https://theses.gla.ac.uk/

Theses Digitisation:

https://www.gla.ac.uk/myglasgow/research/enlighten/theses/digitisation/

This is a digitised version of the original print thesis.

Copyright and moral rights for this work are retained by the author

A copy can be downloaded for personal non-commercial research or study, without prior permission or charge

This work cannot be reproduced or quoted extensively from without first obtaining permission in writing from the author

The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the author

When referring to this work, full bibliographic details including the author, title, awarding institution and date of the thesis must be given

Enlighten: Theses
https://theses.gla.ac.uk/
research-enlighten@glasgow.ac.uk

The Problem Of Nonperformance Of Contractual Obligations And The Provided Means Of Release Under English, Scottish, French And Algerian Laws.

By

Abderrazak Derbal.

(Licence En Droit)

A Thesis Submitted In Fulfillment Of The Requirement

For The Degree Of Master Of Laws,

At The Department Of Jurisprudence.

Faculty Of Law And Financial Studies

University Of Glasgow.

October 1989.

(C) A. Derbal.

ProQuest Number: 10970948

All rights reserved

INFORMATION TO ALL USERS
The quality of this reproduction is dependent upon the quality of the copy submitted.

In the unlikely event that the author did not send a complete manuscript
and there are missing pages, these will be noted. Also, if material had to be removed,
a note will indicate the deletion.

ProQuest 10970948

Published by ProQuest LLC (2018). Copyright of the Dissertation is held by the Author.

All rights reserved.
This work is protected against unauthorized copying under Title 17, United States Code
Microform Edition © ProQuest LLC.

ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106 – 1346

بسم الله الرحمن الرحيم

« إنّ الله يأمركم أن تؤدّوا الأمانات إلى أهلها وإذا حكمتم بين الناس أن تحكموا بالعدل » النساء ٥٨

;od doth Command you to render back your Trusts to those to whom :hey are due; And when ye judge Between man and man, That ye judge vith justice [4 :58]

« أفحكم الجاهليّة يبغون ومن أحسن من الله حكما لقوم يوقنون » المائدة ٥٠

Do they then seek after a judgment (of the days of) Ignorance But who, or a people whose faith is assured, can give better judgment than God?. 5:50]

The little which I can give is to dedicate this work to my mother and to my father. I am also pleased to dedicate this work to my brothers: Layachi, Ibrahim, Mohamed, Abdelwaheb and all my sisters and relatives for their help and encouragement during my study.

Summary.

A legal system is a defective one if it does not "adopt a conscious attitude to the problem of non performance of contracts in consequence of events beyond the control of the parties.".[1]

However, legal systems differ in their consideration of the problem of non performance of contracts. Thus early English law considered that the right attitude was to disregard cases of subsequent impossibility of performance whereas French law takes the opposite view and discharges debtors when a case of impossibility is involved.

The narrowness of the concept of impossibility of performance as an excuse from liability, which is also a matter of difference between the considered laws, led other legal systems to adopt an extended concept of release, by considering cases of onerousness as a valuable plea to discharge a debtor from his contractual obligations.(e.g. Algeria, Germany etc)

In this study we try to give an overview of the position of English and Scottish laws regarding cases of subsequent impossibility of performance. We have therefore studied the doctrine of frustration which covers the above instances and compare it with its counterpart under French and Algerian laws in similar cases.

The doctrine of frustration covers two set of circumstances; those which put the debtor into a real impossibility of performance and those which do not, though the debtor is released. Force majeure under French and Algerian laws covers cases of real impossibility only. Hence, we divided our study into two parts.

The first part deals with cases of impossibility of performance in which the principles of the doctrine of frustration and force majeure are studied and compared with each other. It will be seen that in many cases where the contract was held frustrated under English and Scottish laws, the same solution, that is the release of the debtor, can similarly be

[1] Schmitthoff C. M, "Frustration of International Contracts of Sale in English and Comparative Law" In. Some Problems of Nonperformance and Force Majeure in International Contracts of Sale (Helsinki Conference.1961).127., at p. 127. Emphasis is mine.

reached by using principles of force majeure. However, this is not always true especially for cases involving a delay in the performance of contracts. The second part deals with the other types of frustration such as those of the performance having become valueless or onerous. It will be seen in studying cases of performance having become valueless, that French courts (and Algerian law) release the debtors, and yet their decisions cannot be founded on the principles of force majeure but on those of "Cause". As to the instances of onerousness, the English and the Scottish doctrine of frustration is compared with the one of imprevision as admitted under Algerian and other laws.

Our study covers mainly these two instances of impossibility and possibility. The study and the comparison of the legal concepts used under the considered laws to release a debtor from his contractual obligations might reveal or suggest a sound attitude to be taken when dealing with cases of subsequent impossibility of performance.

Acknowledgments

I am deeply indebted to Dr Orucu E., for her supervision during the carrying out of this study. Thanks are also due to her for having provided me with new editions of certain books. I should also thank her for the checking of English, Swiss and German laws.

I am also very grateful to Prof. Walker D.M, for having read the whole work on English law and for having made valuable suggestions concerning the additions of new cases and the rechecking of others.

LIST OF CASES.

LIST OF ENGLISH AND SCOTTISH CASES.

- Abbot of Westminster V. Clerke, 73 Eng.Rep.59 (K.B.1536).
- Abrahams A.E. Ltd V. W. Campbell 1911.S.C.353.
- Acetylene Co of G.B V. Canada Carbide Co (1921) 8 Ll.L.R.456.
- Albert D. Gaon V. Ste Interprofesionnelle des Oleagineux Fluides Alimentaires [1959] 3 W.L.R.622.
- Amalgamated Investment & Property Co Ltd V. John Walker & Son Ltd [1977] 1 W. L.R.164.
- American Trading & Production Co V. Shell International Marine Ltd (The "Washington Trader") [1972] 1 Lloyd's.Rep.463.
- Anglo Northern Trading Co Ltd V. Emelyn Jones & Williams [1917] 2 K.B.78.
- Anglo-Russian Merchant Traders Ltd & John Batt & Co (London), Re [1917] 2 K. B.679.
- Appleby V. Myers (1867) L.R.2 C.P.651.
- Asfar & Co V. Blundell & Another [1896] 1 Q.B.123.
- Atlantic Maritime Co Inc. V. Gibbon [1953] 2 ALL.E.R.1086.C.A.
- Badische Co., Re [1921] 2 Ch.331.C.A.
- Baily V. De Crespigny (1869) L.R. 4 Q.B.180.
- Banck V. Bromley & Son (1920) 37 T.L.R.71.
- Bank Line Ltd V. Arthur Capel & Co [1919] A.C.435.
- Bensaude & Co V. Thames & Mersey Marine Insurance Co, [1897] 1 Q.B.D.29.
- Bevan V. Bevan [1955] 2 Q.B.227.
- Blackburn Bobbin Co Ltd V. T.W. Allen & Sons Ltd [1918] 1 K.B.540. affd. [1918] 2 K.B.467, C.A.
- Blacklock & Macarthur V. G.G. Kirk 1919.S.C.57.
- Boast V. Firth (1868) L.R. 4 C.P.1.
- B.P. (Exploration) Co Libya Ltd V. Hunt [1979] 1 W.L.R.783. affd. [1981] 1 W. L. R.232.C.A.
- Brandt H.O. & Co V. H.N. Morris & Co [1917] 2 K.B.784.
- Brauer & Co (G.B) Ltd V. James Clarke (Brush Materials) Ltd [1952] 2 ALL. E. R. 497.C.A.
- Bremer Handelsgesellschaft m.b.H. V. C. Mackprang J.R. [1979] 1 Lloyd's .Rep. 221.
- Bremer Handelsgesellschaft m.b.h. V. Vanden Avenne Izegem P.V.B.A. [1977] 1 Lloyd's.Rep.133, affd [1978] 2 Lloyd's Rep.109.H.L.
- Brewster V. Kitchel 1 Salk.198.
- British Movietonews Ltd V. London & District Cinemas Ltd [1952] A.C.166.
- Bunge S. A. V. Deutsche Conti Handelsgesellschaft M.B.H. [1979] 2 Lloyd's. Rep. 435. C.A.
- Cantors Properties (Scotland) Ltd V. Swears & Wells Ltd. 1978 S. C.310.

- Carapanayoti & Co Ltd V. E.T. Green Ltd [1959] 1 Q.B.131.
- Chakki V. United Yeast Co Ltd [1982] 2 ALL.E.R.446.E.A.T.
- Chandler V. Webster [1904] 1 K.B.493.
- Churchward V. The Queen (1865) L.R.1 Q.B.173.
- Civil Service Co-Operative Society Ltd V. General Steam Navigation Co. [1903] 2 Q. B.756.
- Congimex Companhia Geral De Comercio Importadora E. Exportadora, S.A.R.L. V. Tradax Export S.A. [1983] 1 Lloyd's.Rep.250 (C.A)
- Crickelwood Property & Investment Trust Ltd V. Leighton's Investment Trust Ltd [1945] A.C.221.
- Czarnikow C. Ltd V. Centrala Zagricznego "Rolimpex" [1978] 1 All.E.R.81.
- Daimler Co Ltd V. Continental Tyre & Rubber Co (G.B) Ltd [1916] 2 A.C.307.
- Davis Contractors Ltd V. Fareham Urban District Council [1956] A.C.696.H.L.
- Davis & Primose Ltd V. The Clyde Shipbuilding & Engineering Co Ltd 1917, 1 S. L. T.297.
- Denmark Productions Ltd V. Boscobel Productions Ltd [1969] 1 Q.B.699.C.A.
- Denny Mott & Dickson Ltd V. James B Fraser & Co Ltd [1944] A.C.265.
- Ertel Bieber & Co V. Rio Tinto Co Ltd [1918] A.C.260.H.L.
- Esposito V. Bowden (1857) 7 E. & B.763.
- Fibrosa Spolka Akcyjna V. Fairbairn Lawson Combe Barbour Ltd [1943] A. C. 32. H.L.
- Finelvet A.G. V. Vivana Shipping Co Ltd [1983] 1 W.L.R.1469.
- Graves V. Cohen & Others (1930) 46 T.L.R.121.
- Hall V. Wright (1858) E.B & E.746.
- Hare V. Murphy Bros Ltd [1974] I.C.R.603 (C.A).
- Harrington V. Kent County Council [1980] I.R.L.R.353.
- Hart V. A R. Marshall & Sons (Bulwell) Ltd [1977] 1 W.L.R.1067.E.A.T.
- Herne Bay Steam Boat Co V. Hutton [1903] 2 K.B.683.C.A.
- Heyman V. Darwins Ltd [1942] A.C.356.H.L.
- Hirji Mulji & Others V. Cheong Yue Steamship Co Ltd [1926] A.C.497 (The Privy Council).
- Hong-Kong & Whampoa Dock Co Ltd V. The Netherton Shipping Co Ltd, 1909 S.C.34.
- Horlock V. Beal [1916] 1 A.C.486.H.L.
- Howell V. Coupland (1876) 1 Q.B.D.258.C.A.
- Hugh Stevenson & Sons Ltd V. Aktiengesellschaft Fur Carton-Nagen-Industrie [1918] A.C.239.H.L.
- Hyden V. Dean of Windsor (1597) CRO.ELIZ.552.
- International Sea Tankers Inc V. Hemisphere Shipping Co Ltd, (The Wenjiang) [1983] 1 Lloyd's.Rep.400.
- Intertradex S.A. V. Lesieur-Tourteaux S.A.R.L. [1978] 2 Lloyd's.Rep.509.C.A.
- Jackson V. Union Marine Insurance Co Ltd. (1874) L.R.10 C.P.125.
- Jacobs Marcus & Co V. The Credit Lyonnais (1884) 12 Q.B.D.589.C.A.
- Joseph Constantine Steamship Line Ltd V. Imperial Smelting Co Ltd [1942] A. C.

154.H.L.
- Krell V. Henry [1903] 2 K.B.740.
- Kursell V. Timber Operators & Contractors, Ltd [1927] 1 K.B.298.C.A.
- Kyprianou P.D.V. Cyprus Textiles Ltd [1958] 2 Lloyd's.Rep.60.C.A.
- Larrinaga & Co Ltd V. Ste Franco-Americaine des Phosphates de Medula.Paris.39 T.L.R.316.H.L.
- Leitch W. V. Edinburgh Ice & Cold Storage Co.Ltd (1900) 2 F.904.
- London & Edinburgh Shipping Co V. The Admiralty 1920.S.C.309.
- Maple Farms Inc.V. School District of the City of Elmira. 76 Misc.2nd.1080.352. N.Y.S.2nd. 784 (Sup.Ct.19).
- Maritime National Fish Ltd V. Ocean Trawlers Ltd [1935] A.C.524.
- Marshall V. Glanville & Another (1917) 33 T.L.R.301.
- Marshal V. Harland & Wolff Ltd & Another [1972] 1 W.L.R.899.
- Mathey V. Curling [1922] 2 A.C.180.H.L.
- Mertens V. Home Freeholds Co [1921] 2 K.B.526.C.A.
- Metropolitan Water Board V. Dick Kerr & Co Ltd [1918] A.C.119.H.L.
- Morgan V. Manser [1948] 1 K.B.184.
- National Carriers Ltd V. Panalpina (Northern) Ltd [1981] A.C.675.H.L.
- Nickoll & Knight V. Ashton, Edridge & Co [1901] 2 K.B.126.C.A.
- Nordman V. Rayner & Sturge L.T.R (1916) 33 T.L.R.87.
- Norfolk C.C V. Secretary of State for the Environment & Another [1973] 3 ALL. E. R.673.
- Norris V. Southampton City Council [1982] I.R.L.R.141.
- Ocean Tramp Tankers Co V. V/O Sovfracht. The Eugenia [1964] 2 Q.B.226.
- Paal Wilson & Co. A/S V. Blumenthal [1983] 1 A.C.854.
- Pacific Phosphate Co Ltd V. Empire Transport Co Ltd (1920) 4 L.L.L.R.189.
- Palmco Shipping Inc. V. Continental Ore Co (The "Captain George K") [1970] 2 Lloyd's.Rep. 21.
- Pancommerce S.A. V. Veecheema B.V. [1983] 2 Lloyd's.Rep.304.C.A.
- Paradine V. Jane (1646) Aleyn 26.
- Parkinson (Sir Lindsay) & Co Ld V. Commissioners Of His Majesty's Works & Public Buildings [1949] 2 K.B.632.
- Patten V. Wood (1887) 51 J.P.549.
- Petter Cassidy Co.Ltd V. Osuustukkukauppa I.L. [1957] 1 W.L.R.273.
- Phillips V. Alhambra Palace Co [1901] 1 Q.B.59.
- Pionner Shipping Ltd V. B.T.P. Tioxide Ltd [1980] 2 Lloyd's Rep.339
- Port Line Ltd V. Ben Line Steamers Ltd [1958] 2 Q.B.146.
- Pound A.V. & Co Ltd V. M.W. Hardy & Co.Inc. [1956] A.C.588.H.L.
- Poussard V. Spiers & Pond (1876) 1 Q.B.D.410.
- Ralli Bros V. Compania Naviera Sota Y Aznar [1920] 2 K.B.287.C.A.
- Robert H. Dahl V. Nelson Donkin & Others (1881) 6 App.Cas.38.H.L.
- Robinson V. Davison (1871) L.R.6 E.X.269.
- Robson V. Premier Oil & Pipe Line Co Ltd & Others [1915] 31 T.L.R.420 C.A.

- Ross T. Smyth & Co Ltd (Liverpool) V. W.N. Lindsay Ltd (Leith) [1953] 1 W. L. R.1280.
- Russkoe Obschestvo D'Liaizqstovlenia Snariadov I'Voennick Pripassov V. John Stirk & Sons Ltd [1922] 10 Li.L.R.214.C.A.
- Sainsbury H.R.&.S. Ltd V. Street [1972] 1 W.L.R.834.
- Scottish Navigation Co Ltd V. W A. Souter & Co [1917] 1 K.B.222.
- Shipton, Anderson & Co and Harrison Bros & Co Re [1915] 3 K.B.676.
- Smith J. V. Mrs Ann Riddell (1886) 14 R.95.
- Societe Franco-Tunisienne d'Armement V. Sidermar S.P.A. [1961] 2 Q.B.278.
- Sphepherd F.C. & Co Ltd V. Jerrom [1986] 3 ALL.E.R.589.C.A.
- Staffordshire Area Health Authority V. South Staffordshire Waterworks Co.[1978] 3 All.E.R.769.
- St Enoch Shipping Co Ltd V. Phosphate Mining Co [1916] 2 K.B.624.
- Stockholms Enskilda Bank Aktiebolag V. Shering Ltd [1941] 1 K.B.424 and [1943] 2 ALL.E.R.486.C.A.
- Stubbs V. Holywell Ry Co (1867) L.R. 2 EX.311.
- Tamplin F.A Steamship Co Ltd V. Anglo-Mexican Petroleum Products Co Ltd [1916] 2 A.C.397.H.L.
- Tatem W.J. Ltd V. Gamboa [1939] 1 K.B.132.
- Taylor V. Caldwell (1863) 3 B&S.826.
- Taylor J.W. & Co V. Landauer & Co. [1940] 4 ALL.E.R.335.
- Tay Salmon Fisheries Co, Ltd V. Alexander Speedie 1929 S.C.593.
- Thiis & Others V. Byers (1876) 1 Q.B.D.244.
- Tsakiroglou & Co Ltd V. Noblee Thorl G.m.b.H [1962] A.C.93.H.L.
- Unger V. Preston Co [1942] 1 ALL.E.R.200.
- Wait Re [1927] 1 Ch.606.C.A.
- William Watson & Co V. Robert Shankland & Others (1872) 10 M.142.
- Walton (Grain & Shipping) Ltd V. British Italian Trading Co Ltd [1959] 1 Lloyd's. Rep.223.
- Walton Harvey Ltd V. Walker & Homfrays Ltd [1931] 1 Ch.274.C.A.

