and regulations currently in force in many Muslim states, which result from a very long history and the national traditions of each individual state<sup>68</sup>.

The primary legal effect of a force majeure event, if successfully proven, is to exonerate the party invoking it from liability in damages. If the force majeure event touches a certain part of the contractual obligation and makes the performance only partially impossible, the obligation may either be terminated in its entirety or otherwise be extinguished partially<sup>69</sup>; however, a force majeure caused by an intervening impossibility can invalidate the contract so long as the impossibility exists<sup>70</sup>. Thus, when the force majeure ceases to exist, the contract redeems its validity and can be enforced<sup>71</sup>.

Importantly, force majeure should also be distinguished from another doctrine prevailing in Islamic contract law referred to as intervening contingencies (*nazariyyah al-hawadith al-tari'ah*). Intervening contingencies signify occurrences that radically disturb the equilibrium of a contractual obligation, thus making the performance excessively onerous for one of the contracting parties<sup>72</sup>. Moreover, the force majeure and intervening contingencies also share a

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<sup>64</sup> Rayner, *The Theory of Contracts in Islamic Law* (n. 45) 259-60

<sup>65</sup> Ibid

<sup>66</sup> Articles 165, 168, 304, 127 and 233 of the Egyptian, Libyan, Syrian, Yemeni, Algerian, Kuwaiti, Qatari Civil Codes respectively and Saudi Labour Law Article 86.

<sup>67</sup> Firoozmand, (n. 63) 179-80

<sup>68</sup> Ibid 180

<sup>69</sup> Ibid 307

<sup>70</sup> Rayner, 'A Note on Force Majeure in Islamic Law' (n. 7) 88

<sup>71</sup> Ibid

<sup>72</sup> Amkhan, 'The Effect of Change in Circumstances in Arab Contract Law' (n13). 258, 259

number of common features but are fundamentally different: for example, for an event to qualify as an intervening contingency, it must be general in character (affecting a number of people), whereas the force majeure can be particular in nature (affecting a single contracting party)<sup>73</sup>. Furthermore, force majeure makes the performance of the contractual obligation impossible, with intervening contingencies leading only to severe hardship if performance is allowed to continue in its original form<sup>74</sup>. The force majeure, if proven, may lead to a termination or suspension of the contract, whereas intervening contingencies make it possible for the court to modify the onerous contractual obligation<sup>75</sup>. In addition, the force majeure does not fall within the domain of public order, as does the doctrine of intervening contingencies<sup>76</sup>.

Saudi labour law makes mention to force majeure in the termination of work contract Article 74 paragraph (5), which provides that a work contract shall terminate by force majeure, with Article 86 providing that the worker shall be entitled to the full award if he leaves work due to a force majeure beyond his control<sup>77</sup>.

#### **4.8.1 Force Majeure Clauses in Contracts**

A force majeure clause in a contract excuses a party from contractual obligations due to the drafting of a list of specific events that may be triggered by natural, human or other factors. These events may include Acts of God, insurrection, riots, war, flood, thunderstorms, earthquakes, explosion, terrorism, etc. Generally, force majeure clauses list the specified events that will excuse a party from performing his contractual obligations; However, force majeure clauses not only provide for standard unforeseen event, but are also tailored to the specified nature of the contract and the type of business involved. Thus, the nature and extent of application of the force majeure is dependent on the nature of the contract, the type of the business, and the interpretation of the clause providing for it.

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<sup>73</sup> Islam, 'Dissolution of Contracts in Islamic Law' (n.19) 363

<sup>74</sup> Ibid

<sup>75</sup> Ibid

<sup>76</sup> Ibid 364

<sup>77</sup> Saudi Labour Law, Royal Decree No. M/51 on 23/8/ 1426 AH / 27 September 2005

Many commercial contracts contain force majeure clauses that excuse the non-performance of contractual obligations when certain unforeseeable events—such as war, riots, and Acts of God—occur. The force majeure is not a principle of public policy<sup>78</sup>; this means that contracting parties can agree, at the time of the conclusion of the contract or even at the time of its performance, to neutralise, redefine, expand or limit the effects of a force majeure event<sup>79</sup>. In addition, contracting parties can agree to reallocate the risk arising from a force majeure event. The parties can agree to discharge contract if events render the contract impossible or a hardship to perform obligations, or if the agreement is made to extend the time of performance or to delay the performance.

In Islamic Law, parties are free to put any stipulations in a contract. The Prophet states that, ‘Muslims are bound by their stipulations except for a stipulation which makes the unlawful lawful or makes the lawful unlawful’<sup>80</sup>. This saying of the Prophet gives permeation to parties for the drafting of clauses or terms in a contract, such as the force majeure clause. The principle of incorporating clauses or stipulations within a contract facilitate the discharge of the contract in Islamic Law, such as in regard to *khiyar al-naqd* (option of payment), where the condition detailed in the contract gives the seller the option to terminate the contract if the buyer does not pay the price by a certain agreed date under any circumstance.

There is no doubt that the freedom of the stipulations of the contract in Islamic Law give the parties the right to draft a force majeure clause in the contract because such a stipulation will bring benefit for both parties and well reduce the dispute between parties.

In the case of *Saud Ibn Mohammad vs. United Instalment Sales Co. Ltd*, the plaintiff signed a contract with the defendant to take a car under the lease purchase<sup>81</sup>. The plaintiff paid 10% from the whole price as a deposit, and paid a monthly fee of 1700 Riyals. After fourteen months, the car was damaged due to fire. The defendant terminated the contract, the plaintiff paid 33,800 Riyals, but the plaintiff claimed that there was a contract between himself and the company, meaning the company was obliged to give him a new car instead of the damaged car, or to

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<sup>78</sup> Amkhan, ‘Force Majeure and Impossibility of Performance in Arab Contract Law’ (n 59) 306

<sup>79</sup> Ibid

<sup>80</sup> Sunan Abu-Dawud Hadith No 1419

<sup>81</sup> A lease purchase or lease that ends with ownership is a contract ,the customer pays to seller an initial deposit and a monthly payment a non-refundable to rent asset -car, house- after the contract is finished the lessee/buyer has the exclusive right to purchase the asset.

otherwise return the amount paid in advance as a result of the leasing contract. The court refused the plaintiff's request as there was a force majeure clause, stating that if there were any supervening events that led to the damage of the car, the contract would be terminated without a refund of the money paid by the lessee<sup>82</sup>.

#### 4.8.2 Exemption Clauses in Contract in Islamic Law

An exemption clause is an agreement in a contract that stipulates that a party is limited to or excluded from liability. The exemption clause may appear to have a similar effect of a force majeure clause; in actual fact, however, there is a difference. The force majeure clause is lawful stipulation in Islamic Law; it is not limited liability of one party of contract but brings the contract to end, whereas the exemption clause is excluded from liability. This clause contrasts with Islamic Law. Any stipulation making the trustee responsible for any loss in the property entrusted to him is considered an unacceptable clause, and the contract remains valid. Accordingly, a stipulation that the tenant should bear the loss resulting from the destruction of the subject matter of the contract as a result of an Act of God is not permitted as it goes against natural contract<sup>83</sup>.

In an Islamic sales contract, the seller bears all the risks of loss of the subject matter until it is transferred to the buyer, who in turn takes on the full risks, including the risks of defect, damage and depreciation arising thereafter. In an Islamic leasing arrangement, the lessor assumes all risks of loss (not caused by the lessee) and the risks of maintenance<sup>84</sup>. With this taken into account, any exemption clause in the sale of contract means the buyer bears the risk of loss before the delivery of the subject matter will be considered a void condition. The maxim *al-kharāj bi-dhaman*—which can be roughly translated as ‘the profit belongs to him who bears responsibility’<sup>85</sup>—means that, if the subject matter is destroyed, such as by an Act of God, prior

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<sup>82</sup> Riyadh General Court, judgment No 166/25 in 23/05/1429AH 2008

<sup>83</sup> Ibn Qudamh, *al-Mughni* vol 6(n17) 128

<sup>84</sup> Husam El-Khatib, ‘Islamic Economic and Islamic Ethico-Legal Perspectives on the Current Financial Crisis’ (Harvard-LSE Workshop London School of Economics February 26, 2009)

[http://ifp.law.harvard.edu/login/view\\_pdf/?file=Riskmanagement.pdf&type=workshops](http://ifp.law.harvard.edu/login/view_pdf/?file=Riskmanagement.pdf&type=workshops) accessed 2/10/2012

<sup>85</sup> Frank Vogel and Samuel Hayes, *Islamic Law and Finance Religion, Risk And Return* (Brill Leiden 2006) 133

to delivery, the seller will bear the loss—even if there is a condition that means the buyer should bear the loss.

#### 4.9 Frustration of the Purpose of Contract

In some cases, as a result of a surprising event, a party may be incapable of achieving the final purpose for which he is contracted in the transaction. Frustration of purpose (also referred to as commercial frustration) is a motive behind the enforcement of the contract. The doctrine of frustration of purpose is applied when, as a result of supervening events, the purpose of the contract for the party to whom the contract has to be rendered is frustrated, and the other party's performance is no longer of any use to the recipient for the purpose for which both parties intended it to be used. In fact, in the case of the frustration of purpose, the supervening events do not render the contract impossible to perform, but rather impractical or as inducing hardship.

Within Islamic Law, there is the view that many jurists believe that the validity of a contract is not impacted by purpose frustration if such a purpose simply constitutes the intention of one party entering into the contract, and if the contract can still be performed. The jurists provide the following example: if one party enters into a contract to rent a camel for the purpose of carrying him to Makkah to perform Pilgrimage (*hajj*) but the tenant loses his travel funds, meaning he is unable to travel, in this cases, the purpose causes the contract to be frustrated as it is not impossible to perform, i.e. the parties and subject matter still exist. The camel hired may well be used for another purpose or for re-rent to another individual<sup>86</sup>.

However, the Hanafi School and Ibn Taymiyyah from the Hanbali School<sup>87</sup> do not agree with the aforementioned view, but rather consider that the frustration of purpose affects authority of the contract, thus meaning the contract will be frustrated. The Hanafi School deals with the frustration of purpose under the doctrine of *udhr*, whilst Ibn Taymiyyah considers the frustration of purpose as part of *al-jawaih*<sup>88</sup>. One example is if someone rents a shop from a landlord for the purpose of selling a certain type of goods but when, following the conclusion of contract, the

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<sup>86</sup>Ibn Qudarnh, *al-Mughni*, Vol 5(17) 260

<sup>87</sup> ibn taymiyyah Hamid, al fatawa, vol 30 (n 55) 288.

<sup>88</sup> We discussed the two doctrine in above we found that Hanafi School use Excuse *udhr* in general instead of the doctrine of frustration and Hanbali School uses *al-jawaih* in general instead of the doctrine of frustration in extended concept of both doctrines.



goods are destroyed. In such a situation, there is no impossibility: the subject matter, i.e. the shop, is not destroyed, although the purpose of the contract is no longer available, i.e. to sell the goods. As such, according to the Hanafi School and the opinion of Ibn Taymiyyah, the contract will be discharged because the motive of the tenant is to sell the goods, and he does not want the shop for any other purpose<sup>89</sup>.

Another case was provided by jurists: if a man makes a contract with a dentist to pull his tooth out as he is experiencing pain, after the conclusion of the contract, if the pain has disappeared, they see the contract will be discharged because of a frustration of purpose. Other jurists who do not apply the frustration of purpose agree with the Hanafi School and Ibn Taymiyyah School: in this case, the contract must be discharged because no other reasonable benefit can be expected from the contract. Thus, a contract comes to an end if frustration extinguishes its objective<sup>90</sup>. In the first and second cases, the contracting party can use the camel or shop for another purpose, whilst in this case, no purpose can be achieved through removing the tooth.

In the case of *Hamid vs. Salem*, the plaintiff rented land from Salem in order to be an exhibition of local products in Taif city; however, local authorities postponed the exhibition for another time, and so the plaintiff demanded a termination of the contract because the purpose of the contract no longer existed. The view of the defendant is that there is no impossibility of performance: the plaintiff can use the land. On the other hand, however, the court held that the contract should be discharged because the purpose of the contract, as expressed term in the contract, the unexpected event is beyond the parties' control<sup>91</sup>.

The court in Saudi Arabia and Islamic Jurists are very careful and reluctant to apply this doctrine because they do want to make the frustration of purpose an escape for any party if the contract is subsequently recognised as a bad bargain. Moreover, in order for frustration of purpose to be applied, the intended purpose must be an expressed or implied in the contract and known to the parties.

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<sup>89</sup> ibn Abidin Vol 6 ( n 35 ) 81.

<sup>90</sup> Islamic Law concurs with English law in holding that the contract comes to an end ipso facto upon frustration of its purpose.

<sup>91</sup> Taif General Court, Judgement No 312/11 on 11/04/1422AH 2001.

In the case of *Yosef Ibn Abdurrahman vs. Abdullah Ibn Mohammad*, Yosef hired a shop from Abdullah with the aim of using the shop as a bakery. However, the Municipality refused to give permission, and so he asked the court to discharge the contract under frustration of purpose. The court refused because the purpose of contract is not to use the shop for a bakery, but as the parties expressed in the contract, the tenant can use it for many activities, even a supermarket<sup>92</sup>.

#### **4.10 Impracticability and Hardship**

The concept of impracticability is used in several ways: economic hardship, hardship, economic frustration, economic impossibility, commercial hardship, commercial impracticability, and so on. Impracticability is a situation where the performance of the contract, as a result of unforeseeable supervening events, though remaining physically possible, has become economically excessively burdensome to an unexpected level beyond the control and contemplation of the parties and, as a result, the obligations of the parties are quite out of proportion by comparison with those initially agreed.

The doctrine of impracticability of performance of contract might be considered akin to that of frustration in common law, albeit a slightly less extreme version.

The doctrine of frustration governs the events that occur when a contractual obligation is considered impossible to perform. One example might be where a chartered voyage that is the subject of a contractual obligation is prevented from occurring as a result of war<sup>93</sup>. The Islamic Law concept deals with less extreme circumstances, such as when a situation arises where it is *impracticable* (rather than impossible) to fulfil a contractual obligation. Impracticability is considered to have arisen when the obligation imposed upon one party is much more onerous than was originally envisaged at the time at which the contract was entered into and the

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<sup>92</sup> Al-Hasa General Court, judgement No 85/9 on 7/11/1417AH 1997. The court of Appeal diction No 89/G/A in 28/11/1418AH, approve the Judgement

<sup>93</sup> P Stone, *The Modern Law of Contract* (Taylor and Francis, London, 2011)408

obligation accepted. When looking at whether an obligation has become impracticable, however, courts look at the intervening events that lead to such impracticability<sup>94</sup>.

Islamic Law, on the other hand, has traditionally opposed hardship in all aspects of religion<sup>95</sup>. Thus, the Qur'an sets out, 'there is no hardship in religion', which is commonly relied upon by parties to provide the rationale behind the doctrine of intervening contingencies<sup>96</sup>. Article 18 of the Majallah of the Ottoman civil specifically sets out that the only solution to hardship is that of 'tolerance'. In essence, the idea is that, if a supervening event occurs, the burden should be shared between all parties rather than just one<sup>97</sup>.

In Islamic Law, impracticability has been discussed under the rule of the negation of hardship and the principle of 'no unfair loss in Islam'. Consequently, a contract may be terminated if its performance becomes extremely burdensome for the promisor. Ibn al-Hammam states: 'a contract whose performance becomes so burdensome as to involve great loss may be terminated'<sup>98</sup>.

Samora Ibn Jondab had one palm tree in a house belonging to one of the residents of Medina, whose house was in the middle of the garden. To visit the tree, Samora used to enter the house without permission. The owner of the house told him to ask permission when he came, but Samora refused. He brought his complaint to the Prophet who asked Samora to seek permission if he wished to enter, but he refused. The Prophet proposed he exchange his tree with another, or even several trees, in another place, but he did not accept this either. Prophet addressed him and said, 'You are a man who wants to cause loss'. Then the prophet said to the house owner that he should uproot the tree and throw it in front of Samora's house<sup>99</sup>. In this case, there is no impossibility because Samora can enter a man's garden, but it causes hardship for the man.<sup>100</sup>

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<sup>94</sup> H Ramadan, *Understanding Islamic contract law: from classical to contemporary* (Altamira Press, Oxford, 2006) 106

<sup>95</sup> H Berman, 'The Religious Sources of General Contract Law: A historical perspective' 4 *Journal of Law & Religion* (2000) 103-124

<sup>96</sup> Wahbah Al Zuhli, *Al Fiqh Al Islami wa Adilatuh* (Dar Al Fikr, Damsyq, 1984) 302

<sup>97</sup> W Al-Zuhili, *Al Darurah Al-Shariyya* (Al tabaiyya, Beirut, 1971) 259

<sup>98</sup> Kamaluddin Ibn al-Hammam, *Fath al-Qadir* ( vol 9 Dar al-Kutub al-Ilmiya 2003) 223

<sup>99</sup> *Sunan Abu Daawud*, Hadith No 3155

<sup>100</sup> Hossein Sadeghi 'Impossibility of performance of contracts in Islamic Law a comparative analysis with particular reference to Iranian and English law' (PhD theses University of Liverpool 1994).

Accordingly, In Islamic Law, the contract can be discharged because of an unfair loss or harm for any party, even when the contract is not considered impossible to perform. The rule ‘no unfair loss in Islam’ is a corner stone of Islamic Law in many cases. It has frequently been invoked by traditional Muslim jurists to explain their opinions on the unacceptability of causing excessive losses or the termination of contracts because of a change of circumstances.

The Islamic Fiqh Council sees that, if there is a change in circumstances that cause the contract to be viewed as impracticable to perform, such as radical changes in the prices of goods, for example, then the contract may be discharged, especially in the case of a long-term contract<sup>101</sup>.

According to Islamic Law, not only the natural difficulties or a regular change of price can lead to a discharge of contract, such as the party receiving less than the profits expected upon entering into the contract; impracticability must result from supervening events, and the events must have made the performance of the contract excessively onerous for the disadvantaged party. In other words, impracticability is relevant if the hardship leads to a fundamental change in the equilibrium of the contract, and brings about a substantial imbalance. The parties generally enter into a contract with a reciprocal balance in their contractual relationship.

In fact, the dispute appears in terms of the estimates of the degree of hardship. The question arises here as to the degree of impracticability needed in order for it be regarded as legally relevant. This is a complicated question. Impracticability is a relative concept that differs from one case to another. The writer would argue that the most difficult aspect of impracticability is this aspect of the concept, which makes it a very difficult and complex subject for judges and scholars. In consideration to a normal range of events, which cause normal and acceptable consequences in the course of performance of the contract to impossibility, there are different degrees of impracticability ranging from not making benefit to nearly impossibility. For example, in a contract for construction, the disadvantaged party, as a result of an increase in the price of building materials, would not make any profit as a result of the construction of buildings if he has to perform the contract in accordance with its original terms. Also, as a result of very drastic rises in the prices of building materials, he would even suffer a loss, which would ruin his

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<sup>101</sup> The Islamic Fiqh Council decision No 7 Session No 5 1982.

commercial enterprise if he were obliged to fulfil his contractual obligation within the original terms of the contract.

However, determining the degree of hardship is a matter that depends mainly on the individual circumstances of each contract. Moreover, the general state of contractors might be considered relevant in this regard, and the impracticability or hardship that leads to discharged contract is not fixed by a specific percentage of loss. Accordingly, in Islamic Law, if there is dispute between parties about supervening events, i.e. whether it is considered impractical or not, in such a case, this may be subject to the discretionary power of the judge.<sup>102</sup> In the case of *Alsalem vs. Alhamdan*, the plaintiff entered into a contract with the defendant to build houses. The plaintiff demanded the termination of the contract because of the increased price of rebar<sup>103</sup>. At the time of the formation of contract, the price per ton was 3,000 riyals; during the performance of the contract, the price per ton was 5,000 riyals. Accordingly, the plaintiff claimed that would cause him a great loss; however, the defendant refused this and said that there would be only a small amount of loss, which should not affect the contract. The court refused the claim of the plaintiff because the loss was not considered a hardship leading to impossibility or impracticability. Moreover, such a rise in prices is anticipated when parties enter into a contract because the price of construction materials is often unstable<sup>104</sup>.

#### **4.10.1 Currency Fluctuation**

This element considers the impracticability of the performance of contract under Islamic Law, and how this applies to the phenomenon of currency fluctuation. The issue of currency inflation has been considered in-depth by a number of jurists in mind of the disuse of currency. Notably, after clearly differentiating between adulterated pieces and gold and silver coins<sup>105</sup>, Ibn Abidin states that, should there be a change in the value of currency in question, there then needs to be

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<sup>102</sup> In general, the discretion of the judge cannot feasibly be the basis for contract law. But in such cases, the discretionary power of the judge is the way for settlement of dispute about the contract.

<sup>103</sup> The iron of building called rebar( reinforcing bar)

<sup>104</sup> Riyadh General Court, Judgement No 158/25 in 17/08/1427, 2006

<sup>105</sup> In the early time of Islam the currencies were the gold ‘Dinar’ and the silver ‘Dirham’ these currencies were valuable in itself because they are from pure gold or pure silver, so they are not significantly affected by change of the value of the currency. The Muslims Jurists discussed the change of value of currency which is called adulterated specie, copper coins or coins metal (iron and lead).

an amendment made to the contract. On the other hand, it is argued by Shafi and Hanbali laws that the contract be changed as a result of currency value-related changes<sup>106</sup>.

The situation envisaged in this regard is that, when there is a drastic change in the currency of a particular country, thus meaning that it is much more expensive for a party to perform his obligations under contract. In a similar vein, a decrease in the value of currency may also make the price that the other party receives valueless. This context is also the subject of hardship because the severe change in the value of a certain currency distorts the balance between the contracting parties<sup>107</sup>.

Such a situation was recently encountered by a country that applies Islamic Law as a matter of course—the Islamic Republic of Iran—which suffered a five-fold fall in currency following the US announcing the imposition of sanctions on the country as a result of strained foreign relations<sup>108</sup>. As well as the collapse of the Iraqi dinar after the second Gulf War, Iraqi Dinar in 1988 was valued at 3.30 for one US Dollar; afterwards, a USD equalled more than three thousand Iraqi Dinars. In fact, currency changes form a large part of the case law surrounding the subject area of impracticability of contracts in Islamic Law. Most often, currency changes come about as a result of inflation, which is a normal course of events and could be considered foreseeable. As such, normal inflation in currency has not generally been regarded by courts to amount to a supervening event; however, where there has been exceptional rises in inflation, impracticability has been seen to occur, such as in a case where inflation leads to a rise in the price of currency by a high percentage. The particular rise is considered to be exceptional, as well as unforeseeable, and thus meets the requirements that need to be satisfied in order for an intervening event to have occurred<sup>109</sup>.

The problem with changes in currency and their tendency to result in the impracticability of contract is that currency is very time-sensitive. As set out above, the doctrine of intervening contingencies provides that any intervening event that renders a contract impracticable must

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<sup>106</sup> Amkhan, 'The effect of Change in Circumstances in Arab contract law(n13) 279

<sup>107</sup> Abu Umar Faruq Ahmad and M Kabir Hassan 'The Time Value of Money Concept in Islamic Finance'(1991) 1 Review of Islamic Economics 35,45

<sup>108</sup> See New York Times, 'Iran sanctions may cut supply of currency'  
[http://www.nytimes.com/2012/10/17/world/middleeast/irans-supply-of-currency-may-be-at-risk-in-sanctions.html?\\_r=0](http://www.nytimes.com/2012/10/17/world/middleeast/irans-supply-of-currency-may-be-at-risk-in-sanctions.html?_r=0) (last accessed 16/11/12)

<sup>109</sup> Muhammad Ayub, *Understanding Islamic Finance*( John Wiley & Sons Ltd 2008) 459

occur following the conclusion of the contract. Fluctuations in currency can therefore only lead to impracticability, where such changes occur following the entering into of an agreement. However, more complex situations can arise.

In fact, the frustration of the contract due to fluctuations in currency should be discussed, although adjustment of prices, especially after the completion of the performance of the contract in the case of the loss of one of the parties of the contract, such as due to the change in the currency, also warrants attention. Moreover, if the parties cannot terminate the contract, such as the contract of loan, such as if one party borrows money from another, but before reneging the loan the value of the currency falls sharply, is also an instance that should be discussed. The precedents in Saudi courts support the role of the court in terms of modifying the price in order to achieve equality and justice<sup>110</sup>.

#### **4.11 Legal Effect of Frustration of Contract**

The effect of frustration is to discharge the contract totally. It must be pointed out and clarified, however, that, at all times, the doctrine of frustration occurs not in regard to impossible events, but to events that make the performance of a particular obligation hardship or impractical. As abovementioned, this means that judicial determination is often required to determine whether or not performance is, in fact, rendered onerous by a particular event; one party may disagree with such an allegation and accordingly put forward the idea that the hardship is not excessive nor disproportionate, but is simply a risk that is part and parcel of the whole agreement that concludes between the parties. Thus, courts have to state that any loss that must be suffered must be an 'onerous' one, and it is not assessed according to what profits were expected to be gained and are now lost, but where damage is actually caused. Thus, if as a result of a supervening event a party does not make profit as envisaged but neither does it make an excessive loss, the doctrine of supervening events cannot be relied upon to overrule the contract.

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<sup>110</sup> See for example the Judgement of the Board of Grievances No 52/T on 1398AH [1977]

#### 4.11.1 Retrospective Effect of Frustration

There are different legal effects that can be seen in common law jurisdictions as well as those in Islamic contract law. When discharging, there are two theoretical legal positions: one can take the contract back to before it was agreed, placing both parties in the position they would have been in had the contract never been agreed in the first place; or on the other hand, one can take the contract forward in time to the position the parties would have been in had the agreement been performed. In common law jurisdictions, the latter amounts to awarding expectation damages to parties, whilst the former is viewed as rescission, and parties are granted reliance damages, namely the expenditure they have incurred as a result of entering into the agreement in the first place<sup>111</sup>.

However, there are nuances to this legal position. The rescission of a contract means that, effectively, an event that renders the performance of a contract impossible and where its legal effects of frustration of contract apply retrospectively, they go back in time to when the contract was agreed and make it as if the contract was not agreed. However, this can only apply to contracts that are relatively short-term and which take place on an instantaneous basis<sup>112</sup>.

However, this raises questions of damages, and this is one of the most contentious areas of frustration of contract. Where a contract is terminated retroactively, the rules of unjust enrichment are used to determine the damages to be paid. Where unjust enrichment is not possible, however, damages are ascertained according to the value of the subject matter of the contract.

Islamic contract law operates so as to discharge the contracts prospectively; thus, any further agreements that are to become in the future are terminated, and so the frustration operates only as grounds of discharge of future obligations. With this noted, the discharge of contract by frustration in Islamic Law does not operate retrospectively<sup>113</sup>, with the example given by jurists relating to the subject matter in a tenancy contract being destroyed after the tenant used the subject matter, but when the ruin occurs before the end of the time of the contract. The

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<sup>111</sup> Al-Roumi(n19)518

<sup>112</sup> A Amkhan (2), Force majeure and the impossibility of performance in Arab Contract Law, Arab Law Quarterly, (6:3, 1991), 297-308, 305.

<sup>113</sup> al-Kasani ( n20) 210.



frustration operates in the remaining time of the contract only, meaning the tenant is obliged to pay for the time before the destroying of the subject matter<sup>114</sup>.

This position is well illustrated by the case of *Abdul Latif Jameel Company vs. Fahd Alshamiry*, where the judge ruled that the defendant must pay money outstanding before the burning of the vehicle, meaning the frustration did not bring parties back in time to when the contract was agreed<sup>115</sup>.

#### ***4.11.2 Automatic Discharge of Contract***

The effects of frustration on both parties of the contract are automatically excused in general from the future performance of the contract after the occurrence of frustrating events. In the contract of agency in Islamic Law, jurists agree that the death of either the principal or the agent automatically brings the relationship to an end. By the death of the principal, the agent's authority is discharged. Thus, the agent can no longer bind the principal by acts he purports to perform in the principal's name. Also, the agent cannot bind his dispositions on the heirs of the principal because they did not authorise him to do so<sup>116</sup>.

In the contract of sale, if the subject matter is destroyed prior to delivery, the contract will be discharged immediately and automatically without any election by either party or no need to a judicial decision. Importantly, however, this is not the opinion of all jurists in Islamic Law, with some jurists<sup>117</sup> considering that the contract is not discharged automatically, but rather needs a discharger to terminate the contract. The discharger will be a party or judge, with the party's election declaring its termination of contract, or the judicial decision declaring that the contract is discharged<sup>118</sup>. Accordingly, if there are supervening events that render the performance of the contract of tenancy impossible because of the subject matter being destroyed, in this opinion, the

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<sup>114</sup> Ibn Qudamh, al-Mughni(m17) 133.

<sup>115</sup> Riyadh General Court, Judgment No 144/25 on 17/8/1427H 2007.

<sup>116</sup> A Lerrick and Q Mian, *Saudi Business and Labor LawIts Inerpretation Application* (Graham& Trotman1982) 113

<sup>117</sup> In Maliki School

<sup>118</sup> Ibn Qudarnh, al-Mughni, Vol 5, (n 57) 38

tenant has the right to terminate the contract or to otherwise remain in order to continue until the end of the contract time<sup>119</sup>.

However, there is a need to differentiate between frustration and breach of contract, which gives the victim the right of option in terms of whether or not the contract should be considered discharged. The nature and principal of the frustration of the contract are also a purpose of frustration, which cause the contract to be discharged immediately and automatically. However in Islamic law the frustration is not always automatic discharge, the party may have the option to discharge the contract or perform the contract such as partial impossibility.

#### **4.11.3 Accrued Obligations Remain**

As mentioned above, the contract is discharged not at the option of one or other of the parties but is brought to an end automatically, releasing both parties from any further performance of the contract. However, the legal rights or obligations already accrued and due before the frustration event occurred still remain. As such, if one party made a payment in advance of the performance, in Islamic Law, the money paid is recovered in the event of frustration, such as when a buyer purchases a car and pays the seller, but the car is destroyed before delivery, at the fault of the parties. In such a situation, the seller must return the money to the buyer and he must bear the risk of the occurrence of the frustrating event.

The obligations that matured prior to frustration remain to be performed. Jurists provide an example<sup>120</sup> where, if one party rents a house from another party for one year, after five months, if the house is destroyed by an Act of God, the tenant must pay the rental of five months to the landlord because it was agreed as due prior to the occurrence of frustration<sup>121</sup>. The reason of rule is the failure of the party to complete performance because of a supervening event, meaning he has the right to be paid for his achievement of work and if the obligation did not recover

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<sup>119</sup> Mohammad Seraj, *nazariah alaql* (Dar Almtbouat Aljamihi 2001) 223.

<sup>120</sup> Malik Ibn Anas, *al Muwathh* (Al Furqan Group 1994) 345.

<sup>121</sup><sup>121</sup> Ibn Qudamh gave the case if someone is hired by another for ten days to dig a well, but, due to unforeseeable events, digging becomes impossible after the lapse of only five days, the contract of service will be divided into two separate contracts, the contractor will, therefore, be entitled to remuneration for five days of work. See *al-Mughni*, vol 5 (n17) 267.

anything in partial performance, this can lead to an unjust enrichment of the other party, who gets benefit without payment for it<sup>122</sup>.

This position is further illustrated by the case of *Bafail vs. Alsowat*, during which the plaintiff rented out two shops to the defendant for 40,000 Riyals each year with the aim of them being used as workshops for fixing cars. The length of the contract was three years but, after one year and seven months, the local authority removed all shops in order to expand the street. The defendant paid just for one year and refused to pay for seven months as he believed that three years was the duration of the contract, and that the termination of the contract was not the result of his fault, thus meaning the cancellation of the contract. The court considered that the price of rent for a period of seven months was due before the impossibility of the performance of the contract, and that the defendant received a benefit in that period. Therefore, the court ruled that the defendant must pay the plaintiff 23,333 Riyals<sup>123</sup>.

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<sup>122</sup> Al-Roumi (n 19)543

<sup>123</sup> Taif General Court, Judgement No 41/11 on 21/02/1422AH 2001

## **CHAPTER FIVE**

### **Frustration of Contract by Impossibility of Performance of Contracts in Islamic Law**

#### **5.1 Introduction**

In the previous chapter, the frustration of contract in Islamic law was discussed, with the impossibility of performance of contract considered the main part of frustration of contract and one of the most contentious aspects of frustration of contract in Islamic law. This is recognised owing to the fact that most cases of the application of frustration fall under the doctrine of impossibility. Impossibility can be regarded as taking place ‘when there supervening events without default of either party and for which the contract makes no sufficient provision which so significant changes the nature (not merely the expense or difficulty) of the outstanding contractual rights and/or obligations from what the parties could reasonable have contemplated at the time of execution that it would be unjust hold them to the literal sense of its stipulations in the new circumstances/ in such a case the law declares both parties to be discharged from further performance. Accordingly, there is the need to undertake an analysis centred on whether or not there can, in fact, be a doctrine of impossibility of performance in Islamic contract law.

Importantly, the difficulty may lie in actual frustration to be found; Islamic contract law, however, treats matters differently. Thus, all cases and issues relating to impossibility—which are discussed separately under different contracts in Islamic jurisprudence to form a whole unified doctrine of impossibility of performance of contract in Islamic law—will be gathered.

As we will see in this chapter, impossibility of performance of contract occurs because of supervening events relating to the subject matter ‘objective impossibility’, such as the destruction of the subject matter after contract formation but prior to delivery. Whether it

absolute impossibility, partial or temporary impossibility. Impossibility also occurs relating to parties of contract ‘subjective impossibility’, such as death, the illness of one party, or one party becoming bankrupt. Such issues will be discussed in the following sections.

## 5.2 Concept of Impossibility

When we look in-depth at the rules of termination of the contract in Islamic law, it may be seen that the jurists sometimes use different legal terms for one doctrine: for example, in the case of the impossibility of performance of the contract, some jurists use the term ‘force majeure’, whilst others use ‘impossibility’ and others use ‘supervening events’. Nevertheless, all terms possess the same meaning and the same effects.

In Islamic Law, it should be recognised that, if performance is entirely impossible at the time the contract is made, it is considered as a void contract, where such an impossibility may result from either the impossibility for the contract to be fulfilled, such as in the instance of the sale of a bird in the sky or a fish in the sea, or otherwise a complete lack of contractual subject matter.<sup>1</sup> Impossibility in this sense refers to the mistake not to involve frustration. The distinction between the concepts of ‘impossibility’ and ‘mistake’ within Islamic law engages additional consideration of the related concepts of ‘intention’, ‘consent’ and ‘motive’. The ‘operative intention’ refers to the state of mind of the parties at the time at which the contract is established, with ‘motive’ recognised as the underlying and enduring purpose for the contract and its completion.<sup>2</sup>

In Islamic legal history, the ‘sanctity of contract’ has long been recognised that, in some contractual circumstances, such as the death of a contracting party, it was impossible to insist on performance. Islamic impossibility reflects the pursuit of the optimal balance between fairness and justice as one collective ideal, and the sanctity of contract on the other. It is of interest that

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<sup>1</sup> Nayla C Obeid, ‘Particularity of the Contract’s Subject matter in the Law of Arab Middle East’ (1996) 11 Arab Law Quarterly 332 349

<sup>2</sup> N S Mahasneh, ‘Liability exemption for failure to perform under both the Vienna Convention for International Sale of Goods 1980 and Islamic jurisprudence’ (2010) 24 Arab Law Quarterly 73,103

this dynamic mirrors the classic understanding of common law rigidity and the ameliorating effect of equity.<sup>3</sup> Impossibility has taken on an even greater importance given the seemingly limitless range of potential intervening acts that might threaten the ability of parties to complete a contractual bargain. War, insurrection and natural disasters are traditional examples; Islamic impossibility and its emphasis on the broader net cast by impracticality leads to the further possibility that the defence extends to circumstances where the event that triggers the impossibility claim may pose undue hardship, such as currency fluctuation, as opposed to a contract that simply cannot be completed.<sup>4</sup>

Rayner notes that any act of God or unforeseen condition is recognised under Islamic law as force majeure. The key distinction is the unforeseen condition; these may include changes in parties' personal circumstances, such as a significant loss of income, personal illness, or a similar event that may have a subjective component.<sup>5</sup> The nature and extent of the change relied upon to establish *Sharia* compliant force majeure may trigger differing opinions as to what is truly 'unforeseen'. Further, meteorological events that fall short of being classed natural disasters are commonly associated with force majeure, such as events of rain, cold or drought that may affect a crop yield, as opposed to its destruction. Such instances may permit the affected party to rely on the impossibility of performance doctrine in order to avoid further obligations.<sup>6</sup>

As has been seen through the previous debate, the concept of impossibility of Islamic law is termed in various phrases, namely force majeure,<sup>7</sup> supervening events, exceptional circumstances and impossibility. However, frustration has been discussed in the previous chapter as having various applications, such as frustration of purpose and impracticability. In this vein, we will discuss the impossibility of performance of contract, which is regarded as the main field of application of frustration of contract. Moreover, the concept adopted will be that where it is considered impossible only through physicality or illegality. The impossibility (*istihalah*) of contract which will be discussed here and recognised in Islamic law is when a party may be

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<sup>3</sup> David Waines, *An Introduction to Islam* (2<sup>nd</sup> edn, Cambridge University Press 2003) 83, 84.

<sup>4</sup> Adnan Amkhan, 'The Effect of Change in Circumstances in Arab Contract Law' (1994) 9 *Arab Law Quarterly* 258,275.

<sup>5</sup> Susan Rayner, 'A Note on *Force Majeure* in Islamic Law' (1991) 6 *ALQ* 86,89

<sup>6</sup> *Ibid*, 88.

<sup>7</sup> In the civil law at many Arabic countries mention to force majeure instated of frustration of contract of impossibility of performance of contract because the most of the civil law systems practice the French law so this reflected on the many who write about Islamic law from Arab writers.

released from a contract on the grounds that a supervening event occurs after the conclusion of the contract but prior to the performance of the contract, where this renders the performance physical impossible or legal impossibility without the fault of parties. In this regard, it is stated through Islamic Law that there must be absolute impossibility, although it is noted that non-performance may be defended through relative impossibility, i.e. when there is a link between impossibility and one of the contracting parties.<sup>8</sup>

In Islamic law, in order to consider the change in circumstances as impossibility, the following elements must be included:

- A supervening event (unexpected) occurs, causing a fundamental and radical change to be imposed upon the nature of the contract.
- The circumstances render the contract physically and legally impossibility—not only inflicting hardship.
- The circumstances must be out of the control of the parties, and neither party should be responsible for it.

### **5.3 Applications of Impossibility of Performance of Contract**

Before looking in further detail as to how this rationale has been translated into applications of the doctrine of impossibility, one must first consider how Islamic law treats different events. In the case of Islamic law, some parts of impossibility and supervening events are discussed under the contract of sale, and sometimes some of the details fall under the lease contract or fall under al-jawaih and so on. In this research, applications of impossibility will be classified in a different way from what which can be seen in the books of Islamic law; this ensures clarity for the reader. Firstly, a contract is rendered impossible because the subject matter has been destroyed before delivery, or the delivery of it is impossible, or the method of performance is rendered impossible, or there has been a death or illness, bankruptcy or insolvency that subsequently renders the delivery of a subject matter impossible and/or illegal. In Islamic law, these are all considered to

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<sup>8</sup> Amkhan, 'The Effect of Change in Circumstances in Arac Contract Law'(n 4).

be events that fall under the doctrine of supervening contingencies, and are therefore covered below. Accordingly, the impossibility is related to the subject matter of contract or to relating to the parties of the contract.

Islamic law considers that the contract is frustrated by impossibility if the impossibility is objective or subjective. The difference between objective and subjective impossibility is the difference between 'the thing cannot be done' and 'I cannot do it'. Subjective contract refers to the failure of the party to perform the contract because of impossibility for causes personal to him only, in personal contracts such as agency contract or contracts with a doctor to treat patient. In Islamic law, the individual must be the same person performing the contract himself: for example, if someone agreed with a skilled jeweller to make a ring, Islamic law obliges the jeweller himself to perform the contract, and not to give the job to another maker. If there any subjective impossibilities preventing the jeweller from performing the contract, such as illness or if he has died, the contract will then be frustrated.<sup>9</sup>

Accordingly, it is very clear that the rules of frustration in Islamic law are liberal, meaning that almost any kind of subjective impossibility can release a party from their obligations. Coulson states:

'either party to a contract of hire of premises may revoke the contract because of a changing in personal circumstances - the owner, for example, because he incurs a debt which he can pay only by the sale of the premises or the renter because, for example, he becomes bankrupt and leaves the market, or wishes to undertake a journey, or changes his profession or craft'.<sup>10</sup>

Saudi courts recognise the subjective impossibility in personal contract the case of *Ibn huweml vs. Gaze*.<sup>11</sup> In this case, the plaintiff entered into a contract with Gaze, who is the owner of a home decoration workshop. The job was to fix the decoration in the house of the plaintiff. There was a clause in the contract that specifies a particular worker to do the job. However, prior to starting the work, the police arrested the worker. He was sent to jail and subsequently deported from the country for breaking immigration law. The plaintiff wanted to discharge the contract on

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<sup>9</sup> Abdulwahab Alroumi, *Istihalah Oathroh ala Alltiszam* ( Dar Alnahhad Alrabyah 1995) 167

<sup>10</sup> Noel J Coulson, *Commercial Law in the Gulf States the Islamic Legal Tradition* (Graham & Trotman Limited 1984) 86.

<sup>11</sup> Riyadh General Court Judgement No 210\5 in 14\10\1417HD (1997)



this basis, whilst the defendant wanted to keep the contract and claimed that he had another worker of the same ability. The court held that the contract was frustrated owing to the absence of the worker.