LIST OF FRENCH CASES

- Acquitaine V. Ravand. Cour de Bordeaux.January 10th.1917.Gaz.Pal.February 7th. 1917.
- Aguado V. de Bearn Cour de Paris.May1st.1875.D.1875.II.204.
- Alibert V. Cie des Forges etc.Trib.Civ.Montluçon.Feb 21st.1951.D.1952.279.
- Balland V. Kahn.Trib.Com.Nancy.Dec 6th.1915.Gaz.Pal.Nov 4th.1916.
- Begnier V. Legion Proust.Trib.Civ.Melle.Oct 23rd.1915.D.1916.2.83.
- Boix V. Boutles etc.Com.Oct 26th.1936.Gaz.Pal.1936.2.845.
- Bournan V. La New York. Ch des Requettes.June 15th.1911.D.1912.1.181.
- Bouvier V. E.D.F. Trib Gde Instance de Lavale.Apr 29th.1963.D.1963.673.
- Cecaldi V. Albertini.Civ.Apr 14th.1891.D.1891.1.329.
- Chavenon V. Espie.Soc.Feb 28th.1947.D.1947.212.
- Cie du Midi V. Dausse.Civ.Sept 29th.1940.Bulletin des Transports.Jan-Feb. 1941.

p.11. C. Cass.
- Cie L'Union-Vie V. Regnard.Civ.Soc.May 20th.1954.D.1954.615.C.CASS.
- Coulbeaux V. Gautier.Paix-Mantes Sur-Seine.June 24th.1941.Gaz.Pal.1941.2.205.
- Credit Lyonnais V. Kintz etc.Req.Feb 11th.1946.D.365.
- Dame Saurin V. Dame Bonnafous.Civ.1ere.Feb 24th.1981.D.1982.479.C.CASS.
- Dame Tiffon V. Ste Souistre etc.Soc.May 31st.1945.D.1946.21.
- Diagola V. Dewynter.Civ.May 14th.1969.D.1970.Somm.44.
- Dunlop V. Dumarcay.Civ.Soc.Oct 28th.1957.D.1958.Somm.88.
- Durlach V. Grand-Gerard.Req.July 3rd.1918.Gaz.Trib.Aug 18th.1918.
- Electricite de France V. Soc.Anon.Gaillon.Lyon.Nov 8th. 1979.D.1980.IR.441.
- Epoux Butin V. E.D.F.,G.D.F.Trib.d'Instance.Saint-Denis.Aug 25th. 1983. D. 1985.26.
- Epoux Damiette V. Epoux Fournier.Co.Jan 23rd.1968.D.1968.Somm.65.
- Epoux Levy V. Ste anon. cooperative Dame Blanche Un Les Vergers.Orleans.Oct 25th.1973. D. 1974. 66.C.APP.
- Epoux Levy V. Soc.Cooperative.Civ.3eme.Apr 19th.1972.D.1973.205.C.CASS.
- Goujon V. Goujon.Trib.Paix.Cande.Nov 27th.1945.Gaz.Pal.1946.1.17.
- Greard V. Cie Air France (1ere espece) & Cie Air France V. Tremoulet (2eme espece) .Ch. Soc.Apr 15th.1970.2 arrets.D.1971.107.C.CASS.
- Herviers et autres V. Ste Buffalo etc.Dijon.July 19th.1945.Gaz.Pal.1945.2.139.
- Hue V. Hailaust.Trib.Com.Nantes.July 23rd.1870.D.1870.3.115.
- Lamy V. Bailles.Paris.June 9th.1961.D.1962.297.C.APP.
- Maiano V. Simard.Bordeaux.Nov 26th.1940.Gaz.Pal.1941.1.29.
- Nogaret V. Charoulet.Civ.Apr 7th.1954.D.1954.385.C.CASS.
- Nord-Sud V. Robert.Trib.Civ.Seine.March 2nd.1915.Rec.Gaz.des Trib. 1915. 2. 158.
- Pelliot V. Gaillard.Trib.Com.Seine.July 6th.1915.D.1917.2.47.
- Rungeard etc V. Gaillard.Ch des Req.Feb 13th.1872.D.1871.2.177.
- Ste Anon-Musee Grevin V. E.D.F.Com.Nov 21st.1967.D.1968.2.279.C.CASS.
-Ste Bata V. Farge.Caen.Oct.11th.1937.Gaz.Pal.1937.2.797.
- Ste Boulonneries etc V. E.D.F.D.1984.IR.165.C.CASS.
- Ste d'assur etc. V. Dumesnil.Civ.1ere.May 11th.1954.D.1954.611.C.CASS.
- Ste d'assur etc. V. Guilhem.Civ.Feb 15th.1888.D.1888.1.203.
- Soc des Etabl.Barmone V. Fritz.Civ.Soc.Dec 30th.1954.D.1955.Somm.77.
- Ste des Hauts Fournaux V. Couturier.Cour de Caen.Feb 2nd.1916.Gaz des Trib.Nov 12th.1916.Rec. Gaz.des Trib.1916.2.413.
- Ste Dumas V. Dlle Tiberghien.Seine.Feb 14th.1941.Gaz.Pal.1941.1.355.
- Ste Sallier V. Etat Français et S.N.C.F.Trib.Civ.Orleans.Oct 10th & 17th. 1946. D. 1947 . Somm.23.
- Syndicat etc V. Soc.Maurice etc. Civ.3eme.Oct 10th.1972.D.1973.378.
- Transports Maritimes de l'Etat V. Veuve Brossette etc. Veuve Brossette etc V. Cie gen.Transatlantique et Transports Marititmes de l'Etat.Civ.Com.June 19th.1951.2 arrets.D.1951.717.C.Cass.

- Union des Proprietaires etc V. Trufault Le Havre.Dec 14th. 1929. Gaz. pal. 1930. 1. 346.
- Veuve Joly V. Grimault.Civ.2eme.June 29th.1966.D.1966.645.C.CASS.
- Wilk V. Dlachasse.Fontainebleau.March 20th.1946.Gaz.Pal.1946.1.217.
- Trib.Civ.Seine.Apr 17th.1869.D.P.69.5.221.
- Paris.Nov 14th.1873.Bulletin des arrets de Paris de 1873.p.142.
- Civ.March 6th.1876.1.193.S.1876.1.161 (Canal de Crapone).
- Seine.March 24th.1905.G des Trib.1905.2.2.436.
- Trib.Civ.Seine.Apr 21st.1915.Rec.Gaz des Trib.1915.2.158.
- March 30th.1916.S.1916.3.17.concl.Chardenet, (Gaz de Bordeaux).
- Nimes.Jan 4th.1918.Gaz.Trib.1918.2.313.
- Com.Marseille.March 18th.1927.Rec.Marseille.1927.1.322.
- Com.Oct 26th.1936.Gaz.Pal.2.845.
- Com.Beziers.Dec 5th.1938.Gaz.Pal.1939.1.306.
- Lyon.March 1st.1943.S.1944.Chr.p.46.
- Cour de Paris.May 3rd.1950.Gaz.Pal.2.71.
- Civ.1ere.March 7th.1966.Bull.Civ.1966.1.130.n:166.Gaz.Pal.1.409.
- Com.Jan 23rd.1968.J.C.P.68.II.15422.
- Com.Nov 12th.1969.J.C.P.1971.II.16791.C.CASS.
- June 4th.J.C.P.1980.19411.concl.P.Besnard.
- Com.July 8th.1981.Bull.Civ.n:312.
- Ch.Mixte.Feb 4th.1983.3.arrets.J.C.P.1983.IV.123.
- Soc.Jan 25th.1984.Bull.IV.n:145.

CONTENTS

Page

Summary.
Acknowledgments. i
List Of Cases. ii
Contents. viii

Introduction. 1

PART ONE. Where The Performance Of The Contract Is Impossible. 5

Preliminary Chapter. General Ideas On Force Majeure And Frustration. 5
Section One. Definition Of Force Majeure And Frustration. 5
Section Two. Conditions Of Force Majeure And Frustration. 9
§.1. The Event Must Not Be Imputable To The Debtor. 11
§.2. The Event Must Be Unforeseeable. 19
§.3.There Should Be An Impossibility Of Performance (Irresistibility. Insurmountability). 26

Chapter Two. Impossibility As Regards The Subject Matter Of The Contract Or A Thing Essential To Its Performance. 32
Section One. Destruction And Deterioration Of The Subject Matter Of The Contract Or A Thing Essential To Its Performance. 32
§.1. Common Law Cases Compared With French And Algerian Principles. 33
§.2. The Sale Of Goods Act 1979.(S. 7). 45
§.3. Frustration Under The Uniform Laws On International Sales Act 1967. (Art. 74) Or The 1964 Convention And Under The 1980 U.N. Convention On International Sale Of Goods. 51
I. Frustration Under The U.L.I.S Act 1967. 51
A. The Historical Background Of U.L.I.S. 51
B. The Scope Of Application Of U.L.I.S. 52
C. Article 74 Of U.L.I.S. 53
II. The 1980 U.N. Convention. 56
A. General Remarks On The 1964 Convention. 57
B. The Sphere Of Application Of The 1980 U.N. Convention. 58
C. Article 79. 58
Section Two. The Non Availability Of The The Subject Matter Of The Contract Or A Thing Essential To Its Performance. 60
§.1. Requisition. 60
I. Requisition Of Ships Under English Law. 62
II. Requisition Under French Law. 65
§.2. Seizure Of Ships And Confiscation. 68
I. Seizure Of Ships Under English Law. 69

II. Confiscation Under French Law. 70
§.3. Ships Trapped (Shatt-al-Arab Cases). 72
§.4. Ships Damaged. 75

Chapter Three. Impossibility As Regards The Parties To The Contract. 80
Section One. Death. 80
Section Two. Illness Or Incapacity. 82
Section Three. Imprisonment Or Internment. 90
Section Four. Mobilisation. 94
§.1. Mobilisation Under English Law. 94
§.2. Mobilisation Under French Law. 95
Section Five. Strike. 98

Chapter Four. Legal Impossibility And Illegality (Or Fait Du Prince). 105
Section One. Government Prohibitions. 106
§.1. English Law Regarding Government Prohibitions. 106
§.2. French And Algerian Laws Regarding Government Prohibitions. 111
Section Two. Legal Restrictions (Import And Export Prohibitions). 115
Section Three. Trading With The Enemy. 125

Chapter Five. Legal Effects (Or Consequences) Of Frustration And Force Majeure. 131
Section One. Effects Of Frustration. 131
§.1. Common Law Rules As To The Consequences Of Frustration. 132
§.2. The Law Reform (Frustrated Contracts) Act 1943. 134
§.3. Contracts To Which The Act Does Not Apply. 138
Section Two. Effects Of Force Majeure In Synallagmatic Contracts. 142
§.1. The General Principle. 142
I. The General Solution (The Principle Of Connection Between Obligations In Synallagmatic Contracts). 144
II. The Special Solution *Res Perit Domino* (Contracts Involving The Transfer Of Ownership Of A Specific Thing). 148
III. The Risks In Contracts Of Sale Made Under A Condition Or A Term. 151
§.2. The Exceptions. 152
I. Contractual Risks. 152
II. Legal Risks. 153
III. Case Of "Mise En Demeure". 153
IV. Partial Impossibility. 153
V. Temporary Impossibility. 156
VI. The Question Of Partial Exoneration. 161
VII. Partial Exoneration and the Predisposition of the Victim. 162
Section Three. Contractual Clauses Concerning Force Majeure And Frustration. 168
§.1. Contractual Clauses Concerning Force Majeure. 168
§.2. Contractual Clauses Concerning Frustration. 170

PART TWO. Where The Performance Is Not Strictly Speaking Impossible. 176

Chapter One. Where The Performance Of The Contract Becomes Valueless. 177

Chapter Two. Where The Performance Of The Contract Is Onerous. 188
Section One. The English Position. 190
§.1. The Principle. 190
§.2. The Theoretical Basis Underlying The Doctrine Of Frustration. 200
I. The Implied Term Theory. 200
II. The Radical Change In The Obligation Theory. 206
III. The Just And Reasonable Solution Theory. 208
IV. The Disappearance Of The Foundation Of The Contract Theory. 211
V. The Construction Theory. 213
Section Two. The Position Of French Law. 216
§.1. Doctrinal Arguments Generally Invoked In Rejecting The Theory Of Imprevision. 216
§.2. An Illustration (The Court Of Cassation). 218
§.3. The Position Of The Conseil d'Etat. 225
Section Three. The Position Of Algerian Law And Other Systems of law. 233
§.1. Doctrinal Arguments. 233
§.2. An Illustration (Algerian Law). 238
I. The Sphere Of Application Of Article 107/3 Of The Algerian Civil Code. 245
II. The Conditions Of Imprevision. 247
A. The Exceptionality Of The Event. 248
B. The Unforeseeability Of The Event. 251
* Is The Condition of Irresistibility Required under the Theory of Imprevision. 253
C. The Generality Of The Event. 254
D. The Performance Should Become Onerous. 256
1. Definition Of The Onerousness Of The Contractual Obligation. 256
2. The Criterion Of Onerousness. 257
3. When Is The Condition Of The Performance Becoming Onerous To Be Considered. 258
* What Happens When The Debtor Is Compensated For His Loss By Other Means Than The Revision Of His Contract. 258
E. The Non Imputability Of The Event To The Debtor. 260
III. The Effects Of Imprevision. 260
A. The Power Of The Judge Regarding A Case Of Imprevision. 261
B. The Process Of Readjusting The Destabilised Contract. 261
1. The Process Of Reducing An Obligation. 264
2. The Process Of Increasing An Obligation. 265
3. The Process Of Suspending The Contract. 266
Conclusion. 270

Bibliography. 272

General Introduction.

Frustration, force majeure and imprevision. These terms are very well known and many articles have been written on them some of which dealt with one of these terms, whereas others have treated them in a comparative way. The question is what is meant by these three terms?. Certainly from what has been written, a lawyer can give a general definition, however, to bring these terms close to each other and to give a comparative judgment, such as to say one term is similar or dissimilar to the other, is more difficult. Such a judgment certainly needs a more detailed study of these expressions taken from their original sources rather than relying on general ideas concerning frustration, force majeure and imprevision. This in fact is what we want to derive from the study of these doctrines. This is not to say that all what has been said on these different concepts will be discussed in this work. Our effort is more modest than that.

We have tried to study these principles in totally different systems of law viz common and continental laws and in detail. The study includes a discussion of cases, laws and doctrines related to this subject. We have also tried to bring the terms of frustration, force majeure and imprevision close to each other and to see whether what has been said about them can be supported or not.

It is worth noting that this study is limited in several ways, it is confined to contractual obligations only. This means that even though these terms are used in other types of obligations (e.g., in delictual ones 'if speaking of French and Algerian laws') they will not be studied. Furthermore, the comparison of frustration with force majeure and imprevision will be carried on following the same plan as when studying the doctrine of frustration. Thus for example the reported French cases are -in general- those which are similar to a certain extent to those of English or Scottish instances of frustration. Furthermore, our study concerns cases of subsequent impossibility only.

It can be said that perhaps the principle which is common to all legal systems is the one of *pacta sunt servanda* which means that the one who concludes a contract should perform it or pay damages instead. It is

therefore of interest to see how this principle is understood under English, Scottish, French and Algerian laws. Under certain laws -as will be seen- the principle is considered as absolutely sacred (see under force majeure the requirement of absolute impossibility.). Others are less strict in its consideration. An example of the first is French law, and of the latter Algerian law. English law might be said to occupy a middle position between the above two laws.

Under French law, any question of performance having become impossible should be dealt with in relation to the principles of force majeure. The yardstick of it is that, no release is allowed for the debtor unless his performance has become absolutely impossible. The fact that the performance has become ruinous is no plea for release.

English law, before the development of the doctrine of frustration, was more strict than French law. The impossibility was not a sufficient reason to discharge the debtor from his contractual obligations. However, this attitude has changed, and consequently the strictness has been lessened.

Under other laws (e.g., Algerian and other Arab laws, as well as under Swiss and German laws) though the concept of impossibility of performance is not substantially different from the one under French law, nevertheless the fact that certain obligations may become ruinous for the debtor or even for the creditor, is not ignored. In such cases, a modification of the contract is conceived in order to restabilise it and to prevent it from becoming a source of injustice.

Therefore, it appears that the common point between the different laws under consideration is that, the subsequent impossibility of performance discharges the debtor from his obligations. The problem is therefore with the case where the performance has become more onerous only. It is at this point that two principles emerge. These are *pacta sunt servanda* and *rebus sic stantibus*. The latter means that the contract is binding as long as the situation under which it was concluded has not radically changed. A. Richard (in Semaine Internationale de Droit. (Paris.1937), at p.206) says that it is a mistake to juxtapose these two maxims. However, it is thought that, it is possible to say that *rebus sic stantibus* means that the *pacta sunt servanda*principle cannot be maintained as it was initially

conceived (ie at the time the contract is concluded) when those major changes occur. That is to say, another solution (other than the performance of the contract) should be adopted with the *clausula rebus sic stantibus* . This solution is the revision of the destabilised contract.

Many questions can be asked when dealing with this last solution. For example, what does the revision of a contract mean ? who will revise the contract ? is it the legislator or the judge ?.

It can be said that no one is against the intervention of the legislator to revise the destabilised contracts. The real controversy is about the competence of the judge for the revision of contracts. For certain authors, such a power should not be given to a judge, especially if it is done by a general stipulation in the law leaving him therefore with a total discretion in considering cases of hardship. For others there is no reason to fear his intervention. It is even said that the judge is in fact in a better position to consider such cases than the legislator himself.

It has previously been remarked that many authors have compared the English doctrine of frustration with the French concept of force majeure and imprevision. Some of them are quoted below.

Aubrey says that force majeure is much more limited than frustration.[1] Later on the same author says that the strictness of force majeure is not so narrow as it at first sight appears.(Id) Puelinckx (at p.50)[2] says that force majeure is narrower than frustration, and that frustration is closer to imprevision and the German doctrine of Geschaftsgrundlage.(Id) However, another author says that force majeure is no doubt as narrow as frustration.[3] It is further opined that frustration is sometimes close to force majeure and sometimes to imprevision, but it never coincides completely with either of them.[4] So

[1] Michael D. Aubrey, "Frustration Reconsidered- Some Comparative Aspects" (1963) 12 International & Comparative Law Quarterly.1165, at p. 1174.

[2] Puelinckx A. H, "Frustration, Hardship, Force Majeure, Imprevision, Wegfall der Geschaftsgrundlage, Unmoglichkeit, Changed Circumstances. A Comparative Study in English, French, German and Japanese Law" (1986) 3 Journal of International Arbitration.47.

[3] Neville Maryan Green, "Force Majeure in International Construction Contracts" (1985) 13 International Business Lawyer (U.K).505, at p. 505.1.

[4] Henri Lesguillons, "Frustration, Force Majeure, Imprevision, Wegfall der Geschaftsgrundlage" (1979) 5 International Trade Law & Practice.507., at pp.508-09.

we see that some of the writers are of the opinion that force majeure is narrower than frustration, whereas others consider frustration to be as narrow as force majeure. It is interesting therefore to know which of these opinions are the more accurate.

Thus, since strictly speaking, the occurrence of outside events has two effects, viz putting the contractor in a real impossibility to perform his contract, or the contract is still capable of being performed, this study will be carried out under these two headings. The first part of this work will be devoted to cases of impossibility, and the second to the other instances, viz the possibility of performance in which the debtor or the creditor is claiming release (these instances are the performance having become valueless and onerous).

In this study we start with a general statement of principles to be borne in mind when dealing with the cases and instances discussed. This is provided in the preliminary chapter. The other chapters are a study of cases illustrating the application of those principles. These cases may also help in illustrating the development of those principles.

PART ONE

WHERE THE PERFORMANCE OF THE CONTRACT IS IMPOSSIBLE.

PRELIMINARY CHAPTER. GENERAL IDEAS ON FORCE MAJEURE AND FRUSTRATION.

Before dealing with cases involving the application of frustration and force majeure, it is necessary to define these two terms. Then the conditions under which they can be claimed, and when a party is barred from such a claim will be determined. Having done that, it will be a matter of applying those ideas to the different instances of frustration and force majeure which will be studied in the following chapters.

It is worth noting here that this study will mainly focus on English law. As regards Scots law, it can generally be said that its conception of the doctrine of frustration, is not radically different from that of English law.[1] However, because of the difference in sources of the two laws[2], some cases might be decided differently under the two laws. In the course of this study such clear differences between them will be pointed out.

Section One. Definition of Force Majeure and Frustration.

Frustration is the doctrine by which a contract is terminated when its performance through no fault of either party and for which no sufficient provision was made, becomes either impossible or fundamentally changed, as a result of certain events which the parties could not have reasonably contemplated at the time the contract was made. These events must occur after the making of the contract but before or during its performance.

As to force majeure A. H. Puelinckx defines it, following the definition given by Lord Radcliffe of the doctrine of frustration in the

---

[1] See also William McBryde, *The Law of Contract in Scotland* (Edinburgh. W. Green & Son.Ltd. 1987), at pp. 343-44.

[2] Scots law is said to be influenced by Roman law. See Lord Cooper, "Frustration of Contract in Scots Law ", Jou. Comp. Legis. 28 (1946) 3rd S. Part 3 & 4. 1, at p. 1. As regards English law see Walker R. J, *The English Legal System* (6th ed., London Butterworths. 1985) at p. 74 (English law he says is not directly influenced by Roman law).

case of Davis Contractors ([1956] A.C.696),thus:

> "Force majeure occurs when the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for *would render it impossible*. I promised to do this but I cannot due to some irresistible unforeseeable and uncontrolable event.".

The expression italicised by Puelinckx replaces the English common test to the effect that 'performance would be radically different from that undertaken'.[3]

In addition to this it can be said that a general statement concerning force majeure and cas fortuit can be found in art.1147 and art.1148 of the French Civil Code. Thus art.1147 states that:"A debtor is judged liable, the case arising, to the payment of damages, either by reason of the inexecution of the obligation or by reason of delay in the execution, at all times he does not prove that the inexecution came from an outside cause which cannot be imputed to him, and further that there was no bad faith on his part.".[4]

Therefore the obstacle which may excuse the debtor's non performance and releases him from any liability must be "an outside cause", which should not be "imputed" to the debtor. The further question which can be asked is what does "an outside cause" mean?. This may partially be answered (regarding French law only[5]) by reference to art.1148 which disposes : "No damages arise when, as a result of an [event of force majeure] or a fortuitous event, the debtor was prevented from giving or doing that for which he had obligated himself, or did what was forbidden to him.". With regard to art 1148 the 'outside cause' is force majeure or fortuitous

[3] See A. H. Puelinckx, at p. 50.