In contrast, other events may affect the performance of a contract, such as the destruction of a subject matter after delivery, partial impossibility, temporary impossibility and impossibility by illegality. The analysis of Islamic law shows that all of these are treated differently; these will be analysed in further detail below.

Thus, one of the first frustrating events that must be taken into account is the destruction of a subject matter of contract, which depends on the time at which such destruction takes place. This classification is particularly relevant when dealing with the same or similar contracts:

1. Destruction of the subject - matter after the formation of contract but before delivery;
2. Destruction of the subject matter after delivery;
3. Destruction of the subject - matter after part performance.

## **5.4 Impossibility Relating to the Subject Matter of the Contract**

The most common case of impossibility is where it relates to the subject matter of the contract. This impossibility will typically take one of two forms: firstly, as a fact unknown to the contracting parties, the contract subject matter may not have existed at the time of contract formation; secondly, the subject matter may be lost or destroyed prior to contract completion. The former circumstances are similar to those found when the parties are operating under a mutual mistake. Where the subject matter does not exist or never existed, and such facts are known to both parties, Islamic law regards the suggested contract as one that was never formed, given the parties could not have been serious in their intention to create legal relations. With this noted, the destruction of the subject after the contract is formed is discussed.

### **5.4.1 Destruction of the Subject Matter after Contract Formation but Prior to Delivery**

In Islamic law, the subject matter of the contract must be in existence at the time of the contract and must be in the possession of the party,<sup>12</sup> such as the seller, hirer or loaner, etc. Also, the subject matter must be able to be delivered to another contracting party.<sup>13</sup> In Islamic law, when the subject matter of the contract is destroyed following the formation of the contract and prior to delivery or risk being passed to the buyer, the contract will be discharged if the destruction occurred during supervening events. If the parties enter into a contract to sell a specific subject matter but prior to delivery to the buyer it is destroyed, the contract will then be frustrated. Importantly, the buyer is not bound to pay the price, and the seller will bear the risk of loss. Islamic Law emphasises that property and risk are not passed together. Accordingly, the destruction of goods that have been sold but not delivered and the risks related with such are endured by the seller, which would then cause contract frustration unless the seller has asked the buyer to take the possession of the goods. However, a distinction must be drawn here: if a supervening event occurs during the performance of the contract, the only reason the event occurred during this period of time was owing to one of the parties delaying the performance of

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<sup>12</sup> Prophet said ‘do not sell the commodities before taking their possession’ see, *Sunan al-Tirmithi* hadith No 1232.

<sup>13</sup> Muhammad Ayub, *Understanding Islamic Finance* (JohnWiley & Sons Ltd 2007)109

the contract to such an extent that if the delay had not occurred the supervening event would then have occurred subsequent to the performance of the contract. In such a situation, the party that caused the delay is precluded from arguing that a supervening event should have affected the agreement.<sup>14</sup>

Under Islamic doctrine, it is possible to extend the impossibility that arises when the contract subject matter is destroyed after the point of contract formation to circumstances where the subject matter has either ceased to be useful due to natural circumstances or the effect of a specific intervening act. An example is where parties agree that land will be used by two parties where one will develop the land for agriculture and the owner receiving a percentage of harvested crops. The Arabic expression *muzziraah*—notably translated as the act of sowing seeds—is the essence of the agreement; where the land ceases to be productive, Islamic law deems the contract impossible to perform.<sup>15</sup> Malik ibn Anas<sup>16</sup> provides a case of individual purchasing oil from a bottle, but the bottle break and the oil becomes missed prior to delivery to the purchaser. In this circumstance, the purchaser then wants his money to be refunded, and the transaction between the two is then frustrated.<sup>17</sup>

The destruction of the specific subject matter by supervising events, such as fire, earthquake, wind, cold or flood, for example, could render the contract frustrated without any disagreement amongst scholars in Islamic law, but only if the subject matter is specified in the contract. As such, when the parties agree that A shall sell his own car to B for a fixed price, if the vehicle was stored elsewhere and destroyed by fire, the contract is rendered impossible to perform. This example is distinct from the contract where the car company agrees to sell B a vehicle of the type described, where the intended vehicle is destroyed; however, the contract is not impossible to perform as the company can provide another vehicle of the same type, which would satisfy A's obligations.<sup>18</sup>

Another situation may be in regard to when a third party is responsible for subject matter destruction. In this case, it is held by Islamic law that such a person is then regarded as

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<sup>14</sup> A Abd Al Baqi, *Nazariyyat Al Aqd* (Dar Al Ihya 1984) 5450

<sup>15</sup> N Saleh, 'Definition and Formation of Contract under Islamic and Arab Laws' (1990) 5 Arab Law Quarterly 101, 116

<sup>16</sup> He is the leader of the Miliki School.

<sup>17</sup> Malik ibn Anas, *al-Muwatta* (Dar Ihya al-Ulum 1994) 489.

<sup>18</sup> S Rayner, *The Theory of Contracts in Islamic Law* (Graham & Trotman Lit 1991) 223

responsible for any damage or loss incurred. On the other hand, there is another opinion in Islamic law that states a third party should be held responsible; he shall be liable to the buyer with the buyer then liable to the seller.<sup>19</sup> However, the majority of scholars consider that the contract is frustrated and buyer is released from any liability, with the third party responsible for paying the seller. In actual fact, this opinion is consistent with the principles of Islamic law because the third party is a foreign cause, which is similar to a supervening event in the sense that both are outside of the control of the parties.<sup>20</sup>

If the seller is responsible for subject matter destruction, it is held by Islamic law that such a person is then regarded as responsible for any damage or loss. However, whether or not the contract is discharged is viewed by jurists differently: if it is not discharged, the duty of the seller is then to provide a substitute (*mettle*) comparable to it, i.e. goods that are able to be replaced by something similar and in an equal quantity, such as a car. In the event of anything dissimilar (*qimee*), i.e. goods that cannot be replaced by something similar, such as a house, for instance, the seller is then bound to pay for their value.<sup>21</sup> Nevertheless, the majority of jurists see that the contract, in such a case, is discharged, and the seller bears the loss; if, on the other hand, the purchaser has caused the destruction, the contract is not discharged and purchaser shall be responsible for the payment of the agreed price. In this latter case, the perspective is adopted that the subject matter had been delivered to the purchaser.<sup>22</sup>

This impossibility will typically take one of two forms: firstly, as a fact unknown to the contracting parties, the contract subject matter may not have existed at the time of contract formation; and secondly, the subject matter may be lost or destroyed prior to contract performance. The prior circumstances are similar to those found when the parties are operating under a mutual mistake.

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<sup>19</sup> Hossein Sadeghi 'Impossibility of performance of contracts in Islamic Law a comparative analysis with particular reference to Iranian and English law' (PhD theses University of Liverpool 1994).

<sup>20</sup> Mohammed ibn rushd, *bidayat al-mujtahid* (Dar Ibn Hazm 1999) 548.

<sup>21</sup> Hossein Sadeghi 'Impossibility of performance of contracts in Islamic Law a comparative analysis with particular reference to Iranian and English law' (PhD theses University of Liverpool 1994).

<sup>22</sup> Muhammad Al Amine, *Risk management in Islamic finance: An analysis of derivatives instruments* (Brill 2008) 174.

In Islamic law specifically, many cases of the impossibility of performance are discussed under the doctrine of Al-Jaihah,<sup>23</sup> thus, the rules of distraction of the subject matter apply to all kinds of contract, such as contract sales, lease, loan, transportation and construction, etc.

The essential requirement in order for a supervening event to qualify as frustration is that it must make the performance of the contract impossible; thus, the destruction of the subject matter of the contract must make the performance of the contract impossible to frustrate the contract. If there is minor damage of the subject matter and the contract can be performed, this does not fall under rules of frustration. In the case of Alotaibi vs. ALJ Instalment and Leasing Company, the plaintiff took a car from the defendant by a lease purchase contract. A fire burned a small part of the car, and the plaintiff demanded the contract be terminated; however, the defendant refused and stated that the car was still in working condition, and minor damage could be repaired by the defendant on the basis of the contract. The court held that there should be no discharge of the contract because the contract could still be performed.<sup>24</sup>

In regard to the amount of damage that would qualify for frustration under Islamic law, Maliki School<sup>25</sup> recognises this is possible if the supervening event destroys one-third or more of the subject matter. However, there is no minimum damage required in order for the doctrine of impossibility by destruction of the subject matter of contract to operate under. Through the Hanbali School, Ibn Qudamh states, ‘the Prophet order[ed] the reduction of the price in the event of crop damage, whether the loss is one-third of the fruit sold or less’.<sup>26</sup> More specifically, this refers to if the damage means the performance of the contract is impossible—even when the destruction is one-third of the subject matter or less.

The possession of the subject matter by the seller means that it must be in the physical or constructive possession of the seller when the item is sold to another person. Constructive possession refers to a situation where a possessor has actual control over the subject matter

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<sup>23</sup> Al-Jaihah has been discussed in detail in chapter four.

<sup>24</sup> Riyadh General Court, Judgement No 458/25 on 23/8/1427 HD 2006

<sup>25</sup> Ibn rushd (n 18) 548

<sup>26</sup> A Ibn Qudamh, *al-Mughni* ( vol 4, Dar Ihyae Al Turath Al Araby 1985) 87.

without actually having physical control of it; however, the subject matter has come into his risk, and all rights and liabilities, including the risk of destruction.<sup>27</sup>

#### ***5.4.1.1 The reasons for the application of the rule:***

Importantly, a statement was made by the Prophet Muhammad, as follows: ‘If you were to sell fruits to your brother and these is a stricken with Calamity, it is not permissible for you to get anything from him. Why do you get the wealth of your brother, without justification?’<sup>28</sup> Such an expression provides for the rule that, if the subject matter of the sale is destroyed prior to delivery, this is a risk that should be shouldered by the seller. Looking in future detail at the rationale behind this, it is a common feature of Islamic religious law that all regulations are to apply to persons unless they are to cause hardship. Thus, the Quran, the religious scripture of Islamic law, specifically states, ‘there is no hardship in religion’.<sup>29</sup> Moreover, the verse is seen to mean that any obligations—spiritual or otherwise—imposed on persons do not have to be performed if they would cause disproportionate hardship to a person.<sup>30</sup>

With the aforementioned taken into consideration, Muslim jurists have sought to establish the answer behind why, when the property has been transferred, the seller continues to shoulder the risk of the goods when considering that their subsequent destruction would ultimately cause the contract to be terminated. Such jurists argue that the overall nature of a non-gratuitous contract necessitates that an individual who does not receive what was promised to his side of the contract should not be required to fulfil his own responsibilities concerning the other party.<sup>31</sup> Accordingly, such individuals state that, when a situation of destruction of the subject matter arises during the time of sale prior to delivery, it should be required that the ownership of the goods is returned to the seller prior to destruction. As such, it is the seller’s property that is destroyed, and thus it is the seller who should shoulder total destruction risk. Essentially,

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<sup>27</sup> Ayub, *Understanding Islamic Finance* (n13)110

<sup>28</sup> *Sahih Muslim* Hadith No 1554

<sup>29</sup> Quran 22:78

<sup>30</sup> Wahbah Al Zuhli, *Al Fiqh Al Islami wa Adilatuh* (Dar Al Fikr, Damsyq,1984), 302

<sup>31</sup> Muhammad Islam, ‘Dissolution of Contract in Islamic Law’ (1998) 13Arab Law Quarterly 336,368

although it may be seem that such a situation is unjust to the seller, it remains logical when considering the aforementioned argument.

Under Islamic law, when the subject matter of a given contract is still in the possession of the debtor, such a seller utilises warranty (*daman al-aqd*), which refers to the rules that allocate risk.<sup>32</sup> When the subject matter of the contract is destroyed, as in the case where the sold property has been destroyed prior to delivery or when the hired subject matter is destroyed whilst in the possession of the hirer, the concept of warranty (*daman al-aqd*) applies.<sup>33</sup> This means that the holder of the subject matter in question in warranty (*daman al-aqd*) will be responsible for the destruction of the subject matter.<sup>34</sup>

#### **5.4.2 Destruction of the Subject Matter after Contract Formation but After Delivery**

The most important requirement for the purpose of these discussions is that any supervening event that occurs must occur during performance. If a supervening event occurs before any agreement, the Islamic law deals with this case as mistake. A supervening event that occurs after the contractual obligations have been performed, such as the destruction of the subject matter, there is no substantive effect on the contract—no frustration of contract in this case. Indeed, this can be considered a logical corollary of the fact that the contract has now been performed and cannot be affected by subsequent events. Indeed, such a position affirms the fact that any supervening event that occurs subsequent to the contract being performed cannot affect the contract.<sup>35</sup> As a result, one can see that any destruction of the subject matter of the contract that

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<sup>32</sup> Hossein Sadeghi (n 20) 102

<sup>33</sup> destroyed depends on whether the obligor is holding the property in question in *yad daman* (literally ‘in responsible possession’), The rule is that when the property is held in *yad daman*, the possessor is absolutely liable for its destruction, loss or decrease in value, regardless of whether or not it was caused by his fault, the act of a third party or a misfortune from heaven.’ No defence is allowed to exonerate him from his duty to restore the property and he is bound to make good the loss. Whereas the possessor of the property held in trust may escape liability, if the impossibility of returning the thing entrusted to him is due to no fault of his own. See Hiroyuki Yanagihashi, *A History of the Early Islamic Law of Property* (BRILL 2004) 46

<sup>34</sup> F Vogel and S Hayes, *Islamic Law and Finance* ( BRILL 2007)112.

<sup>35</sup> Abdel hamid al Sawi, *Ather Talif Almagood alih* (Imam Muhammad ibn Saud Islamic University 2005) 108

occurs after the delivery of the agreement cannot affect the contract. Thus, the subject matter is at the buyer's risk because the subject matter of the contract has been delivered to the buyer, thus becoming his responsibility, just like any other property in the possession of the buyer. More specifically, the seller has performed his contractual obligation, meaning the buyer must pay the price to seller. However, there is one situation where the contract may be discharged after delivery: if the destruction of the subject matter occurred as a result of the seller's actions, the contract will be discharged; however, this does not fall under the doctrine of impossibility but rather under the breach of the contract.<sup>36</sup>

In the case of a lease contract, this deals with a continuous performance. In such cases, delivery is only a pre requisite for performance and, therefore, destruction of the subject matter even after delivery may ultimately cause the contract to be discharged because the subject matter is still in the possession of the lessor. At this point, it needs to be recognised that, should the lease be centred on unascertained goods, the destruction of the item given by the lessor could be considered within the context of Islamic. For example, if one party agrees to rent his vehicle to another and the vehicle is destroyed, the contract will then be discharged, with both parties free from fulfilling any future responsibilities imposed by the agreement. In contrast, however, should one party agree to rent his vehicle to another party and the vehicle end up damaged prior to the contract being fulfilled, the lessor may then be obliged to offer a substitute owing to the fact that one of the alternatives selected by the obligor has, whilst conducting his contractual obligation, perished. Importantly, however, a contract centred on unascertained goods cannot be described as having routinely changed into an agreement concerning specific goods owing to the exercise of choice implemented by the obligor.<sup>37</sup>

If one party has the right to terminate the contract, khiygr al-shart takes place in cases where the item sold is destroyed after delivery but during a period within which one or both parties have the right to terminate the contract or to continue: for example, if after three days the subject matter is destroyed, the destruction of the subject matter does not frustrate the contract; therefore,

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<sup>36</sup> Alroumi (n 9) 712

<sup>37</sup> al Sawi ( n 28) 214



the buyer must pay the price to the seller<sup>38</sup> because the subject matter is delivered to the buyer according to the contract and it is in the seller's hands.<sup>39</sup>

### 5.4.3 Partial Impossibility

The destruction of the subject matter is not necessary in order for complete destruction. If there are supervening events that cause part of the goods sold to be destroyed, without the fault of either party and before the risk of the loss passes to the buyer, the seller is then under obligation to carry out the performance achievable and possible; however, if the subject matter of the contract is partially destroyed by a supervening event, the rule is that, if the loss reduces the amount of quantity stipulated in the sale of items, as estimated by measure of capacity, weight or enumeration, the sale is discharged in respect of what has been damaged, and the purchaser has the option of discharging the whole contract because the deal is partitioned and consequently cannot be performed as was agreed originally.<sup>40</sup> Alternatively, the purchaser may take delivery of the remainder for its share in the price. The option of price reduction, however, is only available and viable if the presumption can be made that a certain portion of the price can be attributed to the part of the goods damaged or destroyed.

For instance, should an order of wheat be in the process of delivery when half of the rice is damaged by rain, the non-damaged half should be assigned 50% of the price. Another example is if there is one hundred kilos of oil sold but twenty kilos were destroyed before delivery. Accordingly, the purchaser would then be able to choose whether or not the contract should be performed for the remaining part of the subject matter, with this accepted at a rate to be agreed upon. If the contract is to be discharged completely, the buyer may exercise his option of discrepancy. In Islamic law, this is referred to as partition of the transaction (*tafaruq al-safaqa*) due to partial destruction of the sold subject matter. If part of the subject matter sold is destroyed whilst in the possession of the seller prior to delivery, the sale may be cancelled in proportion to

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<sup>38</sup> There is another opinion in Islamic law that the risk shall always remain on the seller, where the buyer or seller has a right of option to terminate the contract, because the contract is still not bound during the option period. See Ibn Qudamah, *al-Mughni* (n 24) 9

<sup>39</sup> Rayner, *The Theory of Contracts in Islamic Law* (n18) 324

<sup>40</sup> Ibn Qudamah, *al-Mughni* (n 24) 87

the destroyed part or the whole contract may be discharged. The buyer has the option of either accepting the remainder for its share in the price or altogether avoiding the whole contract because the transaction is partitioned, and accordingly cannot be performed as was originally agreed.<sup>41</sup>

The rationale for this is provided owing to the fact that every part of the subject matter of the contract covered by the agreement and every part of the subject matter of the contract is equal to a part of the price; destruction of part of the subject matter leads to discharge of the contract and the reduction of the price of the part. The reason behind the option of the buyer to discharge the contract is explained because the part of the goods may not be useful to the buyer; rather, he needs all the goods together. This situation can be seen in the example where a buyer requires a factory to make seats with the same specific shape and a certain colour in order to put these in a ballroom; however, before delivery, a large number of the seats are burned. This goes against the specifications of the buyer as he wants all the hall seats to be the same; thus, he may choose to discharge the contract.

If, on the other hand, partial destruction causes absence in the description of the purchased subject matter, which are things that are included in the sale without being mentioned explicitly, such as trees on land sold, the purchaser has the option to accept the sale for the fixed price or to discharge the whole contract, in which case the seller bears the loss.<sup>42</sup>

Markedly, much the same principle is seen to apply to leases. For instance, if a property is being leased and is partially destroyed, the lessee is then afforded the option of either claiming rent-reduction relating to the loss incurred, or otherwise entirely discharge the lease from the time at which the destruction occurs. It should be recognised that, should decline be of a type whereby the contract can no longer be viewed as suitable for its normal purpose, for example if there is the destruction of the wall, for example, and the flaw cannot be fixed, the contract is then discharged from the date at which deterioration occurs, without the lessee afforded any option in this.<sup>43</sup> On the other hand, if the lessor is happy to fix the issue without inflicting any damage upon the lessee, the contract can then not be discharged by the lessee. With this noted, it is

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<sup>41</sup> M Ibn Abidin, *Radd al Muhtar* ( vol 4, Dar Al Kotob Al Ilmiyah 1992) 566

<sup>42</sup> al-Kasani, *Badai al-Sanai* ( vol 5, Dar Al Kotob Al Ilmiyah 1986) 239

<sup>43</sup> M Islam ( n 27)

believed by some Muslim jurists that the right of avoidance that notably arises following the subject matter's decline or destruction cannot be described as terminated by the subsequent repair of the lease subject matter.<sup>44</sup>

When there is a partial destruction of the subject matter of the contract after delivery, the contract is fully performed and the buyer cannot discharge the contract; the subject matter becomes the buyer's responsibility, thus meaning he also has to bear the loss.

#### **5.4.4 Destruction of Subject Matter after Partial Performance**

Before impossibility arises, if a part of the contractual obligation has been performed and if only part of the subject matter was delivered to buyer but another part of the subject matter still not received is destroyed by supervening event, the buyer would have the right to reject the partial performance and discharge the contract with return of the delivered part to the seller. The buyer can also accept delivery of a quantity less than agreed, but is then liable to pay for the part actually delivered.<sup>45</sup>

The buyer does not always have the option to reject or accept partial performance; there are types of contract that will be discharged if the subject matter is destroyed after partial performance, one example being where the lease subject matter is destroyed following the lessee's partial use of the subject matter. In this circumstance, as held by a Muslim jurists, the contract should be considered discharged; however, in order to perform the stipulations of justice and thereby avoid any undue losses, the party receiving partial performance receives a quasi-contractual<sup>46</sup> obligation, which stipulates the payment of a fair rent. The discharge of such a contract from the time at which destruction occurs—with the rent then needing to be accordingly reduced—would mean, in this case, that the contract is automatically brought to an end at the time of the frustrating event, and that the effect of frustration is to release both parties from any further

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<sup>44</sup> Alroumi (n 9) 740

<sup>45</sup> Hossein Sadeghi (n 20)

<sup>46</sup> Quasi-contract is a legal agreement created by the courts between two parties who did not have a previous obligation to each other to prevent unjust enrichment. See *A Dictionary of Law* (6<sup>th</sup> edn Oxford University Press 2006) 432

performance of the contract. Moreover, any monies payable before frustration remain due. In this regard, Ibn Qudamh states: ‘if one hired a particular riding camel or the letting of a property with payment taken in advance’. He emphasises that, ‘should an accident occur that causes the death of the camel or damage to the property, the camel or house owner would then be required to return the funds to the individual who had paid in advance, with such a situation then meaning that the situation would then be settled’.<sup>47</sup>

#### 5.4.5 Unavailability of Subject Matter

A contract may be considered frustrated even if the subject matter of the contract is not destroyed, where contractual obligations may also be discharged due to the unviability of the subject matter, such as if it has been seized, stolen or is no longer in existence in the market. The scholars give an example of the unavailability of subject matter if the parties entered into a *salam* contract:<sup>48</sup> when the buyer pays the price to sellers to buy kind of goods, such as cotton, and before the due time of delivery there is no availability of cotton in the market or in farms because of an increase in demand, the contract would be frustrated and the seller would need to return the price back to buyer.<sup>49</sup> Another example would be if someone bought a slave<sup>50</sup> but following the conclusion of the contract but before delivery the slave escaped. In such a case, the contract would be frustrated due to the unavailability of the subject matter. There is a case that illustrates the discharge of contract by the unavailability of the subject matter: that of Saleh Alshehail vs. Abu Salah compant.<sup>51</sup> In this case, the parties signed a contract whereby the defendant would import specified lifts from Italy to fix them in the building of the plaintiff within a six-month period. However, because of unavailability of the lifts from the factory in Italy, the factory needed to make new lifts, which would take a longer period of time.

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<sup>47</sup> Ibn Qudamh, *al-Mughni* vol 5 (n24) 274

<sup>48</sup> In Arabic the word *salam* means to advance, This is a contract when the buyer pays the price in advance and the delivery of the subject matter is postponed to a specified time in future. See Muhammad Mansoori, *Islamic Law of Contracts and Business Transactions* ( 4<sup>th</sup> edn, Shari`ah Academy 2008) 203

<sup>49</sup> Ibn Qudamh, *al-Mughni* vol 4 (n24) 223

<sup>50</sup> In that time the law allows the sale of slaves under certain restrictions, in the 20th century when Muslim countries banned slavery.

<sup>51</sup> Almobarz Court judgement No1358/2 on 05/6/1410HD 1990.

Accordingly, the court held that the contract would be discharged due to the unavailability of the subject matter in the due time of delivery, and that the defendant must refund the price paid.

Accordingly, the unavailability of the subject matter makes the contract impossible to preform because the circumstances are beyond the control of the parties. It is similar to the distraction of the subject matter as the seller cannot deliver the goods.

#### **5.4.6 Destruction of an Essential Thing or Person**

There may be cases where a specific item itself is not to be sold or transferred in any other way, but the contract requires—to enable its performance—the continued existence or coming into existence of that specific thing. In such cases, the non-existence, destruction or unavailability of that thing will bring about the end of the contract. For example, should a particular factory or site require the installation of equipment, the destruction of the location would mean the discharge of the contract—irrespective of the fact that the subject matter of the contract is not the site. In this same way, an agricultural partnership agreement (*muzirah*), i.e. when the farmer makes a contract with landlord to rents the land for the growing of seeds, the contract would be discharged should the means of irrigation, i.e. an underground water channel, not be able to be used or if there is a lack of water in the well.<sup>52</sup>

Sometimes, it may be that the essential person has died or is otherwise unavailable.<sup>53</sup> The jurists provide an example where a father pays a woman to feed his baby milk, but after the conclusion of the contract, the baby died and the contract was discharged;<sup>54</sup> as another example, the death of the child may discharge the contract between the child's father and the hospital for the child's treatment. In the contract of suretyship (*Kafalah*), this is a contract whereby the surety undertakes a creditor to produce or bring a debtor person before the police or the court.<sup>55</sup> In a contract of suretyship, the contract will be brought to an end and the surety (*kafil*) discharged from his obligation to produce the principal when the debtor has died.

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<sup>52</sup> Ibn Abidin, vol 6 (n 38) 284

<sup>53</sup> A perish of the parties of the contract will be discussed latter.

<sup>54</sup> Ibrahim Alshirazi, *Almhatheb* ( vol 2, Dar Al Kotob Al Ilmiyah 1995) 261

<sup>55</sup> Mansoori (n 44) 292

In the above cases, the availability of the essential thing or person is necessary to the performance of contract, thus meaning the contract must be discharged if the thing or person is not available because of effect of the purpose of the contract. In the case of *Almajdouie group vs. al gabr transportation*, the parties signed a contract of carriage of goods, where the defendant would carry the goods from Jeddah to the plaintiff in Riyadh; however, after making the contract but before loading the goods, two drivers escaped with the two trucks. Accordingly, the plaintiff brought his goods through the use of another company; however, the defendant demanded a delay penalty. The court rejected the plaintiff's claim because of the absence of drivers and trucks, which were recognised as essential for performance, combined with the escape being beyond the parties' control.<sup>56</sup>

## **5.5 Impossibility of the Contract Relating to the Parties**

This section considers a number of different circumstances wherein contract performance is not possible owing to a number of conditions being apparent, for either one or more of the parties involved. Notably, a number of different types of impossibility will be addressed, namely interdiction, bankruptcy, insolvency, death, illness, inability, and the refusal of one party to perform or receive the agreed performance. In actual fact, the impossibility of the contract relating to the parties is less in application than the relating subject matter. The objective impossibility has more applications and cases than the subjective impossibility.

### **5.5.1 Death of the Party**

The death of one party of a revocable contract, or personal contract, has the result of discharging the contract in the sense of requiring personal performance. In contrast, however, when considering irrevocable contracts, an obligor's death does not impact the contract's validity, nor

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<sup>56</sup> Board of Grievances, Commercial Circle 16 Judgement No 45/D/T/G/16 in 1420H (2000).

does it mean the liability of the estate is no longer applicable. Overall, the general rule is that, upon the death of a party, contractual liabilities pass to that person's personal representatives. Importantly, it should be recognised that, overall, the obligations and rights afforded by Islamic Law are on-going and continuous—even following death. For instance, in the view of Ibn Qudamah, should there have been the setting of a snare during the lifetime of the deceased, the estate then owns any animals caught following his death. Equally, the estate of the deceased is held responsible for any damage caused if, for example, during his lifetime the deceased dug a well that subsequently caused injury to an individual.<sup>57</sup>

However, in consideration to agreements comprising a 'personal element', i.e. where the individual in question is required to conduct a personal act of some kind, the death of the individual induces the termination of the agreement within the contexts of Islamic law. For instance, an author makes an agreement with a publisher to write a book. If the author died, this would render the contract impossible to perform. The agency contract is discharged by the death of either party; also, the employment contract is discharged by the death of the employee.<sup>58</sup> Markedly, Saudi Labour Law considers that the death of employees will cause the contract to be terminated, whilst the death of the employer does not lead to the termination of the contract in general.<sup>59</sup>

If the contract does have a personal nature, the death of either party will not render the contract discharged. For example, if there is a contract to sell a car, if one party died after the conclusion of the contract, the contract must be performed if the contract was made between two people. However, if the sale of the subject matter relies on the personality of the seller or his reputation, such as in the case of a contract of manufacture (*Istisna*), the death of the seller would bring about the end of the contract.<sup>60</sup>

With this taken into account, it is not easy to draw a line between a personal contract and other contracts; sometimes the differences are clear, but sometimes it is not easy to establish the differences. Moreover, it may not be enough to have a contract with a company. For instance, if there is a contract with a decoration company for fixing the decoration of a home but there is the

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<sup>57</sup> Ibn Qudamah, *al-Mughni* vol 4 (n24) 345.

<sup>58</sup> A Lerrick & Q Mian, *Saudi Business and Labor Law* (Graham & Trotman 1982) 37.

<sup>59</sup> Saudi Labour Law, Royal Decree No M/5 on 23/8/1426H 2005, article 79.

<sup>60</sup> Mansoori (n 44) 213

demand in the contract for a particular employee to do the job, the contract would be discharged if the employee detailed were to die.

One last point is worth mentioning: although death usually affects contractual obligations in a negative sense, it may also have the reverse effect in terms of activating a contractual obligation in Islamic law. Thus, a valid declaration or offer of bequest becomes binding only upon the death of the testator. Similarly, immediately upon the death of a debtor, all his debts mature.<sup>61</sup>

### 5.5.2 Illness

In contracts involving personal services, Islamic law regards illness in the same manner as that revealed in the ‘temporary impossibility’ examples: contract performance is temporarily defeated, and at the option of the opposite party, further delays will compromise their interests, and the contract may then be discharged. In the case of all other contracts, illness does not necessarily frustrate the contract; however, an important qualification is introduced. If the ill person might cause a further health risk to others by endeavouring to complete the contract, this additional circumstance might be sufficient to apply the doctrine of impossibility of performance.<sup>62</sup> The illness of an obligor does not constitute the discharge of the agreement if the obligation is not personal. In such an instance, the individual is required to organise the performance to take place, which may be through the employing of an agent, for example. Notably, the contract should be interpreted in consideration to all applicable circumstances, namely utilisation and custom, so as to determine whether or not the obligation may be viewed as personal. In the situation of continuous performance, a temporary illness does not mean the promisor is freed from agreement with the exception that the performance is prevented as a result of the illness.

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<sup>61</sup> A Alayed, *Asbab Anhelal Alqud* (Imam Muhammad ibn Saud Islamic University 2002)181

<sup>62</sup> Ibid.



Various elements that should be taken into account in terms of measuring whether or not a contract of employment will be frustrated by long-term absence due to the illness of the employee.<sup>63</sup> In the Quran, ‘charges no soul with more than it can bear’<sup>64</sup> can be said to support a discharge of obligation due to illness as, if the ill employee is obligated to perform the contract, it would be considered more than he can bear.

It must be added that even dangers to life and the health of third persons who are not parties to the contract may discharge a contractual obligation. A pilot may be discharged if the performance of his obligation to fly passengers sees the airplane endangering his life—even if the latter are not parties to his contract. Whether or not he is discharged, however, is a matter of degree depending on how serious the danger if the contract were to be performed. Muslim jurists have expressly provided that a contract of agricultural partnership (*muzirah*) may be brought to an end by the illness of the party if the planting season will be missed and the party is still sick.<sup>65</sup> This applies to short-term personal contracts, and requires immediate performance; illness leads to the discharge of the contract.

### **5.5.3 Bankruptcy (iflas) and Interdiction (hajer)**

Interdiction can be classified as ‘prohibition of any meticulous person from embarking upon his own property. Under Islamic law, any contract entered into by an insane person is null and void (*bitil*). Evenly balanced with minors without prudence, such a person is devoid of all aptitude. The reason for this is that he cannot have the intention to produce legal associations, which forms the source for the legality of all contracts in Islamic law.

Bankruptcy forms the basis for interdiction consistent with all schools of Islamic law. It has been considered as a special rather than a ‘general’ type of interdiction; it is a prohibition offered for upholding the interests of others, rather than the welfare of the interdicted person himself.

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<sup>63</sup> Saudi Labour Law (n 54)

<sup>64</sup> Quran 23: 62

<sup>65</sup> M Ibn Muflih, *al-Furu* ( vol 4 Dar Al Kotob Al Ilmiyah 1985) 440.

Consequently, bankruptcy only influences those contracts that can be potentially damaging to the benefits of others.

The corollary to the Islamic rule that all contracts must be the product of autonomous parties freely agreeing to enter into a relationship on specific terms is that all contracts may be terminated on consent.<sup>66</sup>

Bankruptcy is universally accepted in all Islamic legal schools as a lawful impossibility basis for contract termination. There is a division of opinion concerning whether the bankrupt that subsequently purports to enter into contracts with third parties has created a void contract or whether, as with a minor as discussed above, the contract is voidable at the instance of the opposite party.<sup>67</sup> It is noted that bankruptcy is a defined legal state under Islamic court, although its pronouncement confirmed by final order can determine that the person is bankrupt. The nature of personal debts, combined with the relationship between debt and available assets that may trigger a bankruptcy, may vary across jurisdictions; the order itself is determinative of status.<sup>68</sup>

In contrast, Islamic law separates bankrupt status from the concept of insolvency the inability of a party to meet their on-going financial obligations as they come due<sup>69</sup>. Islamic law regards insolvency as determined with reference to individual circumstances; unlike bankruptcy, an insolvent person cannot rely on this circumstance as triggering an impossibility of performance-finding. For this reason, contractual obligations continue for insolvent persons. This approach is consistent with the Quran passages that stress the importance of honouring one's obligation freely assumed by the contracting parties.<sup>70</sup> Moreover, Saudi Arabia Regulations provide that, as opposed to treating the circumstance as an inevitable impossibility that must terminate the agreement, a party that fears it may be about to become unable to pay its debts, may seek amicable conciliation with creditors to avoid bankruptcy. Alternatively, the party may apply to the Saudi Commercial Court in Board of Grievances for an order to convene settlement

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<sup>66</sup> Chibli Mallat, 'Commercial Law in The Middle East: Between Classical Transactions And Modern Business' (2000) 48 *The American Journal of Comparative Law* 81,101.

<sup>67</sup> *Ibid.*

<sup>68</sup> See Commercial Rules for Bankruptcy in the Kingdom of Saudi Arabia Royal Decree No M/6 on 4/09/1416H 1996.

<sup>69</sup> N Saleh, (n 12) 112

<sup>70</sup> Qur'an 29 :30

procedures with creditors under the supervision of the Board of Grievances to avoid the possible operation of the Commercial Court Law.<sup>71</sup> However, the Commercial Court may issue a decision that the debtor became bankrupt, and may prevent him from using his money and assets.

Where an insolvent person enters into a contract with another that is unaware of their financial circumstances, the contract may be terminated if the opposite party can establish this requisite lack of knowledge.<sup>72</sup> If insolvency arises during contract performance, the obligations may be suspended until it has determined whether or not the contract remains commercially practicable. The discharge of contract by bankruptcy in Islamic law is discussed if it arises after conclusion and before performance, such as in the case of a sale where, if the seller delivers the subject matter to the buyer but before he receives the price the buyer becomes bankrupt, the contract would then be discharged and the seller would have the right to recover the goods if they were still in existence with the buyer.<sup>73</sup> The Prophet stated: ‘if a man finds his same things with a bankrupt, he has the right to take them back than anyone else’.<sup>74</sup> In the contract of assignment of debt, if the debtor transfers the creditor to a transferee in order to get his payment but after agreement of the assignment the transferee becomes bankrupt, in Islamic law the contract would be considered discharged because of the impossibility of the contract due to the bankruptcy.<sup>75</sup>

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<sup>71</sup> Commercial Rules for Bankruptcy in The Kingdom of Saudi Arabia (n 64)

<sup>72</sup> Frank Vogel, *Islamic Law and Legal System Studies of Saudi Arabia* (BRILL 2000) 159

<sup>73</sup> Ayub, (n13) 167

<sup>74</sup> Muhammad al-Bukhari, *Sahih al-Bukhari* Hadith No 2272.

<sup>75</sup> A Alayed (n57) 150

## 5.6 Temporary Impossibility

Temporary<sup>76</sup> impossibility arises where the subject matter of a contract or an essential person for the performance of the contract becomes unavailable in the short-term because of circumstances beyond the control of the party. In such an instance, the question is then posed as to whether such a lack of availability should constitute the termination of the contract. Notably, Islamic Law is decidedly flexible in regard to performance impossibility: in contrast to the rules and the approach of ‘all or nothing’, the termination of the contract is not always necessary. With this noted, however, it is important to understand three different situations when considering the impacts of temporary impossibility within the context of Islamic Law.

Temporary impossibility may occur due to the objective impossibility related to the subject matter of the contract or subjective impossible related to the parties of the contract. There are some examples of temporary impossibility where the impossibility can end either in the short- or long-term; this means that the obstacles may exist for a certain period with the hope that it will eventually end. Heavy rainfall, as an example, can temporarily stop work at a site, causing the fulfilment of various obligations to be temporarily impossible. Authorities' decisions sometimes may lead to temporary impossibility if they cause the work to stop for a period of time. Occupation or mandatory authorities intervene to stop projects by preventing their supplies or by arresting their owners or a major number of their workers. Illness of the worker is also considered temporary impossibility since illness is supposed to be a transient state that can eventually end. The outbreak of epidemics amongst the contractor's workers and technicians, which subsequently leads to temporarily stopping the project works, is also considered temporary impossibility. Temporary impossibility may also exist when work stops owing to the temporary lack of materials required for fulfilment if those materials are specified in the contract.<sup>77</sup>

Temporary impossibility does not lead to the discharge of the contract generally, whilst temporary impossibility is not, of itself, a ground of frustration; however, in obligations that are

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<sup>76</sup> The phrase used in this heading might appear on first review as an oxymoron the definitive connotations associated with impossibility do not readily associate with a temporary or transient state. It is arguable that a better expression is ‘suspension of performance.’

<sup>77</sup> N Saleh, (n 12)

supposed to satisfy an immediate need, or if the contract specifies a time for performance, temporal impossibility is not applicable as it does not need a particular duration for performance.<sup>78</sup>

Also, the cause of temporary impossibility may not be removed, such as if temporary turns into permanent impossibility, as in the case of the illness of a worker, when it takes a long time instead of being a transient condition. In this case, if illness is presumed to stay longer, by then the contract will be discharged as the impossibility was converted into a permanent impossibility as opposed to a temporal one. The purpose of this is to prevent both parties of the contract from facing a long wait; thus, as a result, the discharge of the contract becomes subject to the request of one of the parties.<sup>79</sup> Moreover, if the delay is so significant that the transaction's worth in a commercial sense is no longer justified, thus rendering the agreement invaluable and making it unreasonable for the parties to be forced to continue with the contract, justification may be seen. If the contract cannot be completed immediately due to intervening events, such as a labour dispute involving cargo handlers at a specific port, which could prevent vessels from unloading cargo in accordance with contractual terms, only where the delay defeats the overarching commercial purpose will impossibility be deemed to defeat its operation. Notably, Islamic law does not demand that parties' contractual rights be suspended indefinitely.

The long duration of illness gives the employer the right to terminate the contract. On the other hand, the employer's right to terminate the contract is not established unless the worker stays absent during this long period of illness. The contract will not even be terminated because of a medical report that says that the worker needs a long period of sick leave. If the employer does not use his right to terminate the contract for any reasons, despite the existence of the reason that gives him this right, such as a long period of sickness, the contract will remain suspended. Furthermore, when the worker recovers and decides to resume working, the employer can no longer exercise this right, meaning the contract will come back into effect.<sup>80</sup>

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<sup>78</sup> G Treitel, *Frustratin and Force Majeure* ( 2ed edn Sweet & Maxwell 2004) 233

<sup>79</sup> Alroumi (n 9)171

<sup>80</sup> Saudi Labour Law (n 54)

## 5.6 Impossibility of Contract by Illegality

There are two types of illegality of the contract: the first exists before the contract is made; this type is discussed under the formation of contract and the doctrine of the mistake. The second type relates to supervening illegality; in other words, cases where the performance of the contract is legal at the time at which the contract is entered into but which becomes illegal after formation and before the time of performance. Legal impossibility is not based upon the implied will or intention of the parties, but rather rests on the requirements of public policy.

Alcohol was allowed at the beginning of the Islamic era, and so there was a widespread presence of alcohol trade and factories. Moreover, there was also commercial exchange between people and cities.<sup>81</sup> Afterwards, however, Islam forbade the consumption of alcohol,<sup>82</sup> as well as its purchase and sale.<sup>83</sup> Accordingly, all contracts dealing with alcohol were discharged as they became illegal by reason of the passage of prohibition law. Moreover, when Islam forbade usury<sup>84</sup> and *riba*, and the Quran and the Prophet cancelled all contracts containing such elements.<sup>85</sup> The first deals the Prophet discharged were those of his uncle Alabbas.<sup>86</sup> The supervening event occurred, which caused the contract rendered incapable of performance because such a type of transaction, namely usury or dealing in a particular commodity, such as alcohol, became banned by Islamic law.

A subsequent law, known as the Orders of the Sultan in Islamic Law, may actually forbid the performance of the contract, such as when dealing with a certain commodity, or the exportation or sale of a commodity, and which therefore needs to be avoided. However, this does raise an interesting question: what if the entering into a contract is not, in itself, at the time, illegal, but is rendered illegal by the performance of the contract? Thus, for example, a contract cannot be performed unless an illegal act is performed? In the analysis and research of this topic, specific

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<sup>81</sup> The prohibition of alcohol was after sixteen years from the beginning of Islam.

<sup>82</sup> Qur'an 5:90.

<sup>83</sup> L Michalak and K Trocki, 'Alcohol and Islam: an overview' (2006) 33 Contemp. Drug Probs 523,562.

<sup>84</sup> Qur'an 2: 278-279.

<sup>85</sup> Mohammad Farooq, 'The Riba-Interest Equation and Islam: Reexamination of the Traditional Arguments' (2009) 9 Global Journal of Finance and Economics 99, 111.

<sup>86</sup> Abu Umar Faruq Ahmad, *Developments in Islamic Banking Practice: The Experience of Bangladesh* (Universal publisher 2010) 64.

Islamic laws on the matter have not been identified; this may be simply due to the fact that this is a hypothetical and/or theoretical scenario, and not one that is likely to exist in true life. Indeed, if one delves further into the analysis, a contract which is rendered incapable of being performed—save by being continued by an illegal act—must have contemplated the committing of an illegal act in the first place (in which case the contract would not be enforceable by Islamic law). However, Muslim jurists have made legal rules and principles relating to changed laws and rulers' orders, and lead to the discharge of the contract, with the principles able to be applied at any time.<sup>87</sup>

At the present time, considering the existence of parliaments and legislative bodies, as well as the changing of laws for political or economic reasons, contracts will be affected. For instance, imports may be prevented from particular countries, or certain commodities may not be exported. Furthermore, the production of a particular commodity may be preventing or building permits in a specific place may be revoked. Moreover, an employment contract may be in place for a young individual, although a new act may increase the age at which people are able to work, thus rendering the contract void as the employee is under the age of legal employment. As can be seen from this example, the conditions fundamental to the contracting parties may be altered through the implementation of a new law. A case that illustrates the illegality of performance is that of Fahed Mohammad vs. Al Mesharaf Recruitment Office.<sup>88</sup> There is a contract between the parties where the defendant is obligated to bring three housemaids from the Philippines. After signing the contract, the plaintiff paid 45,000 Riyals, but before bringing them, due to a dispute between the Business Ministry in Saudi Arabia and authorities in Philippines about labour issues, Saudi Arabia banned contracts with housemaids from the Philippines. Subsequently, the plaintiff demanded the discharge of the contract, and his money needed to be recovered by the defendant as he could not perform the contract; however, the defendant refused on the grounds that the government might allow it soon. The court held that the contract should be discharged due to the impossibility of performance by the law, which had been issued by the government. Many cases arose in Saudi Arabia following the government's decision to free all slaves and banned slavery.<sup>89</sup> There were many contracts for the sale of slaves; the contracts were

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<sup>87</sup> Abd Alrazzak Alsanhuri, *Nazariyyat Al Aqd* ( vol 2, Al-Halabi Printing 1998) 967.

<sup>88</sup> Riyadh General Court, Judgement No 69/25 in 18/04/1431H 2010.

<sup>89</sup> Emancipation decision in Saudi Arabia was in 7/ Nov/ 1962.

not performed after the conclusion of the contract, and sellers wanted to discharge the contracts in order to take compensation from the government owing to the fact that compensation was more than the price of the slave; buyers, on the other hand, wanted to the contract to be performed and were recognised as having the right to get such compensation. However, the courts held that the contract in such a case would be discharged because the performance of the contract was then considered illegal through the new law.<sup>90</sup>

Alteration in the law is not necessary in order for the performance of the contract to be rendered legally impossible, although it is enough to cause performance hardships for one of the parties, such as through high increases in taxes or customs imposed on a specific commodity. In this case, the contract is considered discharged.<sup>91</sup>

## **5.8 The Doctrine of Impossibility as it Applies to Administrative Contracts**

In the beginning, a distinction must be made between private law contracts and public law contracts. Private law contracts are those that are concluded in a private realm, and which can take the form of either civil law contracts or commercial contracts. The difference is important as a different set of regulations applies to each different type of contract, and thus the rules governing the impossibility of performance differ between the two different types of agreement. Public law contracts are those that are concluded with a governmental or administrative agency, and are also referred to as administrative contracts. In talking about the impossibility of performance, the analysis above has referred to private contracts—those that are governed by the civil and commercial codes—rather than administrative ones. Indeed, considering that the majority of contracts that are applied fall into this area, one can consider the above portion to be the most important part of this analysis. However, this is not to ignore the second distinctive type of contract—that of administrative contracts; consideration should be directed towards how frustration would apply in such a situation.

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<sup>90</sup> For example, Riyadh Court Judgement No 387/4 in 19/08/1382H 1963.

<sup>91</sup> See the Board of Grievances, Administrative Appeal Court, Judgement no 416/T/1427. The court hold that the change of price of fuel by government is considered effect on the contract when two conditions are met: the first is if the increase makes the performance of the contract burdensome according to commercial standards. Second is if the increase came after conclusion of the contract.



The major importance placed on the former type of contract may be simply due to the fact that administrative contracts are relatively new in nature, arising mostly in the 20<sup>th</sup> Century. However, they are distinctive to private contracts. Perhaps the most distinctive feature is that the most important principle with these contracts is that they are made for the public interest, and that the public interest is the paramount underlying principle of the contract. Amkhan describes that:

‘writers and courts are unanimous that a contract is administrative if:

- (1) one of its parties is a public authority (administration)
- (2) It has been concluded with the intention of managing or participating in the function of a public service; and
- (3) It contains certain features which are not usually found in private law contracts’.<sup>92</sup>

Whilst of each of these criteria can be delved into in further detail, this part of the paper focuses on the way in which frustration applies to such contracts. Indeed, to do so is more important given that the doctrine of supervening events, whilst still applying to Islamic administrative contracts,<sup>93</sup> is said to hold many differences in the way it applies to administrative contracts.

In principle, the above has shown the legal effects of the doctrine of impossibility effects applying to a private contract, whilst the separate requirements have been satisfied. Both of these principles are however adapted when administrative contracts are involved. Where the doctrine of intervening contingencies apply—in other words, frustration applies to the contract—the fact that the public welfare is paramount means that the supervening event has different legal effects. Thus, a private party is considered to have to continue performing the obligations he holds under contract law so that public welfare is not affected by the non-performance of the contract—irrespective of the event that has occurred.<sup>94</sup>

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<sup>92</sup> Amkhan, ‘The effect of Change in Circumstances in Arab contract law’ (n 4).

<sup>93</sup> The case of *Saudi Arabia vs. Saudi Arabian- American Oil Company (ARAMCO)*. The case raised much discussions and argument in many aspects, particular in the opinion of arbitrators about administrative contract in Saudi Arabia; Arbitration Tribunal declared that ‘Moslem law does not distinguish between a treaty, a contract of public or administrative law and a contract of civil, commercial law.’ [1963] 27 ILR 117. In fact, the administrative contract is exist in Saudi Arabia before that and the administrative judiciary since 1952.

<sup>94</sup> Saed Ali, *Nazariyat al- zuruf al- tariyah fi al- aqd al-idari wa al-shariah* (dar al kitab al arabi 2006) 86

However, in order to counter what might otherwise be a very heavy obligation on the private party, any loss incurred by the party that has suffered the supervening event has to be shared between the public body—even if it has not suffered the loss—given that the doctrine of supervening events does not apply with full effect to the private party. In fact, based on this principle, it is usually the public body that is burdened with suffering the majority of the losses that occur as a result of the supervening event.<sup>95</sup>

Nevertheless, it must be noted at the outset that there are two specific principles that apply to administrative contracts, namely the principle of economic or physical hardship and the principle of administrative risk. The principle of administrative risk applies when the actual administration that has entered into the contract makes a change that could bring about the doctrine of supervening events and which renders a contract impossible of performance. If the administration undertakes an unlawful act that contravenes a contract that is not considered lawful, it must then bear the liability for any loss suffered as a result of the act that was undertaken and the contract being rendered impossible.<sup>96</sup>

The doctrine of economic or physical hardship applies differently. Normal hardships are considered part of the usual contractual risk undertaken by the two parties when they enter into the two contracts. However, where there are hardships considered to be unforeseeable in nature, they are then capable of amounting to events that trigger the doctrine of supervening events and which allow a losing party to claim compensation. These are not limited to events that amount to acts of God, and might even be previous events that have occurred but have not been experienced by, and/or are otherwise unknown to, parties. Thus, for example, if the parties contract to construct on a particular site and the site is then discovered to be geologically difficult or impossible to build upon, impossibility might come into play. Where it does, however, there is a general right of compensation by any affected contracting party, meaning that the doctrine is much more limited in nature than how the doctrine of supervening events usually applies; most

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<sup>95</sup> J McKormack, 'Commercial Contracts in Muslim countries of the Middle East: A comparison with the United States' (2009) 37 *International Journal of Legal Information* Available at: <[http://works.bepress.com/jacqueline\\_mccormack/1](http://works.bepress.com/jacqueline_mccormack/1)> last accessed 15/12/2012.

<sup>96</sup> Ali (n90) 92.

likely as a result of the fact that public welfare is considered paramount in such situations, rather than the welfare of a private contracting company.<sup>97</sup>

Furthermore, there is a distinction to be made between the type of loss that is covered as a result of the supervening event occurring. For private contracts, the losses that would be covered would be the losses that would occur during usual circumstances. As shown above, some schools of thought impose a minimum limit to the loss that would have to be suffered; the Maliki School, for example, states that at least one-third of the total sum of the contract would have to be lost before the doctrine of supervening events could apply.<sup>98</sup> However, for other schools of thought, the general rule is that profits that could generally be made as part of the contract, or when calculating future contracts into account when considering the losses made to contracts. With public administrative contracts, however, the schools that recognise such contracts consider that the loss has to be abnormal in order for the doctrine of supervening events to apply. Administrative Justice in Saudi Arabia does not consider that the loss is limited, but rather when loss becomes abnormal according to commercial practice<sup>99</sup>. As such, future losses are not taken into account, and a loss is not considered a loss of profit; rather, it has to be an actual pecuniary loss borne by some party.

The fact that public law applies different principles also introduces other problems. Thus, the rules are relatively clear with regards to how the impossibility of a contract is treated in private contract law, albeit with different nuances introduced by the different schools of thought. Such nuances are exaggerated when the compensation to be granted to a party as a result of a contract being rendered subject to the doctrine of supervening events is calculated where public contracts are concerned. This is simply due to the reason that such compensation is assessed whilst taking into account the equity and fairness of a situation, and each school of thought has different accounts of equity and fairness. Thus, Shafi'i's pay more attention to the formalities of a contract made, whilst Hanbali pays less heed to the formalities and looks instead to whether or

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<sup>97</sup> Samir AlYusuf, *Nazariyat al zuruf al tariyah wa-atharuhza fi al-tawazun al-mali lil aqd al-idari* (AlHalabi Legal Publications 2009) 105.

<sup>98</sup> It is discussed in chapter four.

<sup>99</sup> See the Board of Grievances, Administrative Court, Judgement No 3/T/1401 in 1980, the Court hold that ' If there is any supervening events occurred during a performance of the administrative contract caused in abnormal loss than the contractor can claim for compensation from administrative body'.

not a contract has been concluded.<sup>100</sup> Such circumstances will be taken into account when determining how the doctrine of supervening events will apply. Furthermore, assessing cases according to equity and justice will always be subject to a discretionary element; this discretion, in itself, is exercised in different ways by judges. The no-system of precedent in Islamic contract law—which, as abovementioned, is applied in accordance with convergence of opinions between writers on the subject rather than the establishment of case-law as is seen in some common law and civil law systems—means that the discretion is ever the more important when determining matters. In addition, this discretionary assessment does not only impact whether or not a contract be rendered to be frustrated upon intervening contingencies; rather, equity will also come in when the judiciary decide what portion of loss should be borne by a public party and the private party.<sup>101</sup>

In this regard, one must distinguish between supervening events that exist only temporarily and those that subsist. Thus, a party is considered liable to compensation for any loss incurred whilst performing a contractual obligation as the result of an event only whilst the event is subsisting. If the difficulty ends and the losses are no longer incurred, the administration then no longer pays the contracting party compensation. Such treatment can be seen to be quite different in regard to the treatment of supervening events in private contract laws, where contracts are generally terminated. Moreover, there is little distinction to be made between on-going and succeeding difficulties in the performance of contracts.

As a result of the above rules, rather than the doctrine of intervening contingencies being considered a norm of contractual law with regards to private contract, the doctrine of supervening contingencies is seen to be a matter of public policy when it comes to public contracts.

One might question whether this is, in fact, an actual distinction, as seen above. Whilst the doctrine of supervening events is governed by specific rules in private contracts, there is a large element of discretion involved—especially since it is judges that must determine relevant matters.

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<sup>100</sup> H S Shaaban, 'Commercial Transaction in the Middle East: What Law Governs?', (1999) 31 *Law and Policy in International Business* 157, 158.

<sup>101</sup> Peter D Sloane, 'The Status of Islamic Law in the Modern Commercial World' (1988) 22 *International Law* 743

In fact, the distinction between administrative and private contracts applying the doctrine of supervening events is, in effect, a matter of public policy for both realms of contract.<sup>102</sup>

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<sup>102</sup> Administrative Court in Saudi Arabia adopt the distribution of losses between the contractor and the governing body ,when there is hardship and loss, the administrative body must compensate the contractor for the order to continue the performance of the contract rather than terminate the contract because the administrative contract regard to the public interest. See the Board of Grievances, Administrative Court, Judgement No 1/T/1400.

## CHAPTER SIX

### A Discussion of Discharge of Contract in English Law

#### 6.1 Introduction:

In chapter three we discussed contracts in Islamic law, but contract in English law offers a very obvious theory. There are many books, theses and articles that discuss contracts in English law, so there is no need to discuss it here. We will just discuss the points which are related to frustration of contract.

Discharge of contract occurs in four forms, which are: performance; agreement; operation of law; and breach of contract<sup>1</sup>. This discussion will focus on performance, agreement and breach, in order to illustrate how the contractual relationship comes to an end. The fundamental element of discharge is that, under the principle of *pact sunt servanda* (i.e. all promises must be kept), the contract should be fully performed. The failure of full performance of all of the contractual elements results in breach<sup>2</sup>. The problem in complex contractual relationships is when performance occurs, which unlike high street sales of contracts is very unlikely to be instantaneous. This means that to understand discharge it helps to ascertain if performance has been completed or circumstances arise to determine if there is breach and a right to damages<sup>3</sup>. The separation of performance and breach is fallacious, because they are mirror images of one another (i.e. either there is full performance or breach). However, it is important to highlight that it is plausible that there are alternative approaches to discharge, though English law is reluctant to allow these other forms as *pact sunt servanda* is a primary concept that must be maintained throughout<sup>4</sup>. This means that there either has to be performance or agreement in order to discharge the contract. If neither of these aspects is present then there is breach, unless the high

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<sup>1</sup> Ewan McKendrick, *Contract Law* (9<sup>th</sup> Edn Palgrave MacMillan, 2011) 321

<sup>2</sup> *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827

<sup>3</sup> Ewan McKendrick, *Goode on Commercial Law* (4<sup>th</sup> Edn Penguin, 2010) 122

<sup>4</sup> *Ibid*, 122

threshold of frustration can be met<sup>5</sup> or there is illegality of contract<sup>6</sup>. Therefore, this paper will examine the various aspects of discharge of contract in order to understand their interaction with performance, agreement and breach. Finally, it will discuss the findings in correlation with frustration.

## 6.2 Concept of Discharge of Contract:

The concept of discharge is simply the identification that the contractual relationship has come to an end. The impact of this is that there is no longer any contractual obligation between the parties<sup>7</sup>. This is *prima facie*, a simple concept, albeit there is a far more complex issue, which is when discharge occurs. In normal high street sale formation, performance and discharge are instantaneous (i.e. A offers y for sale, B picks up y and takes y to the till, and money passes from B to A for y). The consequence is formation and performance passes with the money, in which the discharge occurs with the sale. On the other hand, it may be that there is a construction contract, in which A promises to B to build y. The nature of the contract will identify the specifics, which may result in failure to meet all of the requirements. The consequence of this is that there is a *prima facie* breach. Will this repudiate the contract or will rectification be the correct response<sup>8</sup>? These are all elements that point towards discharge of the contract.

Generally, part completion of the contract will give rise to breach and award of damage; this is because specific performance is only applied in exceptional circumstances (i.e. it must be the most appropriate remedy<sup>9</sup>). The exceptional nature of specific performance is identifiable in its rejection, as the case of *Cohen v Roche*<sup>10</sup>, which held that specific performance in regards to buying a set of chairs was refused because they were “ordinary articles of commerce and of no special value or interest”. On the other hand, the case of *Posner v Scott-Lewis*<sup>11</sup> maintained that the injustice would not be satisfied by damages; thus, it was stated that required discharge could only happen through performance as opposed to the traditional application of damages. The application of *Beswick v Beswick* can result in an application where it is plausible to enforce a

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<sup>5</sup> *Hirji Mulji v Cheong Yue SS Co* [1926] AC 497; *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783

<sup>6</sup> *Edler v Auerbach* [1950] 1 KB 359

<sup>7</sup> Ewan McKendrick, *Contract Law* (n1) 321

<sup>8</sup> J Adriaanse, *Construction Contract Law* (3<sup>rd</sup> Edn Palgrave MacMillan 2010) 336

<sup>9</sup> *Beswick v Beswick* [1968] AC 58

<sup>10</sup> *Cohen v Roche* [1927] 1 KB 169

<sup>11</sup> *Posner v Scott-Lewis* [1987] 3 All ER 513

more liberal approach, which provides that there must be full performance before the contract can be discharged<sup>12</sup>. As Treitel identifies:

“The availability of specific performance depends on the appropriateness of that remedy in the circumstances of each case”<sup>13</sup>.

The remedy of specific performance in the case of breach is problematic, because rather than breach creating discharge, the courts require full performance<sup>14</sup>. The implication of this is breach and performance is no longer a necessitated mirror image of discharge. Also, the alternative reasons for discharge illustrate an exception to the rule of discharge through agreement, performance and breach. Therefore, this discussion will now examine the various aspects of discharge, in order to determine if the traditional mirror image application of breach and performance remain as the prevalent approach to this concept.

### **6.3 Discharge of Contract by Performance:**

#### **6.3.1 Definition:**

The *prima facie* definition of performance is that the party to the contract requires that he/she must perform exactly the obligations provided within<sup>15</sup>. The consequence of this is the primary question to determine if the performance is sufficient to discharge the contract<sup>16</sup>. The link between performance and breach can be reiterated at this point, because if performance is not sufficient then there is breach. The question is whether this will result in discharge, because of the potential of specific performance. The indicators for the court to determine concern the nature of the obligations<sup>17</sup>, i.e. what is the primary obligation, what are the secondary and tertiary obligations. The nature of the obligation is determined by the law<sup>18</sup>. The contract is considered and the legal test of the nature and terms of the contract are applied in order to determine what

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<sup>12</sup> *Evans and Marshall and Co Ltd v Bertola SA* [1973] 1 WLR 349; *Sudbrook Estates Ltd v Eggleton* [1983] 1 AC 444

<sup>13</sup> Guenter Treitel, *The Law of Contract* (13<sup>th</sup> Edn Sweet and Maxwell, 2011) 1106.

<sup>14</sup> Alan Schwartz, A ‘The Case for Specific Performance’ (1979) 89 Yale Law Journal 273.

<sup>15</sup> Hugh Beale (ed.), *Chitty on Contracts* vol. 1(31<sup>st</sup> edn, Sweet & Maxwell 2012) Para 21-001

<sup>16</sup> Arthur Linton Corbin ‘Discharge of Contracts’ (1913) 22 Yale Law Journal 514.

<sup>17</sup> Chitty, (n15) para 21-001

<sup>18</sup> *Dixon v Holdroyd* (1857) 7 E. & B. 903; *Parry v Great Ship Co Ltd* (1864) 4 B. & S. 556.



the primary obligation is (i.e. the purpose of the promise)<sup>19</sup>. This will be applied to all of the contractual obligations, albeit some will be lesser obligations that will play an important role in determining if there has been substantial performance or not. In the case of *Herbert Clayton and Jack Walter Ltd v Oliver*<sup>20</sup> an obligation with an element of discretion was identified, in which the actor was to be given “one of the three leading comedy parts in a musical play”. The implication of this is that as long as one of the leading parts is given it does not matter which one. The test that is applied is an objective one, in which the wider consideration of the contract will be utilised in order to identify the primary obligation(s)<sup>21</sup>.

The second part of the test of performance is to ask whether the performance is sufficient. As Chitty on Contracts (Chitty) identifies:

“[T]he court must first interpret the contract in order to ascertain the nature of the obligation (which is a question of law); the next question is to see whether the actual performance measures up to that obligation (which is a question of “mixed fact and law” in that the court decides whether the facts of the actual performance satisfy the standard prescribed by the contractual provisions defining the obligation)”<sup>22</sup>.

The first element to the objective test has already been discussed, but the second element highlights the contextual application of whether performance has been met. The mix of fact and law is important, because there are times where the exact specifications (i.e. lesser obligations) may not be performed due to potential defect in design or change in the contractual context<sup>23</sup>. In the case of contractual context change, it is unlikely that frustration will be conferred; rather, the lesser obligations will be struck out and the party can perform in a manner to meet the primary obligation<sup>24</sup>. In *Turiff v Welsh National Development Authority* it was held that:

“[T]he real issue is as to the construction of the words physically impossible in the light of those authorities, which establish the common law position”<sup>25</sup>.

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<sup>19</sup> *Smith v Hughes* (1871) LR 6 QB 597.

<sup>20</sup> *Herbert Clayton and Jack Walter Ltd v Oliver* [1930] AC 209.

<sup>21</sup> Ewan McKendrick, (n1) 21.

<sup>22</sup> Chitty (n15) para 21-001.

<sup>23</sup> *Turiff Ltd v Welsh National Water Development Authority* [1994] Const LY 122

<sup>24</sup> Adriaanse, above n8, p 218.

<sup>25</sup> *Turiff Ltd v Welsh National Water Development Authority* (n23).

The meaning of impossibility it seems is that there has to be an exceptional failure of the contractual design, in order for performance of the primary obligation to be frustrated<sup>26</sup>. The implication is that there will not be frustration of the primary obligation if it means that secondary obligations can be removed and/or changed, in order to ensure that the contract can be completed.

The contextual ascertainment of performance can also be seen in the case of the subcontracting of an obligation. In the case of *Margaronis Navigation Agency Ltd v Henry W. Peabody & Co of London Ltd*<sup>27</sup> it was identified that, when two parties enter into a contract, and then a party sub-contracts performance to another, then how is the performance determined? This case identified that performance is linked to the facts and circumstances of the context, as well as the specific circumstances of the case. The consequence of this is that it may be that the initial perception of how the obligation is to be met differs, but as long as sufficient performance of the primary obligation is completed then the courts will determine that the contract is fully performed. Therefore, performance and discharge has two elements (i.e. the obligations and the actual circumstances and context of performance).

### **6.3.2 Complete Performance:**

Complete performance is the simplest of the types of performance to understand, because it relates to performance where the contractual obligation(s) are carried in full. This form of performance meets the general rule where the parties perform the contract by precisely adhering to all of the terms of the contract's primary, secondary and tertiary obligations<sup>28</sup>. The problem with this rule is that it can create hardship, due to circumstantial change<sup>29</sup>; albeit there are incidents where there has to be natural variation of contracts that do not harm the primary obligation, but create ease in respect to the circumstantial changes. Thus, this creates the concept of substantial performance, which will be considered next.

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<sup>26</sup> *Norwest Holst Construction Ltd v Renfrewshire Council* [1996] WL 174519 140.

<sup>27</sup> *Margaronis Navigation Agency Ltd v Henry W. Peabody & Co of London Ltd* [1965] 1 Q.B. 300

<sup>28</sup> *Re Moore and Landauer* [1921] 2 KB 519

<sup>29</sup> *Cutter v Powell* (1795) 6 Term Rep 320

### 6.3.3 Substantial Performance:

Substantial performance is an important concept, because it creates the right of discharge even if not every obligation in the contract is met. The *prima facie* test is that if a party has only partially performed the obligation then there is no right of payment, because the terms of the contract have not been met<sup>30</sup>. This application illustrates the consideration link; whereby “the court has no power to apportion consideration”<sup>31</sup>. The problem with this application is that it fails to take into account the commercial context, which will be utilised to determine if the primary obligations have been met due to circumstantial change<sup>32</sup>. There have been a number of cases that support the plausibility of substantial performance, in which payment can be given for the performance<sup>33</sup>. This means that substantial performance does not necessarily mean that the primary obligation is fully met, or it may be that this obligation is met and some of the lesser elements are not. The consequence of this is that there needs to be a fair reason for apportionment.

The role of substantial performance makes sense in a complex world, especially in complex contracts. This has been most recognised in construction contracts, where intervening forces will create natural changes in the contract, which may result in substantial performance being the only option<sup>34</sup>. The legitimacy of substantial performance has been challenged, which can be seen in Treitel’s commentary:

“It is based on the error that contracts, as opposed to particular *obligations*, can be entire ... To say that an obligation is entire means that it must be completely performed before payment becomes due ... In relation to ‘entire’ obligations, there is no scope for any doctrine of ‘substantial performance’<sup>35</sup>.”

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<sup>30</sup> Ibid.

<sup>31</sup> Hugh Beale (ed.), *Chitty on Contracts* (n15) para 21-031.

<sup>32</sup> Jill Pool, *Textbook on Contract Law* (8<sup>th</sup> edn Oxford University Press 2006)

<sup>33</sup> *Dakin v Oxley* (1864) 15 CB(NS) 646; *Wiluszynski v Tower Hamlets LBC* [1989] I.C.R. 493; *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1.

<sup>34</sup> Sarah Jenkins, ‘Discharge of Contract - Performance and Tender: What Are the Operative Principles for a Global Community?’ (2003) 54 Florida Law Review 451, 494

<sup>35</sup> Guenter Treitel, (n13) 822

This application may be true in a simplistic understanding of contract law, though this is obviously not an appropriate application in complex contracts. The most notable area is that of construction contract law, in which substantial performance will occur due to design defects or change in circumstances. Therefore, payment for works done is clearly an appropriate application.

#### **6.3.4 Tender Performance:**

Tender performance occurs when A needs B to perform the task, in which A makes an offer to B and this is stymied by B's refusal<sup>36</sup>. The reliance on the other party for performance can create difficulties, because the refusal by B will mean that A cannot complete the contract with C<sup>37</sup>. The reliance on tender performance means that there is a right of defence if there has been a refusal by the third party. To claim this defence it is essential for A to have proof of an unconditional offer to B, in order to ensure that there is performance<sup>38</sup>. The application of tender usually relates to the issue of money (e.g. subject to contract for a home, awaiting mortgage approval). However, it is possible to extend to other elements, such as delivery of goods<sup>39</sup>. The consequence of this is that there is defence of excuse, as long as there has been an appropriate tender that has been refused. The time of tender is important, because it illustrates whether there has been an appropriate act of acquiring the tender<sup>40</sup>. It is appropriate to offer a tender on the due date, as long as it has the possibility to ensure that there is effective performance<sup>41</sup>.

It is important to note that if the creditor who has accepted the tender demands payment, and the party that has to perform the duty refuses, which results in the tender being invalidated, then there is no valid tender<sup>42</sup>. The consequence of this is that there is no right of excuse. The same is true if the tender is after the due date for performance, which includes the payment at a future date<sup>43</sup>. This means that there are a number of limitations on a valid tender, in order for the excuse

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<sup>36</sup> *Startup v M'Donald* (1843) 6 M&G 593

<sup>37</sup> Paul Richards, *Law of Contract* (8<sup>th</sup> edn Pearson Education Limited 2007)344

<sup>38</sup> *Dixon v Clark* (1848) 5 CB 365

<sup>39</sup> Chitty, (n15) para 21-084

<sup>40</sup> *Ibid*, para 21-090

<sup>41</sup> *Briggs v Claverly* (1800) 8 TR 629

<sup>42</sup> *Ibid*.

<sup>43</sup> *Dobie v Larkham* (1855) 1 Exch 776

to apply. The additional tests are that the tender must be unconditional, but this does not mean that it is not applied to the right of monies due. The very basis of effective tender is that there has always been a readiness for Party A to perform the contract, but due to the third party's refusal it cannot be met<sup>44</sup>. Therefore, on this basis, the defence of tender is an important application, because it would be unfair to force performance in these circumstances.

### **6.3.5 Personal Performance:**

The traditional application of contract law is that the parties agree to complete the contract personally in a manner that mirrors its terms. The failure to do this will mean that the intention of the parties is not met. This stems from English common law, which is aptly identified in *Butler Machine Tool Co Ltd v Ex-Cell-O Corp Ltd*<sup>45</sup>. This means that the fundamental principle of personal performance will prevail, unless the contract indicates that there will be a tender performance. The other element is if there is a subcontracting element, in which there may be an argument for substantial performance<sup>46</sup>. In *Albright & Wilson UK Ltd v Biachem Ltd* a mix-up by a subcontractor in the delivery of goods gave rise to the question of whether the sub-contractor or the contracting party was in breach. This case held that the contractor was in breach, because the contract did not provide for a subcontracting. This means that the concept of personal performance has to be applied. Therefore, the rule in this is that, if there is not meant to be personal performance to be applied, then the contract reflects this because the mirror image rule will not force the breach on the contracting party; rather, it will be the sub-contractor.

### **6.3.6 Place of Performance:**

The place of performance is very much the same as the personal performance. It is necessary that the place reflects the contract, as opposed to another place for the convenience of the contracting person performing the act. The only exception to this is if the contract allows for an alternative

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<sup>44</sup> Paul Richards (n37) 345

<sup>45</sup> *Butler Machine Tool Co Ltd v Ex-Cell-O Corp Ltd* [1977] EWCA Civ 9

<sup>46</sup> *Albright & Wilson UK Ltd v Biachem Ltd* [2002] UKHL 37,

place of performance. If there is no place of performance stipulated then the place of business will apply, which is seen under the *Sales of Goods Act 1979*:

“Apart from any such contract, express or implied, the place of delivery is the seller’s place of business if he has one, and if not, his residence; except that, if the contract is for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery”.<sup>47</sup>

The place of performance is applied in a simple straightforward manner to what will be the place of business, or in the case of consumer their personal address<sup>48</sup>. In other words, it is a place that will be the most appropriate to the given contract. If the place of performance is not as in the contract or the common sense application then it is plausible to argue non-performance<sup>49</sup>.

On the other hand, the Australian approach identified in *Wisikin v Terdich Bros Party Ltd*<sup>50</sup> held that delivery to the buyer regardless of place is sufficient. The implication of this is that as long as the other party has received the benefit it does not matter where. The English application is more formalistic than this, because performance (in respect to the delivery of goods) has to be at the appropriate place of performance and to a respectable person, in order to discharge the contract<sup>51</sup>. As the case of *Deutsche Genossenschaftsbank v Burnhope*<sup>52</sup>, it was held that the basis of the English contractual interpretation is:

“... not to probe the real intentions of the parties, but to ascertain the meaning of the relevant contractual language. Intention is determined by reference to expressed rather than actual intention”.

This means the mirror image application of performance takes precedent, which is simply the application of the parole rule. The parole rule is seen in both the English and Scottish systems; for example, the cases of *Brown v Rystaffe Trustee Company (CI) Limited*<sup>53</sup>, *Chartbrook Ltd v Persimmon Homes*<sup>54</sup> and *Aberdeen City Council v Stewart Milne Group Limited*<sup>55</sup> reaffirmed that

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<sup>47</sup> The Sales of Goods Act 1979, s 29(2)

<sup>48</sup> Jack Beatson, *Anson’s Law of Contract* (28<sup>th</sup> edn, Oxford University Press 2002) 502

<sup>49</sup> *Bows v Shand* (1877) 2 App Case 455

<sup>50</sup> *Wisikin v Terdich Bros Party Ltd* [1928] Arg LR 242

<sup>51</sup> *Galbraith & Grant v Block* [1922] 2 KB 155; *Linden Tricotagefabrik v Wheat & Meacham* [1975] 1 Lloyd’s Rep 384

<sup>52</sup> *Deutsche Genossenschaftsbank v Burnhope* [1995] 1 WLR 1580

<sup>53</sup> *Brown v Rystaffe Trustee Company (CI) Limited* [2011] CSOH 26

<sup>54</sup> *Chartbrook Ltd v Persimmon Homes* [2009] 1 AC 1101

there should be maintenance of contractual interpretation within the “four corners of the contract” (i.e. the traditional parole evidence rule)<sup>56</sup>. As Gloag argues:

“[W]here the parties have reduced the terms of their agreement to writing, the obligations they have undertaken must be ascertained from the terms of that writing without the aid of extrinsic evidence”<sup>57</sup>.

The result of this is that there is a strong indication that the place of performance must meet the basis of the contract, unless the contractual terms provide for alternative applications. It is also plausible that performance can be in another place when there are intervening acts that make the specified place impossible, which can be seen in the safe delivery of goods when at sea into a safe port when the nominated place of performance becomes impossible (i.e. unsafe)<sup>58</sup>. Thus, the commercial context can be important to implying a different place of performance (which is also possible in the case of time of performance).

### **6.3.7 Time of Performance:**

The time of performance must meet the date provided in the contract; otherwise, there will be a breach of contract. This gives the right for the contract to be discharged for breach and non-performance. However, there are contracts that provide for delay, especially in the case of construction law; whereby intervening events will give a right to extension and the right of compensation. It is important to note that these are built into the contract. The approach to delay in the construction context is explored in the case of *Trollope*<sup>59</sup>, which is the traditional model of apportionment of delay and the right in extension of time. In other words, the time of performance is extended due to intervening events. The argument in this case was that the end time of performance should be extended, because each of the phases was extended. This argument was rejected by Lord Denning, because there was not a good reason for an overall extension (i.e. supporting the traditional contractual model of time of performance). This results

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<sup>55</sup> *Aberdeen City Council v Stewart Milne Group Limited* [2010] CSIH 81

<sup>56</sup> Stephen Woolman and Jonathan Lake, *Contract Law* (3<sup>rd</sup> edn, Sweet & Maxwell 2001) 105

<sup>57</sup> W M Gloag, *The Law of Contract*, (2<sup>nd</sup> edn, W Green 1929) 365.

<sup>58</sup> *Aegean Sea Traders Corporation v Repsol Petroleo SA and Another (The Aegean Sea)* [1998] 1 Lloyds Rep 39

<sup>59</sup> *Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board* [1973] 2 All E.R

in the core application that extension of time should not occur in a manner that will allow the breaching party to benefit from his/her misdeeds<sup>60</sup>; and there has to be the direct interpretation of the contract (i.e. putting the four corners of the contract before the realities of the construction project)<sup>61</sup>. The consequence of this is that the contract recognises that there may be events that require an extension, which is reflected within the framework of the contract.

The application of time and delay links to the principle that a person cannot benefit from an existing default, which is identified in the case of *Walter Lawrence v Commercial Union*<sup>62</sup>. This case held that there should be no further extensions, unless there is a delay caused by a relevant event as stipulated by the contract. Once again, time of performance is mirrored in the contract, though there will be incidences where the time can be changed; however, this must be reflected in the contract. There has been a liberalisation of this application in the construction contract context, which can be seen in *Balfour Beatty v Chestermount*<sup>63</sup>.

The *Balfour Beatty Case* held that for every contractual event that allowed for extra time should be treated separately, in which an extension is added to the final date of performance. This application has been confirmed in the case of *Motherwell v Micafil*<sup>64</sup>, which required that there should be a common sense and fair application in the determination of the cause of the delay<sup>65</sup>. In other words, if 10 days is added to a phase due to an event in the contract then 10 days must be added to the overall contract. As the case of *Great Eastern Hotel Co Ltd v John Laing Construction Ltd*<sup>66</sup>, it was held that there is a:

“... common sense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of the Claimants’ loss. The answer to whether the breach is the cause of the loss, or merely the occasion for loss must “in the end” depend on “the court’s common sense” in interpreting the facts”.

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<sup>60</sup> Uff, J Construction Law (10<sup>th</sup> Edition, Sweet & Maxwell, 2009) 185.

<sup>61</sup> Ibid, 185-6.

<sup>62</sup> *Walter Lawrence v Commercial Union Properties (UK) Ltd* [1984] 4 Con LR 37

<sup>63</sup> *Balfour Beatty Construction Ltd v London Borough of Lambeth* [2002] EWHC 597 (TCC)

<sup>64</sup> *Motherwell Bridge Construction (t/a Motherwell Storage Tanks) v Micafil Vakuumtechnik and Another* (2002) 81 Con LR 44

<sup>65</sup> Burr, A. and Palles-Clark, R., ‘The consideration of critical path analysis in English law’ (2005) 21 *Construction Law Journal*, 225

<sup>66</sup> *Great Eastern Hotel Co Ltd v John Laing Construction Ltd & Anor* [2005] EWHC 181



Once again, one can see that the contract is the main determinant of time of performance (i.e. the legal obligation); however, this does not mean that this should be applied without context. In other words, the determination of performance is both legal and fact-based (i.e. the commercial facts must be considered).

The role of context in determining appropriate performance (even if the time is later) is dependent on the complexities and nature of the contract<sup>67</sup>. This means that the traditional view of performance and time is not always appropriate. For example, the case of *Alghussein Establishment v Eaton College*<sup>68</sup> held that no party should be able to gain from his/her own breach of duty<sup>69</sup> (i.e. the clean hands doctrine). Thus, the application of any *clean hands* doctrine should be carefully considered, especially when determining fault and the liabilities of the parties<sup>70</sup>. The application of this model, in respect to the traditional model of performance, illustrates that performance should be on time, unless there is a clear stipulation in the contract. This is the mirror image approach; however, once again the realities of the commercial context are not understood where breach or frustration becomes more prevalent. This means applying a common sense approach in a rationalised model<sup>71</sup>. The implication of this approach is that it gives greater flexibility to the judiciary to determine the cause of the late performance, in order to determine if the contract is completed. This is important, because the complexity of the law indicates that there needs to be variations through fact (as opposed to the pure adherence of the law)<sup>72</sup>. Thus, there has been a move away from a simple contractual application, which may no longer be appropriate due to the realities of the obligations to be performed<sup>73</sup>. The consequence of this is that there needs to be a system of fairness and common sense to determine if there is: performance; normal breach with damages; or repudiatory breach. The main test that needs to be identified is that the pure application of law will fail, as well will the full application of fact (which can result in palm tree justice). Rather, the obligation of performance stems from the contract; however, its construction and the commercial realities will affect interpretations of time

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<sup>67</sup> *City Inn Limited v Shepherd Construction* [2007] CSOH CA101/00 (*City Inn Case*)

<sup>68</sup> *Alghussein Establishment v Eaton College* [1988] 1WLR 587

<sup>69</sup> S Miller 'Unjustified enrichment and failed contracts' in R Zimmermann, D Visser and K Reid (eds.), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa*, (OUP 2004) 437

<sup>70</sup> Paul Tobin, 'Concurrent and Sequential Causes of Delay' (2007) 143 *ICLR* 144

<sup>71</sup> *John Doyle v Laing* [2004] BLR 295

<sup>72</sup> Daniel Brawn, 'Extensions of Time and Liquidated Damages in Construction Contracts in England and Wales' (2012) 4 *International Journal in the Built Environment* 76

<sup>73</sup> Brodie McAdam, 'Apportionment and the Common Law: Has City Inn Got it Wrong, (2009) 25 *Construction Law Journal* 79

(and extension if provided for in the contract). In the same sense, if these commercial elements cannot be balanced and it would be unfair to infer breach, then frustration may be construed<sup>74</sup>.

### 6.3.8 Payment:

The final aspect in performance that has to be examined is payment, though due to the scope of this discussion only the general aspects of this topic will be explored. Once again, the basis of payment is identified by the contractual form (i.e. the mirror image rule)<sup>75</sup>. The rules of payment are:

- 1) The payment is to be made in legal currency;
- 2) There is a right through novation, variation or waiver to substitute a different obligation than the one originally provided for under the contract<sup>76</sup>. This can be applied through the payment of a cash balance of goods or services if agreed<sup>77</sup>.

The consequence of this is that the role of payment is generally set in the contract, but it is possible for payment to be varied to ensure that it is completed. The application of damages, however, is a legal remedy that is distinguishable from payment; the result of this non-payment of damages is not the same as non-payment of debt, i.e. the monies for completion of the contractual obligation<sup>78</sup>.

A third party can match the payment of the debt, as long as the person is acting as an agent, unless the third party is jointly liable<sup>79</sup>. A payment can be made to a third party or an agent, as long as they have been appropriately commissioned by the party that the payment is meant to be paid to<sup>80</sup>. The nature of the payment should be reflected in the form provided in the contract, which may be cash, cheque, bank transfer, credit card etc.<sup>81</sup> The most important aspect of the payment is that it reflects the form in the contract. Also, the amount of the payment must be in

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<sup>74</sup> *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93

<sup>75</sup> *Re Charge Card Services Ltd* [1989] Ch 497

<sup>76</sup> Chitty (n15), para 21-040

<sup>77</sup> *Re Harmony and Montague Tin and Copper Mining Co* (1873) LR 8 Ch App 407

<sup>78</sup> Chitty (n15) para 21-04

<sup>79</sup> *Ibrahim v Barclays Bank Plc.* [2012] EWCA Civ 640

<sup>80</sup> *Sanderson v Bell* (1834) 2 C & M 304

<sup>81</sup> Jack Beatson (n48) 502

full, otherwise there is not adequate consideration and there is a breach of contract<sup>82</sup>. The exception to this is if there is variation of the contract, or if the application of promissory estoppel applies<sup>83</sup>. The case of *D & C Builders Ltd v Rees*<sup>84</sup> identified that promissory estoppel is allowable if there has been a part payment of debt where there has been acceptance by the creditor and reliance by the parties. The general application of promissory estoppel is fairness, which means that the commercial context will be applied to determine if consideration can be inferred or not. Therefore, once again the exceptions to the general mirror image rule are centred in the application of the fairness rule, in order to ensure that the intentions of the parties are met due to the modification of circumstances similar to the complexities that can arise in time and place. The complexities of performance and the balance that the courts have to apply illustrates that it may be far more appropriate for the courts to infer an application of discharge by agreement on new terms.