[4] See for a similar provision art. 176 Alg.C.C. It is to be noted that the translation of French articles into English is from. John H. Crabb, *The French Civil Code* (as amended to July 1 1976) Fred. B. Rothman & Co New Jersey. 1977 (2nd printing 1985). For a brief discussion of the Algerian Civil Code, see Georges Berlioz, "Le Code Civil Algerien de 1975 et les Contrats Internationaux" (1978) 4 International Trade Law & Practice.81.

[5] This is because under Algerian Civ. C, the outside event may be a case of force majeure or a fortuitous event, or the act of the debtor himself, or the act of a third party. All these are formulated in the Civil Code. See to this effect art. 138/2 & art. 127. See Nour-Eddine Terki, *Les Obligations.Responsabilite Civile et Regime General* (Algiers. O.P.U. 1982) at p. 179.

event.[6] However, as has been said this answer is only partial since force majeure or a fortuitous event can be one of the outside causes which release the debtor from his contractual obligation. The other causes are the fault of the debtor (or the defendant) and the acts of a third party.[7]

Since this study will be restricted to the case of force majeure and the fortuitous event, it is necessary to define these terms. Most contemporary authors, consider force majeure and the fortuitous event as synonymous.[8] The French 'jurisprudence' [in its French sense] also does not differentiate between the two terms.[9] Neither does the French 'Code Civil' make such a distinction.[10] The question which remains is what does force majeure mean?.

No definition of force majeure is given in the Civil Code.[11] As to art.

---

[6] See Barry Nicholas, *French Law of Contract* (London. Butterworths. 1982), at pp. 194-95.

[7] See Leontin-Jean Constantinesco, *Inéxecution et Faute Contractuelle en Droit Comparé* (Bruxelle, W. Kohlmar Verlay. Stuttgart/Librairie Encyclopedique. 1960) at p. 403, and see art. 127 Alg.C.C.

[8] See Leon Marre, *Essai sur les Notions de Cas Fortuit et de Force Majeure . Etude Critique de Quelques Opinions Nouvelles* (Paris. L.G.D.J. 1910), at p. 5, El Sanhoury, *El Wassit* volume. 1 (Beirut. 1951), at pp. 876-77, and El Sanhoury, *El Moudjez.The General Theory of Obligations* (Beirut), at page 300, and Anouar Soltane, *The Sources of the Obligation. The General Theory of the Obligation. A Comparative Study of Egyptian and Lebanese Laws.* (1983), at p. 337, and see Mouhy-Eddine Ismail Alam Eddine, *The General Theory of the Obligation* at p. 459, and see Jean Quesnel, *De quelques Applications de la Notion de Force Majeure en Temps de Guerre. 1930- 1940* (Caen. 1945), at p. 1 footnote. 1.

[9] See Andre Besson, "Cas Fortuit et Force Majeure dans les Accidents d'Automobiles", (1931) Revue Generale des Assurances Terrestres. 272, at 272, and see Mahmoud Djamel Eddine Zaki, *The General Theory of the Obligation* (3rd ed., Cairo. 1978), at p. 360 and see Ahmed Salama, *The Theory of the Obligation*, at p. 296, and see Mohamed Hassanine, *El Wadjiz. The General Theory of the Obligation. The Sources of an Obligation and their Effects in the Algerian Civil Law.* (Algiers. S.N.E.D. 1983), at p. 120.

[10] See Weill, *Droit Civil. Les Obligations* (Dalloz. 1971), at p. 436, and Barry N. at p. 196, and François Chabas, "Force Majeure" (1978) 4 Encyclopedie Dalloz. Repertoir de Droit Civil., at para. 3. The Algerian Civil Code too does not make such a distinction.

[11] See Pierre Ghiho, *Cours de Droit Civil* Vol. 4. *Les Obligations* (2eme ed., Editions L'Hermes. 1983), at para. 640. Neither the Algerian civil code nor the Egyptian one did define the concept of force majeure. See Houcine Amer et Abd

1147, it gives the conditions of force majeure, ie not to be imputed to the debtor. From this condition the French 'jurisprudence' deduced two other conditions viz, the unforeseeability of the event of force majeure and its irresistibility (inevitability).[12] Therefore from what has been said above we may define force majeure as any event which has the three conditions stated above and which prevents the debtor from performing his contract (or obligations).[13]

Generally speaking it might be said that in principle both definitions (ie of force majeure and frustration) are very similar. This is true even for the requirement that there should be no contractual provision dealing with the event in question. This is because under French or Algerian laws too there should not be such a provision in the contract (See post force majeure and contractual clauses). However, this similarity in the wording of the two doctrines does not mean a similarity in the application or the consideration of the requirements put in the definition. An illustrating example is the condition of unforeseeability. Thus under French or Algerian laws, there can be, in principle, no force majeure unless the

---

Arrahim Amer, *Delictual and Contractual Civil Liability* (2nd ed., 1979), at p. 389. The roman jurist Ulpien defines force majeure as what cannot -in human sense- be foreseen, and even if foreseen cannot be resisted. Houcine Amer, op.cit at p. 391 and see Abd Essatar Etelili, *The Conditions of Liability of Airline Carriers and the Causes of Exoneration.* (Algiers. S.N.E.D. 1976), at p. 97, and see Leon Marie, *Du Cas Fortuit et de la Force Majeure* (Caen. 1896), at p. 61 who says that this was intended, and see Encyclopedie (1978) "Force Majeure" at para. 4.

[12] Henri et Leon Mazeaud & Jean Mazeaud et François Chabas, *Leçons de Droit Civil* Tome. 2. 1er Vol. *Obligations Theorie Generale* (7eme ed., Editions Montchrestien. 1985), at p. 633, and Rene Fiatte, *Les Effets de la Force Majeure dans les Contrats* (Paris. 1932), at p. 8. In the Algerian Civil Code the condition of 'not to be imputed to the debtor' is stipulated in several articles such as arts. 127, 139, 176, 208/2, 307. However, it can be said that the conditions of unforeseeability as well as of the impossibility of performance of the contract, are provided in the Code. As to the unforeseeability see art. 138/2 (although it concerns the delictual responsibility, but no reason prevents its application to contractual responsibility.). As to the impossibility of performance see arts. 176 and 307. See El Sanhoury, *El Wassit* vol. 1 at p. 878.

[13] See Encyclopedie Dalloz "Force Majeure" (1978), at para. 1, and see P. Kahn, "Force Majeure et Contrats Internationaux de Longue Duree" Friedmann Collection 181-200, at p. 182, and see El Sanhoury, *El Moudjez* at p. 301, and see Abbas Helmi, *Maritime Law.* (Algiers. O.P.U. 1983), at p. 30, and see Hamdi El Ghenimi, *Studies of the Algerian Maritime Law* (Algiers. O.P.U. 1983), at p. 93.

event is unforeseen. Whereas under English law a contract might be frustrated even if the frustrating event is foreseen. See for instance the case of Tatem (See post).

Following these definitions, it can be said that three conditions are commonly required under English, Scottish, French and Algerian laws. Thus the event which may exonerate a debtor from his obligation must not be due to the fault of the debtor. It should also put him into an impossibility of performing his contract. The event in question should be unforeseeable at the time of the conclusion of the contract. But this condition is to be taken with some reserve as regards English law. However, what is noticeable is that French and Algerian laws speak only of impossibility of performance whereas English law speaks of impossibility of performance and of the fact that an obligation has become radically different from the one undertaken. This may suggest that English law is wider in its concept of release from a contractual obligation than French law.

Section Two. Conditions of Force Majeure and Frustration.

Having given a definition of the two concepts, in what follows, we will focus on each condition as stated in the definition (ie non imputability, unforeseeability and impossibility of performance), and try to make a comparison between English law on one hand and French and Algerian laws on the other.

In this respect it is of interest to note that under **Quebec law** -its Code Civil is based on the French Civil Code[14]- in order that a debtor can claim exoneration from his obligation, the event hindering his performance should be irresistible (insurmountable), unforeseeable, not imputable and the performance of the contract must have become impossible.[15] The fact that the performance has become onerous is no plea for a release.

[14] See Wasserman G, "Impossibility of Performance in the Civil Law of Quebec" (1952) 12 Revue du Barreau de la Province du Quebec.366, at p. 366

[15] G. Wasserman pp. 370 & 379, and Claude Fabien et Ejan Mackaay, "Le Droit Civil aux Prises avec l'Inflation" (1983) 28 Mc Gill Law Journal.284, p. 317, and Maurice Tancelin, *Des Obligations. Contrat et Responsabilite* (4eme ed., Montreal, Wilson & Lafleur Ltee. 1988), pp. 364-65.

Thus article 1072 of the new Quebec Civil Code 1988-89 states that:"The debtor is not liable to pay damages when inexecution of the obligation is caused by a fortuitous event, or by irresistible force, without any fault on his part, unless he has obliged himself thereunto by the special terms of the contract.".[16] Thus Quebec law is not different from French law.

Under **Louisiana Civil Code** too, the debtor who is prevented from performing his contract will not be held liable if the frustrating event, which should be unforeseeable and irresistible, puts him in a real impossibility of performance[17], and not merely that his obligation has become more difficult or more onerous (S. Litvinoff p. 2, and Tul L.Rev pp. 609-10). Another condition is that the debtor must not be at fault in the happening of the event in question (Tul.L.Rev p. 607). Louisiana law therefore -which is also influenced by the French Civil Code- is not different from French and Quebec laws.

Swiss law -see article 119 Code of Obligations- requires an impossibility of performance not imputable to the debtor, in order that he can be discharged from his obligations.[18]

German law is not different from the previous laws. Thus the debtor will be discharged from his obligation where the performance of the contract is rendered impossible due to supervening events not related to his fault.[19]

---

16 See Edward Veitch, 'Comments' (1976) 54 Canadian Bar Review.161, at p. 163.

17 Saul Litvinoff, "Force Majeure, Failure of Cause and Theorie de l'Imprevision : Louisiana Law And Beyond" (1985) 46 Louisiana Law Review.1, at p. 1, and Martin Hunley, "Supervening Impossibility as a Discharge of an Obligation" (1946-47) 21 Tulane Law Review.603, at p. 607.

18 See Pierre Van Ommeslaghe, "Les Clauses de Force Majeure et d'Imprevision (Hardship) dans les Contrats internationaux" (1980) 57 Revue de Droit International et de Droit Compare.7, at p. 33, and Dessemontet F. & Ansay T., *Introduction to Swiss Law* (Kluwer Law And Taxation Publishers. 1983), at p. 113.

19 See Henri Lesguillons, at p. 523, and Cohn E. J, "Frustration of Contract in German Law" (1946) 28 3rd.S. Parts 3 & 4 Journal of Comparative Legislation & International Law.15, at p. 15, Norbert Horn, "Change in Circumstances And the Revision of Contracts in Some European Law and in International Law" (1985) 3 Studies In Transnational Economic Law (Netherlands).15-29, at p. 18, 'Comments' "Commercial Frustration: A Comparative Study" (1967) 3 Texas International Law Forum.275, at p. 293, Rene Rodiere & Denis Tallon, *Les Modifications du Contrat au Cours de son Execution en raison de Circonstances Nouvelles* (Paris, Ed. Pedone.

As to the **United States** law, the English rule as formulated in the case of Paradine V. Jane (infra), that is the impossibility of performance cannot discharge the debtor from his contractual obligations, was at first adopted by American courts.[20] This rule however, was mitigated in the English case of Taylor V. Caldwell (infra), American courts too followed this authority (Berman p. 33, and Texas p. 278). Generally speaking it can be said that the American doctrine of impossibility of performance is similar to that of the English one.[21]

§.1. The Event Must Not be Imputable to the Debtor.

This means that the debtor should not provoke the event of force majeure[22] or be at fault, whether previous or subsequent to the event of force majeure, otherwise there will be no case of force majeure, which means he would not be exonerated, (even partially if speaking of French law as will be seen later on). More generally this means that the debtor should not have any connection with the event of force majeure which hinders his performance of the contract.[23]

1986), p. 123, P. V. Ommeslaghe pp. 21 & 22, Ernest J. Shuster, *The Principles of German Civil Law* (London, Oxford at the Clarendon Press. 1907), at p. 168, and Puelinckx A. H., at p. 59.

[20] See Harold J. Berman, "Non-Performance and Force Majeure in International Trade Contracts" In. International Association of Legal Science Conference in Helsinki 1960. Some Problems of Non-Performance and Force Majeure in International Contracts of Sale. Helsinki 1961. n:2 (1961).31, at p. 33, and Texas p. 278.

[21] John J. Gorman, "Commercial Hardship and the Discharge of Contractual Obligations under American and British Law" (1980) 13 Vanderbilt Journal of Transnational Law.107, at p. 108 footnote. 6. For a detailed study of the American doctrine of impossibility and frustration, see John D. Calamari & Joseph M. Perillo, *The Law Of Contracts* (2nd ed. West Publishing Co.1977), and Ronald A. Anderson & Ivan Fox & David P. Twomey, *Business Law U.C.C Comprehensive Volume.* (Revised Edition. South-Western Publishing Co. 1987).

[22] Henri Mazeaud & François Chabas, *Exercises Pratiques de Droit Civil* Tome. 2 *Obligations. Droit Reels Principaux* (Editions Montchrestien. 1986), at p. 102, and see Gerard Thery, *De la Notion d'Exteriorite dans la Force Majeure et dans la Responsabilite* (Lille. 1948), at p. 47. It is for this reason that the bankruptcy of the debtor which prevents him from performing his contract, cannot be considered as a case of force majeure, since it is not an outside cause. See Pierre Dupont Delestraint, *Droit Civil. Les Obligations* (10eme ed., Dalloz. 1986), at p. 105.

Thus for example if some goods were stolen in a railway station, by the enemy, and this was due to the delay of the company running the carriage by rail, this company could not ask for exoneration, since it was its fault which facilitated that theft.[24]

Though we are speaking of French and Algerian laws, it seems that English and Scots laws are not different in this respect from what has been said. Thus it is well established under English law[25] that where frustration is caused by one's own default or by those who are under his responsibility, one cannot claim frustration in order to be released from his obligation.[26]

The leading case in this connection under English law is, Maritime National Fish, Ltd v. Ocean Trawlers, Ltd.[27] The charterers in this case,

---

23 See for e.g. arts .1302/1, 1881, 1882 Fr.c.c., and art. 544/2 Alg.c.c. Jean Radouant, *Du Cas Fortuit et de la Force Majeure* (Paris. 1920) at pp. 186-87, and see Rene Fiatte at p. 91, and Edouard Bourgoing, *Essai sur la Distinction du Cas Fortuit et de la Force Majeure* (Lyon. 1902), at pp. 92-93, and see art. 1807 Fr.c.c., Jean Carbonnier, *Droit Civil. 4/ Les Obligations* (6eme ed., P.U.F. 1969), at p. 244, Leon Marre, op.cit, at pp. 23- 24.

24 See Carbonnier, op.cit (1969), id, and see Mahmoud Djamel Eddine Zaki, op.cit at p. 367. For an example of a fault subsequent to an event of force majeure see: Gerard Thery at p. 102.

25 For Scots law see Gloag W.M , *Introduction to the Law of Scotland* (9th ed., Edinburgh. W. Green & Son.Ltd. 1987), at para. 11.2 & 11.17, and see McBryde, *The Law of Contract* op.cit, at p. 352.

26 Under English law a contracting party is also precluded from alleging frustration, if his own breach was one of the factor among others which caused frustration . Or that frustration occurred by his own breach and the other party's breach. See Treitel G. H, *The Law of Contract* (6th ed., London, Stevens & Sons. 1983), at 682. Cf what Treitel says with "partial exoneration under French law" infra. (The French case (concerning theft) cited in p. 11 above might be decided similarly under English law.). As to the question whether a sentence of imprisonment imposed on an employee, constitutes self-induced frustration or not, some authors took the second view see Chitty, *On Contracts* Vol. 1. *General Principles* (24th ed., London, Sweet & Maxwell. 1977), at 1447. Whereas others took the first view, and said that, to say an imprisonment for a criminal offense frustrates the contract, is inconsistent with that frustration must not be self-induced. Thus an employer can for example plead frustration in an action brought by his employee for unfair dismissal. But the employee is barred from claiming frustration relying on his imprisonment. See Treitel G. H, *The Law of Contract* (7th ed., London, Stevens & Sons. 1987), at p. 700. As regards French law, as we will see, imprisonment is considered as involving the fault of the debtor and therefore cannot constitute a case of force majeure.

chartered a steam trawler called the St Cuthbert which was "fitted with an otter trawl".[28] Both parties to the contract when entering into the contract knew that it was prohibited under Canadian law "to fish with a vessel that uses an otter or other similar trawl for catching fish"[29], unless under a licence. The charterers operated four otter trawlers in addition to the St Cuthbert. When they asked for the licences, they were granted only three. They were therefore asked to name the ships for which the licences would be granted. The charterers did not name the St Cuthbert within the named ships. Then they alleged that, the charter of the St Cuthbert was frustrated and that, they were not liable to pay the hire due.

The Privy Council held that, the contract was not frustrated, since the charterers were at fault, because they had elected the St Cuthbert not to be licenced to fish with an otter trawl.[30] Hence a party cannot rely on a self-induced frustration.(The National V. Trawlers case at 530.)

It is to be noted that in the National V. Trawlers case, the defendants owned three vessels and chartered the St Cuthbert and the other vessel. However, if charterers charter two trawlers and only one licence is granted to them, would the act of naming one of the two trawlers, be considered as an 'election' as defined in this case?. If it is considered as

---

27 [1935] A.C.524, and see Mertens V. Home Freeholds Co [1921] 2 K.B.526, (a licence was to be obtained in order that further work could be allowed. The licence was refused and the builder was held liable because he deliberately (ie his fault involved) delayed his work which prevented him from getting the licence.). Cited in Roy Glanville Mc Elroy & Glanville L. Williams, *Impossibility of Performance. A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration* (Cambridge, At The University Press. 1941), at 36. See also the case of Ocean Tramp Tankers Co V. V/O Sovracht The Eugenia [1964] 2 Q. B. 226, (a clause in the contract of charterparty states that the charterers should not enter into a dangerous zone. The charterers breached it and entered into that zone. The ship was trapped as a consequence of this in the Suez Canal. It was held that the charterers could not rely on the frustration of their contract since this was self-induced. See the speech of Lord Denning at p. 237. See also David M. Walker, Vol 2. *Principles of Scottish Private Law* (3rd ed. Oxford, Clarendon Press. 1983), at p. 136.

28 Anson's, *Law of Contract* (25th ed., Oxford, Clarendon Press. 1979), at p. 512.

29 The National V. Trawlers case, per Lord Wright at p. 526.

30 The National V. Trawlers case at p. 529.

such then they cannot claim frustration of the contract of the trawler they did not name. Treitel rightly points out that in such a case the charterers having elected one of the trawlers could plead frustration for the second which cannot be licenced, and there would be no self-induced frustration as in the National V. Trawlers case. (See Treitel (1983), at 683). Whereas if it is supposed that a person owns a vessel and charters another one, but is granted one licence only, if he names his own vessel for the licence granted, he cannot claim -relying on the National V. Trawlers case- frustration for the chartered one; since it is his election. In other words it is a self induced frustration.