## **6.4 Discharge by Agreement:**

### **6.4.1 Definition:**

Discharge by agreement allows the parties to end a contract in its current form. This may be that neither has performed the contract, in which the necessary consideration is identifiable by the parties no longer having the right to compel the other to their obligations. In most cases, agreement discharge is considered during contract formation and is then included as a consideration element<sup>85</sup>. Release by either party for obligations not performed is considered as discharge by agreement or consideration. In some cases, discharge by agreement may require one of the parties to settle some of the obligations before the contract is discharged by calculating an estimated value. The only time consideration becomes an issue is where one party has fully performed their part of the contract when the other has not. The non-performing party

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<sup>82</sup> *Foakes v Beer* (1884) 9 App Cas 605

<sup>83</sup> *Collier v P & MJ Wright (Holdings) Ltd* [2007] LTL

<sup>84</sup> *D & C Builders Ltd v Rees* [1965] EWCA Civ 3

<sup>85</sup> See the case of *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.* [1990] 1 All E.R. 512

must then provide consideration to make the agreement binding. Also, if the agreement is made by deed there is no requirement to provide consideration.<sup>86</sup>

It is clear that discharge by agreement is reliant on the need for consideration, i.e. if the agreement by the parties is not enough. McKendrick identifies that if one of the parties has fully performed the contract, but the other has not completed anything, then discharge by agreement will not be supported unless:

- 1) The agreement is by deed;
- 2) The party who is owed performance is estopped from forcing the necessary acts (cf. part payment of debt);
- 3) The parties have waived their rights under the contract<sup>87</sup>; and
- 4) “A contract may be discharged by the operation of a condition subsequent which has been incorporated into the contract. A condition subsequent states that a previously binding contract shall come to an end in the occurrence of a stipulated event”<sup>88</sup>.

Therefore, it stands to reason that the role of agreement is not enough; rather, there needs to be an application that is fair or provided for under the contract.

#### **6.4.2 The Requirement of Consideration:**

The role of consideration has been discussed in respect to the part payment of debt, in which there must be a factor that ensures that there is fairness to discharge the contract. The simplest application is where neither party has relied on the contract. Another application is when there is partial performance and payment, in which the remainder of the contract is discharged on agreement, i.e. there is equal consideration on both sides<sup>89</sup>. It is far more complex when there is

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<sup>86</sup> Robert Ralston, *The Principles of the Law Relating to the Discharge of Contracts*. (Charleston. Biblio Bazaar, LLC 2009) 3

<sup>87</sup> Ewan McKendrick *Contract Law* (n1) 322

<sup>88</sup> Ibid

<sup>89</sup> *Christy v Row* (1808) 1 Taunt 300

not equal consideration, the part payment of debt and estoppel, as in *D&C Builders*, which is one application. Therefore, the tests of consideration include:

- 1) Release and replacement;
- 2) Accord and satisfaction;
- 3) Variation;
- 4) Waiver

#### **6.4.3 Release and Replacement:**

The role of release and replacement (rescission and substitution) is simply the act whereby the parties rescind the initial contract and replace it with a new one, an example of which is partial performance and payment. Also, the example of part payment of debt and reliance (i.e. through estoppel) can be applied in a similar manner. The role of consideration is important; because it is important there is not an act of unjust enrichment<sup>90</sup>. This means that the rescission and replacement has to be fair in the commercial context or the courts will not accept it.

#### **6.4.4 Accord and Satisfaction:**

Accord and satisfaction is where the parties have a desire to rescind the contract (i.e. there is no replacement). The aim is to simply release one another from obligations without replacement of any other contractual duty. This is simple in the case of non-performance by either party (i.e. a bilateral discharge). The problem is when there is unilateral discharge, which is the case when one of the parties has completed their duties, and the result is the other party having to give up all their rights. The consequence is that it is unlikely it will be upheld, unless the agreement is deeded (i.e. accord) and adequate consideration for the performance (as agreed by parties) is allowable<sup>91</sup>. The implication is that there needs to be focus on assuring that there is adequate restitution to ensure that there is not unjust enrichment<sup>92</sup>. This is why in the case of rescission

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<sup>90</sup> *McKenzie v Royal Bank of Canada* [1934] AC 468; *Halpern v Halpern (No 2)*[2007] EWCA Civ 291

<sup>91</sup> Ewan McKendrick, *Contract Law* (n1) 237

<sup>92</sup> *Erlanger v New Sombrero Phosphate Co* (1878) 2 App Cas 1218

that there is a right to a personal restitutionary claim<sup>93</sup> (i.e. satisfaction). The amount of restitution depends upon the circumstance that has given rise to the discharge to agreement, in which the payment of restitution fits into the context of a value that only needs to be sufficient<sup>94</sup>.

#### **6.4.5 Variation:**

The concept of variation is similar to release and replacement of contract, though it may be as simple as reducing the obligations and payment in order to release the obligations of the parties. The most important factor is that this consideration is attached through benefit to either of the parties and the contract is discharged<sup>95</sup>. It is arguable after *Williams v Roffey Bros & Nicholls (Contractors) Ltd*<sup>96</sup> infers that consideration is no longer necessary, albeit it is more than likely that there has to be some benefit to both parties (i.e. benefit to one party is not enough to be variation). Thus, fairness in the commercial context of the contract is once again essential to apply.<sup>97</sup>

#### **6.4.6 Waiver:**

The final element to consider is a waiver, which is where one party voluntarily accepts a request by another to forego the right to strict performance of the contract. This model is not supported by consideration; rather, it is a contractual agreement to allow for partial performance<sup>98</sup>. There is waiver by estoppel, which has been discussed in relation to part payment of debt; thus, this ground will not be gone over once again. Rather, waiver by election will be briefly identified<sup>99</sup>. The case of *Hickman v Hayes*<sup>100</sup> is a prime example of waiver:

- 1) The contract had a specified time of performance;
- 2) The other party asked for extra time;
- 3) The accepting party agreed;

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<sup>93</sup> *Whittington v Seale-Hayne* (1900) 82 LT 49

<sup>94</sup> *Chappell & Co v Nestle* [1960] AC 87

<sup>95</sup> *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189

<sup>96</sup> *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1

<sup>97</sup> Jack Beatson (n48) 521

<sup>98</sup> *The Kanchenjunga* [1990] 1 Lloyds Rep 391

<sup>99</sup> Jack Beatson (n48) 521

<sup>100</sup> *Hickman v Hayes* (1875) LR 10 CP 598

- 4) At the time of delivery the goods were rejected;
- 5) The court held that the time of performance had been waived, which meant the goods had to be accepted and the contract was discharged.

It is identified that waiver is a full and knowledgeable acceptance that rights have ceased and cannot be reclaimed without reasonable notice before reliance. Therefore, discharge by agreement is a complex application that in most cases is based on commercial realities and fairness. The final element of this discussion is to consider discharge by breach, which will be briefly explored.

## **6.5. Discharge by Breach of Contract:**

### **6.5.1 Definition of Breach through Failure to Perform:**

A breach of contract is committed when a party without lawful excuse fails or refuses to perform what is due from him under the contract, performs defectively or incapacitates himself from performing<sup>101</sup>. A contract can be discharged due to breach of contract. In this case, the innocent or injured party has the right to discharge the contract, though they are first required to inform the party that has breached the contract.

Any legal obligations that developed due to the breach of contract will bind the concerned party and they will be required to settle them before the contract is considered discharged<sup>102</sup>.

There are different types of breach, which relate to primary and secondary obligations. It is through a breach of primary obligations (purpose of the contract) that there will be discharge of the contract (i.e. a repudiatory breach). Therefore, a repudiatory breach is failure of performance, which means the contracted is rescinded and damages and losses have to be paid to the harmed third party to prevent unjust enrichment by the breaching party<sup>103</sup>. This is to be distinguished from a contractual right to interpret the contract in a *bone fide* manner<sup>104</sup>. Therefore, a repudiatory breach is simply a failure to perform the contract in manner that meets the primary obligation.

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<sup>101</sup> Guenter Treitel, *The Law of Contract* (n13)

<sup>102</sup> Seana Shiffirin, 'Could Breach of Contract Be Immoral?' (2009) 107 Michigan Law Review. 1551, 1568.

<sup>103</sup> *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc.* [1979] AC 757

<sup>104</sup> *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 227

### **6.5.2 Effect of Anticipated Repudiation and Acceptance of Repudiation:**

Anticipated repudiation is when one party identifies that an obligation of the contract cannot be performed and may request a variation (e.g. an extension of time). The other party may elect to accept the repudiation through waiver or variation (similar to *Hickman v Hayes*) and the contract on this aspect is changed. The alternative right is that the party who is notified of an anticipatory breach can refuse and demand performance<sup>105</sup>. There is no right to terminate the contract at this point; rather, this cannot occur until there is an actual breach. There are qualifications to this rule, in the interests of fairness<sup>106</sup>. This means that if the refusal is wholly unreasonable given the commercial context then there will be an implied variation/waiver<sup>107</sup>. Therefore, election is the acceptance by the party to accept a breach, which results in a waiver/variation, whereas anticipated repudiation is the non-performance of a contractual obligation<sup>108</sup>. An appropriate consideration is that there should be, which states that variation/waiver can be imputed by the courts on the basis of fairness.

### **6.5.3 Claim of Damage as the Core Consequences of the Breach of Contract:**

Claim of damages is the most appropriate test for breach of contract, which is identified in *Hadley v Baxendale*<sup>109</sup>. This case held that when:

“... two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, according to the usual course of things from such breach of contract, or such as may reasonably be supposed to

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<sup>105</sup> *Hochster v De la Tour* (1853) 2 E & B 678

<sup>106</sup> *Clea Shipping Corp v Bulk Oil International Ltd (The Alaskan Trader)*[1984] 1 All ER 129

<sup>107</sup> *The Odenfield* [1978] 2 Lloyds Rep 357

<sup>108</sup> Jack Beatson (n48) 566

<sup>109</sup> *Hadley v Baxendale* (1854) 9 Exch 341



have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it”<sup>110</sup>.

The consequence of this is that breach is being countered by appropriate restitution, as opposed to forcing performance. It is through the payment of damages that the contract will be wholly discharged. In the initial discussion, specific performance may be required to discharge the contract, but this is only applied in exceptional circumstances<sup>111</sup>.

### **6.6 Relationship and Differences between Discharge by Performance, and Breach with Frustration of Contract:**

The application of the tests to allow an extension of discharge by performance to be broadly construed is important, because it creates a greater malleability in the commercial context of the contractual parties. The greater extension infers that unreasonableness does not result in a case where the contract has to result in breach and/or frustration. It is important to note that frustration is an exceptional right, which stems from the narrow rule applied in *Paradine v Jane*<sup>112</sup>, which applies a traditional application of *pact sunt servanda* (i.e. all promises must be kept). This means that it does not matter that circumstances have intervened to render an act impossible: there must be performance. This is an unfair application, especially when the application requires that performance mirrors the contract, and as Simpson argues these two elements together are manifestly unfair and illogical<sup>113</sup>. There have been developments of the frustration model, in order to create fairness, which is best seen in the case of *Davis Contractors Ltd v Fareham UDC*, who limited the application of the doctrine of frustration. It was held that:

“[Frustration] occurs whenever the law recognises that without the 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”.

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<sup>110</sup> Ibid **Per Alderson B. at. 341**

<sup>111</sup> Peter A. Piliounis, ‘The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) under the CISG: As these worthwhile changes or additions to English Sales Law?’ (2000) 12 *1 Pace International Law Review* 6-7

<sup>112</sup> *Paradine v Jane* (1647) *Aleyn* 26

<sup>113</sup> Simpson A W B, ‘Innovation in Nineteenth Century Contract Law’ (1975) 91 *LQR* 247

This means that once the contract is made impossible on a common sense basis then frustration will be allowed<sup>114</sup>. This application remains a very narrow approach, which illustrates that frustration is only applied in exceptional circumstances. On the other hand, the application of performance is far broader, which is illustrative of the aim of the modern law of contract to ensure that there is a general right that contractual obligations are met (as opposed to allowing for draconian breaches in complex commercial realities). Therefore, it stands to reason that there is greater malleability in discharge by performance (including variation and the various forms of agreement) than creating unfairness through a limited model of performance and frustration.

### **6.7 Mistake as a Factor that Vitiates a Contract:**

There are some factors that tend to defeat contractual liability and lead to voided contracts, such as incapacity, misrepresentation, duress and mistakes. This section is concerned with mistakes because there is a relation between a mistake and the formation of a contract and it is important to understand the difference between a mistake and frustration.

During contract formation, a mistake can be defined as an erroneous belief by either both parties or one party that certain ideas or facts are true. It can be used as grounds to invalidate an agreement according to English law. Mistakes at law may affect the validity of the formation of a contract. The effect of a mistake on the validity of a contract depends on the type and nature of the mistake made. The general rule is that, where the parties have made a mistake, at English law the contract may be deemed void, as if the contract had never existed. Equity takes a more flexible approach in that contracts containing certain mistakes may be treated as voidable, where either party can terminate the contract<sup>115</sup>. However, a fundamental mistake, often referred to as an ‘operative’ mistake, may render a contract void.

There are three types of mistakes that can occur during a contracting process, which are unilateral mistakes, common mistakes and mutual mistakes.

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<sup>114</sup> *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1989] 1 Lloyd’s Rep 148

<sup>115</sup> Guenter Treitel, *Frustration and Forcemajeure* (2<sup>nd</sup> edn Sweet & Maxwell 2004) 70

## 6.8 Unilateral Mistake:

Unilateral mistakes occur when a party wrongly interprets the terms of contract. In this form of mistake it's assumed that the other party knew that the mistaken party has wrongly interpreted the contract terms. Unilateral mistakes in English contract law are quite common and can be as a result of mechanical miscalculation or business error. If the unilateral mistake is as a result of mechanical calculations, the courts may decide to uphold the contract as long as the other party does not take advantage of the mistake to breach the offer contract, especially by making the mistaken party enter into a contract they never intended to or that doesn't match their bargain. For a court to uphold a contract, they have to ensure that the mistake does not have much effect, positive or negative, on one of the concerned parties<sup>116</sup>. The case of *Hartog v Colin & Shields* [1939] 3 All ER 566 is an important English contract law case regarding a unilateral mistake. The defendant mistakenly offered to sell a large quantity of hare skins, at a price to be determined at a certain sum per pound, and the plaintiffs accepted the offer. In fact, they meant to offer them at a reduced price per piece. This meant that the price was roughly one third of what it should have been. The court held that the contract was voided because of this mistake. Hare skins were generally sold per piece and given the price the claimant must have realised the mistake.

If a unilateral mistake is as a result of a business error then, in most cases, the contract is terminated. Business error mistakes allow a party to agree to an offer that has been wrongly represented by the seller. An example of a business error mistake occurs when an advertisement contains content that a buyer considers to be a valid offer yet it was wrongly typed or communicated. As a result, an individual enters into a contract with the advertising company only to realise that the offer was invalid. As such, the company that made the business error is expected to pay for the injuries caused<sup>117</sup>.

A contract may become a nullity where a party is mistaken as to the identity of the person contracted with and the other party is aware of that mistake<sup>118</sup>. Where a mistake as to the identity of the other party to the contract is made, the contract will be deemed void if the identity of that

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<sup>116</sup> Melvin A. Eisenberg, 'Mistake in Contract Law' (2003) 91 California Law Review 1575, 1643

<sup>117</sup> Eric B. Rasmusen & Ian Ayres, 'Mutual versus Unilateral Mistake in Contracts' (1993) 22 Journal of Legal Studies 309, 343.

<sup>118</sup> Min Yeo Tiong, 'Unilateral Mistake in Contract: Five Degrees of Fusion of Common Law and Equity' (2004) 1. Singapore Journal of Legal Studies, 227, 240

person is central to the contract; a related case of mistaken identity is found in the case of *Shogun Finance v Hudson* [2003] 3 WLR 1371.

### **6.9 Mutual Mistake:**

Mutual mistakes in contract law development occur when all parties are mistaken about a particular fact in their contract<sup>119</sup>. This type of mistake occurs where the parties of contract are at cross-purposes over the contract's meaning. The two parties have entered into a contract in which both have mistaken the ideas. In this case, the contract is termed as invalid. Mutual mistakes result in nullification of the contract only if the mistaken idea is material. Restatement of the ideas can be used as a way of settling the contract. For a mistake to be termed as mutual there should have been mutual acceptance and agreement between the two parties. The court will consider independently what each party reasonably would have thought the other party was intending in the contract<sup>120</sup>.

The principles of mutual mistakes can be seen in the case of *Raffles v Wichelhaus* (1864) 2 H & C 906, where the plaintiff entered into a contract to sell 125 bales of cotton to the defendant. The goods were to be shipped from Bombay to Liverpool, on a ship called "Peerless". There were two ships named Peerless arriving from Bombay, one departing in October and another departing in December. *Wichelhaus* thought he had purchased the cotton arriving on the October ship, while the plaintiff thought he was contracting for the cotton on the December ship. When the December Peerless arrived, the plaintiff tried to deliver it, and the defendant refused to accept delivery of the cotton. The plaintiff sued for breach of contract and it was held that the contract was void because of a mistake.

### **6.10 Common Mistake:**

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<sup>119</sup> For example, A is offering one thing while B is accepting something else.

<sup>120</sup> Paul Richards (37) 252

A common mistake in English law is a mutual mistake where both parties have made a similar mistake concerning a particular fact. A common mistake in contract formation can occur as result of a mistake regarding a decision where the two parties have options to choose from but they both make a wrong decision. It can also be as a result of ignorance where the two parties choose an idea without knowing the true affairs of state of the idea they are creating a contract for<sup>121</sup>.

The mistake can concern either the existence of the subject matter, and where the subject matter of the contract does not exist the contract will be void, or its quality, at which point the contract will still be valid in English law. It can also involve a case where the contract transfers property from one person to another but the second person in fact already owns the property; if neither party was aware of this then the contract will be void<sup>122</sup>. The leading case on common mistakes is *Bell v Lever Brothers Ltd* [1932] AC 161.

The general English contract law mistake doctrine is readily grasped; it is the nuances that often prove vexing when the overarching legal objectives of certainty and clarity are considered<sup>123</sup>. The distinction between common and mutual mistakes is an example. Where the parties make the same mistake with respect to their intended contract (for e.g. a shared buyer/seller belief that a clock offered for sale is an antique, and not in fact a replica), their mistake is deemed 'common'<sup>124</sup>. A mutual mistake arises where the parties misunderstand the other's intentions and are left at cross-purposes. A common mistake reflects an enduring tension in English law between the respect for sanctity of contract (and associated freedom of contract principles) and the desire to give effect to reasonable commercial expectations of honest persons<sup>125</sup>. Since *Raffles v Wichelhaus*<sup>126</sup>, an overriding mistake doctrine mindset encouraged by the cases and academic commentaries is to pursue a reasonable contract interpretation before declaring the contract void as unenforceable<sup>127</sup>.

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<sup>121</sup> David Capper, 'Common Mistake in Contract Law' (2009) Singapore Journal of Legal Studies 457, 473

<sup>122</sup> Catharine MacMillan, *Mistakes in Contract Law* (Hart Publishing 2010) 19

<sup>123</sup> See David Coleman and Lucy Hawks, 'The great mistake' (2005) 16 P L C 12, 14.

<sup>124</sup> Distinctions generally discussed in P S Davies, 'Correcting mistakes: wither the rule in *Re Hastings-Bass*' (2008) C & P L 406, 412

<sup>125</sup> *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255, 257.

<sup>126</sup> (1864) 2 H&C 906.

<sup>127</sup> Catharine MacMillan (n122) 20

A common mistake has three potential legal outcomes. It can prevent a binding agreement from being consummated, where the parties' fail to reach consensus on essential matters. If invalid, they share an error with respect to an important contextual circumstance<sup>128</sup>. In the second instance, a contract may exist; the issue to be determined is whether it has been vitiated to any extent. Three potential remedies exist – the mistake goes to the 'root of the matter'<sup>129</sup>, sufficiently undermining the contract to render it void; the contract is voidable at the instance of either party, with rescission available; or the mistake is not sufficiently serious to warrant legal intervention<sup>130</sup>. *Great Peace Shipping* confirms that English contract law endorses an 'all or nothing approach' to these questions, which are consistent with the first and third remedies described<sup>131</sup>.

### **6.11 Mistakes and Frustration – an Overview:**

The event must be supervening, which did not exist at the time of conclusion of the contract. The relevant frustration event should be something which has happened after conclusion of the contract. If the event existed at the time of the conclusion of the contract, which the parties were unaware of, it is not regarded as a subject for frustration but instead would be classified as raising an issue regarding a mistake and the rules would then apply.

In contrast, the equitable frustration doctrine evolved as a judicial device to improve the otherwise rigorous common law enforcement of literal promises<sup>132</sup>. In *Lauritzen*, this philosophical underpinning is explained variously as the need to give effect to the demands of justice, to achieve a just and reasonable result, and to do what is reasonable and fair, "... as an expedient to escape from injustice where such would result from enforcement of a contract in its

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<sup>128</sup> Ibid 21

<sup>129</sup> The expression employed in *Kennedy v Panama, New Zealand and Australian Royal Mail Co.* LR 2 QB 580 at 588, and cited in numerous later cases, including *Kleinwort Benson v Liverpool City Council* [1999] 1 AC 953, to extend mistake to factual or legal mistakes.

<sup>130</sup> The now disavowed position taken from *Solle v Butcher* [1950] 1 KB 671.

<sup>131</sup> *Great Peace Shipping*, [72].

<sup>132</sup> *Chitty*, 23-007, 23-008.

literal terms after a significant change in circumstances”<sup>133</sup>. With these features in mind, the cases are examined in greater detail.

In *Great Peace Shipping Ltd.* the Court of Appeal explained a common mistake and its contractual consequences in refreshingly clear and succinct terms. The Court stated that a mistake sufficient to render the contract void must result in “impossible performance”<sup>134</sup>. It is suggested that ‘impossible’ has finite quality; where the mistake makes the contract merely difficult, or less financially unattractive, the contract will be upheld.

*Great Peace* specifically adopts the position by Steyn in *Associated Japanese Bank*<sup>135</sup> and the conclusion made is that for a mistake to vitiate a contract, it must render the subject matter “... essentially and radically different from the subject matter which the parties believed to exist”, as an extension of the principle that the law ought to uphold rather than destroy apparent contracts<sup>136</sup>. In *Kyle Bay*<sup>137</sup>, the Court of Appeal reflects how English appellate authorities coalesced around the *Great Peace* distinction and reaffirmed between the impossibility of performance, and all lesser circumstances<sup>138</sup>. Where a compromise position reasonably determined relative to the facts remained ‘performable’, it was thus distinct from the “... impossibility of a contractual venture”<sup>139</sup>.

The equitable purpose of frustration described above generates distinctly different outcomes than those yielded when mistake principles are operative. As reiterated in *Lauritzen*, frustration operates clinically and automatically to “... kill the contract and discharge the parties from further liability under it”<sup>140</sup>. This definitive frustration characteristic carries the corresponding limitation that its power is not “lightly invoked”, and its operation is narrowly limited and non-extendable<sup>141</sup>. In contrast to common mistakes shared by contract parties that *may* be sufficient

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<sup>133</sup> *J. Lauritzen AS v Wijsmuller BV (The Super Servant Two)*, [1990] 1 Lloyd’s Rep. 1.

<sup>134</sup> *Ibid*, [72] Lord Maltravers, [162], Lord Phillips.

<sup>135</sup> *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255.

<sup>136</sup> *Ibid*, 268E.

<sup>137</sup> *Kyle Bay Ltd v Underwriters Subscribing under Policy 019057/08/01* [2007] EWCA Civ 57.

<sup>138</sup> See also *Brennan v Bolt Burdon* [2004] EWCA Civ 1017.

<sup>139</sup> *Kyle Bay*, [59]; see also *Pitt v Holt* [2011] EWCA Civ 197, where a trustee’s mistake concerning a financial transaction will only be excused if the original trust was established on a mistaken premise.

<sup>140</sup> *J. Lauritzen AS v Wijsmuller BV*(n133)

<sup>141</sup> *Ibid*, see also *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547.

to establish absolute performance impossibility, an operative frustrating event must occur “... without blame or fault on the side of the party seeking to rely on it”<sup>142</sup>.

*CTI Group v Transclear SA*<sup>143</sup> provides a useful bridge between mistake and frustration doctrines. In *CTI*, the Court of Appeal held that a sale of goods contract could not be frustrated because it was impossible to perform<sup>144</sup>. In its confirmation of the very narrow boundaries within which frustration is permitted to operate, only where performance of the new contract would fundamentally differ from that originally contemplated is frustration invoked. Where a supplier chooses not to make goods available for shipment, thus rendering performance by the seller impossible, such a decision is not of itself sufficient to frustrate such contracts<sup>145</sup>. Only a ‘supervening event’ that renders the seller’s obligation performance impossible or “fundamentally different in nature” envisaged when the contract was made can suffice. In all other instances, the courts will hold a party to their promises if they choose, as a matter of contract freedom and party autonomy, to make an unqualified promise to another<sup>146</sup>.

*The Sea Angel* offers an additional compelling example of this firm doctrinal limit<sup>147</sup>. A 20-day vessel charter was not frustrated where vessel redelivery was the result of an unlawful three-month detention by port authorities<sup>148</sup>. One might argue that the parties to such a charter contract might reasonably expect port authorities to obey the law, thus rendering their unlawful action an external and sufficient frustration contract force. *The Sea Angel* suggests that the prudent party negotiating a contract where a potentially frustrating event is even remotely contemplated ought to expressly capture this risk within the contract terms.

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<sup>142</sup> See e.g. *Chitty*, 23-007

<sup>143</sup> [2008] EWCA Civ 856.

<sup>144</sup> Sale of Goods Act, 1979, s. 6

<sup>145</sup> *CTI*, [23].

<sup>146</sup> *Ibid*, [45]; See e.g. *Blackburn Bobbin v T.W. Allen* [1918] 2 KB 467.

<sup>147</sup> *The Sea Angel*, 559.

<sup>148</sup> *Ibid*, 567; see also the recent case of *Bunge SA v Kyla Shipping Co Ltd* [2012] EWHC 3522 (Comm).



## **CHAPTER SEVEN**

### **The Doctrine of Frustration of Contract in English law**

#### **7-1 Introduction**

This chapter will provide a wide-ranging overview, commentary and criticism on the doctrine of frustration. It will begin by examining the general concept of frustration, and its development over time and through case law. It will then turn to analysing the different reasons for which frustration may be claimed or not claimed, involving the analysis of various decisions of the courts and some academic criticism. It will also look in some detail at the limitations and narrow scope of the doctrine of frustration, and also discuss contractual parties' sometimes preferred alternatives, such as drafting force majeure clauses and hardship clauses, in endeavours centred on avoiding the harsh consequences of the doctrine of frustration. It will then conclude by examining the legal effects of the doctrine of frustration—both under old common law and under the new regime provided for by statute. Overall, this chapter aims to be an all-encompassing review of the very specific area of contract law, known as frustration. Relevant case law, applicable statutory authority<sup>1</sup> and pertinent academic comment is considered, integrated and challenged in arriving at conclusions concerning the current state of the law in this field.

#### **7-2 The Concept of Frustration of Contract**

Frustration is a doctrine of English common law relating to risk allocation in a given contract. It covers situations where a contract has been signed, and perhaps even part-performed when intervening events occurred, which renders the performance of the original contract impossible, illegal, or something radically different from that which was in consideration of the parties upon

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<sup>1</sup> Such as Law Reform (Frustrated Contracts) Act 1943.

entering into the contract.<sup>2</sup> In English law the first time, the word ‘frustrated’ appeared in statute when the law reforms (Frustrated Contract) Act 1943 was passed. The frustration was not defined by the Act but referred to it with impossibility of performance.<sup>3</sup> Lord Radcliffe defined the modern concept of frustration in *Davis Contractors Ltd vs. Fareham Urban District Council*:

...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.<sup>4</sup>

The courts have likened the doctrine to that of mistake, where a mistake occurs before the contract is signed and a frustrating event occurs afterwards. Lord Phillips stated that both the mistake and frustration doctrines were based on ‘a rule of law under which, if it transpires that one or both of the parties have agreed to do something which it is impossible to perform, no obligation arises out of that agreement’.<sup>5</sup> Mistake and frustration are therefore interlinked aspects of contract law, which allows for the conclusion or dissolution of an agreement when it is clear that it has become something different from that which was intended originally.

EwanMcKendrick gave more details in the definition of frustration, stating that ‘a contract is frustrated where, after the contract was concluded, events occur which make performance of contract impossible, illegal or something radically different from that which was in the contemplation of the parties at the time they entered into the contract’.<sup>6</sup>

Frustration is a very specific doctrine, and will only apply in certain circumstances. Notably, courts have also very narrowly interpreted frustration cases, making it difficult to claim that a contract is frustrated. It is known as a residual doctrine; therefore, the doctrine cannot apply where parties have made express provision in the contract for the intervening event that occurs subsequently. If one party causes the frustrating event, they will be barred from relying on the

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<sup>2</sup> Jill Poole, *Textbook on contract law* (8th edn Oxford University Press 2006) 470

<sup>3</sup> See The Law Reform (Frustrated Contracts) Act 1943 section 1 ‘Where a contract governed by English law has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of this section shall, subject to the provisions of section two of this Act, have effect in relation thereto’.

<sup>4</sup> *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 .at p 728

<sup>5</sup> *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407. At p 73

<sup>6</sup> Ewan Mckendrick, *Contract law* (8<sup>th</sup> edn Palgrave Macmillan 2009) 245

doctrine of frustration. The doctrine will also not apply where the intervening event was a risk that was foreseeable but not provided for by the contract.<sup>7</sup>

It is important to recognise that the doctrine of frustration is not used to relieve parties of 'bad bargains' made. A reduction in prices or bad currency exchange, for example, will not frustrate a contract as the doctrine is 'not likely to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains'.<sup>8</sup> This is perhaps a significant reason for the restrictive approach to the doctrine of frustration as the courts are clearly wary of parties attempting to use the doctrine in order to escape their liabilities under a contract when the situations become unfavourable to them.

If the doctrine of frustration is argued successfully, the contract will then be brought to an immediate end. This is the only real decision-making power the court holds with regards to a remedy; this leaves parties free from obligations from the date the contract was deemed ended, although they will still be required to perform obligations due before this date. Of course, in certain situations, such a discharge of contract may be as unsatisfactory as holding the parties to the contract.<sup>9</sup> Treitel argues that it would be useful if the courts had the power to modify the contract where necessary, which could result in a more pleasing outcome for both parties. Treitel also argues that there is another problem associated with the law of frustration, and that is that the allocation of risk often being unsatisfactory. As mentioned, the parties will still be bound by the obligations that occur before the date the contract is ended, and one or both parties may have gone to considerable expense. Treitel argues that the loss suffered by the parties should be better apportioned, and that the measures contained in the Law Reform (Frustrated Contracts) Act 1943 are 'general but limited'.<sup>10</sup> Essentially, therefore, it would seem that frustration is a limited and not always fair doctrine, which is commonly used as a last resort.

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<sup>7</sup> Jill Poole, *Textbook on contract law* (n 2) 472

<sup>8</sup> Lord Roskill in *Pioneer Shipping v BTP Tioxide* [1982] AC 724.

<sup>9</sup> G H Treitel, *the Law of Contract*. (12<sup>th</sup> ed London. Sweet & Maxwell 2007) 869.

<sup>10</sup> *ibid* 869.

### 7-3 Development of Doctrine of Frustration of Contract in English Law

The doctrine of frustration was developed in the mid-19<sup>th</sup> Century, and prior to this there lacked a general doctrine with the ability to excuse parties from the performance of a contract. The law was reluctant to excuse a party from the performance of a contract even in cases where supervening events rendered that performance difficult or impossible. The rationale of this rule was that the party could always make express provision for unforeseen events, and if the party did not do so, he should be bound by his contractual obligation. This is known as the 'absolute contracts'.<sup>11</sup> The case of *Paradine vs. Jane*<sup>12</sup> was the leading case asserting this, and concerned rent due on a piece of land, which the defendant had not paid. The defendant argued that he had not been able to take possession of the land because of the action of an enemy army; Prince Rupert was commander of the armies of his uncle, King Charles I. Forces on both sides often looted the estates of the nobles for the purpose of gaining supplies. However, the courts showed no sympathy, and declared that the contract was still enforceable and that the defendant still owed rent. The court held that, if the defendant wanted to be excused from the contract in certain circumstances, those circumstances should have been accounted for in the contract. This approach fails to recognise that some events are simply unforeseeable, and, whilst others may be remotely possible, in order to provide for eventualities should these numerous possible events occur is ludicrous as the drafting of such a contract would clearly be impractical.<sup>13</sup>

At the time, the courts were very much inclined to leave contracting parties and their contracts to themselves, and felt that it was not the role of the court to interfere with such contracts. This goes to explain to some degree the apparent reluctance of the court in these times to forge a doctrine such as frustration. Eventually, however, the courts became more disposed to assisting parties in such situations, and the law began to change with the case of *Taylor vs. Caldwell*,<sup>14</sup> which was a case concerning the hire of a music hall for a concert for a duration of four days. The music hall burnt down before the use, and the plaintiffs were left without a concert location and sued the hall owners for the recovery of their loss. The court held that the contract could be excused,

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<sup>11</sup>L Koffman and E Macdonald, *The law of contract*. (6<sup>th</sup> edn Oxford. Oxford University Press 2007)519.

<sup>12</sup>*Paradine v Jane* (1647) Aleyn 26.

<sup>13</sup>Ewan Mckendrick, *Force majeure and frustration of contract* (2nd edn London. Lloyd's of London Press LTD 1995) 42.

<sup>14</sup>*Taylor v Caldwell* (1863) 3 B & S 826.

rather specifically by stating that the existence of the hall was an implied term of the contract. Judge Blackburn stated:

The parties must from the beginning have known that it could not be fulfilled unless... some particular specified thing continued to exist.

It was decided that the implied term was so obvious that there was no need for it to be mentioned specifically in the contract, and thus, by implying such a term in the contract to enable frustration to occur, the courts were only confirming the intentions of the parties at the time of contracting. The implied term theory relied on the ‘officious bystander test’,<sup>15</sup> whereby the parties would react with an ‘oh, of course’ response if told that a term should have been in the contract.<sup>16</sup> Undoubtedly, this was a method of enabling the courts to interfere with these frustrated contracts at a time where there was a belief in non-interference with contractual relations.<sup>17</sup>

Once created, the doctrine of frustration then expanded somewhat, eventually encompassing situations where performance was impossible for other reasons, and even where the purpose of the contract was held to be frustrated. Indeed, the doctrine expanded so much that the concept of ‘implied term’ frustration became a fallacy.<sup>18</sup> This was confirmed by Lord Radcliffe in *Davis Contractors*.

It may be considered that frustration—at least in most cases—depends not on adding any implied term but rather on the true construction of the terms included in the contract and read in the light of the nature of the contract and of the relevant surrounding circumstances when the contract was made.<sup>19</sup>

This approach, often known also as the ‘radical change in obligations’ approach, recognises that the implied term approach had become artificial, and allowed courts to look at the intervening event in the light of the contract to assess whether performance was impossible or radically

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<sup>15</sup> It is technique for determining if an unexpressed condition was implied at the time a contract was drawn. In this test, an arbitrator or investigator tries to ascertain what would have been the reply of the contracting parties if a nosy-bystander had then asked them, ‘Do you intend to include the term ‘x’ in the contract?’ If the parties, under the circumstances prevailing at that time, would have answered ‘Yes, definitely!’ then the term ‘x’ is assumed to be an implied term. However, a term is not deemed to be implied simply because it seems logical or reasonable under the current circumstances.

<sup>16</sup>See *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, it is well known for MacKinnon LJ's decision in the Court of Appeal, where he put forth the ‘officious bystander’ formulation for determining what terms should be implied into agreements by the courts

<sup>17</sup> Chris Peters, The implication of terms in fact (2009) 68 The Cambridge Law Journal 513,515

<sup>18</sup>H Beale, W Bishop and M Furmston, *Contract: cases & material*. (5<sup>th</sup> edn Oxford University Press 2007) 464

<sup>19</sup>See *Davis Contractors Ltd. v Fareham Urban District Council* [1956] AC 696. P 720

different in nature.<sup>20</sup> Under the new approach, there is no need to attempt to infer an implied term into a contract in order to justify the use of the frustration doctrine.<sup>21</sup>

Whilst modern courts have criticised the implied term foundation of the doctrine of frustration<sup>22</sup>, nevertheless there has been no real annihilation of the theory altogether, and Lord Wilberforce has declared that the theory has simply blended into the modern test. Moreover, there are still grounds for frustration based on an implied term theory, but usually the term concerned will have been implied by law rather than fact.<sup>23</sup>

After this clear widening and expansion of the doctrine of frustration, there is arguably less use of the doctrine. Treitel explains the decline in use as being down to several reasons, namely the courts' reluctance to excuse bad bargains, and also that modern contracts make their own provisions in terms of dealing with obstacles to performance. Nevertheless, clearly the doctrine is still very important where it is necessary.<sup>24</sup>

### 7.3.1 The Effect of Frustration on Absolute Contract in English Law

The doctrine of absolute contract is expressed clearly in *Paradine vs. Jane*,<sup>25</sup> and is this doctrine that has held the development of the doctrine of frustration for so long. As discussed previously, courts were often reluctant to interfere in private contractual relations, but rather preferred to hold parties to their contracts wherever possible. A contract was considered 'absolute' and there was no arguing that external factors could alter performance unless they were provided for in the contract:

When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.<sup>26</sup>

If this doctrine, where all contractual obligations had to be honoured in nearly all circumstances, had been held to have applied in the *Taylor vs. Caldwell* case, the defendants would have been

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<sup>20</sup> The test was confirmed in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675

<sup>21</sup> Leon E. Trakman 'Frustrated Contracts and Legal Fictions' (1983) 46 *The Modern Law Review* 39-55

<sup>22</sup> See Lord Radcliffe in *Davis Contractors Ltd. v Fareham Urban District Council* [1956] AC 696.

<sup>23</sup> *Liverpool City Council v Irwin* [1977] A.C. 239

<sup>24</sup> Treitel, *The Law of Contract* (n 9) 927

<sup>25</sup> *Paradine v Jane* (1647) Aleyn 26

<sup>26</sup> *ibid* 27

held as liable for the loss to claimants, even though the hall had burnt down through no fault of their own. This certainly would have been a most unfair decision, and clearly there was a need for an alternative to this doctrine. The doctrine of absolute contract was not completely encompassing; there were some extreme exceptions to the rule, which allowed exceptions in extreme circumstances.<sup>27</sup> The principle would likely not apply if one party died or also if there were an illegality involved.<sup>28</sup> Whilst these would not apply in the majority of circumstances, the sheer existence of them paved the way for Blackburn in *Taylor vs. Caldwell* to create the doctrine of frustration, and assisted him in laying its foundation.

Whilst the absolute contract rule was considered too rigid, as discussed above, subsequently leading to the development of the doctrine of frustration, the doctrine of absolute contracts does still apply in limited circumstances. For example, it will still apply where it would have been reasonable to provide for the intervening event, usually because it was foreseeable due to the nature of the contract.<sup>29</sup> Today, this doctrine is based on the premise that one party guarantees that they will perform the contract irrespective of all potential risks and, although uncommon, there are still contracts agreed on this basis.<sup>30</sup> Therefore, the case of *Paradine vs. Jane* has not been overruled as such; however, it is now recognised that it is limited to ‘positive and absolute’ contracts, and not all contracts will be of this type. Indeed, these types of contract are now very much an exception in modern contract law.<sup>31</sup>

#### **7.4 Supervening and Antecedent Events: Related to frustration or mistake**

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<sup>27</sup> Treitel, G. H, *Frustration and force majeure* (2ed edn Sweet & Maxwell Ltd 2004) 51.

<sup>28</sup> *Brewster v Kitchell* (1961) 1 Salk.

<sup>29</sup> Knutson, Robert. Common law development of the Doctrines of Impossibility of Performance and Frustration of Contracts and their use and application in long term concession contracts. Paper presented at the ‘Meeting Business Needs in the Presented at the IBA, Committee T, Berlin, October 22, 1996. See [http://www.robertknutson.com/downloads/Imp\\_Frust\\_Paper\\_IBA1096.pdf](http://www.robertknutson.com/downloads/Imp_Frust_Paper_IBA1096.pdf) access in 12/5/2012.

<sup>30</sup> See *Eurico SpA v Philipp Brothers* [1987] 2 Lloyds Rep 215

<sup>31</sup> Jill Poole, *Textbook on contract law* (n 2) (n2) 472

There is a difference between events that occur before the contract is agreed and events that occur afterwards, with such events having an effect on the continuation of a contract. Generally, frustration will only be concerned with events that occur after the contract is agreed. The contract is agreed and has begun, and then an event occurs that frustrates the contract, causing the contract to come to an end.

If the intervening event actually occurred before the contract was agreed, this will usually not amount to frustration; rather, the contract will be considered void for mistake. This is because the unknown event that occurred before the creation of the contract made the conditions radically different, causing the contract to be formed upon conditions that were not in fact truly a mistake. Whilst the two doctrines are interlinked and have a common ground, there is a very important difference between the two: with mistake the contract will be held to be void *ab initio*,<sup>32</sup> meaning that the contract is to be considered as if it was never entered into; with frustration, the contract is held to have existed but will be ended from the date of the frustrating event. In cases of coronation where the contract is discharged by frustration, such as in *Krell vs. Henry*,<sup>33</sup> the cancellation of the coronation procession causes the contract for both parties to be frustrated because the event occurred after the formation of the contract. However, in one of these cases, namely *Griffith vs. Brymer*,<sup>34</sup> a room was rented to view the coronation procession. The legal treatment was different because in this case the cancellation was unknown to both parties, who entered into the contract when the processions had already been cancelled. The contract was found void for mistake.<sup>35</sup>

Issues of supervening and antecedent events are also considered when considering the effects of illegality upon a contract. In line with the above principles, if before the contract was agreed there was actually a law or prohibition that rendered the performance of the contract illegal, this would not amount to frustration but would ultimately render the contract void for illegality. However, if the law that renders performance illegal comes into force after the contract was made, this will be a supervening event and can amount to frustration. In these cases, it is said that

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<sup>32</sup> It is a Latin term meaning ‘from the beginning’

<sup>33</sup> *Krell v Henry* [1903] 2 KB 740

<sup>34</sup> *Griffith v Brymer* (1903) 19 TLR 434

<sup>35</sup> Christoph Brunner, *Force majeure and hardship under general contract principles* (Kluwer Law International 2009) 232



neither party could have assumed the risk that the contract would become illegal; therefore, it is simply terminated owing to frustration.<sup>36</sup>

The case of *Avery vs. Bowden*<sup>37</sup> concerned supervening illegality. The contract was for cargo to be picked up from Odessa. However, due to the Crimean war, a subsequent law was passed prohibiting the loading of cargo at an enemy port. It was therefore found that the contract had been frustrated due to supervening illegality. Had this law been passed without the parties knowing prior to the agreement of the contract, the contract would likely have been void for mistake<sup>38</sup> rather than frustrated.

## 7.5 Foreseen and Foreseeable Events and the Application of Frustration

Ewan Mckendrick says, 'given that a frustrating event is a supervening, unforeseen event, the doctrine ought logically not to apply to an event which is within the contemplation of the parties at the time the contract is concluded'.<sup>39</sup> Jill Poole states that frustration 'only applies to contracts affected by events which have not been foreseen, in the sense that they have not been expressly provided for in the contract'.<sup>40</sup> Foreseeability not only includes elements that have been foreseen, but also those elements that a reasonable man should have foreseen. It will be for a court to decide whether an event which was unforeseen by the parties should have been foreseen by a reasonable man. This test for frustration is confirmed by Vaughan Williams L. J. in *Krell vs. Henry*:

The test seems to be whether the event which causes the impossibility was or might have been anticipated<sup>41</sup>

Generally, therefore, it is considered that, if the supervening event was foreseen by the parties or even by one party, this would bar the use of the frustration doctrine. In the case of *Walton Harvey Ltd vs. Walker & Homfrays Ltd*,<sup>42</sup> hotel owner entered into a contract with an advertising agency, enabling them to display advertising signs for seven years on the roof of the hotel. The

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<sup>36</sup> Richard Taylor and Damien Taylor, *Contract Law* .( 3ed edn Oxford University Press 2011) 257

<sup>37</sup> *Avery v Bowden* (1856) 119 E.R. 647

<sup>38</sup> We have discussed the doctrine of mistake in detail in the previous chapter.

<sup>39</sup> EwanMcKendrick, *Contract Law* (n 6) 251

<sup>40</sup> Jill Poole, *Textbook on contract law* (n 2) 483.

<sup>41</sup> *Krell v Henry* [1903] 2 KB 740 p. 752.

<sup>42</sup> *Walton Harvey Ltd v Walker & Homfrays Ltd* [1931] 1 Ch 274.

hotel was then compulsorily purchased by the Local Authority and demolished. The advertising agency claimed breach of contract, and the hotel argued the contract had become frustrated. The contract was not frustrated as the hotel owners were aware that the Local Authority was looking to purchase the hotel at the time at which they had entered into the contract.

If an event is actually foreseen by the parties and yet they make no provisions for it in the contract, it can be, and is usually, assumed that the parties have assumed the risk of the event occurring, thus meaning the contract will not be held as frustrated. On the same lines, if the intervening event is mentioned and provided for in the contract, frustration will not usually apply, and the contract should continue. Usually, frustration will not apply where parties have envisaged such an event occurring and have made contractual provisions for it.<sup>43</sup> This is all evidence of the narrow construction of the doctrine of frustration.

However, there are certain circumstances where frustration may still apply in the case of a foreseen supervening event. A supervening illegality will usually still frustrate the contract, despite the fact that the possible future illegality could have been foreseen. There have also been instances where the parties to a contract have foreseen a possible frustrating event but disagreed on how to apportion the risk, and therefore left this out of the contract, presuming that lawyers would 'sort it out' if necessary, as in the Suez Canal case where the parties were aware of, and had made suggestions to deal with, the probable closure of the Suez Canal; at the time of contract, however, there were no express stipulations.<sup>44</sup> Failure to come to a subsequent agreement may well result in a decision that the ending of the contract due to frustration is necessary.

Indeed, in 1964 Lord Denning declared that the foundation of the frustration doctrine was not necessarily based upon the notion that the frustrating event was unforeseeable:

It has frequently been said that the doctrine of frustration only applies when the new situation is 'unforeseen' or 'unexpected' or 'uncontemplated' as if this was an essential feature. But it is not so.<sup>45</sup>

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<sup>43</sup> This is however taken on a case by case basis c.f. *Bank Line Ltd v A Capel & Co* [1919] A.C. 435.

<sup>44</sup> *Ocean Tramp Tankers Corporation v V/O Sovfracht (The Eugenia)* [1964] 2 QB 226 and also on foreseen risks not provided for: *W.J. Tatem Ltd v Gamboa* [1939] 1 KB 132.

<sup>45</sup> *The Eugenia* ibid 239.

In this case, Lord Denning opens up the possibility of a slight widening of the doctrine of frustration by declaring unforeseeability not a strict pre-requisite to a claim. There is sense in this approach, and it follows that some events may be highly unlikely to occur, although this is not completely unforeseeable. Of course, foreseeability and probability are extrinsically linked but essentially different things: just because an event is foreseeable does not mean it is probable, and of course it is impractical for parties to provide for every considered eventuality, especially when such eventualities only have a very remote chance of occurring.<sup>46</sup> In *Edwinton Commercial Corporation vs. Tsavlins Russ*,<sup>47</sup> the Court of Appeal held that foreseeability should be used merely as an aid to construction:

In a sense, most events are to a greater or lesser degree foreseeable. That does not mean that they cannot lead to frustration. Even events which are not merely foreseen but made the subject of express contractual provision may lead to frustration where an event...lasts for so long as to go beyond the risk assumed under the contract and to render performance radically different from that contracted for.<sup>48</sup>

The court held that the less foreseeable the supervening event, the more likely a result of frustration; however, the fact that an event was foreseeable was not a complete bar to the operation of the doctrine. This is another example of the continued development of the frustration doctrine and its ability to adapt itself to modern contracts and purposes. It provides a welcome breadth to a very narrowly interpreted doctrine.<sup>49</sup>

## 7.6 Self-Induced Frustration

If the frustration is procured by, or the fault of, either party to the contract, the party at fault cannot thereafter assert that the contract has been frustrated. Self-induced frustration is not, in the eyes of the law, frustration. It is submitted that it is entirely apposite that the doctrine of frustration does not protect a person whose own breach is actually the frustrating event. A case in point is *Ocean Tramp Tankers Corp vs. V/O Sovfracht (The Eugenia)*<sup>50</sup>. Here, a charterer already

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<sup>46</sup> Treitel, *The law of contract* (n9) 966.

<sup>47</sup> *Edwinton Commercial Corporation v Tsavlins Russ (Worldwide Salvage & Towage) Ltd* (The Sea Angel). [2007] EWCA Civ

<sup>48</sup> *Edwinton Commercial Corporation v Tsavlins Russ (Worldwide Salvage & Towage) Ltd* (The Sea Angel) 547.

<sup>49</sup> Pavis Oudhton, *Sourcebook on contract law*. (Cavendish Publishing Lit2000) 311.

<sup>50</sup> [1964] 2 QB 226.

in breach of contract ordered a ship to steam into a war zone, where the ship was immediately detained. It was held by the court that the charterer could not thereafter rely on the fact of the ship's detention as a ground for frustration of contract. That said, deliberate failure to perform a condition precedent may not constitute an act of self-induced frustration *per se*. The court will examine the matter on a case-by-case basis in accordance with the proper construction of the contract. A negligent act by the defendant may well amount to self-induced frustration because such an event is not altogether outside the control of the defendant; indeed, he is the (albeit unintentional) author of it (see, *inter alia*, *Joseph Constantine Steamship Line Ltd vs. Imperial Smelting Corp Ltd*<sup>51</sup>).

In *Maritime National Fish Ltd vs. Ocean Trawlers Ltd* [1935],<sup>52</sup> the respondents were the owners of a ship (the *St Cuthbert*) that had been chartered by the appellants. The ship was fitted with, and could only operate with, a type of narrow-mesh fishing net known as an 'otter trawl'. When the charterparty was renewed, both parties knew it was illegal to use an otter trawl without a government licence.<sup>53</sup> The appellants owned five trawlers and applied for five licences; only three licences were granted, and the appellants were free to choose which of their five ships would be covered. They deliberately excluded the *St Cuthbert*, given the free choice to include it. They were sued for the charter fee, their defence being that the charterparty was frustrated because it would be illegal to fish with the *St Cuthbert*. Unsurprisingly, the court held that the contract had not been frustrated because the allegedly 'frustrating' event had been self-induced by the appellants. In other words, the absence of the licence had been caused by the appellants' own actions, and could not therefore be deemed a frustrating event. Accordingly they were liable to pay for the hire.<sup>54</sup>

In *J Lauritzen AS vs. Wijsmuller BV (The Super Servant Two)* [1989],<sup>55</sup> Hobhouse J sought to define self-induced frustration as a 'label' that has been employed by the courts to describe those situations in which one party has been held by the courts not to be entitled to treat himself as discharged from his contractual obligations. Hobhouse asserted that frustration is self-induced where the alleged frustrating event was caused by the breach or the anticipatory breach of

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<sup>51</sup> [1942] AC 154.

<sup>52</sup> [1935] AC 524.

<sup>53</sup> Use of such nets is restricted on environmental grounds because the fine mesh catches small, immature fish.

<sup>54</sup> Keenan D., *Advanced Business Law*, (11<sup>th</sup> ed., Pearson, Harlow, 2000) 219.

<sup>55</sup> [1989] 1 Lloyd's Rep 148.

contract by the party claiming frustration, or where an act of the party claiming frustration broke the chain of causation between the alleged frustration and the event, making performance impossible. Hobhouse also concurred with the court in *Joseph Constantine Steamship Line Ltd vs. Imperial Smelting Corp Ltd* [1942]<sup>56</sup> in including a situation where the alleged frustrating event was not a supervening event and not altogether outside the control of the parties within the ambit of self-induced frustration.<sup>57</sup>

Ultimately, this case reached the Court of Appeal in *J Lauritzen AS vs. Wijsmuller BV (The Super Servant Two)* [1990].<sup>58</sup> The defendants were contracted to transport a drilling rig for the claimants by sea. The defendants had two vessels capable of doing this work (the *Super Servant One* and the *Super Servant Two*). The contract left the choice of vessel to the defendants. The *Super Servant Two* sank before the contract was performed. Prior to the sinking the defendants had decided to use that ship to transport the claimants' drilling rig and the *Super Servant One* had been contracted to do another job.<sup>59</sup>

It was held that the contract had not been frustrated by the sinking of the *Super Servant Two*. Upon the sinking of the ship the defendants had still been free to perform their contract with the claimants by using its sister ship, the *Super Servant One*. In the Court of Appeal, Lord Bingham held that frustration should not:

‘depend on any decision, however reasonable and commercial, of the party seeking to rely on it.’

The *Super Servant two* case is one of the leading cases in this field, it is submitted, because it showcases the narrow confines and strict limitations within which the doctrine of frustration is permitted to operate. It also highlights the considerable advantages that may be provided by an appropriately drafted *force majeure* clause in a contract: *Jackson vs. The Union Marine Insurance Co Ltd* (1874).<sup>60</sup> The *Super Servant Two* decision confirms that, if a contracting party wishes to insulate himself against the potential that he may be held to perform his obligations within a broader range of circumstances and eventualities, he must bargain (at the stage of contract negotiation) for the insertion of a hardship, intervener or *force majeure* clause because

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<sup>56</sup> [1942] AC 154.

<sup>57</sup> Mckendrick, *Contract Law* (n 6) 262.

<sup>58</sup> [1990] 1 Lloyd's Rep 1.

<sup>59</sup> MacIntyre E., *Business Law*, (5<sup>th</sup> ed., Pearson, Harlow, 2010) 214.

<sup>60</sup> (1874) LR 10 CP 125.

the frustration doctrine will be narrowly construed, and any element of self-inducement will vitiate its operation in practice.<sup>61</sup>

## 7.7 The Burden of Proof of Frustration

The general rule in English civil law is that he who asserts and seeks to rely upon a point of evidence must prove it (and to the standard of the balance of probability).<sup>62</sup> As the House of Lords confirmed in *Davis Contractors Ltd vs. Fareham Urban District Council*,<sup>63</sup> which provides one of the classic statements of the modern law of frustration, the party seeking to claim that a contract has been frustrated owes the burden of proofing the contention. In *Davis Contractors Ltd* Lord Radcliffe held that:

‘frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do’.<sup>64</sup>

In essence, therefore, the party seeking to assert frustration of contract is under a burden to prove all the individual elements of the foregoing definition on the balance of probabilities. Lord Reid added in *Davis Contractors Ltd*:

‘there is no need to consider what the parties thought or how they or reasonable men in their shoes would have dealt with the new situation if they had foreseen it. The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end’.<sup>65</sup>

Therefore, the party seeking to assert frustration must also prove to the required standard that the contract is not wide enough in its terms to provide for the new circumstances.<sup>66</sup> The same party is under a burden to prove that the allegedly frustrating event significantly changes the very nature of the outstanding contractual rights and/or obligations (not merely their difficulty or expense) from what the parties could reasonably have contemplated at the point of the contract’s

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<sup>61</sup> Mckendrick, *Contract Law* (n6) 264.

<sup>62</sup> Slapper G. and Kelly D., *The English Legal System (2012-13)*, (13<sup>th</sup> ed., Routledge, Abingdon, 2012), p9.

<sup>63</sup> [1956] AC 696.

<sup>64</sup> *Ibid*, at p729.

<sup>65</sup> *Ibid*, at p721.

<sup>66</sup> Ewan Mckendrick *Contract Law: Text, Cases and Materials*, (3<sup>rd</sup> ed., Oxford University Press, Oxford 2008) 733.

execution: see, *inter alia*, *National Carriers Ltd vs. Panalpina (Northern) Ltd* [1981]<sup>67</sup> (noting the comments of Lord Simon of Glaisdale at p. 700 in particular).

## 7.8 Prospective Frustration

Prospective frustration deals with events that occur which are thought will probably eventually bring about the frustration of a contract, albeit with such events having not made this a certainty yet. Use of this claim enables frustration to be claimed prior to any real interfering or seriously interfering event having occurred on the premise that such an event is highly likely to occur. Generally, the effect of the events is determined at the time that they occur, rather than assessing how they eventually actually affect performance. It is felt that rights should not be held ‘indefinitely in suspense’;<sup>68</sup> therefore, where such intervening events are likely, parties should be allowed to apply for frustration as soon as possible instead of waiting for the events to unfold as predicted.

Inevitably, this will lead to cases where frustration is upheld, although the events panned out in such a way that the performance of the contract was perfectly possible. This was the case in *Embiricos vs. Sydney Reid & Co*<sup>69</sup> where Greek ships were contracted to voyage through the Dardanelles. However, war broke out between Greece and Turkey, and it was therefore held that the contract was frustrated due to the entrapment of the ships in passage. However, very unexpectedly Turkey allowed such ships an ‘escape period’, meaning that, had the contract been permitted to continue, it would have been capable of performance. This is clearly a unique situation, where an unexpected decision altered what was considered to be a gloomy prospective situation for the contract.

The usual approach is that the intervening event is a kind that, in a reasonable view, will have a significant affect upon the performance of the contract, making performance impossible. If it is not reasonable to hold such an assumption because there is some question as to whether or not the intervening event will end up having a massively detrimental effect upon the contract, it is unlikely the prospective frustration rule will be allowed to apply at the start when the event is

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<sup>67</sup> [1981] AC 675.

<sup>68</sup> See Treitel, *the Law of contract* (n 9) 952

<sup>69</sup> [1914] 3 KB 45.

known; rather, it may apply after the passage of some time, namely when the impact of the event is able to be better assessed. This does mean that such a claim will have to wait until the events are over, but just until a reasonable person would be able to determine that it would be highly likely to interfere with performance.<sup>70</sup>

In such situations, the date of frustration is not necessarily the date when the intervening event occurred but will usually be the date upon which it was deemed that the event would have a high chance of frustrating the contract. This is exemplified in a series of cases concerning ships detained during the Gulf War.<sup>71</sup> At first it was thought that the war would be over swiftly; when it became apparent that it would continue, these contracts were held to be frustrated. The date of frustration was deemed to be as soon as ‘sensible prognosis of the commercial probabilities’ was made, which essentially meant the date that it was realised that the war would continue for so long as to prevent the continuation of the ship’s services. Likewise, the same was deemed to be the case in situations of employment. In *Notcutt vs. Universal Equipment Co (London) Ltd*, an employment contract was deemed not terminated on the date an employee had a heart attack but rather on the date it was determined that the individual would not be returning to work.<sup>72</sup>

## 7.9 Frustration of Purpose

Frustration of purpose occurs where performance of the contract is still a possibility, but where such performance would be completely different to what the parties had originally imagined. Precisely defined, frustration of purpose is to be distinguished from the concept of impossibility or impracticability of performance. In a true case of frustration, it is not that either the performance of contract has become impossible or significantly more difficult than originally contemplated; rather, the party seeking discharge of contract on frustration grounds can still do that which the contract requires, but no longer has the need to do so which originally induced its

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<sup>70</sup> Treitel, , *Frustration and force majeure* (n27) 401

<sup>71</sup> *The Evia (No 2)* [1983] 1 AC 736; *The Wenjiang* (no 2) [1983] 1 Lloyd’s Rep 400; *The Chrysalis* [1983] 1 WLR 1469.

<sup>72</sup> [1986] 1 WLR 641.



participation in the bargain.<sup>73</sup> It means that it is still possible for the contract to be performed but there is no longer the existence of the purpose of contract.

Frustration of purpose is narrowly applied in English law because the courts will always attain an interpretation to overcome any minor supervening obstacles (i.e. diffraction).<sup>74</sup> As McKendrick argues, 'the courts do not wish to provide an escape route for whom the contract has simply become a bad bargain'.<sup>75</sup> The consequence is that frustration will not simply occur from a change of circumstances; rather, there must be an act that makes the foundations of the contract to fall away.<sup>76</sup> The consequence of this is that there has to be such a change of circumstances that is so significant that the courts cannot overcome the obstacle through its re-interpretation in the commercial context.<sup>77</sup>

The initial and exemplified case in frustration of purpose is called 'coronation case' *Krell vs. Henry*,<sup>78</sup> which illustrates when this ground can be used, concerned contracts for the hire of rooms that would be overlooking the coronation procession of King Edward VII of United Kingdom, which unfortunately was subsequently cancelled due to the king's illness. The contracts were held to have been frustrated because, although the rooms could still have been hired, there would of course be no procession to watch, and the view of the procession was the fundamental purpose of the contract. In addition, the court also noted that the doctrine of 'impossibility' could not be applied in this case as it would not have technically been 'impossible' for the lessee. The ruling of Vaughan Williams provides that the basis of frustration on purpose is when the purpose of the contract becomes impossible,<sup>79</sup> meaning that the primary purpose of the contract has to be frustrated as opposed to a secondary requirement that can be struck out by the courts.

The common element of frustration in the *Krell* case is not to see the Derby Day,<sup>80</sup> but the enhanced price associated with the contract. The consequence is a narrow interpretation of a

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<sup>73</sup> Nicholas Weiskopf, 'Frustration of Contractual Purpose-Doctrine or Myth' (1996) 70 *St. John's Law Review* 272

<sup>74</sup> McKendrick, *Contract Law* (n 6) 259

<sup>75</sup> *Ibid*, p 259

<sup>76</sup> Gordley, J 'Impossibility and Changed and Unforeseen Circumstances' (2004) 52 *Am. J. Comp. L.* 513, 522-

<sup>77</sup> *Ibid*, 523

<sup>78</sup> *Krell v Henry* [1903] 2 KB 740

<sup>79</sup> McKendrick, *Contract Law* (n 6)259

<sup>80</sup> Derby Day is example as Vaughan Williams LJ in suggested *Krell v Henry* the case of a person who had contracted to take a cab at an enhanced price to take him to Epsom on Derby Day. For some reason the race was

common foundation of the contract.<sup>81</sup> The result of this is that *Krell* is not commonly followed; rather, it is distinguished from.<sup>82</sup> In actual fact, during the recent case of *North Shores Ventures vs. Anstead Holdings Ltd*,<sup>83</sup> it was maintained that the narrow approach of *Krell* should be maintained in the application of frustration of purpose. Thus, the question centres on how to determine frustration of purpose. The basis of the *Krell* application is that the contract has to become fundamentally different to the original intentions of the parties.

In these cases, the contract specifically mentions the procession; therefore, although the plaintiff was the hirer of the rooms suing for the loss of rent received, surely the defendants could have claimed for the loss of the procession as this was what the plaintiff had advertised? In declaring the contracts frustrated, the court recognised that neither party had assumed the risk that the procession would be cancelled; therefore, it was fairer to one party to hold the contract frustrated.<sup>84</sup>

These cases are often compared with that of *Herne Bay Steam Boat Co vs. Hutton*,<sup>85</sup> where there was a contract for the hire of a boat to look at the king's review of the Navy and a cruise of the fleet. The king's review was cancelled because of his illness; thus, the review would not take place, although it was still possible to cruise around and look at the fleet. The court therefore held that that contract had not been frustrated. This decision rests upon the fact that the purpose of the contract was for the hire of a boat and not solely for the purpose of watching the king's review of the Navy. The court maintained that the cruise would have been possible without the viewing of the review because the fleet was still in the harbour.<sup>86</sup> Clearly, the purpose behind the agreement of the contract is the key to claiming frustration under this ground. However, the decision in this case was helped by the fact that the whole part of the contract could be performed.

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called off. The judge asserted that in such a case the contract would not be frustrated because the seeing of the Derby was not the foundation of the contract.

<sup>81</sup> T Chapman, 'Contracts: Frustration of Purpose' (1960) 59 *The Michigan Law Review* 98, 122

<sup>82</sup> *Amalgamated Investment and Property Co Ltd v John Walker & Sons Ltd* [1977] 1 WLR 164

<sup>83</sup> *North Shores Ventures v Anstead Holdings Ltd* [2010] EWHC 1485 (Ch)

<sup>84</sup> Roberts, Thomas, 'Commercial Impossibility and Frustration of Purpose: A Critical Analysis' (2003) 16 *Canadian Journal of Law and Jurisprudence* 129-146.

<sup>85</sup> See *Herne Bay Steamboat Co v Hutton* [1903] 2 KB 683

<sup>86</sup> McKendrick, *Contract Law* (n 6)260

Normally, a contract will not be considered frustrated even if an intervening event prevents one party from putting to use the subject matter of the contract, even though the intended use was known to both parties.<sup>87</sup> The courts will definitely not frustrate a contract because it became a bad bargain, even if it is arguably seemingly frustrated. In *Amalgamated Investment & Property Co Ltd vs. John Walker & Son Ltd*,<sup>88</sup> the contract for the purchase of a house for redevelopment was upheld, even though the subsequent listing of the building meant development was difficult or even impossible. The listing of the building had caused the value to drop significantly, and even though surely the fact that the property had been purchased to develop was a common purpose of the parties and in their intentions at the time of contracting, frustration was denied by the courts, perhaps out of fear of allowing remedy for a bad bargain.

The application of *Krell* illustrates that the frustration of purpose seems to be little more than the ground of impossibility. This has proven to be problematic because the international trend has been that there should be consideration of hardship in substantive claims of unforeseeable circumstance that results in the contract being impractical.<sup>89</sup> The consequence of this is that there is an argument that there should be a limited ground of frustration of purpose.<sup>90</sup>

## 7.10 Doctrine of Force Majeure Clause

The term force majeure derives from the French language, and literally means ‘greater force’. It is a clause provided for in a contract that lists possible events that may delay or render impossible the performance of a contract, i.e. acts of God, war, damage or destruction to production facilities, terrorism or hostilities. The clause will make provisions in case of such a listed event and will assign risks according to what the parties decide appropriate.<sup>91</sup> It developed as consequence of the newly developed doctrine of frustration, which was narrowly construed by the courts. Liability for breach of contract is strict; therefore, parties wanted to protect

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<sup>87</sup> see *Leiston Gas Co v Leiston-cum-Sizewell Urban DC* [1916] 2 K.B. 428

<sup>88</sup> *Amalgamated Investment & Property Co Ltd v John Walker & Son Ltd* [1977] 1 W.L.R. 164

<sup>89</sup> McKendrick, *Contract Law* (n 6)303

<sup>90</sup> Brunner, *C Force Majeure and Hardship Under General Contract Principles: Exemption for Non-Performance in International Arbitration* (Kluwer Law, 2009) 419

<sup>91</sup> Richard Stone, *The Modern Law of Contract* (9<sup>th</sup> edn Routledge 2011) 408

themselves should an intervening event cause a breach.<sup>92</sup> Since the frustration doctrine is so narrowly construed by the courts, force majeure clauses became more popular because parties of a contract were keen to specify and provide consequences for frustrating events, thus restricting their effect. Crucially, if the use of the doctrine of frustration is avoided, this may mean better consequences for the parties if such an intervening event does occur as there may be better specified remedies as opposed to the sudden ending of the contract.<sup>93</sup>

If the force majeure clause deals with the event that has occurred sufficiently and is applicable, this will then mean that the doctrine of frustration will not apply. The use of such clauses also means that events will be caught by force majeure clauses that would not have been caught by the doctrine of frustration given that the doctrine is so narrowly interpreted. Parties do have to be aware, however, that if the force majeure clause does not cover the event that has occurred, the doctrine of frustration may still apply.<sup>94</sup> Therefore, great care should be taken upon constructing a force majeure clause, and it should cover any form the intervening event may take, even extremely serious forms. In *Jackson vs. Union Marine Insurance Co Ltd*,<sup>95</sup> the case concerned a ship chartered to sail from Liverpool to pick up cargo at Newport and then on to San Francisco. A force majeure clause was contained in the contract stipulating ‘dangers and accidents of navigation excepted’. The ship ran aground between Liverpool and Newport and took eight months to repair. The court held that the force majeure clause was not effective as it did not envisage an event as serious as the one that occurred. The contract was therefore held to be terminated for frustration.

Indeed, great care should be taken in constructing force majeure clauses because the actual term ‘force majeure’ has no defined meaning in law. Donaldson stated that, ‘the precise meaning of this term, if it has one, has eluded lawyers for years’.<sup>96</sup> Use of the term ‘force majeure’ on its own will not be sufficient, and the events and consequences of a force majeure need to be

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<sup>92</sup> Mckendrick, *Force majeure and frustration of contract* (n 13) 34

<sup>93</sup> W C Wright, ‘Force majeure delays’ (2006) 26 *Construction Lawyer* 33,34

<sup>94</sup> Steve Hedley, ‘Carriage by Sea. Frustration and Force Majeure’ (1990) 49 *The Cambridge Law Journal* 209-211.

<sup>95</sup> *Jackson v Union Marine Insurance Co Ltd* (1874) LR 10 CP 125

<sup>96</sup> *Thomas Borthwick (Glasgow) Ltd v Faure Fairclough Ltd* [1968] 1 *Lloyds Rep* 16. p 18

explained fully in the contract in order for the clause to be effective and not rendered void for uncertainty.<sup>97</sup>

The wider the scope of the force majeure clause, the less likely the doctrine of frustration will apply. Nevertheless, significant events, such as seen above, may not fall within most force majeure clauses.<sup>98</sup> There has been some opposition to this approach, with some arguing that the existence of a force majeure clause should exclude the operation of the doctrine of frustration; however, this has not been adopted in practice by the courts.<sup>99</sup>

The main reason behind many parties being so keen to avoid the application of the doctrine of frustration where they have provided a force majeure clause is due to the difference in the results of the successful application of the two approaches. We know that if frustration is successfully argued it will bring about an immediate end to the contract. This is a very inflexible remedy, and sometimes a complete end to the contract is not desired by any party.<sup>100</sup> A force majeure clause provides a more flexible solution; parties can ‘tailor the remedial consequences of the occurrence of any particular specified event’.<sup>101</sup> When agreeing terms to a contract, the parties may sit down and consider events that could possibly hinder or prevent the performance of the contract, and specify exactly what these are and the consequences for if the event does happen. This allows parties to the contract to have the control and to decide if the contract can still be followed, rather than the frustration doctrine simply ending it. A successful force majeure clause will therefore provide parties more control over their own contract.<sup>102</sup>

The concept of impracticability is termed in a number of phrases: economic hardship, hardship, economic frustration, economic impossibility, commercial hardship, impracticability,

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<sup>97</sup> *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd* [1953] 1 WLR 280

<sup>98</sup> *Metropolitan Water Board v Dick Ker & Co* [1918] AC 119

<sup>99</sup> See Mocatta J, obiter in *Bremer Handelgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1977] 1 Lloyds Rep 133

<sup>100</sup> Brunner (n 23).

<sup>101</sup> Mckendrick, *Contract law* (n6)319

<sup>102</sup> Sarah Worthington, *Commercial law and commercial practice* ( Hart Publishing 2003) 311

## 7.11 Frustration of Contract by Impracticability

commercial impracticability and so on.<sup>103</sup> Thus, no difference between hardship and impracticability can be seen; they two terms used synonymously.<sup>104</sup> Impracticability is a legal terminology used to explain circumstances in which, although contractual performance is technically still physically possible, it has become economically excessively burdensome to an unexpected level, beyond the control and contemplation of the parties.<sup>105</sup>

Impracticability is distinguished from impossibility as impossibility excuses performance when the subject matter cannot physically be performed; however, impracticability will be when the performance is still physically possible but the party performing the contract will be overburdened. Thus, impossibility is an objective condition, whereas impracticability is a subjective condition for a court to determine.<sup>106</sup>

As has been discussed before, frustration deals with situations where, due to an intervening event, a contract is impossible to perform or, at the very least, radically altered to be of an entirely different nature. However, parties often argue that a contract has been frustrated because performance has become impractical, thus becoming more burdensome than was contemplated at the time of contracting, essentially meaning that performance would be something radically different to what was envisaged at the start. We also know that the doctrine of frustration, as it operates in English law, is construed very tightly; therefore, it is thought that, generally, a contract will not be frustrated for mere impracticability.<sup>107</sup>

Generally, it has been argued that the existing English law does not support the view that a change in economic conditions, however radical and deep, does not affect the contract, and there are a number of cases that show that impracticability is not enough to frustrate a contract in English law. Treitel states about impracticability that, ‘the English cases do not provide a single

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<sup>103</sup> Generally English courts do not distinguish precisely between commercial impracticability and impossibility. However in a number of cases the phrase ‘impracticability’ or ‘commercial impossibility’

<sup>104</sup> See Forte A, ‘Economic frustration of commercial contracts: a comparative analysis with particular reference to the United Kingdom, [1986] 6 Juridical Review 1,24

<sup>105</sup> Christoph Brunner (n35) 391

<sup>106</sup> Donald Smythe, 2004). ‘Bounded Rationality, The doctrine of Impracticability, and the Governance of Relational Contracts’(2003) 13 southern California Interdisciplinary Law Journal 227,268

<sup>107</sup> Jill Poole, *Textbook on contract law* (n 2) 478

clear illustration of discharge on such grounds alone, and the possibility of such discharge appears to have been denied in a number of occasions in the House of Lords'.<sup>108</sup>

The English law approach to the supervening events that make the contract impractical or difficult is very narrow and limited; this is resolute of the requirement of the principle of sanctity of contract and absolute contract in English law.<sup>109</sup> However, impracticability has been applied and discussed in some of English cases.

The case of *Davis Contractors*<sup>110</sup> dealt with impracticability, with the court holding the view that the contract was not actually frustrated despite a delay of fourteen months and thus considerable more expense to the contractors, who argued that performance was therefore impracticable. However it should be mentioned that the increase in the price of the contract in this case was approximately 23%, with this total increase not considered as a grounds for discharge or adjustment—even in legal systems, which have more liberal views concerning the matter of impracticability.<sup>111</sup> Therefore, the decision of this case by itself cannot be regarded as a definite English law position to impracticability. In the case of *Staffordshire Area Health Authority vs. South Staffordshire Water Works Co*,<sup>112</sup> Lord Denning<sup>113</sup> held that the contract between parties had been frustrated by inflation: since the agreement was made circumstances had arisen that the parties had not foreseen, and in such circumstances it was no longer binding on the parties.<sup>114</sup>

When assessing impracticability, the issues usually centre on an increased cost of performance, which one party claims, somewhat understandably, makes the contract a radically different thing and economically impractical, and therefore argues that the contract should be frustrated. The courts, however, are wary of finding a contract frustrated because of what is considered a bad bargain. Generally, therefore, if performance of the contract is to cost more than anticipated, by

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<sup>108</sup> Treitel, *Frustration and force majeure*(n27) 283

<sup>109</sup> In the United States, the position on frustration due to impracticability is altogether different and more flexible. The Uniform Commercial Code uses a test of impracticability as opposed to impossibility, and it is often considered that the test is what is 'commercially impossible'

<sup>110</sup> *Davis Contractors Ltd V Fareham UDC* (1956) AC 696

<sup>111</sup> Lord Radcliffe said in this case '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'

<sup>112</sup> *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] 1 WLR 1387

<sup>113</sup> See Lord Denning, *The Discipline of Law* ( Butter Worths 1979) 48

<sup>114</sup> This is opinion of lord Denning while the Court of appeal reject the claim and decided the case on traditional grounds.

however much, the courts will not find that contract has been frustrated.<sup>115</sup> Again this is an area of frustration law in which we see courts impose some very strict limitations on the doctrine of frustration, sometimes producing some harsh results. For example, in the case of *Blackburn Bobbin Co Ltd vs. TW Allen & Sons Ltd*,<sup>116</sup> the supply to sellers had failed and the timber required was practically impossible to source elsewhere, and yet this was held to be insufficient for the doctrine of frustration to apply.

However, as with many things governed by the common law, the issue is not always so clearcut, and there is evidence that, in certain extreme circumstances, impracticability will be enough to mount a successful claim for frustration. In *Jackson vs. Union Marine Insurance*, the contract was not ultimately impossible to perform, and yet was still held to be frustrated.<sup>117</sup> Treitel argues that, in actual fact, there is little that is technically impossible, and most cases where the courts have determined performance impossible it has really only been impracticable. He cites the example of *Taylor vs. Caldwell*, highlighting that the defendants could have rebuilt the music hall, enabling the performance of the contract, albeit for considerable expense. He argues, therefore, that performance in these cases is not always truly impossible.<sup>118</sup>

In English law, it has been specifically declared by the courts that a ‘wholly abnormal rise or fall in prices’ would not cause the frustration of a contract.<sup>119</sup> Whilst it is apparent that impracticability will not usually provide a basis for a successful claim of frustration, there is evidence to suggest that the law could quite possibly be widened a little here along the lines that it has been in the United States to provide a more realistic approach.<sup>120</sup>

In the case of long-term contracts and complex transactions, there are various clauses, such as variation clause, adaptation clauses and escalation clause, that deal with the change in circumstances of the contract. These clauses are not related to the discharge of the contract on the basis of frustration, but rather aim to ensure parties continue to perform the contract, although there are supervening events, such as clauses to extend the performance period if there

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<sup>115</sup> *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* [1977] 1 WLR 164

<sup>116</sup> *Blackburn Bobbin Co Ltd v TW Allen & Sons Ltd* [1918] 2 KB 467

<sup>117</sup> *Jackson v Union Marine Insurance Co Ltd* (1873) 2 Asp M C 435

<sup>118</sup> Treitel, G H, *Frustration and force majeure*(n27) 281.

<sup>119</sup> *British Movietonews Ltd v London and District Cinemas* [1952] AC 166, p 185.

<sup>120</sup> Paula Walter ‘Commercial Impracticability in Contracts’ (1987) 61 St. John's Law Review 225,260.



are circumstances to delay the contract performance or to modify the contract price due to the change in the price of the goods or the value of the currency.<sup>121</sup>

### **7.11.1 Doctrine of Hardship Clause**

Hardship clauses are similar in action to force majeure clauses in that they will list an event and provide for eventualities should the event actually happen. The difference between the two concepts of force majeure and hardship is that hardship is where the performance of the contract has become much more burdensome but not impossible.<sup>122</sup> Hardship deals with impracticability, whilst force majeure refers to performance of the party's obligation being recognised as impossible, at least temporarily. Hardship constitutes a reason for change in the contractual way of the parties.<sup>123</sup> The aim of the parties continues in terms of the performance of contract. Force majeure, however, is located in the context of non-performance, and deals with the suspension or discharge of the contract.<sup>124</sup>

Hardship may be a misleading term as the clauses do not necessarily deal with hardship in the ordinary sense but will provide for situations where a contract has been affected by circumstances that have had a severe financial affect upon the parties, thus making the performance of the contract more burdensome or less beneficial for the parties than they could reasonably have expected.<sup>125</sup> Such terms are used primarily in the case of long-term contracts where it is possible that, over a period of time, economic circumstances may change. Unlike force majeure clauses, hardship clauses provide a more flexible solution than the doctrine of frustration.<sup>126</sup> They will provide for a revision or suspension of the contract in the event that the contract is significantly changed economically, and are used when parties want the contract to continue in such circumstances, rather than the doctrine of frustrating abruptly ending the

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<sup>121</sup> Christoph Brunner (n35) 124

<sup>122</sup> Dietrich Maskow, 'Hardship and Force Majeure' (1992) 40 *The American Journal of Comparative Law* 657-669.

<sup>123</sup> Velimir Zivkovic, 'Hardship in French, English and German Law' (2012) *Institute of Comparative Law* 7

<sup>124</sup> Christoph Brunner (n35) 533

<sup>125</sup> Treitel G H, *the Law of Contract* (n9) 953.

<sup>126</sup> Sourasubha, 'Importance of hardship clauses in contract' the article available at <<http://www.legalservicesindia.com/article/article/importance-of-hardship-clauses-in-contract-1077-1.html>> accessed on 23/09/2012.

contract.<sup>127</sup> On occasion, hardship clauses will include an option to terminate the contract,<sup>128</sup> although this is not usually a desire of the type of parties who include hardship clauses, their main concern being to re-apportion the risk rather than discard the contract, especially where it is a long-term contract. A hardship clause is generally intended to be used for the adaptation of the contract when changed circumstances have dramatically altered the economics of the contract. Thus, a hardship clause should be so drafted that it can be unambiguously fit for this crucial task. It should be so drafted that it comprehensively deals with the problem of changed circumstances when necessary.<sup>129</sup>

Similar to force majeure clauses, great care must be taken in the drafting of a hardship clause, and the economic issues involved can be complex. Therefore, in some contracts, there will be the provision that an arbitrator or adjudicator is used in order to objectively determine the issues.<sup>130</sup> Nevertheless, this complexity of hardship clauses has led to some criticism of them. Kotzur states:

The trouble with hardship clauses is that they only force the parties to sit down at a negotiating table; but this does not always result in a solution to the problem.<sup>131</sup>

The criticism being levelled here is that the clauses do not necessarily provide a solution to the dispute, and discussions and negotiations following the invocation of a hardship clause may be lengthy and uncertain. Similar to force majeure clauses, unless a hardship clause covers in full the actual event that occurs, the doctrine of frustration still may apply. Evidently, hardship clauses are great when they work but will often not provide the certainty one wishes for in contracts.<sup>132</sup>

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<sup>127</sup> See *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93

<sup>128</sup> *Bank Line Ltd v A Capel & Co* [1919] A.C. 435

<sup>129</sup> Michael Whincup, *Contract Law and Practice the English System with Scottish* (5<sup>TH</sup> edn Kluwer Law International 2006) 338.

<sup>130</sup> *Superior Overseas Development Corporation v British Gas Corporation* (1982) 1 Lloyds Rep 262.

<sup>131</sup> Kotzur Wolfgang 'Termination of contracts - frustrated parties' (1998) 13 *Journal of International Banking Law*.

<sup>132</sup> I Schuenzer 'Force majeure and hardship in international sale contract' (2009) 39 *Victoria University of Wellington Law Review* 209-226.