The question of election may also be involved in the case where there is a contract of sale. Suppose that a seller entered into two contracts, to deliver 1000 tons of sugar to (A) and 1000 tons to (B). A subsequent restriction on export prevented him from performing his two contracts in full, since 1000 tons only was allowed. Therefore if he elected to perform one of the two contracts, one may say that he cannot claim frustration for the unfulfilled one, because it was his own election, and this is the rule in the National V. Trawlers (see supra).[31]

Schmitthoff (Helsinki.. p. 141), says that there would be no difference in the solution already given if the seller has divided that 1000 tons between the two buyers (ie 500 tons, each). But it is thought that even relying on the National V. Trawlers case, the seller would not be liable for such an act. Because in the National V. Trawlers case the defendants had a certain election by which they could avoid the breach of their contract, whereas in the above example, there is no such choice; since in both possibilities (ie to divide the quantity or to perform one contract in full) there would be a breach of the contract.

But now the solution to such a hypothetical example is provided in the case of Intertradax S.A.V. Lesieur-Tourteaux s.a.r.l.([1978] 2 Lloyd's Rep.509.). There it is stated that where one party enters into several contracts, and subsequently, without being aware that he would be prevented from performing them all, he is so prevented, then he can rely on the frustration of those not performed. The only requirement is that he has to act in a "fair and reasonable" manner.[32]

---

[31] Schmitthoff C. M, Helsinki Conference, at p. 141.

The question which was left open 'until it comes directly in issue'[33] is, as stated by Lord Russel of Killowen, in the Joseph Constantine case ([1942] A.C 154, at 179.), where he said :

> "No question arises on this appeal as to the kind or degree of fault or default of the contractor which will debar him from relying on the frustration. The possible varieties [of fault[34]] are infinite, and can range from the criminality of the scutler who opens the sea cocks and sinks his ship, to the prima donna who sits in a draught and loses her voice..."

So it was left open whether negligence only or a more deliberate act was required to constitute self-induced frustration.[35]

---

32 To this effect Lord Denning in the Intertradax case at p. 513, referred to the speech of Donaldson J (court of first instance) where he said:"...If the seller appropriated the goods in a way which the trade would consider to be proper and reasonable -whether the basis of appropriation is pro rata, chronological order of contracts or some other basis- the effective cause is not the seller's appropriation, but whatever caused the shortage". See Schmitthoff C. M, *Export Trade The Law and Practice of International Trade* (8th ed., London, Stevens & Sons. 1986), at pp. 160-61. It is to be noted that no moral commitments are to be taken into account when making such appropriation.(Pancommerce S.A. V. Veecheema B.V. [1983] 2 Lloyd's Rep.304, 307) ibid at 161, and see David Green, "Force Majeure Clauses and International Sale of Goods-Comparative Guidelines for the Common Lawyer" (1980) 8 Australian Law Review.369, at p. 375.

33 Per Lord Porter in Joseph Constantine [1942] A.C.154., at p. 206.

34 Cheshire Fifoot & Furmston , *Law of Contract* (11th ed., London, Butterworths. 1986), at p. 565. As to the question of onus of proof of frustration it can be said that under French and Algerian laws, it is the debtor who alleges that he is released by force majeure to prove force majeure. See art. 1315/2 Fr.c.c, and Henri De Page, *Traite Elementaire de Droit Civil Belge* Tome. 2 (3eme ed., Bruxelle. 1964), at p. 602. English law is not different. However, the onus of proof of default (ie the frustration was self-induced) is not on the party alleging frustration, but on the party who denies the existence of frustration.(Joseph Constantine [1942] A.C.154., and see Chitty, *On Contracts* Vol. 1. (24th ed., 1977), at para. 1446.

35 Fifoot ibid. However, it has been suggested that 'fault' includes "deliberate act and negligent destruction or damage to property without which the contract cannot be performed.". See Atiyah P. S, *An Introduction to the Law of Contract* (3rd ed., Oxford, Clarendon Press. 1981), at p. 206, and see Christine Mogridge, "Frustration, Employment Contracts And Statutory Rights" (1982) 132.2 New Law Journal.795, at pp. 796-97. The question which might be worth asking is whether illness caused by one's own carelessness can amount to frustration?. Viscount Simon in the Joseph

As to French law , when the fault of the debtor prevents him from claiming an event of force majeure, that fault should have some influence on the damage caused. This explains why in the case where a debtor having borrowed something, is 'mis en demeure' (which means to ask the debtor in a legal form, to perform his contract at the agreed time)[36] to restore it, but does not , and the thing perishes, he will not be liable for such loss if he can prove that that thing would have perished even if it had been delivered in time to the creditor.(See art. 1302/2 French C.C and art. 168/2 Alg.C.C).[37] This proves therefore that the debtor has nothing to do with the destruction of the thing borrowed.

Another case is worth discussing. This is C. Czarnikow Ltd v. Centrala Zagranicznego "Rolimpex".[38] Rolimpex a Polish state trading company, entered into a contract with an English company (Czarnikow), by which Rolimpex should export 200,000 tons of sugar to Czarnikow. The making of the contract by Rolimpex was authorised by the Polish authorities, because the production of sugar in that year, was estimated to be over domestic needs. However, the production failed owing to a natural event. Because the remaining product could not suffice the domestic needs in full, the government of Poland issued a regulation prohibiting export of sugar. Rolimpex was therefore unable to fulfill its

---

Constantine case [1942] A.C 154, said at p. 166, that:"Some day it may have to be finally determined whether a *prima donna* is excused by complete loss of voice from an executory contract to sing if it is proved that her condition was caused by her carelessness in not changing her wet clothes after being out in the rain...provided, of course, that it has not been deliberately induced in order to get out of the engagement.". Cited in F. C. Sphepherd & Co Ltd V. Jerrom [1986] 3 All.E.R.589, per Lawton LJ at p. 596.

Atiyah on his part suggests that in "view of the way in which courts treat negligence as something almost akin to a breach of the moral code, it would not be surprising if they were to deny that a contract was frustrated in such circumstances. But it is very doubtful if this would be a useful or desirable result from the point of view of social policy." *An Introduction..* at p. 206.

36 For more explanation of this see Carbonnier (1969), at pp. 251 et seq.

37 Radouant at pp. 189-90.

38 [1978] 1 All.E.R.81. Although this case was cited in Schmitthoff, *Export Trade* (1986), at p. 153 as an illustration of the question of licences, it can in fact be related to self-induced frustration. In this case there was a clause dealing with the event in issue, ie 'government intervention', but it is possible to deduce that the contract would be frustrated in the case where there is no such clause at all.

obligation, therefore it claimed to be released relying on the force majeure clause, which reads that:

> "Should delivery in whole or in part.., be prevented or delayed..by government intervention..,...beyond the seller's control...,the contract shall be void..without penalty payable or receivable."(Per Lord Denning M.R at p. 88)

Before the court of Appeal, one of the questions dealt with was whether Rolimpex could be treated as a separate body from the government, and not as a department of it. Because, if it was proved that it was a department of the government, then Rolimpex could not rely on the force majeure clause, where it was stated "government intervention". Because it "cannot rely on a self-induced 'intervention' any more than it could rely on a self-induced frustration..." (Lord Denning id.)

But it was found in this case that:

> "As a matter of Polish law Rolimpex is treated separately from the Polish state and government of Poland for the purpose of considering whether an act of the government of Poland constitutes force majeure.".(Lord Denning p. 90.)

Therefore Rolimpex was not liable for its non performance.

Under French law a similar question was raised in two cases viz, Greard V. Cie Air France (1ere espece) and Cie Air France V. Tremoulet (2eme espece) (Ch. Soc. April 15th. 1970. 2 arrets. D. 1971.107 C. Cass). A contract was concluded in 1958, and approved by the government, between Air France and its employees (the air-crew). It was agreed that the employees would benefit from any advantage given to the personnel working on land. In 1963 an indemnity called "de rattrapage" was given to the personnel working on land, whereas the personnel of navigation was refused that indemnity from the A.F and this following an order issued by the government deciding not to grant that indemnity to them. Five years later the personnel of navigation brought an action against the decisions issued by the government, which were abrogated. A.F was therefore obliged to pay that indemnity to the personnel of navigation. What was further required by Gerard & Tremoulet was the damage for

the late payment of the indemnity. This is called under French law 'dommages-interets moratoires'.

A.F claimed force majeure. That is to say the late payment was due to the government and that its decision was insurmountable and therefore it was not liable for those damages resulting from the late payment.

In the two decisions of the Court of Cassation, it was held that the condition of an event not imputable to the debtor making the performance of the contract impossible, was not met in this case. This is because A.F was considered to be the state itself. Even the conditions of unforeseeability of the decisions issued by the government, and the condition of being insurmountable were not met. It was indeed established that A.F did not take any measure such as to make those decisions void. What it did in fact was to follow the order of the government (ie not to pay the indemnity). However, in two subsequent[39] cases decided in 1980 (EDF V.Soc.Anon.Gaillon.Lyon.Nov 8th.1979.D.1980.IR.441, and June.4th.J. C.P.19411. Concl. P. Besnard), a strike of the employees of EDF (which is a public enterprise) which was declared because of certain decisions taken by the government, was held to constitute force majeure for EDF, for its non performance of the contract it concluded (see these cases infra under "strike"). In another subsequent case viz Ste Boulonneries (see infra under "strike") decided in 1984 by the Court of Cassation, it was held that EDF was exonerated from liability for non performance, although the frustrating event (strike) was a result of certain decisions taken by the government. As to the conclusion which can be inferred from what has been discussed above and concerning the possibility of exoneration of a public enterprise, because of unforeseeable measure taken by the government, it might be said that French courts do not pay attention to the fact that a public enterprise -in cases of strike- might be argued to be the state itself. Therefore, a case like Rolimpex may probably be regarded as

---

[39] In fact even in the case of Bouvier V. E.D.F, decided in 1963, the court did not base its decision on the fact that EDF was to be considered as the state itself, but it based it on the condition of unforeseeability which was not met. Similarly in the case of Ste Anon-Musee Grevin V. E.D.F (C.Cass) 1968, EDF was exonerated on the ground of the unforeseeability of the strike although this was due to the government. No question was raised about the possibility of considering EDF as the government. (Both cases are cited under 'Strike' infra).

one involving a case of force majeure without reference to the nature of Rolimpex.

But generally speaking English, French and Algerian laws regard imputability as a limitation to the doctrine of frustration and force majeure.

Under Algerian law a question like the one involved in the Rolimpex case has not -as far as we know- been raised. Under Egyptian law, and in the context of the doctrine of imprevision, El Fazary[40] is of the opinion that where a state company concludes a contract, but the performance of the contract is rendered onerous for that company, because of passing of a law in order to decide whether that company can claim the revision of its contract or not, one should distinguish between two situations. If the company is administratively and financially separate from the government, then it is entitled to claim the revision of its contract, otherwise -and this is the second situation- it should be barred from using this right. This seems to be not fundamentally different from English law.

§.2. The Event Must be Unforeseeable.[41]

Under French and Algerian laws the event must be unforeseen at the time the contract is concluded.[42] Because if the event was foreseen at that time, the debtor would have to do all that is possible in order to perform his contract and to take more precautions to this end. Or at least he should have refused to make that contract.[43] It is even possible to say that the

---

[40] Hassbou El Fazary, *The Effects of Changed Circumstances on Contractual Obligations in Comparative law* (Alexandria. 1979), at p. 325.

[41] Hamed Zaki, said :"...il faut dire qu'il n' y' a pas d'evenement qui echappe par sa nature, a toute prévision humaine..". Hamed Zaki, *L'Imprevision en Droit Anglais Etude de Droit Anglais* (Paris. 1930), at p. 226.

[42] See Mahmoud Djamel Eddine Zaki, op.cit at p. 363. Under American law too the frustrating event must be unforeseen otherwise the one who invokes impossibility would be considered as having taken the risk of its happening. See Texas.. at pp. 279 & 283, and Berman at p. 36, and Richard W. Duesenberg, "Contractual Impracticability : Courts begin to Shape §.2-615" (1977) 32 Business Lawyer.1089, at p. 1095.

[43] See Carbonnier (1969), at p. 243. Therefore the debtor who makes a contract and knows from the beginning that he will be prevented from performing his contract, would be at fault in entering that contract. See Alain Benabent, *Droit Civil. Les*

debtor should have stipulated what should be done in the case of an event of force majeure. In the absence of such precautions and since the event was foreseen the debtor will be considered as having taken the risk of that non performance. This is so even if it is said that the bearing of the risk of force majeure (speaking of French law) is not presumed; because this is true in the case where the debtor has not foreseen the event in question.[44]

Under English law the weight of the foreseeability of an event regarding the release of a debtor, is not very clear. For example in Davis

---

Obligations (Montchrestien. 1987), at para. 251, and see Ali Bencheneb, *Theorie Generale du Contrat* (2nd ed., Algiers. O.P.U. 1982), at p. 107, and see El Sanhoury, *El Wassit* vol. 1 at p. 878, and Mahmoud Djamel Eddine Zaki, op.cit at p. 362.

The same solution is also held under English law. Thus where one party only was aware of the contingency, and did not disclose it to the other party, there the contract will not be frustrated if claimed by the former. The illustrative case of that is Walton Harvey, Ltd v. Walker And Homfrays, Ltd [1931] 1 Ch.274, where the defendants let a hotel in order that the plaintiffs could "fix or exhibit" (per Lord Harnworth M.R at 277) "electrical illuminated advertisements" (id at p. 274). Subsequently the local authority under statutory power acquired the hotel and demolished it. When being sued for damages, the defendants claimed their non-liability relying on that event on which they had no control. Lord Harnworth M.R (at 280) made the point that the defendants were aware of that contingency and they could provide for it, but they did not, so they were bound by their contract. Therefore they were liable to pay damages to the plaintiffs. See also Wade H. W. R, "The Principle of Impossibility in Contract" (1940) 56 Law Quarterly Review.519, at pp. 534-35.

Moreover, under English law where the contract is a speculative one, even if the change in the circumstances which brought change in the obligation is unforeseen this cannot frustrate the contract. An example is given in the case of Larrinaga And Co. Ltd V. Societe Franco-Americaine Des Phosphate De Medula Paris (39 T.L.R.316), in this case shipowners undertook to provide steamships in order to carry cargoes for the charterers. Owing to the first world war, charterers did not ask the owners for the ships. After the war was over, and being asked to perform the contract, the owner claimed that "the war and its incidents" (per Viscount Finlay at p. 318.1) put an end to the contract. It was held that the contract was not frustrated, because:

"the charterparty was a speculative [one] and both parties took the risk that different conditions might prevail when the charterparty came to be performed...". Id This means that since the contract was a speculative one it "negatives any presumption of the parties' implied agreement to terminate the contract in the event of some unforeseen events...". See Arnold D. McNair, "Frustration of Contract by War" (1940) 56 Law Quarterly Review.173, at p. 186, and see Thiis And Others V. Byers (1876) 1 Q.B.D. 244.

[44] Cf USA law footnote.42 supra. For English law see p. 20.

Contractors etc ([1956] A.C. 696, 731.), it was said that :

> "Two things seem to me to prevent the application of the principle of frustration to this case. One is that the cause of the delay was not any new state of things which the parties could not reasonably be thought to have foreseen. On the contrary, the possibility of enough labor and materials not being available was before their eyes and could have been made the subject of special contractual stipulation. It was not made so."(Per Pearson J in Sidermar [1961] 2 Q.B.278 at 303.)

Hannel J in Baily V. De Crespigny[45] said that:

> "Where the event is of such a character that it cannot reasonably be in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens.".

Thus it might be inferred from the fact that, an event was foreseen or foreseeable at the time the contract was made, that parties to the contract took the risk of its happening. Therefore they cannot claim to be released from their obligation to perform the contract.[46]

In the Scottish Navigation,[47] A.T.Lawrence said :

> "No such condition should be implied to hold that reasonable man could have contemplated the circumstances as they exist and yet have entered into the bargain expressed in the document."[48]

---

45 (1869) L.R.4 Q.B.180, at p. 185, and see Denmark Productions Ltd V. Boscopel Productions Ltd [1969] 1 Q.B.699, at p. 725 per Salmon L.J, and see Chandler V. Webster [1904] 1 K.B.493, and Cricklewood [1945] A.C.221.

46 Treitel (1983), at p. 679. This is also the case under USA law, see supra.

47 [1917] 1 K. B. 222. 249., approved in the Bank Line case [1919] A.C.435, 466.

48 The fact that foreseen events preclude frustration from being applied, can be inferred *a contrario* from a number of cases: Chandler [1904] 1 K.B. 493, per Romer L.J. at p. 501, Cricklewood [1945] A.C. 221, 228., cited by Streatfield J. in Morgan V. Manser [1948] 1 K.B. 184, at 188-89, and see the speech of Lord Brandon in Paal Wilson & Co. A/S V. Blumenthal [1983] 1 A.C.854, at 909., cited by McBryde, *The Law of Contract* (1987), at p. 345. See also F. C. Sphepherd & Co Ltd V. Jerrom [1986] 3 All.E.R 589 (C.A) where Lawton LJ, speaking of the frustrating event

However, a totally different conclusion was reached in the case of W.J.Tatem.Ltd v. Gamboa ([1939] 1 K.B.132.) In this case, although the risk that the ship may be seized was foreseen, nevertheless it was held that, the contract was frustrated. Goddard J said:

> "...if the true foundation of the doctrine [of frustration] is that once the subject-matter of the contract is destroyed, or the existence of a certain state of facts has come to an end, the contract is at an end, that result follows whether or not the event causing it was contemplated by the parties."[49]

In this respect it is interesting to note that in one French case an actress, made a contract to play in a theatre during her holiday knowing that her holiday (conge) might be revoked and therefore she might be in the impossibility to perform the contract she made (ie to play). Such revocation did happen in fact, but the court decided that the revocation constituted a case of force majeure and that she was exonerated from her performance and was not liable for such non performance. (See G. Thery p. 78) But this should not induce one to say that even under French law the condition of unforeseeability is not very clear. This is because it is an established rule under French and Algerian laws that unforeseeability is a condition of force majeure.

Having discussed the question whether unforeseeability is a required condition under English, French and Algerian laws, it is of importance to know how this condition is considered. It can be said that the test used in deciding whether there is unforeseeability or not is that "the event must be

---

involved in this case (viz imprisonment), said at p. 595 para. b., that the event was neither foreseen nor provided for in the contract at the time the contract was concluded. This may suggest that he considers unforeseeability as a condition of frustration.

However, it is always possible that the inference that where an event is foreseen, parties took the risk of its happening, can be rebutted by proving the contrary intention. See Treitel (1983), at p. 681.

49 Tatem V. Gamboa at p. 38., and see Treitel (1987), p. 697. See also Mc Elroy, op.cit at p. 246, the same writer says that even in Taylor V. Caldwell the decision would not have been changed if the plaintiff showed that the defendant had insured against fire, which in other words means that the destruction of the premises was foreseen. This is in fact a mere probability. Whereas foreseeability means whether there has been any fact which may induce saying that the frustrating event would happen. See for this test Mazeaud, *Leçons* (1985), at para. 576, p. 633.

one which any person of ordinary intelligence would regard as likely to occur.".[50] Under French law it is similarly required that we have to see whether an ordinary person in the place of the debtor could have foreseen the event in question, or not,[51] (ie a consideration *in abstracto*). The consideration *in abstracto* of the condition of unforeseeability means that we will not concern ourselves with the question whether the debtor himself has not foreseen the event, rather we have to see whether he should have foreseen that event or not.[52] It is further required under French law that there must be an absolute unforeseeability, that is the event has to be unforeseeable for any one and not only with regard to the debtor.

But it is not necessary, for an event of force majeure to have never happened, to be considered as unforeseen. Therefore it would be sufficient if at the time the contract was concluded, there was no reason to believe that that event would happen.[53] The criteria used is therefore objective, such as whether the event is rare or frequent in its happening.[54] Furthermore, the unforeseeability should be appreciated in a reasonable manner (notice that English courts too use the word 'reasonable' p. 21

---

50 Treitel (1983), at p. 680. Which in other words means the 'reasonable man test'. See the Davis Contractors case... [1917] 1 K.B.222, 249, approved in the Bank Line case (see supra), and see the Baily case...(1869) L.R. 4 Q.B.180, per Hannen J at p. 185.

51 Mazeaud, *Leçons* (1985), at p. 633. For Algerian law see art. 138/2 Civ.C.

52 See Mazeaud, *Leçons* (1985), at p. 633, and see Gabriel Marty & Pierre Raynaud, *Droit Civil* Tome 2. 1er Vol. *Les Obligations* (Sirey. 1962), at p. 530, and Mahmoud Djamel Eddine Zaki, op.cit at p. 361, and Anouar Soltane, op.cit at p. 337, and Mouhye Eddine Ismail Alem Eddine, op.cit at p. 459. Where the creditor did have an idea about the event which prevented the debtor from performing his contract, but such an idea was vague or a pure hypothesis, in such a case he would not be prevented from claiming the performance of the contract by the debtor. Or to ask for damages in case of non performance, if the event in question was not considered a case of force majeure. See G. Thery at p. 79.(Implicitly this means that there should be a certainty in the happening of the event.), and Jean Quesnel, op.cit at p. 14 ("la possibilite de la realisation d'un evenement qui peut passer a l'esprit, n'enleve pas a cet evenement son caractere de force majeure s'il se realise vraiment". Quesnel referred to a case decided by the Court of Cassation in 1842).

53 Mazeaud, Leçons (1985), p. 633, and see El Sanhoury, *El Wassit* vol. 1. at p. 878.

54 Radouant at p. 153, reference to cases are cited there.

supra). Because as an abstract notion it can be said that any event is foreseeable.[55] What Hamed Zaki says (supra footnote. 41) might be regarded as an adherence to this abstract view. It is for this reason that the French jurisprudence uses the word "normally", ie an event which is normally unforeseeable.[56] In order that an event can be considered as normally unforeseeable, it should be appreciated *in abstracto*, ie by the diligent man etc.(Borris Stark (1985), at p. 261)[57]

What should be noted is that A. Vialard in commenting on art. 138/2 Alg.C.C, in which the word 'normally' was used, deduces that this article has revolutionised the French traditional concept of force majeure. That is to say the requirement of an absolute unforeseeability.[58] Another author criticises the deduction of A. Vialard. He suggests that 'normally' means that the test in considering the unforeseeability is subjective and not objective.(Ali Bencheneb, *Theorie Generale du Contrat* (1982), at pp. 106-07). What can be said is that the use of the word 'normally' does not appear in the arabic version of that article, and it is known that 'Arabic' is the official version. Apart from this it is not correct to say that the use of the word 'normally' has revolutionised the French traditional concept of force majeure; since -as has been said above- the French jurisprudence used that word before. This would mean that it is not a new word. On the

55 Alex Weill & François Terre, *Droit Civil. Les Obligations* (4eme ed. Dalloz. 1986), at p. 432.

56 See Veuve Joly V. Grimault Civ.2eme.june 29.1966.D.1966.645. Boris Starck, *Droit Civil.1Responsabilite Delictuelle* (2eme ed., Paris, Librairie Technique. 1985), at p. 260

57 The standard of foreseeability is as has been well expressed "... halfway between the inveterate pessimist who foresees all sorts of disasters and the resolute optimist who never anticipates the least misfortune.". See Bianca C. M. & Bonell M. J. (et al), *Commentary On The International Sales Law. The 1980 Vienna Sales Convention* (Giuffre. Milan. 1987), at pp. 580-81. For a recent case where the term 'normally unforeseeable' was used see: Syndicat etc V. Soc.Maurice etc Cass. Civ. 3eme.Oct 10th.1972.D.1973.378. See Guy Raymond & Pierre Billard, *Droit Civil. Concours des Fonctions Publiques* (Paris, Librairie Technique. 1986), at para. 353. But the notion of 'normally unforeseeable' is not recent. For examples of its use see Fiatte (1932), at p. 9. See also Neville Maryan Green (1985) op.cit, at p. 505 col. 2.

58 See Antoine Vialard, *Droit Civil Algerien. La Responsabilite Civile Delictuelle* (2nd. ed., Algiers. O. P. U. 1986), at pp. 149-50. This idea was previously suggested by the same author in Revue Algerienne des Sciences Juridiques.(1979), at p. 290.

other hand, saying that 'normally' means a subjective test, does not appear to be true. Either French authors as well as jurisprudence and arab authors are of the opinion that the appreciation of the unforeseeability is objective ie in abstracto.(See for example El Sanhoury, *El Wassit* vol. 1 at p. 878)

What is further to be noted under English law is that there is always the general exception by which the contract will be held frustrated, notwithstanding the fact that the contingency was or was not foreseen by both parties to the contract. This is so where the performance of the contract would involve the act of trading with the enemy, which is illegal.[59]

We may conclude from what has been said that under French and Algerian laws, it is an established rule that in order that an event constitutes a case of force majeure, it must be unforeseen at the time of conclusion of the contract. As to English law we may say that no clear rule of law is settled upon which it can be said, with certainty, that the foreseeability of an event, does or does not prevent frustration from application. It is perhaps for this reason that the test of the foreseeability of the subsequent event was criticised, as being "very vague (and) elusive" and that, :

> "It is common learning that the thought of a man is not triable, for the Devil has not knowledge of man's thoughts".[60]

---

59 Treitel (1983), at p. 679. It is thought that under French and Algerian laws, such an act would also be considered as illegal; since it is contrary to public order (ordre public).

60 Arnold D. McNair, "War-Time Impossibility of Performance of Contract" (1919) 35 Law Quarterly Review.84, at p. 96. Another author says that it does not matter whether the frustrating event was or was not foreseen. The conditions of frustration in the writer's view, is that, by the occurrence of the event, further performance of the contract would be a thing radically different, and that parties did not provide expressly or impliedly that they would be bound by their contract, notwithstanding the occurrence of that event. 56 L.Q.Rev (1940), at p. 178. This may be supported by what the House of Lords held, in British Movietonews V. London and District Cinemas Ltd,[1952] A.C.166, 185: it is not any uncontemplated turn of events which may frustrate the contract, but only if there has been a fundamental change in the situation. But it should be noted that this does not mean that the test of unforeseeability -as it is said above- has no weight at all. The only thing is that Viscount simon in the British Movietonews case was emphasising the essential test of the obligation having

However, these conflicting views regarding this test, might be solved by saying that the test of foreseeability of a frustrating event, is only one factor to be taken into account when deciding whether or not a contract can be frustrated. In other words it is:

> "one of the surrounding circumstances to be taken into account in construing the contract, and will of course, have greater or less weight according to the degree of probability or impossibility and all the facts of the case."(Per Pearson J in Societe Franco-Tunisienne d'Armement V. Sidermar G.P.A. [1961] 2 Q.B. at 303.)

Nevertheless, the unforeseeability of a frustrating event is of interest to be considered as a condition, in order that a contract can be frustrated. Otherwise, dismissing this condition and requiring the condition that the obligation has become radically different, would provide an easy way of release for a contracting party. An illustration can be found in the French case of Ste Bata (infra under 'Fait du Prince'), where a passing of legislation was foreseen but it can be said that it had made the contract radically different. Therefore by requiring the latter condition only, the debtor would be released, whereas with the former one no release would be allowed to him.

§.3. There Should be an Impossibility of Performance (Irresistibility or Insurmountability)[61]

Under French and Algerian laws the event must be insurmountable and having put the debtor in an absolute impossibility to perform the contract.[62] Therefore if the impossibility concerns the debtor only and

become radically changed, by the occurrence of the frustrating event. See De Cruz S. P, "A Comparative Survey of the Doctrine of Frustration" (1982) 2 Legal Issues of European Integration.51, at p. 52. But see Schmitthoff, Helsinki.. at p. 151, who says that it is not 'a decisive test.'. (ie the unforeseeability of the event).

61 It should be noted that both French doctrine and jurisprudence use the concept of irresistibility and impossibility as synonymous. See Henri et Leon Mazeaud & Jean Mazeaud, *Traite Theorique et Pratique de la Responsabilite Civile Delictuelle et Contractuelle* Tome 2. (6eme ed., Paris, Editions Montchrestien. 1970), at p. 688. para. 1573.

the methods of performance he uses, he will not be released, since that impossibility will not constitute a case of force majeure.[63] Thus if a lessee could not live in the house he leased because of a subjective reason such as his nationality, he cannot allege that his nationality is a case of force majeure. In the case of Durlach V. Grand-Gerard, (Req. July. 3rd. 1918. Gaz. Trib. Aug 18th. 1918), the jurisdiction before which that case was brought emphasised the objective impossibility -and not the subjective one- which gives the debtor the possibility to claim force majeure, and

[62] See El Sanhoury, *El Wassit* vol. 1 at p. 879 and the case cited there, and see to the same effect art. 307 Alg.C.C. Therefore if other methods of performing the contract are still available, the debtor will not be released, since he has to use the other methods. This is true unless a special method of performance is stipulated in the contract. Therefore if that method becomes impossible by an event of force majeure, the debtor will be released even if the contract could be performed by using other methods. See Radouant at p. 36, and Fiatte at p. 33, and see El Sanhoury, *El Moudjez* at p. 301, and Mahmoud Djamel E. Z, op.cit at p. 363, and Jean Quesnel at p. 11. It seems that this is also true for English law. See page 194 infra what Viscount Simonds pointed out, and see p. 196.

[63] Although in general cases the impossibility is material, there could be however, other kinds of impossibility which may constitute a case of force majeure. See El Sanhoury, *El Wassit* vol. 1 at p. 879 and Houcine Amer, op.cit at p. 394, and see Mohamed Hassanine, *El Wadjiz*, op.cit at p. 121. This is true for example for the writer who has been prevented from writing the book he promised because of a dental sickness. In other cases there was a risk of death in performing the contract. Such danger constituted a case of force majeure. Thus an actor contracted to give a play in a certain city. Because of an epidemic in that city he breached his promise. That epidemic was considered as a case of force majeure. See Radouant at p. 23 and see Weill (1986), at p. 433 footnote. 254. In other cases when there is a real danger, this may constitute a case of force majeure. Thus a lessee abandoned the premise he leased because he was afraid of the bombardment during the French war. In the case of Hue V. Hailaust, Trib.Com.Nantes.July.23rd.1870.D.1870 .3. 115, a captain of a ship refused to perform his contract of carriage because of a real danger in passing along an enemy coast (this was during the French war of 1870). It was decided that he was not liable for his non performance. See Radouant at p. 24. This may be explained by the fact that the debtor of an obligation is not obliged to risk his life in order to honour his obligations (see infra under French requisition cases). An example of moral impossibility given by some arab authors, is where a singer who undertakes to give a show but one of his relatives (parents or friends) died and this event affected his moral ability to sing at the presumed day. In this case the death may constitute for him a case of force majeure exonerating him from giving that show. See El Sanhoury, *El Wassit* vol. 1 at p. 879 and see Mohmoud Djamel E. Z, op.cit at p. 366.

declared that

> "No event forced the lessee into the impossibility to live in the house, since there was no destruction of the house or other causes which may have prevented the debtor from living in it and that other persons than the debtor could have lived in the leased premise".(See Radouant at p. 55)

The **United States** law is not different here; since the impossibility must be objective.[64] However, under **German law** the debtor would be discharged whether the impossibility is objective or subjective (ie concerning the debtor only)[65] as long as this impossibility was not foreseen by him at the time of the conclusion of the contract. (P. V. Ommeslaghe p. 22)

The irresistibility has to be considered *in abstracto* and this by reference to the criterion of the 'bon père de famille'. That is to say the debtor being a 'bon pere de famille' could not have resisted the event or its consequences.[66] From this condition it can be seen that where the performance is rendered more difficult or more onerous than expected, it would not constitute a case of force majeure. This was affirmed by the French civil jurisdiction a long time ago when it rejected the theory of 'imprevision'.[67] Therefore if the contract remains materially executable, there cannot be a case of force majeure even if its execution has become valueless or useless (but see infra Chapter.1, Part.2). For example if a person buys a premise (fond de commerce) in order to run a business and then he becomes ill and cannot therefore continue that business, he will

64 See Texas.. p. 279, Alphonse M. Squillante & Fellice M. Congalton, "Force Majeure" (1975) 80 Commercial Law Journal.4, at p. 8 col. 1, Tul.L.Rev (1946-47) at p. 604.

65 J. Cohn p. 15, Cohn E. J, *Manual of German Law* vol. 1. *General Introduction. Civil Law* (2nd ed., London. Oceana Publication, Inc.1968), para. 224, P. V. Ommeslaghe p. 22.

66 See Mahmoud Djamel E. Z, op.cit at p. 365. This means the objective consideration of the irresistibility, and not the one of the 'strongest and the more diligent person'. See Weill (1986), at p. 433. Or as it has been expressed by another author who says that 'the law does neither ask the debtor to be a superman nor a man who makes no effort at all to perform his contract.'. See Philippe Malaurie & Laurent Aynes, *Cours de Droit Civil. Les Obligations* (Ed. Cujas. 1985), at p. 334. English law does not seem to be different in this respect from what has been said above.

67 See A. Bencheneb, *Theorie* ... at p. 107.

still be asked to pay the price of the fond de commerce. (See Com.January 23rd.1968.J.C.P.68.ii.15422), and see Benabent 1987 at para. 251) The same principle (ie concerning cases of onerousness) is also held under English law. Thus where the performance has become onerous, no release is provided to the debtor (see infra). American (ie under impracticability), German and Swiss laws are different in this respect (see infra). But Quebec and Louisiana laws are similar to French law.

However, it appears that under English law the concept of impossibility is wider than in French law. This is because the contract - under English and Scottish laws- may be held frustrated either when it has become impossible of performance (e.g. the destruction of the subject matter of the contract (infra)), or where because of a frustrating event the performance of the contract under the new circumstances, would be a performance of a fundamentally different obligation from that undertaken (e.g. the coronation cases, or cases involving a long delay in the performance of the contract (infra) though the performance is still possible.).

Similarly under **German law** where because of a delay in the performance of the contract, not imputable to the debtor and due to supervening events, the performance, if enforced, would be radically different from that undertaken, then the debtor will be discharged from his obligation and the case would be considered as one of impossibility.[68]

But comparing the concept of impossibility as understood under French and English laws, it should be said that **German law** is less rigorous than these two laws.

As to the conditions already studied, it might be said that although the condition of non-imputability is very similar under English, French and Algerian laws, nevertheless we see that 'imprisonment' for example frustrates a contract under English law whereas it is considered as an imputable event under French law. Another difference is that whereas French law pays little attention to the fact that a state company (or a public enterprise) is or is not separate from the government, under English law, this appears to be very essential otherwise the alleged frustrating event would be considered as self-induced. The illustrating example can be

[68] See J. Cohn at p. 17 (citing a case decided before the first world war), and see P. V. Ommeslaghe at p. 22.

found in the case of Rolimpex (see supra).

Again considering the condition of unforeseeability, we see that although the test used under English, French and Algerian law, is an objective one "persons of ordinary intelligence", nevertheless unforeseeability has not similar weight under the two systems. Thus under French and Algerian laws it is a condition without which no force majeure can be pleaded. Whereas under English law it is still an unresolved question whether this condition is or is not necessary for the application of frustration.

As to the condition of impossibility, it is clear -as will be seen- that English law is wider in its conception of impossibility than French law. This is because of the test used by English courts. That is to say the one that 'performance if enforced would be a totally different thing from that undertaken'.

What has been said suggests -as has already been pointed out- that although English and French laws require the same conditions, nevertheless their application to different cases may sometimes differ.

Having studied the conditions under which a contract may be terminated (or suspended under French and Algerian laws as will be seen) because of an event of force majeure, what will be discussed in what follows is an illustration of these requirements. Under French and Algerian laws there are already clear settled rules that an event, in order to constitute a case of force majeure, must not be imputable to the debtor, and should be unforeseeable and having put the debtor into an absolute impossibility to perform his contract. Under English law on the other hand, the cases to be studied will show how English law courts have developed the doctrine of impossibility of performance and frustration. Therefore we will see whether in a given circumstance it is easy to ascertain the possible conclusion reached by a court in deciding a case, in holding it frustrated or not. In other words, whether it is possible to forecast a court's decision in holding a contract frustrated or not, bearing in mind the principles which will be settled.

Under English law instances of frustration can be classified into two categories.[69] One is where performance of the contract is impossible,

[69] Under Algerian and French laws force majeure is confined to cases of absolute

the other is when performance of the contract is possible, but nevertheless the contract is frustrated. But this does not mean that the first category is only where the performance is strictly speaking impossible, because later on it will be seen that a contract is not impossible as has been said, although it is included under the first category. For this reason it must be borne in mind that in dealing with cases of impossibility, a wide meaning[70] is given to this word but not included within the second category. There are instances such as, the destruction of a subject matter, death and illegality which are clearly cases of impossibility.

The usefulness of this classification, is first of all, to gather English cases which have some similarities into one category, and others in the other category, rather than to enumerate instances of frustration without making any classification . Secondly, this classification will allow us to compare this common law doctrine ie frustration, under its two headings (impossibility and possibility and more accurately frustration in *stricto sensu*)[71] with the equivalent doctrine used in other legal systems, viz French and Algerian laws, in other words the doctrines of force majeure and imprevision.

The fact that performance becomes impossible, can be subdivided into several headings, but we have preferred to classify it into three. The first is where a thing essential to the performance of the contract is destroyed whether *stricto sensu* or *lato sensu*. The second is where the impossibility concerns the person who has to perform the contract such as his death or or incapacity. The last one is where the performance is illegal (or legally impossible or restricted).

---

impossibility. Where the performance is possible, no release is allowed under French law, whereas such a release is provided under Algerian law; since the doctrine of imprevision is admitted.

70 See Wade, 56 Law Quarterly Review (1940) pp. 548-49, where he says: "...there is no rigid principle which the courts can pray in aid to delimit the respective spheres of possibility and impossibility. The fixing of the dividing line is a matter for judicial discretion, and it is for the courts to declare what they are prepared to consider impossibility and what they are not."

71 See Arnold D. McNair, "The Law Reform (Frustrated Contracts) Act 1943" (1944) 60 Law Quarterly Review.160, at p. 162, where this term was used to describe the coronation cases(see post).

CHAPTER TWO. IMPOSSIBILITY AS REGARDS THE SUBJECT MATTER OF THE CONTRACT OR A THING ESSENTIAL TO ITS PERFORMANCE.

As has been said above, the doctrine of frustration covers instances where the performance of the contract is impossible, and those where the performance is possible but the contract is nevertheless frustrated.[1] French and Algerian laws will also be treated under these two headings.

The impossibility which will be discussed in what follows is the one which concerns either the destruction of the subject matter of the contract, or a thing although not the subject matter of the contract is considered essential to its performance. An example of the latter is the requisition of a ship or its stranding or its seizure etc.

Section One. Destruction and Deterioration of the Subject Matter of the Contract or a Thing Essential to its Performance.

In the following subsections, we will study the leading English and Scottish cases illustrating the subject under discussion. These cases as well as the principles they involve will be -as far as possible- compared with the French and Algerian principles. Sometimes French cases are provided as a probable similar application of those principles. Our study is mainly -as regards English and Scottish laws- based on common law cases (**§.1**). However, two important Acts involve the question of impossibility of performance, therefore, they will be included in this study of the doctrine of frustration.(**§.2 &3**)

---

[1] It is to be noted that to say that the "contract is frustrated" is inaccurate, since what is frustrated is the further performance of the contract, and not the contract. See Heyman V. Darwins [1942] A.C.356 at p. 400, cited by William W. McBryde, "Frustration of Contract" (1980) Juridical Review.1, at p. 16, and McBryde *The Law of Contract* (1987), at p. 343, and see Lord Atkinson in the Larrinaga case (1923) 29 Com. Cas. at p. 12. Mc Elroy, *Impossibility of Performance* (1940), at p. 219.

§. 1. Common Law Cases Compared With French and Algerian Principles.