## 7.12 The Legal Effect of Frustration

### 7.12.1 Automatic Total Discharge

The effect of frustration is that the contract is discharged automatically at the time of the frustrating event as to its future operation, but it is not made void *ab initio* (from the beginning):<sup>133</sup> *Hirji Mulji vs. Cheong Yue Steamship Co Ltd* [1926]<sup>134</sup>. The Law Reform (Frustrated Contracts) Act 1943 makes various provisions in this eventuality, as does the common law. Thus, a court does not have the power at common law to allow the contract to continue and to adjust its terms to the new circumstances the contract discharged without any election by either party. The reason for why this approach has not found favour in the English authorities is that it would lead to uncertainty in respect to the agreed contract terms and would create the undesirable situation of courts having to formulate contract terms for the parties. This is contrary to the position that the parties would be in if there was simply a breach of contract: in that situation, the parties retain some choice over the results; they could choose for the contract to be ended or they could choose for it to continue. Frustration is therefore a very severe doctrine with harsh consequences for the parties.<sup>135</sup> Frustration operates not only partially but totally. What this means is that the obligations of both parties are wholly discharged in so far as the performance of them had not fallen due when the contract was frustrated. Once a contract has been deemed frustrated, it is subject to total discharge at law, although it may be necessary for the court to tie up the loose ends left by the contract up to the point in time at which it was frustrated (*Appleby vs. Myers* (1867)<sup>136</sup> and contrast *BP Exploration Ltd v Hunt (No.2)* [1982]<sup>137</sup>). Both parties are released from the obligations they owe to perform the contract after the date of discharge without incurring any liability for breach of contract. It should be noted that

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<sup>133</sup> Mckendrick, *Contract Law: Text, Cases and Materials* (n 66) 744.

<sup>134</sup> [1926] AC 497.

<sup>135</sup> Ewan Mckendrick, *Contract law* (n 6) 254

<sup>136</sup> (1867) LR 2 CP 651.

<sup>137</sup> [1982] 1 All ER 925.

the Law Reform (Frustrated Contracts) Act<sup>138</sup> will not apply if the parties make their own provisions for the effects of frustration.

### 9.12.2 Prospective Operation of Discharge

Frustration discharges the contract prospectively, which means that the parties are released from their future contractual obligations but not from the obligations that be existent before the time of the frustration.<sup>139</sup> Obligations under the contract that were due for performance prior to the date of frustration will still be enforceable, whilst all obligations occurring after the frustrating event will no longer be enforceable as the contract will have legally ended. This can leave losses falling quite arbitrarily, and the loss is said to ‘lie where it falls’. The law on such loss used to be governed by the common law, and often had harsh consequences for one party where the loss would fall extremely unevenly. Therefore, following much criticism of the common law, the Law Reform (Frustrated Contracts) Act 1943 was enacted which endeavoured to apportion loss between the parties more fairly in the event of frustration ending the contract.<sup>140</sup>

The law does not provide parties with protection for steps taken as a consequence of looking forward and anticipating the consequences of discharge by frustration of contract: *Gamerco SA v ICM/Fair Warning (Agency) Ltd.*<sup>141</sup> As a matter of base logic, the doctrine does not apply to an event that is within the contemplation of the parties at the time the contract was concluded: *Walton Harvey Ltd vs. Walker and Homfrays Ltd.*<sup>142</sup> With that said, this proposition was challenged by Lord Denning in *Ocean Tramp Tankers Corp v V/O Sovfracht (The Eugenia)*,<sup>143</sup> and note also *W. J. Tatem Ltd vs. Gamboa.*<sup>144</sup> The best view, it is submitted, is that the matter is a

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<sup>138</sup> the Law Reform (Frustrated Contracts) Act 1943 see section 2(3)

<sup>139</sup> Richard Stone and other, *Text, Cases and Materials on Contract Law* ( 2ed edn Routledge 2011) 510

<sup>140</sup> Paul Richards, *Law of contract* (8<sup>th</sup> edn Pearson Education Limited 2007) 368

<sup>141</sup> [1995] 1 WLR 1226.

<sup>142</sup> [1931] 1 Ch 274.

<sup>143</sup> [1964] 2 QB 226.

<sup>144</sup> [1939] 1 KB 132.

question of fact and degree, and the extent to which the event in question is foreseeable.<sup>145</sup> In the recent case of *The Sea Angel*,<sup>146</sup> it was held by Rix LJ that:

‘the less that an event, in its type and its impact, is foreseeable, the more likely it is to be a factor which, depending on other factors in the case, may lead on to frustration.’

### 9.12.3 Money Paid or Payable before Discharge

English law, on this point, was most unsatisfactory and ultimately quite convoluted. Originally, under the common law, if a contract required advance payment—that is, one party required payment, in part or in full, prior to any performance being carried out—they would not be able to recover the payment, and indeed if the payment was still outstanding they would be liable to pay it, even though the contract was frustrated.<sup>147</sup> Such an advance payment was only considered recoverable if there was a total failure of consideration.<sup>148</sup>

A similar imbalance was found where performance was required in advance of payment and there had been part performance prior to the contract being frustrated. In the event of this, the party who made part performance found themselves at loss as they would be without payment for the work that they had completed.<sup>149</sup> Clearly in both situations the effects of the frustration were unsatisfactory, with the loss so arbitrarily distributed it often left one party significantly out of pocket. The Law Reform (Frustrated Contracts) Act 1943 was enacted to provide a fairer apportionment of loss.

Under the Act where the contract stipulates full or part payment in advance prior to performance, the money paid will be recoverable and the party not liable to pay any that is unpaid, and it will not be necessary to demonstrate total failure of consideration.<sup>150</sup> If the party who is receiving the advance payment has incurred expenses, the court has the discretion to agree to them retaining or recovering some of the advanced payment to offset the expenses; this is as long as the expenses

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<sup>145</sup> Mckendrick, *Contract Law*(n6) 264

<sup>146</sup> [2007] EWCA Civ 547.

<sup>147</sup> *Chandler v Webster* [1904] 1 KB 493

<sup>148</sup> Trends.E. Doctrine of frustration: Emerging trends. (2007) 2 *The Journal of Legal Awareness*. 171-142

<sup>149</sup> *Appleby v Myers* (1867) LR 2 CP 651; *Cutter v Dowell* (1795) 6 TR 320

<sup>150</sup> The Law Reform (Frustrated Contracts) Act 1943 s. 1(2)

do not exceed the amount payable in advance and the court cannot award more than the expenses actually were.

There are few reported case examples of the application of this statute in practice, however. In one we do have it would appear that the courts applied the law in a somewhat different way to which academics have interpreted it. In *Gamerco SA vs. ICM/Fair Trading (Agency) Ltd*,<sup>151</sup> the court has been criticised as the judge awarded full payment in advance to be returned, with no deduction for the party's expenses. This decision appears to be contrary to the provisions contained in the Act, which allow for expenses to be deducted from the advance payment return. The case is difficult to explain away on the facts but gives some indication that the courts are still unwilling to interfere with the bargain made by the parties to the contract. Of course many still hold the view that parties should be free to contract as they wish, and the provision of advance payment is a type of insurance and method of risk allocation in a contract that should not be interfered with by the courts.

Where there is no provision in the contract for advance payment, there will be no compensation for expenses incurred;<sup>152</sup> however, if one party makes part performance without payment and this provides a valuable benefit to the other party before the frustrating event, the court then has the discretion to award financial compensation to the performing party as they see fit in the circumstances. The award may not be greater than the value of the benefit, any expenses incurred by the party receiving the benefit, and also the effect that the frustrating event has had upon the benefit bestowed. Assessment of any such benefit is likely to be difficult as often work will only be half completed. The benefit must be a tangible one, and of assessable benefit.<sup>153</sup>

#### **9.12.4 Obligation other than to Pay Money**

The common law rules on this point, as articulated in *Appleby Vs. Myers*,<sup>154</sup> were replaced by section 1(3) of the Law Reform (Frustrated Contracts) Act 1943 (see also *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*<sup>155</sup>). Section 1(3) provides as follows:

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<sup>151</sup> [1995] 1 WLR 1226

<sup>152</sup> Beatson.J.(2002). *Anson's law of contract*. 650

<sup>153</sup> A Canadian case determined that a half completed central heating system was of no benefit until its completion – *Parsons Brothers Ltd v Shea* (1968) 53 DLR (2d) 86

<sup>154</sup> (1867) LR 2 CP 651.

‘where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money...) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of said benefit to the party obtaining it.’

This is such amount as the court deems just, having regard to the full circumstances of the case and in particular regard to the amount of any expenses incurred before discharge by the benefited party and the effect (in relation to any benefit) of the circumstances of the frustration. This provision has been criticised by some commentators as ‘unnecessarily complex’, and has, on occasion, tested the interpretative capabilities of the courts.

The leading judgment in this area is found in the case of *BP Exploration Co (Libya) Ltd vs. Hunt (No 2)*,<sup>156</sup> and again has been subsequently criticised. In this case, Robert Goff J. held that, in assessing valuable benefit, there is a need to first identify and give a value to the benefit; this would then be the upper limit of what could be awarded under s.1(3). The court should then decide at their discretion what sum they would award up to the limit decided. Goff also stated that, if the benefit accrued was destroyed by the frustrating event, there could be no award. This would mean that the value of the benefit was being assessed after the frustrating event when the wording of the statute suggests that this assessment of the benefit should take place before the frustrating event. The case law in this area is therefore rather disappointing and fails to bestow the full benefits that the legislation appears to promise.<sup>157</sup>

The Act does not apply to all contracts, leaving those excluded to rely on the normal outcome of frustration. It will not apply where the contract has made an express provision regarding frustration, in insurance contracts or contracts for the carriage of goods by sea.<sup>158</sup> It will also not apply to specific goods, generally perishables, nor to wholly performed contractual obligations distinguished from those affected by the frustrating event.<sup>159</sup> In these situations, the loss will be born by the parties as it falls.

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<sup>155</sup> [1943] AC 32.

<sup>156</sup> [1979] 1 WLR 783

<sup>157</sup> Treitel, *Frustration and force majeure* (27) 574

<sup>158</sup> *Appleby v Myers* (1867) LR 2 CP 651; *Cutter v Dowell* (1795) 6 TR 320

<sup>159</sup> *Appleby v Myers* (1867) LR 2 CP 651; *Cutter v Dowell* (1795) 6 TR 320

## CHAPTER EIGHT

### **Frustration of Contract by Impossibility of Performance of Contract in English Law**

#### **8.1 Introduction**

A contracting party is asked to fulfil the promises given, and is not easily excused from his legal responsibility. In the beginning, parties are obligated to perform their contractual liability; however, there is an exception if non-performance is caused by change beyond the parties' control. The supervening impossibility of performance may bring about the discharge of a contract. The English doctrine of impossibility of contract has had a slow growth in its application and ability to discharge contracting parties from their obligations.

This chapter, in an attempt to analyse the doctrine of impossibility and its operation in relation to contracts, will look closely at both the concept of initial impossibility arising from a common mistake on the part of both parties as to the state of things before the contract was agreed, and the concept of subsequent impossibility. In the case of frustration, on the other hand, the agreement is binding when entered into, but subsequently becomes impossible by virtue of a supervening event. This chapter will concentrate on the doctrine of frustration due to the focus on supervening events.<sup>1</sup>

We will examine the concept of impossibility and the objective and subjective impossibility, and the rules relating to the discharge of contractual obligations and allocation of risk. We will look at the situation when either the subject matter or a thing essential for performance is destroyed or unavailable, either partially or completely. It will then consider how the death or supervening incapacity of a party will affect a personal contract. Towards the latter part of the dissertation, it will discuss the problems that arise when a method of performance becomes impossible or a

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<sup>1</sup> It should be borne in mind that many of the same principles and tests apply to mistake cases too.



particular source becomes unavailable. It will conclude by looking at the effect of delay and temporary impossibility on a contract.

## 8.2 The Concept of Impossibility of Performance

The term impossibility and frustration sometimes are used as interchangeable words to mean a same doctrine. Some writers use the supervening impossibility or physically and legally impossible instead of frustration, or as synonymous words. In actual fact, the doctrine of frustration is wider than the term impossibility; thus, impossibility really is an aspect or part of the doctrine of frustration of contract because the events or applications of frustration may arise for a number of reasons, such as a supervening impossibility, illegality, impracticability or frustration of purpose.

Impossibility of performance of contract simply means that it is the performance of the promise that became physically impossible for the person to perform the contract due to certain event that have occurred following the formation of contract, which is recognised as being beyond the control of parties. The clearest and most frequent case of impossibility is where it relates to the subject matter of contract, where the effect of events on a subject matter of contract are more applicative than the circumstances surrounding the parties, particularly in the case of commercial contracts.<sup>2</sup>

There are cases where parties never actually reach a true agreement because they are mistaken as to some element of the contract before the contract is concluded and the cases where the contract becomes impossible to perform subsequent to the agreement having been reached. Generally speaking, in the first instance, the contract is void *ab initio*; in the second, an otherwise valid contract is brought to an end from the point at which the impossibility arises.<sup>3</sup>

Originally, the English law was very strict in its insistence on the literal performance of absolute promises. English law had taken on the strict understanding that a particular promisor was

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<sup>2</sup> Graff Jenny, 'Frustration and supervening impossibility/ the doctrines of consideration and promissory estoppel', (2000) International Business school, Cambridge 1,12

<sup>3</sup> Eisenberg Melvin, 'The Role of Fault in Contract Law: Unconscionability, Unexpected, Circumstances, Interpretation, Mistake, and Nonperformance'(2009) 167 Mich. L. Rev 1413, 1430

considered to be effectively bound by the promised expressly made. In the pre-19<sup>th</sup> Century law, the general rule was that a change in circumstances after a promise was made did not excuse the promisor's from performance—even if it made performance impossible<sup>4</sup>. This strict approach was established in *Paradine vs. Jane*.<sup>5</sup>

However, as of 1863, the judiciary via their decisions through the courts looked to both relent and excuse the further on-going performance of a particular contract because of the fact that there was a condition implied<sup>6</sup> through the doctrine of frustration.<sup>7</sup>

### 8.3 Objective and Subjective Impossibility

There are two types of impossibility of performance that discharge the duty of performance under a contract. Subjective impossibility is due to the inability of the individual promisor to perform, such as through illness or death, but it is not impossible for other parties. Objective impossibility means that no one can render the performance.<sup>8</sup>

The distinction between objective and subjective impossibility appears to be derived from civil law systems in which the former was more readily regarded than the latter as a ground of discharge. For this purpose, impossibility was regarded as objective when performance could not be rendered by anyone, and as subjective when it could not be rendered by the promisor because of some disability personal to himself, but not rendered by others. It must be emphasised that it does not follow from the distinction that subjective impossibility can never provide the debtor with a defence.<sup>9</sup>

The contract will have to be objectively impossible to perform before it is held to be void. The case of *Thornborow vs. Whitacre*<sup>10</sup> holds that a party cannot escape liability on the grounds of

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<sup>4</sup> Simpson A.W.B 'Innovation in Nineteenth Century Contract Law' (1975) 91 LQR 247.

<sup>5</sup> *Paradine vs. Jane* (1647) Aleyn 26

<sup>6</sup> The discussion of effect of frustration on implied term is in chapter seven.

<sup>7</sup> *Taylor v. Caldwell* (1863) 3 B & S 826

<sup>8</sup> Objective impossibility is called as well absolute impossibility and subjective impossibility is called relative impossibility.

<sup>9</sup> G H Treitel, *Frustration and Force Majeure* (Sweet & Maxwell 2004) 72

<sup>10</sup> *Thornborow vs. Whitacre* (1705) 2 LD Raym 1164

impossibility purely relating to his individual ability or circumstances. Neither will he be discharged from his obligations simply because he finds the contract particularly difficult or onerous to perform: ‘It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play’.<sup>11</sup>

Subsequent impossibility will similarly not excuse parties from performance if it was brought about by the conduct of one of the parties. The case of *Southern Foundries Ltd vs. Shirlaw*<sup>12</sup> held at 717 per Lord Atkin that, ‘...conduct of either promisor or promisee which can be said to amount to himself of his own motion, bringing about the impossibility of performance is in itself a breach.’

Clearly, any impossibility that can be attributed to either party will be considered a breach of contract,<sup>13</sup> and the defaulting party will become liable in damages in the usual way. Where the impossibility brought about by one of the parties existed at the time of the contract, he is likely to be held to have warranted possible performance of the contract and held to be in breach of that warranty.<sup>14</sup>

As discussed above, it is sometimes possible for the courts to hold that a party made an absolute promise and therefore accepted the risk of the fact that the contract might be impossible to perform. Whether a contract is considered absolute will be a matter of objective construction of the terms of the contract. If the contract is held to be absolute, the party will be held to his performance—irrespective of whether the impossibility is his fault. In the case of *Paradine vs. Jane* (1647), Aleyn 26, a lessee, was held liable to pay rent even though he had been evicted from the property by armed forces during the civil war. A lease is a type of contract commonly regarded as being objectively absolute without reference to the subjective intentions of the parties.

Overall, the contract must be objectively impossible to perform; the subjective views of the parties as to their circumstances and their personal ability to perform the contract will not usually be taken into account. Similarly, if a party is active in bringing about the impossibility, the

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<sup>11</sup> *Davis Contractors Ltd vs. Fareham UDC* [1956] AC 696 at 729

<sup>12</sup> *Southern Foundries (1926) Ltd vs. Shirlaw* [1940] AC 70

<sup>13</sup> This is fault of the party referred to self-induce frustration which we discussed that in chapter seven.

<sup>14</sup> Eisenberg Meivin ‘Impossibility, Impracticability and Frustration’ (2009) 1 JLA Harvard Law School

contract will not be seen as objectively impossible but rather as having been breached. Conversely, some contracts will be held to be objectively absolute, and the subjective intentions of the parties in forming the contract and their level of fault in bringing about the impossibility of performance will not be relevant.<sup>15</sup>

In addition, the defence of impossibility became available only if objective impossibility existed. Objective impossibility<sup>16</sup> occurred when the contractual obligation could not actually be performed. For example, if a musician promised to play a concert at a specific concert hall but the concert hall subsequently burnt down, it would be impossible to perform according to the contractual agreement and the musician would be excused from performing at that particular venue. Subjective impossibility<sup>17</sup> exists when only one of the parties to a contract subjectively believes that she or he cannot complete the required performance.<sup>18</sup>

## **8.4 Applications of Objective Impossibility**

### **8.4.1 Impossibility due to Destruction of the Subject before Delivery**

The destruction of the subject matter of contract is the most obvious application of impossibility of performance of contract. If the subject matter of a contract is destroyed after the time at which the contract was made and before the time when it should have been performed, the contract will be frustrated by impossibility.<sup>19</sup> As a result, the risk of destruction of goods sold but not delivered remains with the seller and would therefore frustrate the contract unless the seller has called upon the buyer or the relevant authorities to take possession of the goods.<sup>20</sup>

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<sup>15</sup> Christoph Brunner, *Force majeure and hardship under general contract principles*(Kluwer Law International 2009) 87

<sup>16</sup> It is often referred to by the statement 'The thing cannot be done'.

<sup>17</sup> It is often referred to by the statement 'I cannot do it'

<sup>18</sup> See West's Encyclopaedia of American Law 'Impossibility' (2005) <<http://www.encyclopedia.com/topic/Impossibility.aspx>> accessed 3/01/2011

<sup>19</sup> Treitel, *Frustration and Force Majeure* (n9) 74

<sup>20</sup> See Sale of Goods Act 1979 section 20 (1) states that 'Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not'.

The most common example in English law for the destruction of the subject matter is the destruction of the music hall in the case of *Taylor vs. Caldwell*,<sup>21</sup> which was the starting point in the development of the doctrine of frustration. This case is involved the destruction of the subject matter of the contract. In *Taylor vs. Caldwell*,<sup>22</sup> the agreement was to let a music hall and gardens for concerts be played in four occasions. Before the first concert, however, the music hall was burnt down, and hence the contract was frustrated.<sup>23</sup> Both parties were therefore released from their obligations under the contract. In coming to this conclusion, Blackburn<sup>24</sup> stated that:

‘The debtor is freed from obligation when the thing has perished, neither by his act nor his neglect and before he is in default, unless by some stipulation he has taken on himself the risk of the particular misfortune which has occurred.’<sup>25</sup>

This can similarly be applied to building contracts where a builder is contracted to carry out work to an existing building. In *Appleby vs. Myers*<sup>26</sup> the plaintiff contracted to erect machinery on the defendant’s premises for a fixed sum. A fire destroyed the whole of the building and the partially erected machinery, and it was held that the contract was frustrated as the premises were entirely destroyed through neither party’s fault. This can perhaps be contrasted with *Taylor vs. Caldwell*<sup>27</sup> and be considered a more correct approach in light of the restrictive use of frustration. It was only the hall that was burnt down in *Taylor vs. Caldwell*<sup>28</sup> but that was deemed to be a fundamental element of the contract. In *Appleby vs. Myers*,<sup>29</sup> if only the partly completed erection of machinery had been damaged but the building itself remained standing, the plaintiff would have had to start over again as the contract would not have been frustrated because the

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<sup>21</sup> *Taylor v. Caldwell* (n7)

<sup>22</sup> *Ibid*

<sup>23</sup> L Koffman and E Macdonald, *The Law of Contract* (6<sup>th</sup> edn Oxford University Press 2007) 527.

<sup>24</sup> Blackburn J in *Taylor vs. Caldwell* (1863) 3 B & S 826

<sup>25</sup> Blackburn J recognised that the civil law is not binding on English Courts, but states that it is a useful indicator of the principles on which the law is grounded. Blackburn J also refers to a line of authority involving bailment. For example the case of *Williams vs. Lloyd W. Jones* 179 82 Eng. Rep. 95 (K.B. 1629), the claimant had delivered a horse to the defendant on the condition that it be returned on request. Without fault on the part of the defendant, the horse became sick and died and was therefore not able to be returned on the request of the claimant. It was held that bailee was discharged from his promise by the fact that the horse had died. Blackburn J stated that it was a settled principle of English law that in contracts for loans of chattels or bailment, if the promise of the bailee or borrower to return the goods becomes impossible because the goods have perished through no fault of his own, the bailee is excused from this promise. It is noted that in none of the cases relating to bailment was it expressly agreed that the destruction of the subject matter would release either party from their obligation, ‘the excuse is by law implied’

<sup>26</sup> *Appleby vs. Myers* (1867) LR 2 CP 651

<sup>27</sup> *Taylor v. Caldwell* (n7)

<sup>28</sup> *Ibid*

<sup>29</sup> *Appleby vs. Myers* (n 24)

performance of contract was still possible through introducing another part of machinery. This principle established in *Taylor* and subsequent cases<sup>30</sup> is now contained in Section 7 of the Sale of Goods Act.<sup>31</sup>

‘Where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is avoided.’<sup>32</sup>

It is important to note that this provision relates only to agreements of sale of goods. The importance of the distinction between specific and generic, or ascertained and non-ascertained goods, is crucial. It is thought that the enactment of Section 7<sup>33</sup> mirrored the decision in *Howell vs. Coupland*<sup>34</sup> where an agreement to supply 200 tons of potatoes from specified land was for specific goods. For example, if a seller was to agree to sell 100 tons out of 200 tons of King Edward potatoes in his stores, this would be deemed specific goods for the purposes of Section 7. On the contrary, however, if the agreement stated just 100 tons of King Edwards, this would be a contract for generic goods, and the contract therefore would not be frustrated. One curious point to note is that, where the goods are part of a specified bulk, Section 7 will apply only if the specified goods are given as a fraction or percentage of the bulk. It is difficult to see the rationale behind frustration applying where the goods are specified as ‘10% of those 200 bottles of wine’ and yet not applying where they are described as ‘20 of those bottles of wine’.<sup>35</sup>

The terms destruction or perish are not defined by the Act, but it is given a broad interpretation so as to include stolen goods and partly perished goods.<sup>36</sup> In *Barrow, Lane & Ballard Ltd*,<sup>37</sup> for instance, a contract was for 700 bags of Chinese ground nuts. The 700 bags were held to have perished for the purposes of Section 6 when 109 of the bags were stolen prior to the agreement to

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<sup>30</sup> *Appleby vs. Myers* (1867) LR 2 CP 651, Ex Ch (contract for installation and maintenance of machinery discharged by destruction of premises and machinery)

<sup>31</sup> The Sale of Goods Act 1979, s7. In the section is only concerned where the act is manifestly and objectively impossible at the time of the formation of contract.

<sup>32</sup> While in a contract for the sale of specific goods, the article regarding which the parties are contracting is not in existence, the contract is void. This is established by Section 6 of the Sale of Goods Act, 1979 which says: Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void’

<sup>33</sup> The Sale of Goods Act (n29).

<sup>34</sup> *Howell v. Coupland* (1876) 1 Q.B.D. 258

<sup>35</sup> L S Sealy & R A Hooley, *Commercial Law: Text, Cases and Materials* (4<sup>th</sup> edn OUP 2009)311

<sup>36</sup> *It is objective impossibility.*

<sup>37</sup> *Barrow, Lane & Ballard Ltd vs. Phillips Phillips & Co* [1929] 1 KB 574 KBD

sell. The case of *Asfar vs. Blundell*<sup>38</sup> above gives a good account as to what may be held to have perished in a commercial sense.

#### **8.4.2 Destruction of Goods after Passing of Risk**

Where goods are destroyed following the risk being passed to the buyer, the contract is not frustrated by impossibility by the destroying of the goods, and so the buyer must pay the price despite the goods having been destroyed because the seller performed his liability;<sup>39</sup> this stands unless a demand has been made upon the seller to deliver the item sold, in which case the item then remains at the risk of the seller.

Section 20 in SOGA states that the risk passes with property in the goods unless otherwise agreed. An amendment made to SOGA by the Sale and Supply of Goods to Consumers Regulations 2002 inserted Section 20 (4),<sup>40</sup> which now states that the risk remains with the seller until delivery where the buyer acts as a consumer. This is a welcome amendment as it seeks to protect consumers where goods are destroyed following an agreement to sell but before delivery. Although this means that the buyer may be able to claim frustration, this is a better position than it would be where the risk was to pass whilst the seller was still in possession and the goods destroyed.

However, although the destruction of the goods after the passing of risk will discharge the seller's duty to deliver them, it will not totally discharge him from his outstanding obligation. The contract may, for example, cause him to transfer shipping documents, such as carriage and insurance, to the buyer so as to enable the buyer to obtain the benefits of the contract contained

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<sup>38</sup> *Asfar vs. Blundell* [1896] 1 QB 123

<sup>39</sup> section 7 of the Sale of Goods Act 1979 which avoids contracts for the sale of specific goods which perish before the risk has passed to the buyer, applies, or to any other contract for the sale, or for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished.

<sup>40</sup> See Section 20 (4), 'In a case where the buyer deals as consumer or, in Scotland, where there is a consumer contract in which the buyer is a consumer, subsections (1) to (3) above must be ignored and the goods remain at the seller's risk until they are delivered to the consumer'

in, or evidenced by, those documents, with such an obligation surviving the destruction of goods after the risk has passed.<sup>41</sup>

It may be the case that, before impossibility arises, the subject matter has partly been delivered, such as if the two parties entered into a contract and the contract provides for the specific goods to be delivered by instalments and for the price to be paid after the completion of all deliveries. Other examples include after part of the deliveries has been made, the rest of the goods being destroyed or war breaking out in the seller's country, thus making further export of the goods impossible, or if the buyer is unable to return the goods because he has resold the goods or has incorporated them in a building.

There are difficulties that can only be met by providing a remedy of such a situation because the buyer may have re-sold at a price higher than the contract price and also higher than the current market price. In addition, non-performance is beyond the parties' control.

Some solutions can be considered. First, if we said that the buyer was to pay the cost price of goods the seller bought, there is no benefit for the seller. The second solution is to account the price of goods delivered from the price of the whole goods; however, the problem here is price, which could be the wholesale price or retail price. The first price will be for the benefit of the buyer; the second will benefit the seller. The third solution would allow the seller to claim the amount of benefit to the buyer, provided that this does not exceed the expenses shouldered by the seller.<sup>42</sup>

The fourth solution involves requiring the buyer to account for the benefits he has derived from the goods. The consequence of the solution is the seller will get the benefit of the buyer's advantageous re-sale or increase in the market price.

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<sup>41</sup> Atiyah PS, Adams John and Maconcen, *Sale of Goods*( 11<sup>th</sup> edn Pearson Education Limited, Essex 2005) 360

<sup>42</sup> Posner Richard and Rosenfied Andrew ' Impossibility and Related Doctrines in Contract law: An Economic Analysis' (1977) 6 *The Journal of Legal Studies*.



### 8.4.3 Partial Destruction of the Subject Matter

The subsequent discussion is considered in regard to the destruction of the whole subject-matter of the contract. The destruction of some severable part of the subject matter of the contract resulting from a supervening event that does not affect the physical integrity of the rest of subject matter, such as destruction by fire of half of the goods in a warehouse, leaving the other half unharmed, for example, are cases that are to be distinguished from those where the whole is destroyed.

It is interesting to note that the contract in *Taylor*<sup>43</sup> was for the use of ‘Surrey Music Hall and Gardens’. It was therefore only part of the subject matter that was destroyed by the fire; the gardens still existed. However, it was held that the destruction of the music hall rendered performance of the contract impossible. This implies that, when part of the subject matter is destroyed, the courts will investigate the purpose of the contract. If the part that is destroyed renders the purpose impossible, the contract will be held to have been frustrated by its destruction. Accordingly, partial impossibility does not make the contract frustrated if it had not defeated the main purpose of the contract.<sup>44</sup>

Where the contract is severable, it is possible that one part of the contract may become frustrated and hence discharged, whilst other parts remain undamaged. Furthermore, it may be that legislation renders a part of the contract illegal. It may be that illegality will excuse a minor obligation under the contract without discharging the total thing. For example, war time building restrictions may temporarily excuse a covenant to build, as was the case in *Cricklewood Property and Investment Trust Ltd vs. Leighton's Investment Trust Ltd*<sup>45</sup>.

Aside from these specific examples, it is unlikely that there is any general doctrine of partial impossibility. In actual fact, the English law has difficulties in establishing how to deal with partial impossibility; this is due to the fact that, when the doctrine of frustration operates, it discharges the whole contract. In other words, the English law thinks of impossibility of

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<sup>43</sup> *Taylor vs. Caldwell* (1863) 3 B & S 826

<sup>44</sup> Ewan Mckendrick, *Contract Law Text, Cases and Materials* (4<sup>th</sup> edn OUP 2010) 708

<sup>45</sup> *Cricklewood Property and Investment Trust Ltd vs. Leighton's Investment Trust Ltd* [1945] AC 221

performance as a contract and not merely as an obligation.<sup>46</sup> The cases in which it might appear that courts are applying such a doctrine can usually be explained by other means. For example, in the case of *Egham and Staines Electricity Co Ltd vs. Egham UDC*,<sup>47</sup> where the courts held that the electricity company was excused from their contractual obligation to provide electricity for lighting during the time at which war-time lighting restrictions prevented them from so doing. Although this may, at first sight, appear to suggest the contract was frustrated partially, the courts actually held that it came within a force majeure clause, which stated that the parties would not be liable if their default was due to an unavoidable cause.

In the case of *Sainsbury (H R & S) Ltd vs. Street*,<sup>48</sup> in June 1970, the defendant, who was a farmer, entered into contract with the plaintiffs, who were corn merchants, to sell them 275 tons of barley from a crop growing on a land. Without the seller's fault, only 140 tons were produced. The defendant sold the crops to other corn merchants at a higher price. The plaintiffs brought an action against the defendant, claiming damages in respect to the defendant's failure to deliver the 140 tons actually harvested. The court rejected the seller's claim that he was excused from delivering any at all, that a contract of sale was subject to an implied term under which he was obliged to deliver the smaller amount if the buyer so requested, in which case the buyer is required, by Section 30(1) of the Sale of Goods Act, 1979, to pay for it at the contract price. The plaintiffs were therefore entitled to the damages claimed.

It has been held that, where a party enters into several contracts and his supplies are subsequently reduced by other events, he is not excused from performance and must therefore pay damages for any contractual promises that he cannot meet.

In this vein, the problem arises when the one party of contract has entered into contracts with a number of parties to supply each of them with specified goods from the same certain source. This subject matter becomes impossible in part, without any fault of the parties. The result is that, although the seller is not prevented from performing one of the contracts, he is prevented from performing all. There are cases such as this situation in the present time, which have arisen because the goods will be imported from an international source, which has ceased to be

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<sup>46</sup> Nicholas Barry, 'Force Majeure and Frustration' (1979) 27 American Journal of Comparative Law 231,245

<sup>47</sup> *Egham and Staines Electricity Co Ltd vs. Egham UDC* [1944] 1 All ER

<sup>48</sup> *HR & S. Sainsbury Ltd. v. Street*, [1972] 1 WLR 834

available to the seller because of export restrictions imposed by the authorities of the foreign country.

As an example, an owner of a factory expected his factory to produce 10,000 tons of iron, and so he agreed to sell 2,000 tons to five individual buyers. The factory was destroyed completely by fire after the production of 6,000 tons, and so there is a need to establish a solution to the problem. The first possibility for solving this issue is that all contracts are discharged because there is partial impossibility, i.e. the seller cannot perform his obligation in full. However, this is not a practical solution as it would leave the seller free to go into market and sell the whole 6,000 tons actually produced at the higher price, which would probably prevail because of the shortage. If the seller delivered 2,000 tons to any one buyer, the buyer should then have no cause for complaint.

The second possible solution is no discharge of the contracts because the discharge must be as a result of events beyond the control of the party; however, the discharge came about because of the choice of the seller. If the seller chooses to deliver 2,000 tons to three of five buyers and his contracts with two buyers are not discharged, his inability to deliver anything to the other two are a result of his own choice. However, there is an objection to the solution that the seller has a free choice of buyers, and so he will deliver to who agrees to pay money more than the price in the contract. Moreover, the contracts cannot be discharged for two parties due to the seller's choice; as a ground of discharge, a party cannot rely on an inability to perform, as can be seen in the case of *Lauritzen A.S. vs. Wijsmuller B.V. (The Super Servant Two)*.<sup>49</sup>

The third solution is that some of the contracts be discharged: if the seller delivers production to three buyers, the contracts with two buyers are discharged. However, the problem remains that the seller has a free to choose buyers; he will deliver to those who will pay the highest price. On

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<sup>49</sup> *J Lauritzen AS vs. Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd's Rep, The parties had made a contract for the transportation of a drilling rig, which, as the both knew, could only be carried out by one of two vessels owned by the defendants, namely, Super Servant One and Super Servant Two. The contract referred to both vessels, but did not specify which one would be used. The defendants, intending to use Super Servant Two, allocated Super Servant One to other contracts. Super Servant Two then sank. The defendants claimed that the contract was frustrated, but the plaintiffs alleged that the impossibility of performance arose from the defendants' own acts, and that they should not therefore be discharged from performance. The Court of Appeal held that, even though the defendants were neither negligent nor in breach of contract in the way in which they had allocated the vessels, the doctrine of frustration did not operate to remove their liability under the contract with the plaintiffs.

the other hand, the law may require him to deliver to those who had made the contracts at the earliest dates.

The fourth solution is to suggest that the seller divide his production between five buyers, i.e. deliver 1,200 tons to each buyer, and he would be excused from each contract with regard to the balance of 800 tons.<sup>50</sup>

The first and second solutions should not be adopted because of the reasons mentioned above. The third and fourth solution can be adopted as this is related to the frustration of contract by partial impossibility with the division of supplies between some or all parties. However, the fourth solution is closest to the principle of *pro rata* division or the principle of allocation of supplies. Importantly, there is no legislation in English law<sup>51</sup> for the allocation of supplies or cases illustrating this principle; however, it is possible in the case of partial impossibility to apply the rules relating to bankruptcy, which relates to the allocation of payment of debts between creditors. Importantly, this is only if the seller becomes bankrupt following a court's decision.

#### **8.4.4 Impossibility by Unavailability of the Subject Matter**

A contract may be impossible to perform where the subject matter of the contract is not destroyed but becomes unavailable for the purpose of performance by the reason of it ceasing to be at the disposal of the parties. The contracts for charter parties have been frustrated when, for example, a ship was seized, detained or requisitioned, and when cargo was impossible because of a strike at the port. Sales contracts have been frustrated when, for instance, the goods were requisitioned.<sup>52</sup>

Where both parties are mistaken as to the availability of the subject matter at the time of the contract, this may be sufficiently fundamental to avoid the contract. The leading case on this issue is that of *Courturier vs. Hastie*,<sup>53</sup> in which the parties entered into a contract for the sale of a cargo of corn, which was believed to be in transit from Salonica to England. Unknown to both

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<sup>50</sup> Treitel, *Frustration and Force Majeure*(n9) 223

<sup>51</sup> In United State there is support of the principle of allocation was recognised as matter of common law.

<sup>52</sup> Treitel, *Frustration and Force Majeure* (9)135

<sup>53</sup> *Courturier vs. Hastie* (1856) 5 HLC 637

the parties, the corn's quality had deteriorated to such an extent that the master had sold it. The House of Lords held that the matter turned on the construction of the contract, concluding that:

'The contract plainly imports that there was something which was to be sold at the time of the contract, and something to be purchased, no such thing existing... judgment should be given for the defendants.'<sup>54</sup>

However, the court in *Couturier* did not mention the word 'mistake'; they based their reasoning on the construction of the contract and the fact that there was a total failure of consideration on the part of the sellers.

Lord Denning applied a different interpretation in the case of *Solle vs. Butcher*<sup>55</sup> in which he held that there was an implied condition precedent that the contract was capable of performance. He reasoned that, in *Couturier*, the parties had proceeded on the assumption that the goods were capable of being sold when, in actual fact, they were no longer available for sale. Lord Denning's interpretation does seem to give effect to the most likely intention of the parties; however, in the absence of a clear intention to release each other from the agreement if the subject matter is not available, it is not clear when Lord Denning is suggesting a term of this nature should be incorporated within the contract.

The exact legal basis for importing this term has been the subject of some debate amongst commentators, and will be discussed briefly. The draftsmen of the Sale of Goods Act 1979<sup>56</sup> appear to have interpreted the decision as stating that a mistake as to the existence of the subject matter of the contract inevitably renders it void.<sup>57</sup> Moreover, impossibility may arise where the performance of a contract depends on the continued state of affairs after the making of contract ceases to exist. If the subject matter becomes unavailable after the contract has been concluded, this may also render the contract frustrated for impossibility. For example, in the case of *Bank Line Ltd vs. Arthur Capel & Co*,<sup>58</sup> a charter party was held to be frustrated when the ship was requisitioned and so unavailable to the charterer. Temporary unavailability may also suffice, although this will be discussed later.

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<sup>54</sup> per Lord Cranworth, the Lord Chancellor

<sup>55</sup> *Bank Line Ltd vs. Arthur Capel & Co* [1919] AC 435

<sup>56</sup> the Sale of Goods Act 1979 s(6)

<sup>57</sup> Treitel, *Frustration and Force Majeure* (n9) 136

<sup>58</sup> *Bank Line Ltd vs. Arthur Capel & Co* [1919] AC 435

In a lot of cases, the unavailability of subject matter is only temporary, and in some circumstances the subject matter of a contract are still in existence, which simply may not be available for the purpose contracted. In the case of *International Sea Tankers Inc. vs. Hemisphere Shipping Co. Ltd.*,<sup>59</sup> a ship of oil was trapped in Shatt-al-Arab because of the outbreak of war, and so it was an impossibility to perform the contract to carry oil from Iraq. It held the charter party indirectly frustrated due to the unavailability of the subject matter.<sup>60</sup>

#### **8.4.5 Impossibility of the Method of Performance**

Where a method of performance has been agreed on and that method has subsequently become impossible, the contract will be frustrated. However, it is not sufficient that the parties contemplated a particular method of performance, although it must have been expressly agreed that this was the exclusive method by which the obligation would be carried out. This is demonstrated in *Nickoll & Knight vs. Aston, Edridge & Co.*,<sup>61</sup> where a cargo of cotton seed was to be sold and shipped at certain Egyptian ports by a steamship called 'Orlando' to be delivered to plaintiffs in the United Kingdom. When the 'Orlando' subsequently ran aground, the plaintiffs brought an action for breach of contract against the defendants for failing to ship the cargo. It was held that<sup>62</sup> the contract was frustrated since there was an implied term that, if at the time of performance the 'Orlando' was not fit, the contract would be at an end. This, in fact, displays the weakness in the implied term approach to frustration. It would surely not have been the intentions of the parties to render the contract at an end; rather, the use of another fit for purpose vessel or a delay to allow for the 'Orlando' to be repaired would have been more likely contemplations.

In *Tsakiroglou & Co Ltd.*,<sup>63</sup> the House of Lords refused to imply a term that shipment was to be made via the Suez canal. The parties both expected that shipment would be via the Suez canal when it closed in 1956 because of the war between Egypt and Israel; there was no shipping of

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<sup>59</sup> *International Sea Tankers Inc. v. Hemisphere Shipping Co. Ltd (No 2)* [1983] 1 Lloyd's Rep 400

<sup>60</sup> Paul Richards, *Law of Contract* (eighth edn Pearson Education Limited Essex 2007) 373

<sup>61</sup> *Nickoll & Knight vs. Aston, Edridge & Co* [1901] 2 KB 126

<sup>62</sup> By a majority of the Court of Appeal.

<sup>63</sup> *Tsakiroglou Co. Ltd vs. Noble Thorl GmbH* [1962] AC 93

goods from or to East Africa via that particular canal. But there was no expressed stipulation; hence, the House of Lord held that sellers should have shipped the goods by the alternative route around Cape of Good Hope. The parties have to look for all impossible ways to help them to perform the contract. A further case where the contract was not frustrated by closure of the Suez canal is that of *The Eugenia*<sup>64</sup> above, where the alternative journey from Genoa to India via the Cape of Good Hope increased the journey time from 108 days to 138 days.<sup>65</sup> In both cases, the cargo was such that delay would not affect it, and the only effect was to make the journey longer and more onerous for the charter party.