Before discussing this subject, it is necessary to say that in early English law, impossibility of performance was not a good plea for release of a party from his liability of non performance of the contract. In this context the case of Paradine V Jane (1646 Aleyn 26) is generally referred to. This is a case where the plaintiff let to the defendant a piece of land. Being sued for the rent, the defendant pleaded that an enemy alien had expelled him from the land, therefore he was not able to pay the rent, since the profits expected from it were defeated by the expulsion. This plea was rejected as:

> "Where the law creates a duty or charge and the party disabled to perform it [without any default in him] and hath no remedy over, there the law will excuse him...but 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".[2]

This was based on the idea that such a party could provide in the contract for that contingency and if he did not then he is supposed to have assumed the risk.[3] Therefore, the party who enters into a contract, is not undertaking to do his best for the accompletion of his obligation, but he has to do it whatever may be the circumstances.[4] So following this rule, the non performing party has to pay damages for his failure to perform the contract.

Thus, although the defendant's "purpose of enjoyment [of the house] and profit taking had been 'frustrated'" by that event, nevertheless the contract was not held frustrated.[5] Furthermore, in Paradine, the

---

[2] Chitty Vol. 1 (24th ed., 1977), para. 1401, and see Salmond J. & Perce H. Winfield, *Principles of the Law of Contracts* (London. Sweet & Maxwell. 1927), p. 294.

[3] (1946) 21 Tulane Law Review p. 603, and see Sen G. M, "Doctrine of Frustration in the Law of Contract" (1972) Journal of the Indian Law Institute Special Issue.132, at p. 146.

[4] Salmond p. 292.

[5] Corbin A. L, "Frustration of Contract in the United States of America" (1947) 29 3rd.S. Parts 3 & 4 Journal of Comparative Legislation & International Law.1, at p.

defendant did not plead that his obligation to perform the contract, viz to pay the rent was impossible, since payment of money cannot be impossible. But he alleged that his obligation was conditional on the continued use of that house (since he was expelled). (See (1940) 56 Law Quarterly Review at p. 524). That plea was rejected since "there is no implied covenant that the premises -[in leases]- shall continue in a fit state for habitation.". (Ibid at 525 footnote 20).[6]

Despite the harshness of this rule it is still good law; because parties to a contract may undertake absolutely to perform the contract or to pay damages instead.[7]

As to French law, speaking of the contract of 'Louage de choses' and more precisely of 'Baux de maisons', art. 1719 C.C, states that amongst the obligations of the lessor is "d'en faire jouir paisiblement le preneur pendant la duree du bail.". Therefore if this obligation cannot be performed by the lessor because of an event beyond his control (e.g, a Prince having expelled the lessee) this might constitute a case of force majeure ('fait du prince' for its definition see infra). Therefore the lessor is exonerated from his obligation (ie to provide a quiet enjoyment of the house leased). Since the debtor in synallagmatic contracts is exonerated where he is prevented from performing his obligation because of an event of force majeure (fait du prince "the prince having expelled the lessee"), therefore the other party viz the

---

2.

[6] This case would have been decided differently under Scots law. See W. McBryde, Juri. Rev. at p. 7. In the case of The Tay Salmon Fisheries Co. Ltd V. Alexander Speedie 1929 S. C. 593, Lord Sands at p. 604 said that under Scots law, in the relation between landlord and tenant, the payment of rent is conditional on the enjoyment of possession of the leased premises. Where that enjoyment is impossible, no rent is payable. See also McBryde, *The Law of Contract* (1987), at p. 350.

[7] See for an example Anson (1979), p. 495, and see also Gloag (1987), at para. 11.3. Lord Justice Bowen in Jacobs.. V. Credit Lyonnais (1884), 12 Q.B.D. said at p. 603- and approved by Lord Atkinson in Matthey V. Curling, [1922] 2 A.C. at p. 234- that:"... a person who expressly contracts absolutely to do a thing not naturally impossible, is not excused for non-performance of being prevented by vis major.". Cited by Mc Elroy, *Impossibility of Performance* at p. 6 , and see David M. Walker, Vol. 1. *Principles of Scottish Private Law* (2nd ed. Oxford, Clarendon Press. 1975), at p. 672, and Vol. 2 of the (3rd ed., 1983) at p. 134, and see Schmitthoff, Helsinki... at p. 131 footnote. 10. This is also true for French and Algerian laws. See infra 'force majeure & contractual clauses'.

lessee, is also exonerated from his obligation, viz to pay the rent during the period of the deprivation of the enjoyment of the thing leased.[8]

As to Algerian law, art. 486 C.C concerning the contract of lease (bail) states:"Where the enjoyment of the leased premise is substantially reduced by an act legally issued by an administrative authority, the lessee can either ask for the termination of the contract or the reduction of the rent.". Therefore it can be said that *a fortiori* when the lessee was expelled by an act of an enemy authority, he can ask for a termination of the lease if the prohibition was for a permanent period. If temporary only, it is possible to say that the judge might hold the contract suspended. The suspension of the contract of lease can also be applied under French law. All this is in fact an application of the general principles of force majeure.

In the case of Cie L'Union-Vie V. Regnard, (Civ.Soc.May 20th.1954. D.1954. 615. C. Cass) the Court of Cassation decided that where the deprivation of the lessee of enjoying the leased house is due to a 'fait du prince', the lessor could not be held liable for that deprivation. The eviction here was due to a passing of a law subsequent to the contract of lease. The lessee was expelled from the house he leased, and consequently the lessee was also exonerated.

The rule as settled in Paradine; has some exceptions[9] one of which is where a party expressly provides in his contract that he will be released in case of impossibility.[10] Another exception is where the contract involves personal services (as will be seen), and one of the parties dies or becomes permanently incapacitated[11], or where performance becomes illegal by a change in the law.[12]

---

8 See Henri et Leon Mazeaud & Jean Mazeaud, *Leçons de Droit Civil* Tome. 3. Vol. 2. *Principaux Contrats* (3eme ed., Editions Montchrestien. 1968), at p. 206, and see Encyclopedie Dalloz (2nd.ed., 1978), Tome. 1. Repertoir de Droit Civil, under "Bail" para. 306 to 310

9 See Lihazur Rahman Khan, "Frustration Legislative or Administrative Intervention" (1982) 6 Cochin University Law Review.91, at p. 92.

10 Salmond p. 294.

11 Treitel (1983), p. 648. and see Hyden V. Dean of Windsor (1597) Cro . Eliz . 552 cited by Mc Elroy, op.cit, at p. 5, this case concerned death. As to temporary incapacity, see post.

12 Frederic C. Woodward, "Impossibility of Performance as an Excuse for Breach of Contract" (1901) 1 Columbia Law Review.529, p. 529., and see Mc Elroy,

The rule in the Paradine case (ie the impossibility of performance is no plea for release) has been also changed through a number of cases, which dealt with the destruction of a particular thing essential to the performance of the contract. Some of them are discussed below. The position of French courts (when making the comparison or in similar cases) will be shown by discussing some French cases.

An example where a contract was terminated by the destruction of its subject matter is Taylor V. Caldwell[13]; where the defendants gave to the plaintiffs the use of the Surrey Gardens and the music hall, for a number of concerts to be given there. Before the first concert took place, the Hall was destroyed by an accidental fire. It was held that parties to the contract are discharged from liability. The defendants were not liable to give the use of the Hall and the plaintiffs to pay the price for the use of the Hall.[14] This is because the continued existence of the Hall was the foundation of the contract[15], or its existence was a condition to the obligation to pay the agreed sum of money (called there rent)[16], and such condition is so obvious that to provide for it expressly in the contract "appeared to the parties superfluous.".[17] By this case a new concept was introduced into English

---

op.cit p. 5, and see Abbot of Westminster V. Clerke, 73 Eng.Rep.59 (K.B.1536), illegality caused by a subsequent Act of Parliament., cited in (1980) Vanderbilt etc at p. 109 footnote 10.

13 (1863) 3 B & S. 826. This decision which can be said to have revolutionised the rule as established in Paradine, has induced one author to saying that English law did not have an established doctrine of frustration until 1863. See McBryde, The Juridical Review at p. 6. However, this remark should not concern cases of impossibility in personal contracts or case of subsequent changes in law; since the cases in which the promisor was released dated earlier than 1863. As regards Scots law, it has dealt with problems of frustration as early as 1549. See McBryde id.

14 See also Beale H. G. & Bishop W. D. & Furmston M. P, *Contracts. Cases and Materials* (London, Butterworths. 1985), pp. 286-87

15 (1919) 35 L.Q.R. p. 86.

16 (1901) 1 Col.L.R p. 529, although parties in Taylor used the terms 'rent' and 'letting', nevertheless this contract was not one of landlord and tenant, but one of "licensor and licensee". Per Blackburn J. in the Taylor case, cited in National Carriers V. Panalpina...[1981] A.C.675 by Lord Hailsham at pp. 686-87.

17 It may be said that if it were Caldwell who sued Taylor for the rent, the latter could plead "frustration of his purpose of enjoyment and profit taking, not the impossibility of making payment." (1947) 29 Jou of Comp Legis at p. 2. This would make the claim similar to that in Paradine . It might be said that, looking at the Paradine

law ie where in a contract the continued existence of a thing (like the Hall here), or a person (as will be seen later), is the foundation of the contract then an implied condition is to be read into such a contract, releasing both parties, if that thing or person ceases to exist[18] without fault of either party.

Under French law, this case might be decided on the basis of art. 1722 C.C, which states "If, during the period of the lease, the thing leased is wholly destroyed by a fortuitous event, the lease is terminated as a matter of law (see to the same effect art. 481/1 Alg.C.C) if the thing leased is destroyed in part only, the lessee can, depending on the circumstances, ask either for a reduction of the price or the termination of the lease (see to the same effect art. 481/2 Alg.C.C).[19] No

---

and Taylor cases, they are very similar. See G. M. Sen (India), at p. 149. This is because in Paradine the purpose was defeated by the expulsion, and in Taylor by the destruction of the hall. Would this logically make any difference in deciding whether the contract is frustrated? Not in our view. See also Jeffrey Price, "The Doctrine of Frustration and Leases" (1989) 10 Journal of Legal History.90., at p. 104.

18 (1946-47) 21 Tul. L. Rev. p. 603. It has been observed that the principle of Taylor V. Caldwell viz the implication of a condition in a contract to dissolve it, was understood -in subsequent cases- wider than it really was. Because it was thought that such implication is possible merely by the fact that, had the frustrating event been brought to the partie's intention, they would have agreed that such a term or condition should be read in their contract. "Read as wide as this the decision in Taylor V. Caldwell constitutes a grave threat to the general principle of sanctity of contract." McElroy R. G, & Glanville Williams, "The Coronation Cases I" (1940-41) 4 Modern Law Review.241, at p. 243. This criticism appears to be directed to some subsequent cases especially those called the coronation cases. Because in those cases the principle of the Taylor case viz the perishing of a thing, was extended to cover cases where an expected event being the foundation of the contract, was defeated by the cancellation of that event, and this was held to put an end to the contract.

19 The rule under Scot s law seems to be similar to that of art. 1722 Fr.C.C, and art. 481 Alg.C.C. See infra., see also to this effect David M. Walker, *The Law of Contracts and Related Obligations in Scotland* (London. Butterworths. 1979), at p. 477.

It is to be noted that the doctrine of frustration can also apply to leases of land (see National Carriers Ltd V. Panalpina (Northern) Ltd [1981] 1 ALL.E.R.161), and see Fifoot (1986), at 567, and Treitel (1983), at 672, and Evans David Lloyd, *The law of Landlord and Tenant* (2nd ed., London. 1985), at p. 192. Their Lordships in Panalpina however, said that it is very rare that a lease of land could be frustrated. Fifoot (1986), at p. 567. An example of such rare circumstances is "some vast convulsion of nature which swallowed up the property altogether, or buried it in the depths of the sea.". Chitty Vol. 1 (24th ed., 1977), at 1442.

damages are to be granted in the above two situations.". Therefore it is possible to treat the Taylor case, as falling into the second stipulation of this article.[20]

A similar case, in that it dealt with the deterioration of the subject matter of the contract, is the French case of Credit Lyonais V. Kintz etc, (Req. February 11th. 1946. J. 365). The belongings of (K) were kept in the bank of (C). Due to an 'infiltration' of water from the underground of the bank, those belongings deteriorated. (C) in order to be exonerated invoked the inundation as a case of force majeure since -as he alleged- it was caused by the war. (C) also remarked that he installed a machine to remedy such events as inundation, but that the electricity was interrupted and the work of the machine was paralysed as a consequence and this facilitated the inundation. The Court of Appeal decided that the interruption of the electricity was foreseeable. For the question of inundation the court declared that this did happen continually in the past, and that (C) should have remedied the situation a long time ago, but no special measure had been taken for that purpose, therefore the inundation was not unforeseen. For these reasons the Court declared the debtor responsible for what happened. The Court of Cassation did confirm that judgment (called 'arret' under French law).

In the English case Appleby V. Myers ((1867) L.R 2.C.P.651.), a similar conclusion as the one of Taylor (above) was reached. The plaintiff contracted to erect certain machinery upon the premises of the defendant for a fixed sum to be paid on completion of the work. After the

---

Under Scots Law it is an established rule that the destruction of the subject of a lease by a frustrating event, liberates both the landlord and the tenant. (See to this effect the case of Cantors Properties (Scotland) Ltd V. Swears & Wells Ltd. 1978 S. C. 310. In such a case the contract is at end (see the speech of Lord Johnston at p. 324, and similarly of Lord Cameron at pp. 318-19, and Lord Brand at p. 326). The maxim applied here is *res perit domino*. (Per Lord Cameron at p. 319).

In the case where there is a partial destruction of the subject of the lease the tenant can claim an abatement (ie a reduction) of the rent. See to this effect Lord Cooper (1946) 28 Jou. Comp. Legis, at p. 4, and see William McBryde, (1980) The Juridical Review, at p. 7.

[20] Cf Constantin Stoyanovitch, *De l'Intervention du Juge dans le Contrat en cas de Survenance de Circonstances Imprevues. Theorie de l'Imprevision* (Aix Marseille. 1941), at p. 382, who referred to article 1302 Fr.C.C when invoking the case of Taylor V. Caldwell.

(machinery) was partially installed, a fire broke out without the fault of either party, and destroyed the premises (factory) as well as the machinery. It was held that the contract was terminated. To this end Blackburn J, in giving his judgment said:

> "...it appears that the work which the plaintiff agreed to perform could not be performed unless the defendant's premises continued in a fit state to enable the plaintiffs to perform the work on them..."(Appleby Ibid p. 659.).

But in this contract the plaintiffs will not be discharged if the fire destroyed a part of the machinery only and not the factory, although the machinery was the subject matter of the contract. Blackburn in this case said:

> "Had the accidental fire left the defendant's premises untouched, and only injured a part of the work which the plaintiff had already done, we apprehend that it is clear the plaintiffs under such a contract as the present must have done that part over again, in order to fulfill their contract...".(Appleby Ibid 660.)

This is because the factory was necessary for the performance of the contract ie to erect the machinery[21], that is the reason of the discharge of the plaintiffs. It is thought that if all the machinery were destroyed, but the premise was untouched, the plaintiff would have been discharged.

Comparing this case with principles of French law, it might be said that the French principle which can be relied on in deciding such a case is to be found in arts. 1787-88-89-90 Fr.C.C. It is declared that where a person undertakes to do a piece of work and the materials are provided either by the person for whom that job is to be done or by the worker himself, if the thing before it is finished and delivered is destroyed, the worker cannot ask for a remuneration for the work he has provided in making that thing.(Weill (1971), at p. 519, and Dupont (1986), at p. 116, and Benabent (1987), at para. 259)

Thus a garage keeper who is working on a thing given to him, cannot be remunerated for the work he has done when that thing as well as the garage itself are destroyed by an event of force majeure. (See also art. 1741

21 Treitel (1983), p. 653.

Fr.C.C.. See Fiatte at p. 102).

As to Algerian law, article 568 /1 C.C (which is the same as art. 665 Egypt.c.c., as well as arts. 1788 et seq Fr.C.C) stipulates that if the thing which (A) for example has undertaken to perform, has perished by force majeure and this before it was delivered, the risk in this case is on the worker. In other words he cannot ask for remuneration for his work (or for the material he has provided, if he did provide it). If the material ('matiere') is provided by the person for whom the work was to be done and the worker provides his work only, the risk is always on the worker; since he cannot ask for remuneration for his work. But that person also bears the risk of the destruction since that thing was provided by him and he did not get anything. In the two situations the worker has no right to remuneration since the person for whom the work was to be done did not get anything from that work. (See to this effect *El Wassit* Vol. 7 part. 1, pp. 93 to 96).

In the case where the work has not been finished because of the death of the worker and the contract is one of *intuitu personae* the heirs (heritiers) of the worker are not allowed to ask for remuneration for what has been done, unless the person for whom the work was to be done, has benefited from that work. The sum of remuneration in this last case would be equal to the benefit got by that person. Therefore if that person did not get any benefit whatsoever from the work done, no remuneration is allowed, and this even if the worker has in fact done some work or has made some expenses.[22]

What has been said is true unless there has been a 'mise en demeure' either from the worker (in this case the 'mise en demeure' is made to the person to take delivery of the thing done) or the person for whom the work was to be done (in this case made to the worker to deliver the thing already done), in such a case the worker can ask for a remuneration for his work (the first case), or that person is allowed to claim damages (as in the second case).(See to this effect art. 568/2 & 3 Alg.C.C).

As can be seen from the Appleby case, the work (ie the machinery being installed) as well as the premises which were destroyed, put an end to the

[22] See to this effect arts. 569 & 570 Alg.C.C., and see El Sanhoury A, *El Wassit* Vol. 7 part. 1 (Beirut. 1952), pp. 257 to 265, and see pp. 236 to 239 (cf. Law Reform (Frustrated Contracts) Act 1943, and cf Scots law rules infra under 'Effects of frustration'.

contract and both parties were released from further performance and were not liable for what happened. Under French or Algerian law - following the cited article- both parties may be released and no liability would arise. Thus the solution under English, French and Algerian laws in a case like Appleby is similar in principle. Where the destruction concerns the thing to be done then the contract might be held frustrated under English law[23], and certainly will be so held under French and Algerian laws. Whereas if the destruction concerns a part only of the thing to be done then under English law he debtor has to do the work again. Under French and Algerian laws, the solution would be different.

The last English case in connection with the subject under discussion (ie where parties are discharged because of destruction of the subject matter of the contract)is Howell V Coupland.[24] This was a case where the defendant agreed to sell 200 tons of potatoes to the plaintiff to be grown on his own land:"They are to be grown there and delivered to the plaintiff provided they are grown there" said Mellish LJ.[25] Because of a disease, potatoes were destroyed and all the defendant could provide was 80 tons, and 120 tons remained undelivered. It was held that the seller (defendant) was not liable for the remainder. Melish L.J said:

> "...it is an agreement to sell what will and may be called *specific things*.".(Howell p. 262.)

In fact regarding the provisions of the Sale of Goods Act 1893 (now 1979) the goods in that case were not specific as Melish L.J said, but "unascertained goods taken from a specific bulk".[26] To that effect S.

---

[23] But see Treitel (1987), at p. 669.

[24] (1867) 1 Q.B.D.258. See also D. M. Walker, *Principles*... Vol. 2 (3rd ed., 1983), at p. 135. In the Scottish case W. Leitch V. Edinburgh Ice And Cold Storage Cop. Ltd (1900) 2 F. 904, it was agreed that Leitch would receive some old materials in order to erect a new stable with them. Before delivery, the materials were destroyed by fire and this without fault of either party. It was decided that the other party to the contract (ie Edinburgh..) was not liable in damages.

[25] Howell ibid p. 262, and it was thus provided in the contract. See p. 262 in the Howell case.

[26] See A. P. Dobson, *Sale of Goods & Consumer Credit* (London, Sweet & Maxwell. 1975), at para. 4.11. For a distinction between specific and unascertained

61(1) defines specific goods as "identified and agreed on at the time the contract of sale is made.".(Treitel (1983), p. 693, and Anson (1979), p. 522, and Chitty Vol. 1 (1968), para. 1319.)

However Lord Coleridge L.J in giving his judgment explained the ground upon which this case was decided saying that:

> "...there should be a condition implied that before the time for the performance of the contract the potatoes should be, or should have been, in existence, and should still be existing when the time came for the performance."[27]

Because goods were destroyed therefore the condition was not fulfilled and parties were accordingly discharged. The case of Howell V. Coupland is now to be treated not as being an application of S.(7) (agreement to sell specific goods) but an application of either S. 5(2) or to be explained by common law principles in S. 62(2).[28] This Act is to be studied later, in

---

goods see post p. 46.

[27] The Howell case p. 261., emphasis is mine. It is to be noted that this case was decided on the basis of the Taylor principle. See Mc Elroy, op cit at p. 25.

[28] S.5 (2) of the S.G.A 1979 reads:

"There may be a contract for the sale of goods, the acquisition of which by the seller depends on a contingency which may or may not happen".

S.62 (2) reads:

"The rules of the common law , including the law merchant, except in so far as they are inconsistent with the provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, apply to contracts for the sale of goods.".

See Chalmers', *Sale of Goods Act 1979 Including the Factors Acts 1889 & 1890* (18th ed., London, Butterworths. 1981), p. 101, and see Mc Elroy, op cit at p. 27 footnote. 2, citing to that effect the case of Re Waite (1927) 1 Ch. 606 [and now the case of H. R. & S. Sainsbury V Street [1972] 1 W.L.R.834, where Atkin LJ said -as expressed by Chalmer's- that the "plain language of the Act now prevents so wide a meaning being given to "specific goods" so far as concerns the application of the statute:an unascertained or unapropriated portion of a larger designed mass,whether the latter is "existing goods" or "future goods" must be outside the statutory definition."(he meant S. 61(1)). Chalmers p. 107, and see Mc Kenna J in the same case (Sainsbury) at p. 837, he also said that the Howel case cannot be an application of S.6 or 7 of the S.G.A 1893, since both sections are dealing with existing goods, and a crop not yet grown is not within this meaning. See also Thornely J. W. A, "Seller's liability for

this section.

Treitel ((1987), p. 673) bases this decision on the fact that, though the goods were unascertained or not specific they were to be taken from a particular source viz the land, and if that source failed then the contract would be at an end. This might be considered as a convincing ground upon which the decision of Howell can be based, taking into account what will be said thereafter. However, it should not be understood from what has been said that where in a contract parties contemplated a particular source, they will be discharged if that source fails. This is not the case, because to have this result (ie the discharge) there must be an express provision (not a mere contemplation) that the contract is to be performed using exclusively that source. (See post pp. 47-48).[29]

Comparing this case with principles of French and Algerian law of contract, it can be said that the Howell case can be considered as a sale of future goods. This sale of 200 tons of potatoes should also be considered as a sale of unascertained goods (it is thus under English law). This is because the land where potatoes were to be grown might produce more than 200 tons. Therefore this quantity should be individualised (ie ascertained) from the whole quantity produced. As a consequence of this, no property and no risk is transferred to the buyer until the act of individualisation has been made. Therefore the seller is always considered as the owner, and any destruction of the goods rests with him. However, though it is said that the sale is of unascertained goods (chose de genre., which means that the seller is always responsible to provide the promised goods) nevertheless the seller is exonerated from his liability for non performance viz the non delivery of the contracted quantity. This is because the source of supply was determined (see the speech of Mellish J. supra). However, if the seller promises a quantity of goods (ie future crop) but without determining any source of supply, a bad harvest, as in this case, cannot be considered as an

partial failure of crop to be grown on specified land" (1973) Cambridge Law Journal.15, at p. 16., and see Benjamin's, *Sale of Goods* (1st ed., London. Sweet & Maxwell. 1974), at 427.

29 But see Greig D. W, *Sale of Goods* (London, Butterworths. 1974), p. 215, where he says that although goods in that case were not specific, but :" it is not unreasonable to treat goods from a special source as being the equivalent of specific goods for the purpose of S. (7).".

impossibility of performance, and he will not be exonerated for his non performance of the contract.[30]

It can be seen therefore from the illustrations given in these cases that where the subject matter of the contract, as in the Howell case or an object (e.g a factory) essential for the performance of the contract as in the Appleby case is destroyed, then the contract will be frustrated or terminated. This is in fact the principle involved in Taylor V. Caldwell.

The harsh rule in the Paradine case being now mitigated, it is no longer possible to say that even impossibility of performance under English law is no plea for release (excluding cases of contractual risk bearing). Therefore English law is in accord now with the one of French and Algerian laws. The solution under **Taylor**, can also be reached under French and Algerian laws. That is to say the contract might be terminated or the rent being reduced under French or Algerian principles, and both the lessee and the lessor would be released from further performance of the contract.

Howell may also be terminated by force majeure, as explained above, if it is based on the fact that it was a sale of unascertained goods to be provided from a contractually determined source of supply which failed. Again **Appleby** as has been seen is similar to cases under French and Algerian laws. It should be noted here that when we say that the solution is similar, we do not mean that the same principle is admitted under these laws, but that the release is allowed under these laws notwithstanding the principle applied to reach that conclusion as far as we are concerned with the doctrine of impossibility.

Having seen the different instances under which a contract can be frustrated or being considered as involving an event of force majeure, it can be said that under English, Scottish, French and Algerian laws the destruction of the subject matter of the contract or a thing essential to its performance puts an end -in principle- to the contract and releases both parties from further performance without being at fault.

---

[30] Radouant p. 35 and pp. 38-39, and see Mazeaud, *Leçons. Principaux Contrats* Tome. 3. Vol. 2 (1968), p. 149.

§.2. The Sale of Goods Act 1979 (S.7).

As has already been said, it may be interesting to study the provisions of the Sale of Goods Act 1979. The only Article dealing with cases of frustration is section 7. This concerns the destruction of the subject matter of the contract.(Chitty, *Specific Contracts* Vol. 2 (1983), at 4122, and see Schmitthoff, Helsinki.. p. 130.)

Section 7 reads:

> 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.

Under French as well as Algerian laws it suffices to say that where there is a contract of sale of a specific thing (corps certain., Mazeaud, *Leçons.Principaux Contrats*.Tome. 3, Vol. 2 (1968), p. 95) and that thing has perished by an event of force majeure, before the risk of its destruction passes to the buyer by the making of the contract (under French law) or by the delivery (under Algerian law) then the contract is to be held terminated by force majeure, and both parties are released.

As may be seen under section 7 Sale of Goods Act, there are six requirements to be met in order for it to apply.

Firstly. There must be an agreement to sell goods, and not a contract of sale.

Section 2, of the Act provides:

> (1)- A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.
>
> (2)- There may be a contract of sale between one part owner and another.
>
> (3)- A contract of sale may be absolute or conditional.
>
> (4)- Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale.
>
> (5)- Where under a contract of sale the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell.
>
> (6)- An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Secondly The goods in question must be specific goods. This is defined

by S. 61(1) as being "identified and agreed on at the time the contract is made".[31] The example given below may differentiate specific goods from unascertained goods. Thus:

> "Where a farmer sells his flock of sheep he sells specific goods, but where he sells a lamb out of his flock he sells unascertained goods, where he sells the lamb marked A.B.120, assuming that the lambs carry different identification numbers, he sells again specific goods.".[32]

As this section requires that goods must be specific in order that the contract of sale can be frustrated, the question which may be asked is whether under the Common law rules the sale of unascertained goods can be frustrated. Russel J. in Re Badische ([1921] 2 Ch.331, at p. 382) said that it is possible that frustration applies to cases of unascertained goods although this may be rare. An example of such rare circumstances is where the obtaining of the contractual goods from a named country of supply was interrupted by that country becoming an enemy country. ((1940) 56 L. Q. Rev, pp. 194-95). However, in Blackburn Bobbin, Ltd v. T.W.Allen, Ltd ([1918] 1 K.B.540; affd.[1918] 2 K.B.467, C.A)[33], although there was war which prevented the delivery of goods nevertheless, the contract was not frustrated, and the seller was held liable for damages. This was explained by the fact that the seller could perform his contract by delivering goods from any other source, since no particular source was contemplated.

Therefore, it can be said that, where the goods are purely generic goods[34], for example expressed as 200 tons of potatoes, the contract cannot be frustrated by the destruction of those goods. The seller is

[31] Schmitthoff C. M, *The Sale of Goods Including the Hire-Purchase Act.1965 and Other enactments* (2nd ed., London, Stevens & Sons Ltd. 1966), at p. 86. However, mere identifiable goods are not specific goods. See Kursell v. Timber Operators &Contractors, Ltd.[1927] 1 K.B.298, per Sargant L.J. at p. 314.

[32] Schmitthoff (1966), op.cit at p. 86, for a similar determination of specific and unascertained (chose de genre) goods, see Mazeaud, *Principaux Contrats* (1968), at p. 95.

[33] Cited by MacLeod J. K, *Sale and Hire Purchase* (London, Butterworths. 1971), at p. 255.

[34] This was defined as where the contract may be satisfied by any out of the world supply of those goods. See MacLeod J. K (1971), op.cit, at p. 256.

required to deliver the goods from any other source.[35] This is an application of the maxim *genus numquam perit*.[36] Under **German law** too when the promised goods are defined in kind only, then the maxim *genera non perunt* is applicable. In this case as long as the species of those goods are available, the debtor will not be discharged even if he has to buy them from abroad. Thus if a seller promised to deliver a certain quantity of 'leather bags' but due to a fortuitous event his stock was totally destroyed, he will not be released from his obligation since; although the leather was for example rare, it can nevertheless be found in stocks of other merchants.[37]

The same rule is held under **Swiss law** with the difference that if the performance of the contract in such a case would involve an insurmountable difficulty and costs, then the debtor can be discharged. (See the comment under art. 97.C.O.).

However, under English law there are other types of unascertained goods such as those in Howell v. Coupland [38], ie the sale of potatoes to be grown on a particular piece of land, where the contract can be held frustrated, by the failure of the crop.[39]

It has been suggested that a sale of unascertained goods can be held frustrated if there is a common assumption of the parties that the contracted goods are to be taken from a particular source. (See Benjamin's, *Sale of Goods* (1974), at para. 430 (emphasis is of Benjamin). However, it should be added to what is said above that there should be an express provision concerning that contemplated source.(See Benjamin's *Sale of Goods* (3rd ed., 1987) p. 1103). In general terms the rule can be settled as follows:

---

[35] Dobson, *Sale of Goods and Consumer Credit* (3rd ed., London, Sweet & Maxwell. 1984), at 4.11.

[36] Atiyah P. S, *The Sale of Goods* (5th ed., Pitman Publishing. 1975), at p. 171.

[37] See P. V. Ommeslaghe at p. 23, Texas.. at p. 293, J. Cohn at p. 15, Lesguillons at p. 512, R. Rodiere & D. Tallon at pp. 128-29, Konrad Zweigert & Hein Kotz *An Introduction to Comparative Law* Vol. 2 *The Institutions of Private Law*. Translated from the German by Tony Weir (2nd ed., Clarendon Press. Oxford. 1987), p. 213.

[38] (1876) 1 Q.B.D.258.

[39] Atiyah, *Sale of Goods*(1975), at p. 172.

(a) If parties by express provisions intend the goods to be taken from that particular source exclusively, then the contract can be frustrated by the failure of that source. This is an application of Howell V. Coupland (supra).

(b) If no provision is made related to that particular source, then:

1- if *one* party only contemplates to get the goods from that source, then the contract cannot be frustrated by the failure of it. (See Blackburn Bobbin Co.Ltd V. T.W.Allen Ltd [1918] 2 K.B.467, and see Benjamin's, *Sale of Goods* (1974), at para. 430).

2- if *both* parties contemplate that source and no provision is in the contract, there is no clear English authority settling this point. As to the case of Re Badische, where parties to the contract contemplated Germany as the source of supply and subsequently by the war it became an enemy, and the contract was held frustrated, this has to be explained as a case of illegality, and not because the mutually contemplated source failed. (See Treitel (1987), at pp. 673-74).

Thirdly The goods must have perished. That is to say destroyed accidentally.[40] Or "so damaged as no longer to answer to the description under which they were sold.".[41] But mere deterioration in the quality of the

[40] Schmitthoff, *Sale of Goods* (1966), at p. 54, but this does not mean complete physical destruction. See Glanville L. Williams, *The Law Reform (Frustrated Contracts) Act 1943*. (London. 1944), at p. 89. In one case the requisition of a specific parcel of wheat was considered as having perished. Re Shipton Anderson & Co.and Harrison Bros.& Co [1915] 3 K.B.676, cited in Glanville, *The Law Reform..*, at p. 89. Under French or Algerian law, the goods sold might be completely destroyed or partly destroyed or deteriorated. In the last case the solution - whether to terminate the contract or to hold it as still continuing in its effects and to reduce the original contractual price according to what perished- depends -under Algerian law- on whether that destruction was substantial enough as if it was known to the buyer before the conclusion of the contract, he would not have contracted at all or not. The question whether the destruction is substantial or not, is left to the discretion of the judge. (See infra for more explanations).

[41] Chitty, *Specific Contracts* (1983), at 4123, and see Benjamin's, *Sale of Goods* (3rd ed., London. Sweet & Maxwell. 1987), at p. 257. See also the case of Asfar & Co. v. Blundell & Another (1896) 1 Q.B.123, goods are also to be treated as having perished where" the nature of the thing is altered, and...becomes for business purposes something else, so that it is not dealt with by business people as the thing which it originally was...". Per Lord Esher M.R. at p. 128. Therefore the word "perish" is to be understood in a commercial sense.

goods, cannot be treated as 'perishing goods'.(Chitty, *Specific Contracts* (1983), at 4123.)

We are therefore left with the conclusion that an agreement of sale of specific goods will be held frustrated when the whole promised quantity of goods is destroyed. Or that the goods are badly damaged as to alter their nature and become something else in a business sense.

Fourthly The perishing of the goods must be through no fault of either party.

Fifthly The perishing of the goods must be subsequent to the agreement to sell the goods.

Sixthly The risk in goods must not have been passed to the buyer. So if the goods were sold and perished after the risk has passed to the buyer, then the contract would not be frustrated.[42] To this effect S. 20 (1) provides:

> "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".[43]

When these requirements are met, then the contract can be frustrated, or avoided, as expressed in this Act.[44] Both parties are discharged from liability, that is, the buyer to pay the price, and the seller for non-delivery.(Atiyah, *Sale of Goods* (1975), p. 170.)

What is to be noted is that, S. 7 applies to all agreements to sell specific goods as required above. But it also applies in the case of S.18 r. 2 & 3, and S. 19.[45]

---

[42] Atiyah, *Sale of Goods* (1975), at p. 171.

[43] It is to be noted that under French law too, the risk passes with the ownership and not with the delivery of the thing sold. The opposite rule is held under Algerian law. That is to say the risk of a destruction passes with the delivery and not with the ownership.

[44] Dobson, *Sale of Goods and Consumer Credit* (1975), at 4.08.

[45] Benjamin's, *Sale of Goods* (3rd ed., 1987), at p. 258.

S.18, r.2 provides:" Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until the thing is done, and the buyer has

What is further to be noted is that, S. 7 of the S.G.A, can be negated or varied by parties according to S. 55 (1).[46]

It has to be borne in mind that a contract of sale can be frustrated by events other than the perishing of the goods, for example by requisition see Re Shipton ([1915] 3 K.B.676), but the frustration here is under common law rules and not under this Act. (See Schmitthoff, *Sale of Goods* (1966), at p. 55, and Benjamin's, *Sale of Goods* (1974), at para. 430). Schmitthoff (id) suggests that the frustration of the contract by the requisition is possible where the goods are specific. If they are not ascertained there can be no frustration unless those goods are assumed by both parties (reference is made here to the case of Re Badische see above) to be the subject-matter of the contract ie the contracted goods. But it is to be noted -as has been said- that where both parties contemplate a source of supply of goods, and this fails to materialise, then there can be no excuse for the non performance of the contract. It should not be inferred from what Schmitthoff says that frustration may occur simply by the fact that the contracted goods were mutually assumed by both parties to be such.(What has been said in p. 43 & pp. 47-48 supra, are applicable here.).

We may conclude from what has been said that under English, Scottish, French and Algerian laws, that when in a contract of sale of

---

notice that it has been done."

S.18, r.3 provides:" Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until the act or thing is done, and the buyer has notice that it has been done.".

S.19 provides:" Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled,

and in such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.".

As is seen this section deals with what is called the right of disposal. That is to say, where the seller reserves the right to property, until some conditions are fulfilled, for example until he gets the purchase price. See Schmitthoff, *Sale of Goods* (1966), at 92.

[46] Schmitthoff, *Sale of Goods* (1966), at p. 196.

goods, the subject matter of the contract is accidentally destroyed before the risk passes to the buyer (by the conclusion of the contract. But by the delivery under Algerian law), the contract would be held frustrated or as involving a case of force majeure. Thus without considering the details involved in Section 7 of the S.G. Act 1979, the rule under the above laws is substantially the same.

§.3. Frustration under the Uniform Laws on International Sales Act 1967 (art. 74) or the 1964 Convention and under The 1980 U.N Convention on International Sale of Goods (art. 79).

Having studied S. 7 of the Sale of Goods Act 1979, it is worth noting that, there is another provision related to the doctrine of frustration. This is Article 74 of the Uniform Laws on International Sales Act 1967 (U.L.I.S). its historical background, its application and its main provision viz, art. 74 will be discussed. Since the 1980 convention has replaced the old one, it is therefore of importance to study it. It should be however, noted that the United Kingdom adhered to the old one but not to the new one, whereas France adhered to the new one only.[47]

I. Frustration under The Uniform Laws On International Sales Act 1967 (or the 1964 Convention)

A. The Historical Background of U.L.I.S

In order to unify the substantive law[48], relating to international sales, two Conventions have been signed, at the Hague in 1964.

One of them is the Uniform Law on the International Sale of Goods (abv.U.L.I.S). The second is the Uniform Law on the Formation of the

47 It is remarked by Barry Nicholas (at p. 202), that there is no reported case either in Scottish or English courts which involve the 1964 Convention. This might be explained by the fact that British businessmen do not refer to this Convention in their dealings. See Barry Nicholas, "The Vienna Convention On International Sales Law" (1989) 105 Law Quarterly Review.201.

It should further be noted that the U.K ratified the 1964 Convention under the reservation that it will be applied only in the case where the parties choose it as the law of their contract. Barry Nicholas (1989), at p. 202.

48 Schmitthoff, *Sale of goods* (1966), at p. 37.

contracts for the International Sale of Goods.

The two Conventions, have been ratified by the United Kingdom, and statutory effects is given to them by "The Uniform Laws on International Sales Act 1967". This Act came into force on August 18th,1972.[49]

B. The Scope of Application of U.L.I.S.

1. When U.L.I.S Applies.

U.L.I.S applies to contracts for the international sale of goods. Therefore domestic contracts are excluded.[50] Two conditions are necessary for the application of U.L.I.S.

(a)- Parties to the contract have to carry out their business in different contracting states.

(b)- An element of internationality[51] must be involved in their contract. This is so in three instances:

1- Where the goods are in the course of carriage, or will be carried from one state to another.

2- Where the acts constituting the offer and the acceptance are effected in different states.

3- Where the goods are to be delivered in a state other than the place where both offer and acceptance were effected.(Atiyah, *Sale of Goods*(1975) p. 239.)

2. When U.L.I.S is Excluded.

U.L.I.S, is not applicable in the following instances:

(a)- Where contracting states do not consider themselves as different states, since U.L.I.S applies to contracts between different states.[52]

---

49 Atiyah, *Sale of Goods* (1975), at p. 239, Kenneth C. Sutton, "The Draft Convention on the International Sale of Goods. Part.1" (1976) 4 Australian Business Law Review.269, at p. 269 footnote. 1.

50 But it is possible for parties to a home contract, to adopt U.L.I.S. Or that the state may apply it to home as well as to international transactions. See Schmitthoff (1966), at 323. Parties may also exclude the application of Art. 74 from their contract, or to provide for excusable circumstances not provided for in this article. See Graveson R. H., Cohn E. J., Diana Graveson, *The Uniform Laws on International Sales Act.1967. A Commentary* (London, Butterworths. 1968), at p. 96.