In a contract for sale and supply of goods, it will not be a defence for the seller to say that goods are not available from the source from which he originally intended to get them. Even if the source is the sole source from which goods can be obtained, a mere interruption or reduction of supplies due to commonplace difficulties will not frustrate the contract; they are ‘the warp and woof of industrial and commercial aggravation’. In *Blackburn Bobbin Co Ltd*,<sup>66</sup> the seller was not discharged from his obligation where its source of supply was cut-off due to the outbreak of war. This extends to the situation where the seller’s supplier chooses not to supply to the seller, rendering his performance impossible.<sup>67</sup> The contract will still not held to be frustrated despite this not being the fault of the seller. It is submitted that, in each of these cases, the seller assumes the risk by asserting that the goods can be supplied as agreed.

It is clear that, if a party is seeking to rely on the fact that their performance has become impossible because of the unavailability of a source to discharge them from their obligations

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<sup>64</sup> *Ocean Tramp Tankers Corp vs. V/O Sovfracht* [1964] 2 QB

<sup>65</sup> Lord denning in this case stated ‘It was originally said that the doctrine of frustration was based on an implied term. In short that the parties, if they had foreseen the new situation, would have said to one another: ‘If that happens, of course, it is all over between us.’ But the theory of an implied term has now been discarded by everyone, or nearly everyone, for the simple reason that it does not represent the truth. The parties would not have said: ‘It is all over between us.’ They would have differed about what was to happen. Each would have sought to insert reservations or qualifications of one kind or another. Take this very case. The parties realised that the canal might become impassable. They tried to agree on a clause to provide for the contingency. But they failed to agree. So there is no room for an implied term’.

<sup>66</sup> *Blackburn Bobbin Co Ltd vs. Allen (T.W.) & Sons Ltd* [1918] 1 KB

<sup>67</sup> the court held: ‘The sellers in this case agreed to deliver the timber free on rail at Hull, and it was no concern of the buyers how the sellers intended to get it there...(this was not) a matter which both parties contemplated as necessary for the fulfilment of the contract

under the contract, the source must have been one which was in the minds of both of the parties at the outset.<sup>68</sup>

## 8.5 Applications of Subjective Impossibility

### 8.5.1 The Death of a Person Essential to Performance

Most commercial contracts do not have need of performance by particular person because the commercial contracts in usual are made between companies. Thus, the death or illness of a person does not normally prevent the performance of a commercial contract, and so death does not make performance impossible in this kind of contract. However, a contract for personal service, as well as sometimes in the case of commercial contracts, will be impossible in the instance of death if a particular person is required by any party of contract to be a part of performance of the contract, such as a designer or an engineer.<sup>69</sup> The death of one party may make the contract is impossible to be performed in requiring personal performance from one or both of parties. For example, a contract of apprenticeship, employment, or agency is ended by death of any one of the parties. The rule is stated by Pollock C.B. in *Hall vs. Wright*:

‘All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them; and should he die, his executor is not liable to an action for the breach of contract occasioned by his death’.<sup>70</sup>

Under general contract law, the death of a party will not have any effect on the contract or any of the rights accrued under it. The personal representatives of the deceased person are bound to complete performance on his behalf insofar as the estate allows, and they may sue for the return side of the agreement. This is not the case when personal relations are the foundation of the contract. In such an event, the death of one or other of the parties, the contract is *prima facie* discharged.<sup>71</sup>

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<sup>68</sup> J Beatson, *law of Contract* (28<sup>th</sup> edn, Oxford University Press 2002) 541

<sup>69</sup> L Koffman and L Macdonald, *The Law of Contract* ( 6<sup>th</sup> edn Oxford University Press 2007) 529

<sup>70</sup> Hall v. Wright, El. B. & E. 746 (1858)

<sup>71</sup> *Chitty on Contracts* (30<sup>th</sup> Edition, Sweet & Maxwell, 2008) Volume 1 para23



Importantly, the Law Reform (Frustrated Contracts) Act 1943 will apply in some situations. Where part of the contract can be severed and those parts of the contract have been performed before the contract was discharged due to the death of the party, or were discharged but for payment of an ascertainable sum, the courts must treat that part as a separate contract that had not been frustrated. This provision keeps in mind severable obligations already performed, but departs from the common law refusal to allow the recovery of money paid or benefits conferred.

Contracts that might be discharged because of the death of one of the parties include contracts between principle and agent as in *Graves vs. Cohen*,<sup>72</sup> during which the court had to consider a contract between a jockey and his employer, a racehorse owner. It was held that the death of the employer frustrated the jockey's contract since the contract created a relationship of mutual confidence. This common law position stands but has diminished in importance owing to statutory provisions in relation to the most important parts of employment, which deal with the effect of death on a contract of employment. One statutory example can be found in the Employment Rights Act 1996, Section 176. In the instance that an employee whose employer has given him notice to terminate his contract of employment dies before the notice expires, the statutory provisions relating to redundancy payments apply as, if the contract had been duly terminated by the employer by notice expiring on the date of the employee's death, this may not be the case when the employer is in a partnership and only one of the partners dies. In the case of *Phillips vs. Alhambra Palace Co.*,<sup>73</sup> the death of one partner of a firm who owned a music hall was held not to discharge the contracts of performance.

In relation to partnership generally, a partnership will be frustrated as regards all the partners on the death of any of the partners unless there has been an alternative agreement. Neither the surviving partners nor the personal representatives of the deceased are obliged or entitled to carry on the partnership.<sup>74</sup> If a partner gives valid notice of the dissolution but dies before the receipt or expiration of the notice, the dissolution will take effect on the date of death rather than at the expiration of the notice.

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<sup>72</sup> *Graves vs. Cohen* (1929) 46 TLR 121

<sup>73</sup> *Phillips vs. Alhambra Palace Co* [1901] 1 KB 59

<sup>74</sup> Partnership Act 1890 s 33 (1)

### 8.5.2 Illness of a Person Essential to Performance

A contract for personal services, if it is to be performed by the promisor himself, will be discharged if, without default on his part, he becomes physically incapable of performing the contract. For example, if a contract with a lawyer to take a case is made but the lawyer suffered a stroke, causing him to lose his mental ability, the contract will be frustrated by mental illness.

The serious illness of the party of contract may frustrate personal contracts; it will do so if illness is continued for long time or if it is of such a disabling character as to preclude performance. Examples of when a party might become incapable of performing the contract include when an employee becomes incapacitated by illness. In the old case of *Robinson vs. Davison*,<sup>75</sup> the court held that the illness of a piano player contracted to play a concert frustrated the contract. In the case of *Hart vs. AR Marshall & Sons (Bulwell) Ltd*,<sup>76</sup> the contract of employment was held to be frustrated by the indefinite illness of the employee. It is likely that the length of service will be a relevant factor in determining whether the contract is frustrated by prolonged illness. The test of whether or not illness will be sufficient to frustrate the contract will depend on whether the illness is such as to cause an impact in the business sense in regard to engagement. In *Notcutt vs. Universal Equipment Co.*,<sup>77</sup> the employment contract was frustrated when an employee had a heart attack and would never work again. In the case of *Mount vs. Oldham Corpn*<sup>78</sup> it was held that the absence of a headmaster from a school through illness was not sufficient to put an end to his employment relationship with the education authority.

However, illness will not automatically frustrate an employment contract as it is a question of degree and whether the employee's incapacity is such that further performance would be either impossible or radically different from that undertaken by him and accepted by the employer. Relevant considerations will include the terms of the contract, the nature and duration of the employment, the nature of the illness, the period of past service and the prospects of recovery.<sup>79</sup>

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<sup>75</sup> (1870-71) L.R. 6 Ex. 269

<sup>76</sup> *Hart vs. AR Marshall & Sons (Bulwell) Ltd* [1978] 2 All ER 413, [1977] 1 WLR 1067, EAT

<sup>77</sup> *Notcutt vs. Universal Equipment Co* [1986] 3 All ER 582

<sup>78</sup> *Mount vs. Oldham Corpn* [1973] QB 309, [1973] 1 All ER 26, CA

<sup>79</sup> Kelly, Cliona, 'Frustrating the Rights Out of You: The Doctrine of Frustration and Employment Contracts' (2004) 4 U C Dublin L Rev 1,35

Hence, in *Condor vs. The Barron Knights Ltd*,<sup>80</sup> a contract was devised where a drummer was to play seven nights a week, but who subsequently had a nervous breakdown and was advised to play no more than four nights a week for medical reasons. This contract was frustrated.

The factors that need to be taken into account when assessing whether or not a contract of employment has been frustrated by long-term absence due to the illness of the employee include, for example, the terms of the contract, the length and nature of the employment, the length of service of the employee, and the nature of illness.<sup>81</sup>

This would seem straightforward enough as it is clear that, if the person contracted to perform a service was unavailable through no fault of their own, it would then be impossible for the contract to proceed. If the contract was for commercial services or for the sale of goods, the contract would then unlikely be frustrated due to serious illness as the contract could be performed by an alternative person and/or the business. Ellington uses the example of a tailor who dies whilst producing a suit. If his widow finished the suit and delivered it, the contract would not be able to be frustrated.<sup>82</sup>

### **8.5.3 Imprisonment of a Person Essential to Performance**

An employment contract will also be frustrated by the imprisonment of the employee. In the case of *Hare vs. Murphy Bros Ltd*,<sup>83</sup> a foreman had worked for the same employers for 20 years but was given a 12-month prison sentence, which was considered sufficient to render the contract of employment impossible. A temporary internment will not be sufficient to discharge a contract of agency. Call up for military service has also been held to frustrate a contract of employment. The National Industrial Relations Court<sup>84</sup> dismissed his claim of unfair dismissal on the grounds that his sentence of imprisonment amounted to a breach by the employee of his contract of employment of such a serious a nature that it constituted a unilateral repudiation by him of that contract. In the Court of Appeal, Lord Denning did not feel that a breach of contract had

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<sup>80</sup> *Condor vs. The Barron Knights Ltd* [1966] 1 WLR 87

<sup>81</sup> See *Spencer vs. Paragon Wallpapers Ltd* [1976] IRLR 373, the Employment Appeal Tribunal.

<sup>82</sup> Paul R Ellington 'Termination of contracts under English law' (1997) 7 I.B.L.J 857, 865

<sup>83</sup> *Hare vs. Murphy Bros Ltd* [1974] 3 All ER 940, CA

<sup>84</sup> In *Hare V. Murphy Brothers Ltd* (1974) IRLR 342

occurred because the event that had led to the employee's imprisonment was in no way connected with his contract of employment, and his imprisonment was the act of the court that had sentenced him. He said:

'The sentence of 12 months' imprisonment frustrated the contract of employment. I know that it was brought about by his act, namely, the unlawful wounding. In that way it may be said to have been self-induced; but it was still a frustrating event'

When the employee being imprisoned is prevented from continuing the work under the contract, frustration due to imprisonment is easy to see as the imprisonment will prevent the employee from being able to do his job; however, the employer would be wrong to think that any period of imprisonment would constitute frustration. The employment appeal tribunal has ruled that an employee that was effectively prevented from working for some time due to bail conditions did not have the employment end due to frustration, and the employer could have chosen to actually terminate the employment if it had so wished.<sup>85</sup>

Where an employee is imprisoned for a substantial remainder of the employment contract's duration, it may be frustrated by the employer; however, it was held in *FC Shepherd vs. Jerrom*<sup>86</sup> that the employee is barred as this would be self-induced frustration, although the Court of Appeal held that the employee was not unfairly dismissed. The contract of employment was frustrated. Essentially, although imprisonment can frustrate an employment contract, the effect of imprisonment is not just on an employment contracts but includes personal contracts, such as agency contract.

#### **8.5.4 Competence or Deskilling**

It is very controversial for an employment contract to be frustrated by virtue of illness or imprisonment as the supervening event may well have been outside the control of both parties

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<sup>85</sup> Treltel, *Frustration and force majeure* (Sweet & Maxwell London 2004) 538

<sup>86</sup> *FC Shepherd & Co vs. Jerrom* [1987] QB 301

and the employer may need to replace an employee for practical reasons. However, it has recently been recognised that a contract may be frustrated by ‘de-skilling’; this, it is submitted, is a somewhat alarming development in today’s employment background where performance targets play such a major role.<sup>87</sup> The case was *Gryf Lowczowski vs. Hinchinbrooke Healthcare NHS Trust*,<sup>88</sup> and the employee was a consultant whose clinical capabilities were in doubt. On the facts of the case, it was held that the contract was not in fact frustrated as there was a significant chance of re-skilling taking place. In addition, the catastrophic effect this would have had on the consultant was also taken into account. This is an area that is unsuitable for the doctrine of frustration as the employer’s interests, where competence is concerned, are addressed fully by the law of employment contract. From the employee’s point of view, this may be seen as a way for the employer to circumnavigate the protections against unfair dismissal in employment law. This case highlights that the doctrine of frustration can be difficult to apply in many employment cases.

### **8.5.5 Impossibility by Bankruptcy**

Frustration of contract by bankruptcy may be discussed under frustration by illegality because law and courts will deal with bankruptcy cases or under impossibility if the financial ability of a party means that a contract became impossible to perform. The party of the contract who filed for bankruptcy will be discharged from the obligation by impossibility but to repay their debts as long as they give up all assets owned.

Personal contracts are not terminated due to bankruptcy; in these circumstances, it may be appropriate for the court to consider frustrating the contract if the bankruptcy has affected the contract significantly. There is scarce case law in the UK concerning personal contracts frustrated due to bankruptcy; therefore, the operation of the doctrine in these circumstances must be rare. However, with a lack of judicial precedent on the issue combined with the fact that a

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<sup>87</sup> D Brodie ‘Performance Issues and Frustration of Contract: Case Comment’(2006) 71 EMP L B 2006, 71

<sup>88</sup> *Gryf-Lowczowski vs. Hinchinbrooke Healthcare NHS Trust* [2006] ICR 425 QBD

contract usually will not be frustrated for bankruptcy, it is important that the juristic basis of frustration is clear in order that it may be applied to new situations such as this.

Andrew Burrows states that, whilst there is no argument as to the existence of the doctrine of frustration, there is dispute concerning the juristic basis of the doctrine.<sup>89</sup> The case of *National Carriers vs. Panalpina (Northern) Ltd*<sup>90</sup> is very useful in terms of analysing the basis of the frustration doctrine as the judges in this case provide a nice analysis of the various bases of the doctrine. Lord Hailsham identified five theories on the basis of frustration: the implied term theory, a fair and just solution, removal of the foundation of the contract, total failure of consideration, and the construction theory. It is useful to look at these theories in more detail in order to analyse how they fit in with the reality of the use of the doctrine of frustration.

The effect of bankruptcy and insolvency is not usually considered in the same light as frustration and common mistake; however, where the seller in a sale of goods contract becomes insolvent before the goods have been transferred to the buyer, the distinction between ascertained and non-ascertained goods becomes of paramount importance. Neither the bankruptcy nor insolvency of a person terminates a contract already made, but when a bankruptcy order is made, all property or rights vested in the bankrupt at the time pass to the trustee of the bankrupt's estate.<sup>91</sup> It may be impossible for a buyer to obtain goods bought from the seller who goes into bankruptcy unless he can show that certain ascertained goods, although still in the possession of the bankrupt seller, had actually been transferred in title to the buyer. In *Re Goldcorp Exchange*<sup>92</sup> it was established that unless the goods purchased could be ascertained, then the purchaser would merely be a creditor and hence would barely be able to recover anything.

SOGA makes special provision for the situation where the buyer becomes insolvent and, by virtue of Section 39(1)(b), an unpaid seller can stop goods in transit even after parting possession in such circumstances. Section 41(1)(c) provides that the seller can refuse to deliver except against payment in cash. Although insolvency does not put a contract at an end, a notice of

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<sup>89</sup> Andrew Burrows, *A Casebook on Contract*, (3<sup>rd</sup> Edition, Hart Publishing, Oxford: 2011) 708

<sup>90</sup> [1981] AC 675

<sup>91</sup> Michael Bridge, *Benjamin's Sale of Goods* (8<sup>th</sup> Edn, Sweet & Maxwell 2010) Para 3-046

<sup>92</sup> *Re Goldcorp Exchange Limited* [1995] 1 A.C. 74 is an English Privy Council case on trusts law

insolvency may have the effect of a repudiation of the contract as the buyer is essentially saying they are unable to fulfil their obligation to pay the purchase price.<sup>93</sup>

Ellington comments that bankruptcy will not usually terminate a contract.<sup>94</sup> He states that contractual rights will normally be passed over to the trustee in bankruptcy, and contracts can be enforced against the trustee—unless they are personal contracts. The contract price will then be added to the list of ordinary creditors by the trustee. Clearly, this is not a very satisfactory conclusion for the party at risk. Their name might be added to the list of creditors, but this is contingent upon the amount of creditors: they will be unlikely to receive anything near what they are owed under the contract. Depending upon what point they were at in the contract, they may prefer to cut their losses and terminate the contract immediately. A party to a contract with a bankrupt may be able to apply to the court for the contract to be discharged. It would then be down to the court to apportion fair payments from either party in respect of work done and according to what it deems to be fair.<sup>95</sup>

## 8.6 Temporary Impossibility

Temporary impossibility arises when a thing or person essential to the performance of a contract becomes temporarily unavailable for a period. In cases where the performance is rendered impossible but only temporarily, the question is centred on whether contractual performance when resumed would amount to performance of a fundamentally different contract.<sup>96</sup>

For supervening events, it is possible to suspend the contract without discharging it all together.<sup>97</sup> For example, the illness of an employee might excuse his absence from work for the course of the illness without actually discharging the whole employment contract. Temporary impossibility may also be sufficient to frustrate the entire contract, such as in the case of the temporary unavailability of the subject matter of the contract, as per *Jackson vs. Union Marine Insurance*

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<sup>93</sup> White Michelle, ‘Contract Breach and Contract Discharge Due to Impossibility: A Unified Theory’ (1988) 17 *The Journal of Legal Studies* 353,376

<sup>94</sup>Paul R Ellington(n 82) 866

<sup>95</sup> *Ibid*

<sup>96</sup>Jill Poole, *Casebook on Contract Law* (10<sup>th</sup> edn OUP Oxford 2010) 550

<sup>97</sup> *Boast vs. Firth* (1868) LR 4 CP 1

*Co.*<sup>98</sup> A ship was chartered in November with a provision that it proceed with all possible dispatches from Liverpool to Newport, where it was to load a cargo and proceed to San Francisco. The ship ran aground between Liverpool and Newport, and was not fully repaired until August the following year. The contract was held to be void because the ship was unavailable for the voyage for which it was chartered. A voyage in August the following year was thought to be radically different from that which was agreed. It is clear that, even if the impossibility is only temporary, it may be that the delay is sufficient to render the contract impossible to perform.

The party of the contract may have a temporary excuse for the non-performance of temporary impossibility, such as when the illness of an employee was not of such duration as to frustrate his contract of employment, meaning the employee would not be in breach of the contract through failing to work whilst ill. The excuse can extend to cases where the employee is temporarily prevented from performing by other causes beyond his control.

As has been established, the time is the essence of the contract. A contract will be discharged by temporary impossibility where it can be performed on the day or days over the temporary impossibility extends. The illustration of this situation is provided by *Robinson vs. Davison*,<sup>99</sup> where a contract where a pianist was to give a concert on a specified day was held to have been discharged.

Where the contract is one of fixed duration and the unavailability of the subject matter is only temporarily unavailable the court must:

‘...consider the ratio of the interruption in contractual performance to the duration of the contract. The higher the ratio the more likely the contract is to have been frustrated’.<sup>100</sup>

In the case of *The Nema*,<sup>101</sup> a charter party became frustrated when a strike closed the port at which the ship was due to load. There were seven voyages contracted for between April and December; only two could be completed.

A contract that does not express a specific time for performance is not of the essence, but may however be discharged by reason of the length of delay resulting from temporary impossibility.

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<sup>98</sup> *Jackson vs. Union Marine Insurance Co* (1874) LR 10 CP 125

<sup>99</sup> *Robinson vs. Davison* (1871)L.R.6Ex.269

<sup>100</sup> Mulcahy Linda, *Contract Law in Perspective* ( 5<sup>th</sup> edn Routledge-Cavendish Oxford) 550

<sup>101</sup> *Pioneer Shipping Ltd vs. BTP Tioxide Ltd (The Nema)* [1982] AC 724





## 8.7 Length and Effects of Delay

Frequently, as has been established, supervening event causes delays in the performance of the contract, causing financial losses for one of the parties.

It is important to remember that the delay must not be attributable to either of the parties if it is to be considered a frustrating event. This means that long delays in the arbitration itself, which are brought about because of inactivity on both sides, cannot frustrate the contract because they are self-induced. It is the length of the delay that is important in determining whether or not the contract will be frustrated. As has been seen in the case of *Jackson* above, the delay has to be:

‘of such a character that the fulfilment of the contract, in the only way or ways contemplated and practicable, is so inordinately postponed that the delayed fulfilment will involve something commercially or fundamentally different from that contemplated in the contract’.<sup>102</sup>

War is one example of an event that could cause delay to the performance of a contract. Delay caused by war might be long enough to frustrate the contract, but there is no irrefutable presumption that the outbreak of war will do so. In the case of *Fibrosa Spolka Akcyjna vs. Fairbairn Lawson Combe Barbour Ltd*,<sup>103</sup> for example, the contract was frustrated as a result of the delay caused by the outbreak of war. The contract was for the building of machinery in Poland, which was to be delivered to England within three to four months of the settlement of the final contract details. Before the delivery, however, the Germans occupied Poland, and the machines were not able to be delivered. This was a contract in which the time for delivery was specified and the length of occupation frustrated the purpose of the contract; however, each situation depends on its facts.

It seems likely that the delay will have to be something that the parties would not have thought to contract against and something that would be of equal concern to both of them. In the case of *Davis Contractors vs. Fareham Urban District Council*,<sup>104</sup> the claimant contractors agreed to build 78 houses for the defendants at a charge of £94,000. The work was scheduled to last for eight months; however, owing to a shortage of skilled labour, it actually lasted for twenty-two

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<sup>102</sup> Halsbury’s Laws of England (Contract Volume 9(1) (Reissue)) paragraph 902

<sup>103</sup> *Fibrosa Spolka Akcyjna vs. Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32

<sup>104</sup> *Davis Contractors vs. Fareham Urban District Council* [1956] A.C. 696

months, and the cost was in the region of £115,000. It was argued that the contract had been frustrated by the length of the delay. The court held that the contract had not been frustrated.

Lord Radcliffe stated:

‘The possibility of their not being enough labour was before their eyes and could have been the subject of special contractual stipulation....Though timely completion was no doubt important to both sides, it is not right to treat the possibility of delay as having the same significance for each.’

He concluded that the doctrine of frustration ought not to be used to get the contractor out of an unfortunate contractual predicament that he could have guarded against.<sup>105</sup>

The relationship between delay and frustration can be said to be one of degree, depending on the facts of the specific situation at hand. It has been held that the appellate courts should therefore be reluctant to interfere with the findings of the lower courts and arbitrators. In the case of *Kodros Shipping Corpn vs. Empresa Cubana de Fletes, The Evia*<sup>106</sup> at 368 The House of Lords, held in relation to the exact date of frustration caused by delay:

‘The choice of date in this case, as in the others, was for the umpire or arbitrator concerned and is not a matter for your Lordships' House.’

Whether or not delay will cause frustration may, to some extent, also depend on the type of contract under examination. If the contract is a commercial contract, it seems that delay is more likely to affect its substance. In the case of *National Carriers Ltd vs. Panalpina (Northern) Ltd*,<sup>107</sup> Lord Simon stated that:

‘Commercial men must be entitled to act on reasonable commercial probabilities at the time they are called upon to make up their minds.’

Thus, businessmen are often thought by courts to be entitled to know where they stand, and should not be required to wait on events.

With regard to delay, the same principles apply as across the whole doctrine of frustration. The courts will be concerned with considering the details of what the parties agreed, whether expressly or impliedly. They will then look at whether the delay was self-induced, and whether it was something that could have been foreseen and dealt with by a contractual stipulation. If it was not, they will look in detail at whether the length or effects of the delay actually altered the

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<sup>105</sup> Treltel ,Frustration and force majeure(n 85) 236

<sup>106</sup> *Kodros Shipping Corpn vs. Empresa Cubana de Fletes, The Evia* [1982] 3 All ER 350

<sup>107</sup> *National Carriers Ltd vs. Panalpina (Northern) Ltd* [1981] AC 675 at 706

substance of the performance to a degree that was substantially different from that which the parties had contemplated when they entered into the agreement.<sup>108</sup>

## 8.7 Impossibility by Contract by Illegality

Even if the performance of a contract is still technically possible, a contract may be frustrated because, since the contract was agreed, there has been a change in the law that now renders performance illegal. As Lord Macmillan stated: ‘it is plain that a contract to do what it has become illegal to do cannot be legally enforceable’.<sup>109</sup> As discussed briefly earlier, if the performance of the contract was illegal before it was agreed, frustration will not apply, and the contract will be dealt with under the rules for illegal contracts. It is only a supervening change in the law that will permit the use of the doctrine of frustration. Essentially, the reasoning behind this is that no one can be assumed to have taken the risk that the contract would become illegal. Most obviously this will occur if legislation is enacted after the contract is agreed, which affects the legality of performance.

Many of the historical cases on frustration due to illegality deal with contracts rendered illegal by war. The case of *Avery vs. Bowden*<sup>110</sup> concerned supervening illegality. This concerned a contract for cargo to be picked up from Odessa. However, due to the Crimean war, a subsequent law was passed prohibiting the loading of cargo at an enemy port. It was therefore found that the contract had been frustrated due to the supervening illegality. Had this law been passed unknowingly to the parties prior to the agreement of the contract, the contract would likely have been a mistake rather than frustrated.

Under the Trading with the Enemy Act 1939, it is, as the title suggests, illegal to trade with a country with which the UK is at war. Therefore, if a war is declared before a contract is fully

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<sup>108</sup> John Stannard, *Delay in The Performance of Contractual Obligations* ( OOU Oxford 2007) 343

<sup>109</sup> *Denny. Mott & Dickson vs. James B Fraser & Co Ltd* [1944] AC 265

<sup>110</sup> *Avery vs. Bowden* (1856) 119 E.R. 647

performed, the contract will be frustrated.<sup>111</sup> Similarly, if anything to do with the performance of contract is subsequently prohibited by law, the contract may be frustrated.<sup>112</sup>

There are also situations where the illegality affecting the performance of the contract is only a temporary or a partial illegality, encompassing only some of what the contract covers. Temporary illegality is dealt with in much the same way as temporary impossibility in that the court will look to the facts of the case and decide what is proportionate and reasonable. For example, in *National Carriers Ltd vs. Panalpina*<sup>113</sup> the local authority blocked the access to a warehouse which was on a ten year long lease for twenty months. The defendant could not rely upon frustration as excuse for failing to pay their rent as the length of time the illegality prevented performance was minor in terms of the length of the contract. Where partial illegality is concerned, the issue upon which the courts will focus is whether the illegality defeats the main purpose of the contract or just part of it. If it defeats the main purpose, the contract will be held to be frustrated;<sup>114</sup> if, on the other hand, the illegality is only applicable to part of the contract and not the main part, the parties will not be able to rely on frustration to end the contract.<sup>115</sup>

In any event, even if the contract is not frustrated, the parties should be able to rely on the supervening illegality for non-performance of the part of the contract that is now illegal. Similar to temporary illegality, illegality will provide an excuse for non-performance as long as the illegality lasts.<sup>116</sup>

Treitel argues that the concept behind frustration for illegality is the question of public interest. There is obviously a public interest that the law is observed, and Treitel argues that the degree of presumption that a contract will be frustrated for illegality is dependent upon the public interest in upholding the particular law.<sup>117</sup> If there is a contract provision dealing specifically with illegality, such as when providing for a temporary suspension of the contract, where the export of

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<sup>111</sup> *Fibrosa SA vs. Fairburn Lawson Combe Barlow Ltd* [1943] AC 32

<sup>112</sup> *Metropolitan Water Board vs. Dick Kerr* (1916)

<sup>113</sup> *National Carriers Ltd vs. Panalpina (Northern) Ltd* [1981] AC 675; [1981] 2 WLR.

<sup>114</sup> *Denny, Mott & Dickson*, op cit (fn 74)

<sup>115</sup> *Cricklewood Property Investment Trust Ltd vs. Leighton Investment Trust Ltd* [1945] AC 221

<sup>116</sup> *Libyan Arab Foreign Bank vs. Bankers Trust Co* [1989] QB 728

<sup>117</sup> G H Treitel, *the Law of Contract* (12<sup>th</sup> edn Sweet& Maxwell Limited 2007) 949

a particular thing was unlawful, for example, this may survive the frustration doctrine in the interests of later continuing trade and because the provision supports the law.<sup>118</sup>

A subsequent change to the law may also frustrate a contract and hence discharge the parties from future performance obligations. Where the performance of the contract has been rendered frustration by an Act of Parliament passed after the contract was made, the promisor is then excused from performing his promise. The presumption is that parties intend the contract to operate in accordance with the law on force at the time at which the contract was agreed. This rule has, for example, been used in the context of employment agreements.<sup>119</sup> The same principle applies when the method of performance is rendered illegal by an act of the state under delegated legislation or a declaration of war or a ban on exports etc.<sup>120</sup> Again, if the contract requires performance in another country, it will be discharged if that performance becomes illegal under the law of that country.

The law may ban doing something undertaken in the contract or may prevent the use of the subject matter for the common purpose of the parties. A contract implemented during a war is illegal if it involves commercial communication with an enemy. The public policy considerations on the prohibition against trading with the enemy are based on exception because observance of this prohibition can affect the survival of the nation. This point is reflected in a number of special rules that apply where the performance of contracts was legal but which is later affected by this prohibition. Such a contract is illegal at common law on the ground of public policy that would tend to aid the economy of the enemy country. If, in fact, performance would not involve any further commercial contact with the enemy of enemy, the contract is considered illegal.<sup>121</sup>

Of course, illegality must not always mean that a contract is frustrated; in some contracts, the parties may have agreed that one party bears the risk that the contract will subsequently become illegal, and that party will therefore bear the loss.

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<sup>118</sup> Hindhey, John, W. Queen, Erin M. (2006). Anticipating and Managing Projects, Changes in Law. *Construction Lawyer*. vol 26. No 4. pp 26- 32

<sup>119</sup> See *Brewster vs. Kitchell* (1698) 1 Salk 198

<sup>120</sup> *E Hulton & Co Ltd vs. Chadwick and Taylor Ltd* (1919) 122 LT 66 (government restriction on imports)

<sup>121</sup> Treitel, *Frustration and Force Majeure* (n9) 352

# CONCLUSION

## General

The aim of this conclusion to give a final finding and a critical analysis of the formers chapters and to recognise certain parts and directions they may be useful and suitable for this aria of the law to progress in the future.

At the first, the discussion in the second chapter is an attempt to provide a brief account and general characterisation of the very large sphere of Sharia. We will find that Islamic law is becoming increasingly recognised and accepted within the Western world and, as a result, the way in which it is developed and interpreted is gaining much greater attention. Fundamentally, when looking at Islamic law, the central premise is the fact that God is seen as the divine law, and whilst there are multiple different ways in which God's word is translated into legal practice and applied by jurists, it is this concept of God being central that is fundamental. The various different aspects of Islamic law being considered include the main sources of Islamic law and the jurisprudence that is applied on a day-to-day basis, recognising that there are potentially several different accepted ways of Islamic law operating both in the traditional sense and also in the modern context. All of these factors are deemed relevant to the application of Islamic law, both currently and going forward into the future—particularly where there is an emergence of the use of Islamic law in traditional Western societies.

From the discussion it might be summarised that the question of Sharia requires a thorough study. One should discuss each area of Sharia under its own heading. As a conclusion, one might observe that Sharia is a blessing of God to the community owing to its universality, perfection, effectiveness in preserving all the necessities of existence, and provision of what is needed to build a civilisation and its identity. The belief that Sharia manipulates merely a religious point of view is rejected; the argument or accusation that Sharia is predominantly concerned with the life in the hereafter also not acceptable. The discussion denies these wrong allegations.

The Sharia is comprised of all the elements that give Islamic life its particular colour and taste, and it contributes to the achievement of Islam's higher objectives. As such, the community will

only achieve success and felicity in this life and in the Hereafter if the objectives, purposes and principles of Sharia are clearly understood and appreciated. The objectives and principles of Sharia are embodied in the divine revelation, i.e., the Quran, the Sunnah and in other secondary and supplementary sources of Islamic law.

It should also be noted that the various provisions of the law of some Muslim states are based on Islamic law. It seems to be necessary and appropriate for foreign parties (businessmen, companies and investors) to be familiar with and to understand the Islamic terms and rules, values and traditions—all of which are embraced by Sharia, particularly where there are extensive dealings or transactions between these states. In actual fact, Islam and its law do not allow of divisions between the various facets of human life. Religion cannot be separated from politics, morality and economics, just as the human personality cannot be compartmentalised into religious, political and economic segments. As such, Sharia regulates not only legal rights and obligations, but also non-legal matters. It also provides moral guidance for human conduct in general. Therefore, the Muslim community should organise its life primarily by reference to religious values and spiritual principles. In other words, the establishment of political, economic and social order should be based on those particular values. It is necessary to emphasise that some Muslim countries have implemented and practiced Islamic law not only in limited areas, as has been asserted by some scholars, but also throughout the various fields and aspects of life, i.e. economics, politics and social policy, as well as the law.

In chapter two in second part, particular attention has been directed towards the Saudi legal system. Saudi Arabia's legal system recognises the supremacy of divine sovereignty. Saudi courts rely on the principles of Sharia jurisprudence, and apply statutory laws to cases before it unless they conflict with the Islamic Sharia. The Board of Grievances represents an example of an Islamic judicial body that has been adopted in order to cope with modern society. Saudi Legislature has taken a major step forward in terms of modernising the Saudi Judicial System. In Saudi Arabia, the Sharia primary sources, the Qur'an and the Sunnah, have supremacy over all laws and man-made regulations or normative instruments. However, sometimes Saudi law is more widespread than Sharia law, and encompasses Islamic law and the law and rules adapted from other laws within the general framework of Sharia principles. There are a few exceptions to this rule, particularly in regard to Saudi law, which is unconnected to Islamic law and principles,



such as the Banking Law and practices, which controls some activities that are obviously forbidden in Islamic law, namely interest. This raises many controversial discussions and objections in Saudi Arabia.

Saudi law is unwritten, especially civil and commercial laws, although there are legal principles apply to a lot of cases; however, there are differences between the judgements of judges even if the cases are similar. In recent years, especially from 2007 when the judicial system in Saudi Arabia was developed, the judiciary in Saudi Arabia has been in need of review and update in the field of commercial and civil laws, as well as procedures law. Furthermore, Judgements also need to be published and be in everyone's reach as there is a lack of published judgement. Although the development is moving slowly, Saudi Arabia attempts to establish a comprehensive legal system. This target requires great effort of re-studying Islamic law and several international laws so as to reform the law in Saudi Arabia in consistency with contemporary law.

The chapter three we discussed law of contract in Islamic law, which is considered one of the most important topics, as discussed in Islamic law. It must be emphasised that the classical jurists of Islamic law did not attempt to develop a general theory of contract; rather, their efforts were concentrated on the detailed and individual treatment of each contract, with jurists categorising each contract into classes of nominate contracts with their own distinctive rules. Any study of the concept and scope of contract in Islamic law has to start from consideration of the various contracts in Islamic law. In the authoritative books, each contract has been defined separately and examined meticulously. It will be suggested, however, that this separate treatment of contracts is more of a reflection of the process by which Islamic law was developed, as opposed to any conscious desire to specify the sphere of contracts. It was, in particular, a necessary and inevitable by-product of the process of Islamic law, meaning the subjection of practices in markets to the overriding norms of the Islamic religion in which jurists were engaged. This process was necessitated by the fact that Islam is regarded not only as a religion but also as a way of life. As a result of changing the social life and changing in dealing in the markets and the trade in the following centuries, scholars had legislated rules for each nominated contract those used to be in practice, with the jurists covering all rules of contracts in the method. It is true that the contract of sale provided a ground for analogy. The majority of legal researches

all encompass a section on contract of sale in which important ground rules are provided for contracts in general.

In the present time, contemporary jurists have attempted to develop a comprehensive theory of the contract in Islamic law, with many books and researches in the theory of the contract in Islamic law published; however, it must be noted that, although it is positive development in the law of contract, but these theories are not comprehensive: there is no book or research covering all topics of the contract that are discussed under contract theory as is happening in English law. The other problem is terminology; jurists use different terms to the same meaning, such as in regard to force majeure, supervening events, exceptional circumstances, impossibility, impracticability and hardship, where some writers use force majeure or supervening events as opposed to frustration. Accordingly, jurists must give greater attention to the terms to determine their meaning and the need to adopt standardisation of terminology. It is true that the development and prosperity of writings of legal and jurisprudence books were in medieval times, and so cases and examples given will be old. Also, the jurists were responsible for the development of Islamic law from its main sources rather than judges.

The essential argument that has emerged in Islamic law concerns whether or not the parties are free to make transactions outside the scope of the stipulations of Islamic law of contract. Jurists argue that, by virtue of the proven by the lawgiver are void and have no legal effect in the law. It is important to note that this view also extends to obligations not expressly permitted by Islamic legal nominate contracts—established by early jurists.

Law of contract differs from other branches of law of obligation in one important respect: that the parties themselves are free to make their own terms on which to enter to enter into a contract. The main opinion in Islamic law recognises the concept of freedom of contract and condition in the law. Accordingly, parties are granted relative freedom to make whatever type of transaction and stipulation they choose so long as they are not in contradiction with the general Islamic principles. The supporters of freedom of contract in Islamic law form the majority opinion of jurists. Thus, non-restriction of nominate contract types is therefore the general rules in Islamic law, where jurists who support this opinion, based on authentic and unambiguous evidence, deduce that every contract and condition is legally valid even though it is not mentioned in the primary sources—unless, of course, it is in contrast to general religious rules.

In subchapter three 3.3 and 3.7 when one takes the time to understand Islamic contract law as being derived from the principles of freedom of contract, its various peculiarities to a Western scholar become explicable and justifiable. For example, the idea that a party should be allowed to escape a contract simply because circumstances changed, rendering his obligations more onerous, would be deemed a dangerous proposition under Western paradigms of contract law; yet, when one takes into account Islam's prohibition of *gharar* and the libertarian principle from which this prohibition itself is derived, one is forced to accept that the doctrine of imprecision is a necessary feature of Islamic contract law. In actual fact, this is caused by a lack of understanding of the differences between the views of jurists in Islamic law schools. The observation is that there is a noticeable lack of high-quality Western research in the field of Islamic contract law. Those sources that do purport to provide detailed insights into Islamic contract law generally fail to identify the nuances between the approaches of the four schools of Islamic jurisprudence.

In chapter four has been discussed and analysed part of the main topic of the research frustration of contract in Islamic law, we found that the main problem with the method adopted in the traditional books of Islamic law is that it is not based on a consolidated theory. Muslim jurists have not tried to create a general and organised doctrine of frustration of contract. The doctrine is nowhere clearly expressed and the individual rulings assume many different forms and are to be found dispersed throughout the traditional legal books. The majority of traditional jurists have been mostly looking for solutions rather than principles, and any researcher will often find himself faced with some different opinion in the same cases. Although Islamic Law did not define frustration as term, this does not mean there are no applications of the principles of frustration. In this research, it has been concluded that Islamic law applies the principles and provisions of frustration widely, which has been discussed in the form of details under the types of nominate contract and under different doctrines.

In the research in chapter four and five, we built a completed theory of frustration of contract by elements found in the Islamic traditional literature; the main factor is change of circumstances, which make performance of contract onerous or impossible. We recognised in the qur'anic principle of justice and equity there are many verses, which illustrate that no difficulties, hardship or burden will not be imposed on people, and the Prophet saying; there shall be no

unfair loss nor the causing of such loss also the legal maxims and the principal of necessity. Therefore, frustration is designed to avoid onerous or hardship in performing contract. We applied these principles on all cases of frustration; we found that they support an adoption of discharge of contract because of frustration; this is the starting point to build the theory.

After that we looked for more details of cases related to frustration of contract in the books of Islamic law and in the views of scholars, than we found doctrine of excuse *udher* . Also the doctrine of natural disaster *al-jawaih* can lead to the discharge of the contract due to natural calamities, which destroy the fruit and crops. Even the main areas to which the doctrine of *udher*, under the Hanafi School, are applied on leases and fluctuation of currency and the doctrine of *al-jawaih* was applied on destroy the fruit and crops, in this research it also been discussed, with it established that the doctrines of *udher* and *al-jawaih* are applied more broadly in Islamic Law in regard to supervening events that make the contract impossible or difficult to perform, whether the effect is objective or subjective. Then we continued to create the theory of frustration of contract by looking at and researching all nominated contracts in the Islamic law , which are discussed by scholars, it is found that many of the details and cases related to the frustration of contract found in many contracts , for example, some of the issues relating to frustrate of purpose are discussed under the contract of seal and others in the contract of lease , as well as the impossibility of performance of the contract because of the death of one of the parties of the contract, was discussed in all kinds of contracts in classic Islamic books. We have collected all the details and issues related to the frustration from several of contracts form traditional books of Islamic jurisprudence. Then we studied and analysed them and put them with the rules, elements and principles which aforementioned. Despite the lack of writings about a complete theory of the frustration of contract in Islamic law, it was possible to establish this theory. In this work an attempt was made to set out the elements of the Islamic law of frustration of performance and create theory of frustration as they appear to someone familiar with modern law systems and, particularly with English law. Finally, we built a completed theory of frustration in the Islamic law. In conclusion, that frustration is considered in Islamic Law, and leads to the discharge of contract.

This thesis specifically in chapter four and five has also attempted to unify the legal terms relating frustration comparable to that in English law because the writings of jurists use many different terms to identify the frustrations, and the use of supervening events, force majeure, impossibility and intervening events.

It should be stressed that the researcher found a way to avoid the difficulties resulting from the reference to the strict rules of some Muslims jurists by differentiating between own opinion of jurists and Islamic law, and by giving the latter precedence over the former. So as to avoid the strict application of the some opinions in commercial transactions by resorting to the more flexible opinions—as this is consistent with the provisions of Islamic law and freedom of contract—the application of the doctrine of frustration in Islamic law in order to remove the hardship and difficulties, this is basic principle in Islamic law.

In fact, at the time of the Prophet and the time afterwards, spanning up until the 19<sup>th</sup> Century, there were law cases in general or related to the contract that occurred between parties of the contract, who then asked the Prophet to issue a judgment in the dispute in the case, as well as scholars and judges who came after the Prophet. However, with the beginning of the 20<sup>th</sup> Century, when scholars began writing books in Islamic law broadly, most cases related to contracts, including to frustration, posed by scholars were purely hypothetical questions in order to give solutions to the legal problems.

Frustration of contract limits the principle of sanctity of contract. Islamic law assigns great importance to the doctrine of freedom of contract; however, in its application to frustration, Islamic law has a high degree of flexibility and malleability. Although this flexibility is also justified on the bases of intention and free will of the parties, the parties should not be required to be bound by a contract which, due to the change of circumstances, is significantly different from the one they originally foreseen, when the contract was freely concluded between them in the first place.

In chapter four Force majeure exonerates a party to a contract if he can successfully attribute injury to circumstances beyond his control. The nature and scope of the force majeure is determined by the terms of the contract and the circumstances surrounding each case. Although there is no specific rule to be found in traditional Muslim jurists about force majeure, it can be

recognised through the rules relating to the conditions in the contract. The general rule is that the parties of the contract are free to put any beneficial terms in the contract, and the terms must be performed, as well as the rules of the right of the option to termination the contract.

In chapter four we also discussed the doctrine of supervening events provides that, following a contract being entered into, an event occurs that was exceptional and could not be anticipated, and also has the result of making an obligation that was entered into much more onerous than it was initially where an undertaking was first made, a contract is then considered to have become impracticable. The rationale behind such a doctrine is the maxim in the Islamic religion that there should be no hardship in religion, and all parties should help one tolerate any difficulty that arises so as to create equity in society. The effect of finding that there has been such an intervening event is to render a contract as invalidated as if it had never been entered into, with courts applying the law of unjust enrichment to try and ensure that parties do not benefit as a result of the contract being invalid. As is commonly seen, however, case law illustrates that there are greater complexities and nuances associated with the matter.

In chapter four, we saw application of Islamic law of frustration of contract on some case in Saudi Arabia. Frustration of contract in Saudi law only is discussed in some the Judgements of the courts, which are unpublished and inaccessible by the researcher; although there have been attempts to publish the judgments, attempts are still weak and insufficient. In addition, there are no written laws relating to the contract or frustration, except labour law and the law of Public Procurement Contract Regulations; thus, the legislative authorities should set laws relating to contracts generally containing the rules of frustration in order to achieve clarity of legal opinion in such cases.

The importance of this study lies in the trend prevailing in Muslim scholars and writers at the present time, where the rules of contract—including frustration in Islamic law—should no longer be left outside the domain of the reassertion of the Islamic law within the sphere of civil liability. In this respect, Saudi Arabia was one of the leading Arab countries known to have acknowledged the importance of introducing the classical principles on frustration into judicial applications, and it can be seen that there has been a trend towards the reassertion of the Islamic law—at least in

the theoretical sense in another Islamic countries. Although there are no written laws in Saudi Arabia relating to frustration, the court cases apply this principle on the basis of the provisions of Islamic law.

Chapter five discussed, Analysised of whether there can, in fact, be considered a doctrine of impossibility of performance in Islamic contract law, akin to that of frustration in common law. The above has therefore looked at doctrines of impossibility of performance, of frustration, and how these apply in the real modern world. The basic foundation of Islamic contract law and how it applies obligations does not appear to specifically refer to the impossibility of performance. However, notions of hardship and *udhur*—as interpreted differently by the Islamic schools of thought—has rendered in the framework of supervening events that applies so as to govern the impossibility of performance in Islamic contract law. The fact that supervening events can be a natural or artificial event has meant that the doctrine, in effect, applies as a comprehensive framework. The applications of impossibility through the analysis and extrapolation of Islamic law by the writings of jurists was either linked to the subject matter of the contract or to the parties of the contract. The destruction of the subject matter of the contract gives rise to the question of risk, under Islamic law, where the rules determining which party bears the risk when the specific article is destroyed depends on whether the obligor is holding the subject matter in question. The rule is that, when the subject matter is held in hand, the possessor is absolutely liable for its destruction, loss or decrease in value—regardless of whether or not it was caused by his fault, the act of a third party, or a misfortune from heaven. No defence is allowed to exonerate him from his duty to restore the property and he is bound to make good the loss.

One need not distinguish between impossibility rendered by an Act of God, an impossibility rendered by death or illness, or an impossibility rendered by bankruptcy. All that is considered when determining whether or not the doctrine is applied and any compensation that might be paid to a losing party as a result of the doctrine applying is whether requirements of the doctrine of supervening events are met, including foreseeability and fault to be attributed to parties. As such, one might come to the conclusion that the doctrine of supervening events is the sole body of law governing impossibility of contracts, a body that covers all frustration, force majeure and Act of God clauses as seen in civil and common law traditions.

It must however be highlighted that this analysis is an art rather than a science. The essential problem is that doctrines are not set in stone; indeed, there are differences between the different schools of thought in Islamic law in terms of how impossibility of performance, supervening events and frustration would be treated when interpreting a contract. Quranic principles, as set out in prophetic traditions and the practice of the Prophet, are accepted as sources of contract law, although there are differences in terms of the interpretation of particular aspects of these sources.

Furthermore, there is even an argument as to whether or not new conceptions of law are allowed to be introduced to respond to the particular challenges that are seen today. As one author notes: ‘In the tenth century, Muslim Scholarship came to a consensus that Islamic law or Sharia was finalised as laid down in juristic writings. The task of the forthcoming generations was to follow these laws. This Consensus also announced that further individual, independent reasoning or personal interpretation would not be necessary or permissible. The doors of *Ijtihad* (independent or personal interpretation) were henceforth closed.’ Indeed, this is furthered by the fact that, whilst the common law on contract came about as a result of judicial decision, Islamic contract law developed as a result of discussion and consensus, polemic. Thus, there was no hierarchal authority to determine the contentious issues that came about.

All of this has a large impact of course on the question of how the doctrines of frustration, impossibility of performance and supervening events are interpreted in the modern day. As seen above, the notion of impossibility of performance is largely different today than it must have been when Islamic contract law first evolved. The debates on whether or not Islamic contract law is considered able to develop and respond to new challenges that exist today impacts upon how impossibility of performance features in different interpretations of Islamic contract law by the different schools of thought in existence.

Some academics and theorists in the area disagree with the idea that consensus on the law has been reached, and it is now simply time to apply the law. Some of them, for example, point out that the theory of contract law depends on the state at the time, public interest, and the overriding spirit of Islamic law. Thus, Islamic ideals should be applied, although different rules need to apply to different situations; there would be little point in keeping old rules and trying to fit them into a new situation simply for the sake of formalism. Such an approach would have to be the



one applied in order for the doctrine of frustrating events to be found. The debate between the approaches above does, however, render the analysis subject to the basic premise of scholars accepting that Islamic contract law is capable of change and interpretation: as pointed out above, the doctrine of supervening events appears to have arisen largely as a result of notions of hardship, as applied in Islam. In actual fact, the issue of changes in the currency value that Muslim jurists showed the problem clearly without filling the gap, that most jurists believe that there is no discharge of contract for the change of currency. It is not possible to find a valid justification in Islamic law that can authorise the transfer of losses to the other party, the reason is due to the change in the currency does not exist largely in the past time .This issue needs to be reviewed in Islamic law by jurists.

In chapter five as a final note, however, it must be appreciated that there will always be nuances and differences in thought between all different jurisdictions. Impossibility of performance and how it applies in Islamic contract law must be looked at as a matter of consensus opinion. The doctrine of supervening events and its rendering in certain contracts as impossible of being performed appears to reflect exactly such consensus. In the writer's opinion, it is this doctrine that forms the foundation of impossibility of performance in Islamic contract law.

In chapter six we discussed the discharge of contract in English law, in general it is obvious that English law of contract is the basis of many common law systems over the world; the essence of English common law is that it is made by judges sitting in courts, applying legal precedent In English Law. There is unwritten legal system in England and Wales such as law of contract. However, jurists, academics and lawyers wrote the contract on a lot of studies and research; complete theory of the contract in English law has been much discussed. The discharge of the contract theory is most important issue in contract law, and the frustration of contract in particular warrants more discussion and research owing to the fact that, historically, the concept of frustration has been invoked to mitigate the onerous doctrine of absolute contracts where performance of a contract is prevented by supervening events for which neither party to the contract is responsible and loss allocation is required.

The discharge of contract in English law refers to the termination of obligation contract due to court orders or after making a mutual agreement to terminate. In addition, contract discharge can be as a result of contract breach, performance discharge or even material discharge. Contract discharge happens when the contract is terminated before the obligations that should have been met by the contract come to an end. In most cases, discharge of contracts calls for the parties to pay for damages caused by the nullification of the contract. If the contract is discharged due to breach of the contract, the party who breached the contract is expected to put for all injuries caused by the nullification process. In practice, most contracts are discharged by performance; if a contract is discharged by performance, however, there are no secondary obligations to pay for since the contract has been completed only before the speculated period. A contract is said to have been discharged if its initial obligations are terminated. In some cases, after the primary contracted is ended, secondary obligations arise. Importantly, however, such obligations cannot be considered a formal part of the primary contract.

Since a contract is created by means of an agreement, it may also be discharged by another agreement between the same parties. Contract discharge by agreement occurs when parties agree to end a contract before it has been performed fully. The original contract may not provide for its termination, but the parties may make a new agreement to end their contractual obligation.

Where one party has already fully performed their side of the contract, they may require the other party to give value in exchange for release from the remaining obligation. The party promising to release the other party may change their mind before the value is paid. However, if the party in breach has relied on the agreement and has changed their situation in some way, a court may force the party, promising release to keep to the agreement.

A contract may contain a term that, if some specified event occurs after the contract is formed, it may be terminated at the option of either or one of the parties. This is a condition subsequent e.g. the return of an item that is defective for a refund. It is however required that the parties involved adopt an agreement that is legally binding when discharging a contract by making an agreement to prevent one of the parties from changing their mind and suing the other for breach of contract in the future.

In chapter six we discussed discharge of contract due to breach of contract is only applicable where the breach of contract is as a result of conditions or fundamental breaches. Conditions breach refers to failure of one part to meet the essential terms of the contract. This means that, if it is breached, it would render the contract meaningless. A condition can either be expressed by parties themselves or indeed can be implied by law. On the other hand, fundamental reaches occur due to non-purposed terms forcing the other party to breach the contract; however, warranty breached cannot result in contract discharge due to breach.

The analysis undertaken in chapter 6 highlights the nature and scope of the mistake and frustration doctrines. It is apparent that mistake is a more likely exigency than a sufficiently frustrating event that the contract must be terminated. Given the intensely circumstance-driven nature of the cases that have considered each doctrine, it is likely impossible to fashion definitional parameters with any greater degree of precision than that provided by the authorities cited here.

It can be seen that the issue of discharge of contracts is dealt with by the doctrine of supervening events in Islamic Law. This can be seen as akin to that of frustration in the English law, although there are various differences between the two.

Chapter Sven discussed frustration of contract in English law, this is controversial subjects in English law and has passed through stages of development, began when the court did not recognize the frustration in the seventeenth century to complete theory in the present time. English law doctrine of frustration deals with all the circumstances in which make the performance of contract becomes impossible, impracticable or illegal because of supervening event is beyond the control of the parties, it including subjective and objective impossibility, impracticability or hardship, frustration of purpose and illegality.

In fact in English law the first attempt to create a general principle of frustration, was the destruction of the subject matter of contract in music hall case *Taylor v Caldwell* in 1863. It has been evidenced from the start that, even prior to the development of the doctrine of frustration, the courts looked unfavourably at interfering with private contracts, preferring to leave such negotiations to the parties themselves. However, in a more modern context, it was recognised that there are some contractual disputes that it is necessary for the court to involve themselves

with, and gradually over time the doctrine of frustration has widened somewhat to include claims for events and circumstances that the court—at least at one time—would not have considered. Nevertheless, whilst the doctrine of frustration has clearly expanded and become more widely used, this is not to say that it is a widely used doctrine on the whole. The courts continue to approach frustration with narrow interpretation, and only in much specified circumstances will parties be able to escape their contractual agreements by claiming frustration. It would be observed that the development of the doctrine of frustration indicates the development by way of weakness into absolute contract step-by-step, haltingly and hesitatingly, and the approach of the contract has been gradual rather than straight and direct.

There is also evidence that, in the modern context, parties are a little more reluctant to rely on the doctrine of frustration because of the limited remedy if it is argued successfully. Savvy commercial contract lawyers are now often able to provide clauses in a contract, such as force majeure and hardship clauses, which can circumvent the use of the doctrine of frustration, and accordingly enable parties to have more control over what happens to their contract should it be interfered with by a supervening event.

One element of frustration law that has significantly changed, however, is the financial apportionment of loss after a successful claim. Now this area is governed by statute, it provides for a fairer more equitable approach to loss apportionment, thus avoiding the situation where one party bears more than their fair share of the loss. We have also seen, however, that, whilst the statute provides the means for a fairer approach for such parties, the courts, in practice, remain reluctant to interfere with the private contracts, and decisions tend to err on the side of the common law approach, and do not as yet provide for completely fair loss adjustment. Clearly, therefore, whilst the development of the doctrine of frustration has been remarkable, there is still some development and widening of scope possible in order to ensure that parties to contracts affected by frustration receive a fair settlement of the issues and losses arising. The study of the English doctrine of frustration would suggest that, as far as the problem of impracticability or economic hardship is concerned, a distinction should be made between the concept of frustration and its applications in practice. It was discussed that the doctrine of frustration, from a conceptual perspective, is capable of being applied in cases of economic changes in the contract. An examination of the English cases and judicial statements in the context of cases involving

impracticability suggests that, potentially, economic troubles can be regarded as a ground for discharge under the doctrine of frustration. The doctrine has the potential to apply in such situations because the present dominant test for the operation of this doctrine—namely fundamental change of performance—shows that it is not the nature of the supervening event that matters so much as the effect of the event on the performance of the obligation. Thus, this test can be satisfied by a very severe change in the economics of a contract. However, this amount is not enough to say that the English doctrine of frustration is theoretically applicable in cases of commercial or economic hardship. The extent of economic hardship which would provide the requirement of the performance being fundamentally different from that which was undertaken by the contract under the English doctrine of frustration is far from the concept of economic hardship which established in this study. The extent of economic changes which would be regarded as relevant under this doctrine must be very excessive and something near to impossibility. Therefore, the concept of economic hardship—as defined by this thesis—is not within the ambit of the English doctrine of frustration.

The problem that has to be required in the law of frustration is when the supervening events have been foreseeable or foreseen by the parties. Foreseeability events or contemplation of the contracting parties: There is In English law different view about this point. Some cases see that events must be beyond the anticipation of the parties to consider the frustration. A more liberal opinion has been adopted by another case sees that is not merely anticipated event by the parties makes the doctrine of frustration is inapplicable. As well as investigative, the level of knowledge of the parties by court is not impracticable and not helpful. We think that the later opinion is the nearest to principals of English law and the most suitable of the natural of commercial contracts in nowadays. The standard to be accepted must be objective and unchanging, because the capacity may differ from person to person, as will the examination by which any person is to be judged. With this noted, it is questioned: what are the tests to be adopted? English law has to adopt objective test to determine whether or not an event can be said to be foreseeable at the time of the conclusion of contract

In conclusion, one of the most striking characteristics of the law is the narrowness of the confines in which it can operate successfully. There are numerous gateway conditions; these

must be strictly adhered to or a finding of frustration of contract will be denied. The doctrine is a necessary component of the legal system—that much is certain.

in chapters seven and eight, as we saw in English law, Although the doctrine of frustration in English law seems to be flexible and wide, there are certain obvious restrictions that appear to reduce its application of frustration such as frustration must not be self-induced .Frustration of part of a contract: The general opinion taken in English Courts is that the doctrine can be applied only to the whole performance and not if only there is partial impossibility as we discussed in chapter eight. A more certain law of frustration is required. Frustration is a doctrine is proper limits. English courts have stuck to a strict approach in regard to the application of the doctrine of frustration; this is rooted to the doctrine of absolute contracts, which existed in the past. Despite these limits, the courts have made clear some extent in some of their recent judgements; they need to be given more detail than has until now been done so as to provide answers to such questions including the extent to which something short of physical impossibility might be frustration, including the extent to which frustration of purpose is recognised, whether leases are really a special case, the meaning of fault of one party as a factor debarring reliance on frustration, whether partial or temporary impossibility is recognised, the remedies available following frustration and other questions which were dealt with in this work. English law would hold its role as the leading law in the field of commerce and those businessmen throughout. They would continue to choose it as the applicable law of their contracts dispute. It is logical to give judges the power to adjust the terms of the contract to new situations when both parties intend to continue to perform their contractual obligation in the changed circumstances instead of inducing automatic discharge of the contract as the only solution in all cases of frustration. By providing applicable law to judges, such power should be kept within reasonable limitations so as to avoid uncontrolled flexibility of the law. Thus, English law must also avoid the all-or-nothing method.

In fact, that the doctrine of frustration is one of the most important issues in the theory of the contract because frustration is not a theoretical doctrine but rather a practical application in all cases relating to frustration. Moreover, frustration is one of the deeper issues of the contract, as well as the most accurate and the most difficult, because the doctrine affects the performance, which is considered the main purpose of the contract. The doctrine of frustration is not a new

doctrine created by recent legislation but is considered a theory with historical roots, which has passed the stages of development.

The doctrine of frustration provides a most valuable contribution to contract law, and has been the elimination of the absolutism and presentation of a softened, more malleable legal front, whilst preserving general contractual integrity through insistence on compliance with exacting criteria. This is a difficult balance to strike, and the law on frustration has done a reasonable job.

The doctrine of frustration does not contradict the binding force of the contract, but because of the exceptional circumstances, the contract is discharged, with frustration a changeable doctrine according to supervening events and economic circumstances from time to time.

Chapter eight is discussion frustration of contract by impossibility of performance of contract, which is considered as the mean part of frustration of contract In English law, it has been established that impossibility is the legal theory which has full elements that make it practically theory, and which is developed by new cases, with new principles coming from such cases. The impossibility must be in the nature of the thing to be done (objective impossibility) or in the inability of the promisor to do it (subjective impossibility). The impossibility becomes available if objective impossibility exists. Objective impossibility occurs when the contractual obligation cannot actually be performed. Objective impossibility is often referred to by the statement ‘the thing cannot be done’, which is widely recognised in English law, and has more judicial applications than the subjective impossibility. The destruction of the subject matter of the contract perhaps by supervening events or the unavailability of the subjective matter and the method of performance demonstrate the importance of English cases relating to frustration.

As we saw in chapter six and eight It is clear that in both the case of initial and subsequent impossibility the courts are dealing with the allocation of risk between the parties of an event which neither of the parties foresaw occurring when they entered into a contractual relationship. In both cases the courts are dealing with the construction of the contract. If the contract made provision for the event then the contract governs the situation. Both doctrines operate within very

narrow confines and operate on the premise that men should be held to their bargains. If the parties have not expressed a term dealing with the event in question, the courts will have to analyse the entirety of the contract to establish whether one can be implied as having been in the contemplation of both parties as something essential for the performance of the contract. In this respect both doctrines are similar, there are different juristic principles one relating to the formation of contracts and the other to their discharge. The doctrine of initial mistake operates to rectify a situation in which the parties were never in genuine agreement because they were mistaken as to the presence of a particular set of circumstances. In the case of subsequent impossibility or frustration the parties must have been in genuine agreement as to the essential features of the contract whether expressly or impliedly, but a supervening event has rendered those features substantively and radically different from that which they envisaged.

In conclusion, we have seen that the doctrine of frustration indeed operates very narrowly, although it does allow for the termination of contracts due to subjective impossibility arising from the death or illness of a contract party. The juristic basis for the doctrine, however, is slightly more ambiguous; this can be a problem when considering other more ambiguous events that could frustrate a contract, such as bankruptcy. Initially, we considered that the implied term theory was used to justify frustration. However, it has since been seen that there are also significant merits to the 'foundation of the contract' test, and it certainly appears to work well as far as impossibility for illness, death or bankruptcy is concerned. Nevertheless, the construction theory has received immense support by courts.

One further common example of frustration is found where impossibility of performance has arisen from changes in the law. By way of illustration, in the event that a contractual agreement's performance is rendered impossible by an Act of Parliament implemented after the contract was made, the promisor is then excused from performing their promise. This is because it is presumed that the parties need to form their contractual agreements on the basis of the law in existence when the particular contract is put in place. The same principle is applicable in the event that performance is made to be impossible legally through the presence of legislation in the circumstances delegated, through powers exercised under differing legislation.

Application of the doctrine of frustration on lease contract there is argument in English law about it; the majority of the House of Lords decided that the doctrine was, in principle, as applicable to



leases as to any other contract, , although its application may be less frequent than to other types of contract. More attractive alternatives in property law way by the possible enactment of a statutory right for the tenant to surrender the lease in cases in certain supervening circumstances. . Property owners and lessees, particularly in commercial hires, would be well advised to avoid frustration by the putting of express clauses in contract relating to common supervening events.

In the changing world of today, the law of impossibility of performance forms an important part of the general law of contract, and particularly attracts the attention of businessmen and their legal advisers. A more certain doctrine of frustration in English law would ensure that English law would retain its role as the leading law in the field of commerce, and that businessmen throughout the world would continue to choose it as the governing law of their contracts. The English law of frustration must also be more generous. The Law Reform (Frustrated Contracts) Act, 1943, did not add to the events on which a contract is discharged for frustration of performance; rather, the Act only changes the legal consequences of a discharge for impossibility of performance when that takes place by law independently of the Act.

## **Comparative study**

At the final part of the research we looked to all chapters and studied the features of Islamic law and English law, we found that there are similarities and differentness related to the frustration of contract law, the differences and similarities were found and concluded in many of the points in subchapters of this research in the following:

The features that are common to Islamic and English law are their antiquity and their continued development without any major disruption or interruption over many hundreds of years. The two systems have very old principles and have not lost their strength over the years. Another similarity is absence of a legal code; in most European and Arab countries general law has been codified. However, Islamic and English law, as well as Saudi law, are uncoded. But the

essence of English common law is that it is made by judges in individual cases; rules of law made by judges must be followed in later cases. However, in Islamic law jurists were responsible for its development from its main sources rather than judges. An important feature of English law is that cases are published and accessible to everybody, but in Saudi Arabia the situation is different as most of the cases are unpublished, which means judges and lawyers do not know the precedents and this is a negative aspect of the Saudi legal system. Attempts have been made to publish the cases but they are still weak.

Unlike English contract law, which is very much based upon general legal and equitable doctrines, contract law under Islamic law tends to be highly specialised, in that different sets of rules have developed to regulate different types of agreement. As Saudi Legal explains, “The Islamic Law texts do not set out an all-embracing theory of contract law which applies to all types of contracts. Rather, the texts deal with certain contracts, such as sales, hire, loans, agency and guarantees, in individual chapters. Accordingly, certain rules which apply, for example, to contracts of sale do not necessarily apply to guarantees, and vice versa.” Instead of general theories of contract law, there are principles of contract law and it is these principles which, when applied, give Islamic law its conceptual coherence. There is no general theory of contract law in Islamic law. Indeed, this is furthered by the fact that while the English law on contract came about as a result of judicial decision, Islamic contract law developed as a result of discussion and consensus, polemic. Thus, there was no hierarchical authority to determine the contentious issues that came about.

English law has a complete theory of frustration of contract . It is generally argued that Islamic law has no general theory of contract; this argument is based on the fact that the law books do not contain any general contract theory and this is true for all the fields dealt with in these books. Regarding contracts, Islamic jurists have categorised each contract into classes of nominate contract with their own distinctive rules. Therefore, the development of Islamic contract law is the result of the method undertaken by Muslim jurists to elaborate a system to categorise the nominate contracts by determining whether, in any given contract, right passed in ownership or possession, and whether consideration is passed or otherwise. At the present time jurists are establishing a theory of contract in Islamic law similar to the theory of contract in English law.

In addition, the very process of critically evaluating Islamic contracts law or the various schools thereof is very different when evaluating English laws or theories. The primary reason for this is that, unlike English contract law, which has been designed by humans in a pragmatic way, Islamic contract law is the result of the interpretation of primary Islamic texts (or secondary teachings) combined with the continuous need to promote the principles of commutative justice and liberality; therefore, to critically evaluate contract Islamic law is either to doubt scholastic interpretations of religious texts (a task best reserved for theological scholars) or to doubt the importance or integrity of the principles upon which it is based. As a Western lawyer, the author feels unqualified to encroach into either of these domains.<sup>122</sup>

It is very difficult to compare the approaches of English and Islamic law as regards the freedom to make contracts. This is mainly due to the fact that the various, and sometimes conflicting, views put forward by the jurists of the different schools make it very difficult to speak of Islamic law as a unitary system. For the purposes of comparison we will take freedom of contract to mean the extent to which the legal system recognises and gives validity to contracts created by the parties. In that sense, freedom of contract is the general rule in English law. Any contract made by the parties will be legal and enforceable, unless it is contrary to public policy or otherwise illegal. In Islamic law there are two views. According to the first view, the rule appears to be that the parties have no freedom to make contracts. In this rule, as has been argued in the text, there is the useful exception of economic necessity. If the existence of a new contract becomes an economic necessity, it will be given legal validity. Although this exception is a very limited one, it is useful in so far as it could be invoked – indeed has been – by the contemporary Islamic jurists to give legal recognition to the various contracts necessitated by modern economic and business life. However, the opinion adopted now is that the parties are free to make any contract on condition that does not contradict the Islamic law. Cultural order in English law systems is built on the principle of liberty which emphasises the freedom of the individual as an ultimate objective in their national legal systems. Hence, a wave of scholarly contribution began a long time ago to implement the principle of individual freedom through different multidisciplinary institutions. Capitalism as a political and economical idea emerged to serve the optimal objective of a system of liberalism. On the application of this cultural order to its legal

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<sup>122</sup> See chapter three 3.1, 3.2. 3.3

system, the freedom of the individual is an undisputed pillar of private/public laws, including the law of contracts. Unsurprisingly, then, freedom of contract is the major principle of the doctrine of contract in English common law. Islam takes a different stand. Its legal system, although conceptually it shares the same values (liberty, justice and equality) of most legal orders, has its own interpretation through different multidisciplinary institutions. So the principle of permissibility instead of freedom of contract is the meaning of liberty. It means that the individual is free to enter into a contract if that contract is not prohibited under Islamic law. Politics and economics are too limited, to some extent, to the same principle in order to serve both public and private interests and not only the interest of either. The question is what role the law of contracts plays in allocating resources. In other words, what is the normative justice of contract: corrective or distributive justice?<sup>123</sup>

Islamic contract law therefore shares many similarities and differences with English contract law and how it is treated, and has strict laws on the formation and adherence to contracts. One of the most contentious aspects of Islamic contract law, however, remains that of how impossibility of performance, otherwise known as frustration, is treated. In English systems, frustration can be regarded as taking place “when there supervenes an event without default of either party and for which the contract makes no sufficient provision which so significant changes the nature (not merely the expense or difficulty) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances in such a case the law declares both parties to be discharged from further performance”.

In explaining how Islamic law treats frustration of performance, one is required to recall the basis and foundation of Islamic law and particularly the different manner in which it has arisen when compared to English conceptions of contract law. The English conception of contract law, whether arising from the civilian system or the common law system, derived from the particular legal and economic theories that were seen in the 18th and 19th centuries. Both of these times

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<sup>123</sup> See chapter 3.4 and chapter 7.3 and 7.4

saw resurgence in the popularity of natural law theories and gave rise to doctrines of *laissez faire* economic theory. As such, contract law was predicated on the general idea of freedom of contract and not imposing onerous obligations on people. This too affected how frustration of performing a contract was brought about in English contract law.

Contractual relationships occupy different spaces in Islamic law versus its English law counterparts and the broader global social consciousness. In the former, a contract is regarded as a promise of performance, where the inability to deliver on the promise results in the contract being deemed a nullity. In the English system as the leading English law example, a contractual promise is more often characterised as a guarantee and, depending on its interpretation as conditional or unconditional, the promisor may be obligated to the opposite party even where the subject matter of the contract no longer exists. These distinctions carry additional significance when Islamic impossibility principles are examined. Further, Islamic law places lesser importance on the ‘sanctity of contract’ and the associated importance of contractual promises as expressed in English law.

However, the different ways in which different systems of frustration of contract law have come about also have different implications. In English law frustration of contract came about in the 18th and 19th centuries as a result of increases in numbers of contractual transactions, a direct result of the industrial revolution and a general increase of material products in society. English contract law and doctrines of frustration therefore tend to deal with the productions of industry in mind. Islamic contract law, however, is much more rooted in history, coming about in the seventh century. This was long before the period of the English industrial revolution and was generally aimed at contractual exchanges in the primary and secondary sectors, rather than tertiary ones. Although English law delayed adoption of the doctrine of frustration, it now has a good theory of frustration of contract. Islamic law does not have a complete theory of frustration, as Islamic law approach in the adoption of legal theories; also English law was in dire need of a theory of frustration in order to get rid of the restrictions of the principles of absolute contracts.<sup>124</sup>

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4. See chapter four 4.6 and chapter seven 7.3 and 7.3.1

Different legal effects can be seen in English jurisdictions as well as in Islamic contract law ones. When frustrating a contract, there are two theoretical legal positions: one can take the contract back to before it was agreed, placing both parties in the position they would have been in had the contract never been agreed in the first place; alternatively, one can take the contract forward in time to the position the parties would have been in had the agreement been performed. In English jurisdiction, the latter amounts to awarding expectation damages to parties, while the former is seen as rescission and parties are granted reliance damages, namely the expenditure they have incurred as a result of entering into the agreement in the first place. As such, one might come to the conclusion that the doctrine of supervening events is the sole body of law governing impossibility of contracts, a body that covers all frustration, force majeure and Act of God clauses that is seen in English traditions.<sup>125</sup>

The attitude of Islamic law on the effect of the frustration of performance on contracts differs from that of English common law in some aspects. While in English law the occurrence of the frustrating event brings the contract to an end immediately and automatically, under Islamic law frustration of performance does not necessarily operate to discharge a contract immediately and automatically. However, if the subject matter of the contract is destroyed the discharge of the contract will be immediate, but, for example, in frustration of purpose and partial impossibility the discharge of the contract is not necessarily immediate, the party can perform the contract. By what has been said so far, two main differences between the approaches of Islamic and English law towards the doctrine of changed circumstances are noticeable. Firstly, under English law, the application of the doctrine results in the coming to an end of a contract and, thereby, automatic discharge of the obligor. According to Islamic law, on the other hand, this is an unsuitable solution in these cases. Sometimes the promisor might prefer continuation rather than dissolution of the contract, notwithstanding even enormous difficulties. Hence, Islamic law gives him an option to cancel the contract if he so desires. The option should, however, be exercised promptly by a contractor who was unaware of loss when he made the contract. The difference between the two systems in this respect results from the fact that the judicial basis supporting the doctrine in each system is different from the other. In English law, material change of circumstances must

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5. see chapter four 4.11 and chapter seven 7.10

destroy the ‘foundation’ of a contract. When the foundation of a contract falls away, the contract falls away with it. Under Islamic law, on the other hand, a contract remains valid even under changed circumstances because it has all the requirements of a valid contract. It must be added that even by following the practice of certain Muslim jurists in basing the doctrine on the ‘implied term’ theory, one comes to the same conclusion that the party incurring loss has a right of termination. This is due to the fact that, under Islamic law, the party who benefits from an express or implied condition of the contract has a right of termination if the condition is not satisfied.<sup>126</sup>

Impossibility has three possible manifestations in English law that are mirrored in its Islamic equivalent: the loss or destruction of the contract subject matter; a circumstance that prevents the promisor from completing the contract; and the operation of an external factor on contract completion, such as legal impossibility, or frustration or purpose. The force majeure/Act of God concepts are often cited in this connection.

The Islamic frustration/impossibility doctrines are so broad and potentially flexible that many circumstances that would be deemed insufficient grounds under all English law systems are sufficient under Islamic doctrines. It is apparent that when English law or impossibility principles are employed to give the analysis a comparative element, Islam, through the combined weight of the authorities derived from Shari’ah sources, will sanction a significantly broader range of circumstances that may permit parties to avoid obligations that would remain enforceable in the other systems. The attitude of Islamic law on the effect of the frustration of contract on contracts differs from that of English common law. While in the latter the occurrence of the frustrating event “brings the contract to an end forthwith, without more and automatically under Islamic law, frustration of the contract does not necessarily operate to discharge a contract. Automatic discharge is only one of the effects that frustration of the contract may have on contracts. What we have discussed so far in this thesis indicates that impossibility of performance may have one of the following effects on contracts under Islamic law.

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6. see chapter four 4.11 and chapter seven 7.10

It is a general rule of Islamic law that a promise to do what is initially impossible is void; the reason is probably that no serious intention to create legal relations can be supposed where both parties know of the impossibility. Merely going through a form of words that the parties know means nothing and will not make a contract. In cases where the parties contract for a result both deem possible, the invalidity of the contract can be based either on the existence of an essential error or on the basis of impossibility of performance. Both approaches have the same result, as in both cases the contract will be void under Islamic law as well as English law.

There is a significant difference between the approaches adopted by Islamic and English law relating to the doctrine of frustration of contracts. The difference lies in the fact that Islamic law sees a contract as a promise of a performance. When the party cannot perform because of impossibility, the promise is void. English law, on the other hand, sees a contract as a guarantee of a result. Therefore, under English law a promisor may still be held liable for damages when the contract concerns a promise of the impossible – for example, a promise to deliver a thing which does not exist – if, as a matter of construction, the contract can be regarded as an unconditional guarantee rather than a guarantee conditional upon the possibility of performance. In such cases, the promisor can be held to have warranted the possibility of performance.

To frustrate the contract due to impossibility, it must be the absolute possibility of performance of an obligation in Islamic law necessitates the existence of the specific subject matter of a contract, for instance the thing sold, as distinguished from the price at the time of the formation of contract, such as the sale of a fetus in the womb. English law in this respect is similar to Islamic law, subject, of course, to what was said earlier regarding unconditional guarantees, and adopts the rule that when, in a contract for the sale of specific goods, the article regarding which the parties are contracting is not in existence, the contract is void. This is established by Section 6 of the Sale of Goods Act, 1979, which says: “Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void”. It is clear that the rule that necessitates existence of the subject matter of contract at the time of its formation only applies to contracts concerning specific goods. In a contract concerning generic goods, the quality, quantity and description of the goods must be determined at the time of making the contract. When a contract concerning



generic goods automatically becomes a contract concerning specific goods as soon as the seller has chosen the article he intends to deliver, it follows that the property in the goods chosen but not delivered shall pass to the buyer and that their destruction shall bring the contract to an end, and discharge the parties from their obligations. This argument, however, cannot be accepted, because it means that the nature of a contract agreed between the parties is changed with the sole intention of one party, i.e. the seller, and without the other's assent. This cannot be reconciled with the basic principle of Islamic law underlying the law of contract that all aspects of contracts are governed by two free wills. In fact, it is this principle that distinguishes contracts from unilateral legal acts in Islamic law. An example of this latter category is the acquaintance of a debtor by his creditor, which shall be effective with the sole consent of the creditor. Under English law, where there is a contract for the sale of unascertained goods, the property in the goods will pass to the buyer when one party unconditionally appropriates goods to the contract with the assent of the other. The assent may, however, be express or implied.

Under both Islamic and English law, an agreement to sell specific goods is avoided if the goods perish before the risk passes to the buyer. The two systems, however, differ as to the time at which the risk passes to the buyer. Islamic law, in an approach similar to German and old common law, holds that the risk does not pass with property. As a result, the risk of destruction of goods sold but not delivered remains with the seller and would, therefore, frustrate the contract unless the seller has called upon the buyer or the relevant authorities to take possession of the goods. This approach is the opposite of the approach adopted by modern English law, according to which a contract for the sale of specific goods passes both the property and the risk at once.

Under Islamic law, unlike English law, the effect of frustration of a purpose forming an express or implied term of the contract is not to bring the contract to an end, but to give the beneficiary the right of termination. In such cases, Islamic law concurs with English law in holding that the contract comes to an end upon frustration of its purpose, because when the foundation of a contract falls away, the contract falls away with it. Thus, a contract comes to an end if frustration extinguishes the subject matter of the contract. An example frequently given by traditional jurists concerns the case of a man who employs a dentist to remove his painful tooth, but the pain disappears after the formation of the contract.

The scope of this rule in Islamic law is comparatively narrow. Not all damage to the article sold shall cause automatic frustration of the contract in Islamic law; unlike English law, the rule only applies when the destruction is total and is caused by a so-called Act of God. If the thing sold is not totally destroyed but merely becomes defective before delivery and the defect is not caused by either party's fault, the purchaser shall have a right of termination of the contract; this means the party has the right of option to continue or to discharge. Islamic law and English law concur in holding that in contracts in which delivery suggests performance of the contract, the destruction, by any circumstance, of the subject matter after delivery will not frustrate the contract, because a completely performed contract cannot be frustrated.

That there is a difference between Islamic law and English law in the application of frustration on the lease contract. Where there is a lack of clarity in English law about that. Whilst Islamic law apply the frustration of contract on the lease contract, the doctrine of *udher*, which was created in the first to apply on the lease contract. The reason for this difference, that Islamic law consider the contract of lease as transfer the usufruct of the property to the lessee. Whilst English law see the contract of lease as conveyance and vests in the lessee an estate in the land itself. However, the majority of the House of Lords in the case of *Panalpina* considered that the doctrine of frustration is Applicable in principle to the contract of leases too. But the application of frustration on the contract of lease may be less common than to other kinds of contract.

English law has difficulty in knowing how to deal with partial impossibility. This is due to the fact that when the English law doctrine of frustration operates, it discharges the whole contract. In other words, the common law thinks of impossibility of performance or frustration of a contract and not merely of an obligation. However, the courts have used other means to deal with the problem. Meanwhile, in Islamic law jurists have given some rules and examples about partial impossibility and the contract may be frustrated due to partial distraction of the subject matter.<sup>127</sup>

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<sup>7</sup> see chapter eight 8.4.3

In English law where the parties have expressly provided that the contract is to be performed exclusively in the stipulated manner, impossibility in the agreed method of performance may bring the contract to an end. If, for instance, a seller contracts to deliver a particular shipment via a special road, or in a named ship, he may not be held responsible if the road is blocked or the ship stranded on that date. This requires that both parties should have contemplated a particular method of performance as an implied term of the contract. And in this respect it must be remembered that Islamic law – like English law – is very reluctant to interfere with a freely negotiated contract by implying a term into it, unless there can be no doubt that, although the term was not expressly mentioned in the contract, it was, nevertheless, intended by both parties that it should form part of the contract. Islamic law does not discuss impossibility of the performance method, but in fact gives the parties the right to set any condition terms in the contract, so according to the principles of Islamic law the parties can express any performance method.

The rules of Islamic law on the subject of impossibility of performance are flexible. Unlike the English law rules of frustration, they do not involve an all-or-nothing approach. Impossibility does not necessarily terminate a contract; the effect of temporary impossibility under Islamic law does not completely discharge performance but suspends it until the impossibility ends.

Islamic and English law recognises the impossibility of the contract, whether subjective or objective impossibility if a person is essential to perform the contract. As far as subsequent bankruptcy is concerned, Islamic law concurs with English law in holding that a contract is not terminated by the bankruptcy of one of the parties thereto. Both systems agree that a person only becomes bankrupt on the making of an appropriate decree by the court. Although bankruptcy does not, in the normal circumstances, terminate prior contracts, it may, under Islamic law, confer certain rights on the other party. In the case of the sale of goods, for example, bankruptcy or insolvency of the buyer confers on the seller the right to withhold delivery. In contracts involving a personal element, in which some personal act of the debtor

himself is required, his death brings the contract to an end, under both Islamic and English law.<sup>128</sup>

As far as English law is concerned, there have been attempts to regard economic factors, such as inflation, devaluation and price rises, as frustrating events. In spite of these isolated attempts, the decisions of the English courts show that they are not prepared to hold a contract frustrated simply because the cost of performance to one party has risen sharply.

The difference between the two systems is that Islamic law is more readily prepared to allow the application of the principle of changed circumstances. One should not, however, interpret this statement liberally and conclude that either contractor may revoke the contract because of a change in his personal circumstances. It has even been suggested that a contractor in a Muslim jurisdiction hired under a contract of service to dig a well may rescind the contract should he strike rock after the first few feet of digging. One has to be cautious in accepting this statement unconditionally.

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7- see chapter five 5.4 and 5. 5 and chapter eight 8.3

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