51 Feltham J. D, "Uniform Laws on International sales Act 1967" (1967) 30 Modern Law Review.670, at p. 671.

52 This is especially so where the contracting parties have similar provisions related to sales law. An example of this is the U.K and the Commonwealth countries.

(b)- Some contracts are excluded from its application, such as sales of securities -sale of negotiable instruments or money- sale of any ship-vessel or aircraft which is or will be subject to registration- sale of electricity- sale by authority of law or execution or distress.[53]

C. Article 74 of U.L.I.S.

This is the main provision concerning the subject under discussion, ie frustration and impossibility. Under the heading of "Exemptions", it reads that:

> 1- Where one of the parties has not performed one of his obligations, he shall not be liable for such non-performance if he can prove that it was due to circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or to overcome; in the absence of any expression of the intention of the parties, regard shall be had to what reasonable persons in the same situation would have intended.
>
> 2- Where the circumstances which gave rise to the non-performance of the obligation constituted only a temporary impediment to performance, the party in default shall nevertheless be permanently relieved of his obligation if, by reason of the delay, performance would be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract.

The provision of the Act appears to be in accord -with some reservations[54]- with English doctrine of discharge of contractual relationships by impossibility or frustration.

From that provision, we can say that, there are two sets of circumstances which prevent a contracting party from the performance of his obligations. The first one is where that party is permanently prevented, the second one is where he is temporarily prevented (or delayed).

See Schmitthoff (1966), at p. 37.

53 Art. 5 of the Act, see Atiyah, *Sale of Goods* (1975), at p. 241, and similarily see art. 2 of the 1980 Convention. It is also to be noted that, where U.L.I.S applies the rules as to private international law are excluded, (Art. 2 of the Act) see Schmitthoff (1966), at p. 323.

54 This is because as it will be seen later on, this provision is not totally similar to English law as it appears at first sight.

1. Where the performance is **permanently** prevented.

In this case the contracting party is not liable for the non-performance, but only if he can prove that, he was not bound to take those circumstances into account, or to avoid, or to overcome them, at the time of the conclusion of the contract. In other words, this means that, those circumstances were not contemplated [55] (ie unforeseen), and that he could not avoid or overcome them.

In order to determine whether such requirements are met or not, it is necessary to refer to the intention of the parties to the contract, at the time of its conclusion.

If such intention cannot be ascertained.[56] Then reference is to be made to the objective[57] test provided by that Act. This test is the "reasonable person in the same situation", taking into account the trade practices in relation to the contract in question.(Legal Issues.. p. 58.)

2. Where the performance is **temporarily** prevented.

When the impediment is only temporary, then the permanent release from further performance is only possible where the delay caused by such circumstances, is such as to render the performance of the contract an entirely different obligation from that contemplated by the contract.[58] Or as it is stated in this Act

> "So radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract"[59]

This test is in fact similar to that used in the English doctrine of frustration of a contract.(Schmitthoff, *Sale of Goods*(1966) p. 327, and Legal Issues etc p. 59.)

As to the reservations already expressed, that is, this provision is

---

[55] (1982) 2 Legal Issues of European Integration at p. 58.

[56] As parties may, for example, not have contemplated such an event.Ibid.

[57] Michael G. Rapsomanikis, "Frustration of Contract in International Trade Law and Comparative Law" (1980) 18 Duquesne Law Review.551, at p. 573.

[58] See Schmitthoff, *sale of Goods* (1966), at p. 327.

[59] Art. 74 (2) U.L.I.S. The test of "radically different.." reflects Common law rules whereas the conditions stated in art. 74/1 might reflect Civil law principles.

similar to that of the English doctrine of discharge of contract by frustration.[60] Generally speaking, the criticism made to the wording of Art 74, is about the difficulty in giving an accurate definition for the different terms used in it. In other words, using concepts, which cannot bear the same legal meaning in different legal systems, especially common law and continental law (mainly French law). For example in para 1. it is stated:"Where one party...one of his obligations...". This implies that, a contract creates a lot of obligations, and that, a party to a contract, may fail to perform one or more of his obligations. This is comprehensible to a civil law lawyer, but certainly not, to a common law lawyer. This is because; obligations which are -under civil law- created by law, are, in common law created simply by way of implied terms.

An example which may clarify this idea, is to be found in the Sale of Goods Act 1893. The duty of the seller, as stated there, is only to deliver the goods, and of the buyer is to pay the price. All other duties are implied terms, in the contract.((1979) Am.Jou.Comp.L pp. 234-35.)

Another aspect of the difficulty for a common law lawyer is that, his doctrine of frustration applies to the contract as a whole or to nothing. So he cannot see how one or more obligations can be frustrated, while the contract as a whole is not.

Another observation is that, whereas para 1, speaks in terms of release from liability, para 2, speaks in terms of release from obligations.((1979) Am.Jou.Comp.L p. 234.)

Also where the article reads "due to circumstances..to take into account.." this in fact is in accordance with the civil law approach. This is because the liability is based on 'fault', and the non-performing party has to prove that the frustrating event was beyond his control and foresight. However, the common law approach is different since the non-performing party has to prove that his obligation is rendered impossible or that it becomes radically changed from that undertaken.((1979) Am.Jou.Comp.L p. 237.)

Another remark is that Art. 74/2 speaks of 'change in the obligation', and this is inconsistent with the common law approach, because the 'fundamental change' under the common law covers the performance of the contract as a

---

60 See generally Barry Nicholas, "Force Majeure and Frustration" (1979) 27 American Journal of Comparative Law. 231, at pp. 231 et seq.

whole and not a change in one or more obligations, which is in fact a civil law approach.[61]

But it may be noted that the Act uses the word 'obligation', therefore it is expected that the change will be in the obligation. It has already been said that under common law -the example of the sale of goods- there is only one obligation whereas the others are implied. However, in civil law many obligations are stated in the statute and some of them may be implied. This is the opposite of the common law. To this effect, saying that there is a change in the contract, is only another way of saying that there is a change in the obligation. Even common law lawyers use the term 'obligation' in relation to frustration. For example Chitty says that there must be a 'radical change in the obligation' and not in the circumstances.(See Vol. 1 (25th ed., 1983), at para. 1526-27). Another example is given in the speech of Sir John Donaldson in Marshall V. Harland ([1972] 1 W.L.R.899, at 904), where he said -in defining the doctrine of frustration-

> "... all that the lawyer means by "frustration" of a contract..[is where] a contract...cease[s] to bind the parties if, through no fault of either of them unprovided for circumstances arise in which a contractual obligation becomes impossible of performance or in which performance of the obligation would be rendered a thing radically different from that which was undertaken by the contract.". (See also C. M. Schmitthoff, Helsinki (1961), at p. 128).

On the whole these remarks show the difficulty in drafting an accurate uniform law for all merchants, and at the same time fitting all legal systems. It is for this purpose that a new Convention had been drafted in order to improve the previous one. This Convention is "The 1980 U.N convention on contracts for the international sale of goods".

II. The 1980 United Nations Convention On Contracts For The International Sale Of Goods.

In order to understand the reason of drafting this new Convention, general comments should be made concerning the old one.

61 (1979) Am. Jou. Comp. L at p. 241.

A. General Remarks on the 1964 Convention.

The first remark is that very few countries participated in the 1964 convention. The participants in the preparatory work of this convention were mainly from civil law tradition.[62] This is so even if its wording reflects conceptions of the Common law.[63] This fact was one of the reason which made France not ratify it.(Plantard p. 312) Only nine states ratified this Convention.(Plantard p. 313)

Among the criticisms directed to the 1964 Convention is that this Convention was too complex and it used abstracts, artificial and vague concepts.(See Sutton p. 269, and Ndulo p. 4) It concerned regional rather than global trade. It took little account of the developing countries.(Sutton p. 269, and Ndulo p. 3) This may be due to the fact that very few of the third world countries participated in its preparation.[64] As a result, concepts used in this Convention were familiar to western countries but unclear for non-western ones.[65]

Thus it appears that substantial modifications of the 1964 Convention were necessary in order that it could attract countries of different legal, social and economic systems.(Sutton p. 269, Nicholas B. (1989), p. 203) To this end, a working group of the United Nations Commission on International Trade Law (UNCITRAL) was set up in 1968. It took it 7 years (from 1969 to 1976).(Sutton p. 269, and Ndulo pp. 2 & 3) During the preparatory works of this convention many countries of different legal,

[62] Michael Joachim Bonell, "La Nouvelle Convention des Nations-Unies sur les Contrats de Vente Internationale de Marchandises" (1981) 7 International Trade Law & Practice.7, at p. 8, and Muna Ndulo, "The Vienna Sales Convention 1980 and the Hague Uniform Laws on International sale of Goods 1964: A Comparative Analysis" (1989) 38 Part. 1 International & Comparative Law Quarterly.1, at p. 1, Nicholas B. (1989), p. 203.

[63] Jean Pierre Plantard, "Un Nouveau Droit Uniforme de la Vente Internationale: La Convention des Nations Unies du 11 Avril 1980" (1988) 115 Journal du Droit International.311, at p. 313.

[64] See Martin L. Ziontz, "A New Uniform Law for the International Sale of Goods: Is it Compatible with American Interests?" (1980) 2 North Western Journal of International Law & Business.129, at p. 134.

[65] See Ziontz at p. 134. For other criticisms pointed out by an American delegation at that time, see Ziontz pp. 137 et seq.

social and economic systems were represented (ie Western countries, Eastern ones, others from Africa, Latin America.).(See Ziontz p. 147 footnote. 120, and Ndulo pp. 24-25)

As to the **1980 Convention** it is less complex, less abstract and shorter than the previous one.(Sutton p. 270) There was in fact a reduction of one third of the articles compared with the old one.(Bonell p. 10) Among the countries which ratified this convention, there are France and the United States of America.

This convention came into force on January 1 1988.(See Plantard p. 311, and Ndulo p. 1, Nicholas B. (1989), p. 201) Parties are allowed to exclude the application of this convention to their contract.(Bonell p. 12, and Ndulo p. 8)

B. The Sphere of Application of the 1980 U.N. Convention.

The sphere of application of this new Convention is substantially different from the old one. Thus it is no more a question of goods sold having to move from one state to another, or that the offer should have been made in one state and the acceptance in another. The 1980 Convention applies either when the parties have their place of business in different **contracting** states (ie states having ratified this convention), or that by application of private international law, the law of one contracting state will be applied (ie the application of this convention as a consequence). This would mean that if one of its conditions is met, it will apply even if the contract of sale is formed (ie offer and acceptance) and executed in one single state.[66]

C. Article.79.[67]

This article reads :

"**(1)** A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control, and that, he could not reasonably be expected to have taken the impediment into account at the time of the

---

66 Ndulo pp. 7-8, Ziontz p. 151, Bonell p. 11, Sutton pp. 271 et seq, and see "The 1980 Vienna Convention On The International Sale Of Goods" Lausanne Colloquium Of November 19-20, 1984. Publications De L'Institut Suisse De Droit Compare. (Schulthess Polygraphischer Verlag Zurich 1985. (Reprint 1987)), at pp. 26 et seq. For more details and examples of application see Plantard at pp. 318-19 et seq.

67 For an interesting and detailed study of this article see C. M. Bianca, M. J. Bonell, *Commentary..* at pp. 572 et seq.

conclusion of the contract or to have avoid or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or part of the contract, that party is exempt from liability only if:
(a) he is exempt under the preceding paragraph; and
(b) the party whom he has engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

Thus it can be seen that a new requirement is added. This is that the impediment must be beyond the control of the party invoking the exoneration. In other words it must not be imputable to him.[68] The other modification is that, regard is to be given to what cannot reasonably be expected to be taken into account (ie unforeseen. Bianca & Bonell p. 578 and pp. 580-81), or be avoided or overcome concerning either the event itself or its consequences. Under the old Convention, we have seen that regard is to be made first to the intention of the parties and then to the reasonable person. We also note that the word "consequences" is a new addition in this Convention. This is because sometimes the event itself is foreseen whereas its consequences are not.[69] The other modification is that the word "circumstances" as used in the old Convention is substituted in this new Convention by the word "impediment", which appears to be more precise. (See also Bianca & Bonell p. 579)

68 See Bruno Oppetit, "L'Adaptation des Contrats Internationaux aux Changements de Circonstances: La Clause de 'Hardship'" (1974) 101 Journal du Droit International.794, p. 808, Marcel Fontaine, "Les Clauses de Hardship. Amenagement Conventionnel de l'Imprevision dans les Contrats Internationaux a Long Terme" (1976) 2 International Trade Law & Practice.7, p. 21, Michael D. Aubrey, (1963) 12 Int'l & Comp. L. Q., at p. 1182, and see Bianca & Bonell pp. 579-80, Schmitthoff, *Export Trade* (1986), p. 150

69 Cf with what El Fazary is suggesting under the theory of imprevision (the condition of unforeseeability).Infra.

It has also rightly been pointed out that para.1, reflects to a certain extent the principle of force majeure of Civil law countries.[70]

The other modifications are the question of performance being made through a third party, and the one of notification. This may reflect what is said to the effect that this Convention was drafted "with much greater regard for international commercial practice than was the ULIS".(Ziontz p. 177) The exoneration under this new Convention has its effect during the time of the impediment. The solution under the 1964 Convention is more practical than this one. This is because it may happen that after a long delay, the performance, if enforced, would be radically changed. Normally in such a case the contract should be terminated rather than enforced as it is the case under this new Convention.[71]

Section Two. The Non Availability of the Subject Matter of the Contract or a Thing Essential to its Performance.

Under this section we will study the cases where the subject matter of the contract or a thing essential to its performance is no longer available in order to be used for the purpose for which the contract was concluded. This non availability may take the form of a requisition or a seizure or a damage caused to the subject matter of the contract or to a thing essential to its performance which make it unfit for the purpose of the contract. In other circumstances that non availability will have the effect of altering the nature of the contract.

§.1. Requisition.

The cases discussed below, will show how courts deal with the event of

[70] See Plantard p. 360, and Anna Kamarul (et al), "The 1980 U.N. Convention on Contracts for the International Sale of Goods" IN. Meeting on International Trade Law.7th, Australian Academy of Science. Can.-berra, 1980. 7th International Trade Law Seminar. Can.-berra.1980., at p. 260, Nicholas B. (1989), p. 235, and see Bianca & Bonell p. 578.

[71] See also Barry Nicholas (1989), p. 236. It might be said that the suspension of the contract as the only solution to problems of nonperformance, is also a "short sighted view" or "an all or nothing solution", just as the termination of the contract is, when it is the only solution to problems of frustration. See p. 168 infra. But see Bianca & Bonell at p. 591.

requisition when it concerns a subject matter of a contract or a thing essential to its performance.

Cases of English and French laws will be given separately and then some comments will be made on them. Before dealing with these cases, it can be said that under English law, when the goods -if speaking of a contract of sale- are specific, and if before the ownership of them passes to the buyer, they are requisitioned, then the contract of sale may be held frustrated since there is a real impossibility of performance.[72]

As to the question whether the contract can be frustrated by requisition where the goods are unascertained, it can be said that since the requisition might be a frustrating event, what has been said supra -concerning the question of frustration of unascertained goods- applies here. But Benjamin suggests that normally there can be no frustration unless it was the common intention of the contracting parties that those goods would be -in whole or in part- the contracted goods. (Benjamin (1974), para. 438 referred to the case of Re Badische).[73]

French law is not different in this respect. Thus, where the requisition concerns a specific thing, the seller can plead force majeure (this solution can also be applied under Algerian law).(See Fiatte (1932), p. 11). However, force majeure cannot be pleaded for the sale of unascertained goods (chose de genre) and this by application of the maxim *genera non pereunt.* But where the source of supply is stated in the contract, and that source fails, the debtor might claim his exoneration. This in fact is also the position taken by the English courts. Because when we have said that frustration can apply to a sale of unascertained goods although in rare circumstances, one of the examples given was that the goods were to be provided from a named country which became an enemy. Thus we see that the source of supply here too was determined. Therefore the general principle to the effect of *genus nunqam pereunt* is applicable for the other cases.

---

[72] See Re Shipton Anderson & Co V. Harrison Bros [1915] 3 K.B.676. Benjamin's, *Sale of Goods* (1974), at para. 438, and see Rudolf Gottschalk, *Impossibility of Performance in Contract. With a Supplement for the years 1938-1944* (London, Stevens & Sons. 1945), at p. 11 footnote (i), and Treitel (1987), at p. 670.

[73] What has been said in supra about the comment made on the question of the contemplated particular source (p. 43 & pp. 47-48 & p. 50) can be applied here.

I- Requisition of Ships under English Law.

Three English cases are given here, where the main question was whether the interruption in performance of the contract, caused by that event (ie requisition), was such as to put an end to it. It should be noted that when discussing the French cases, we will not look at the question of interruption caused by the requisition and whether it puts an end to the contract. This is because under French or Algerian law, the question is whether the event itself (ie requisition) can be treated as a case of force majeure or not. If it is so considered, then there is a consideration of the effect of this event, in other words whether the court will terminate the contract (as it is the solution and the only one under English law, where such an event is considered as a frustrating event) or suspend it (such a solution cannot be found under the English doctrine of frustration).

In two cases; viz F.A.Tamplin Steamship Co Ltd V. Anglo-American Petroleum products Co Ltd ([1916] 2 A.C.397.), and Port Line Ltd V Ben Line Steamers Ltd ([1958] 2 Q.B.146.), the contract was not frustrated. In Tamplin there was a contract of time charterparty for five years. After being used for two years the ship was requisitioned and twenty two months remained before the expiry date of the contract. This made the Lords decide that, the contract was not frustrated, since the interruption was not such as "to make it unreasonable to require the parties to go on.". Many months are left in which the ship can be used before the five years expired.(Lord Loreburn in the Tamplin case p. 408.) So the interruption period was not sufficient enough to put an end to the contract.

There was an opinion amongst their Lords that time charterparty (as opposed to voyage charterparty) could not be frustrated , since it: "..does not contemplate any definite adventure or object to be performed or carried out..".[74]

In the case of Port Line (above), there was a time charterparty for

[74] See Chitty Vol. 1 (1983), at para. 1554. However, in Anglo Northern Trading Co V. Emelyn Jones & Williams [1917] 2 K.B.78, Bailhache J. said at p. 84 that frustration can apply to a time charterparty. The test he proposed is the probable length of deprivation compared with the unexpired duration of the contract of charterparty. And see National Carriers V. Panalpina..[1981] A.C.675, where it is approved that frustration applies to all kind of charterparties including time charterparties. Per Lord Roskill at 712.

thirty months, after seventeen months the vessel was requisitioned and remained in that state three months. This was held not to frustrate the contract, (notice that ten months were left in which she could be used). Diplock J. in giving his judgment, and in deciding whether such requisition or interruption caused by it, would frustrate the contract or not, referred to Lord Loreburn's test in Tamplin , where he said that if:

> "the requisition is likely to last for substantially less than the remaining period of the charterparty, the contract is not frustrated"

Diplock also referred to the test of Lord Dunedin in the Metropolitan case (1918), where he said:

> "Was the interruption one which was likely to be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted?"(See the Port Line case p. 162.)

Applying these to the case before him he concluded that the contract was not frustrated.

However, in Bank Line Ltd V. Arthur Capel & Co ([1919] A.C.435.), a time charterparty for twelve months was held to be frustrated by the requisition of the ship. The parties agreed that the ship should be delivered on April 30th,1915, but beyond the owners' control, delivery was impossible at that date. Subsequently the ship was requisitioned, and three months later the owners sold their ship although it was on requisition; because they treated the contract as frustrated and also because they gave the charterers the option to cancel the contract if the ship was not delivered at the agreed date. At that time the charterers brought an action for non-delivery of the ship, and they did not use their right of cancellation.

The House of Lords held that the contract was frustrated. Lord Finlay LC said:

> "A charter for twelve months from April is clearly very different from a charter for twelve months from September"[75]

---

[75] Bank Line at 442. Cf with what Bramwell B. said at p. 75 infra. Although the

and that if that charterparty -after this delay- is to be enforced, it would be a totally different thing and the owners could say *Non haec in foedera veni.*[76]

In cases of interruption of this type (ie requisition) as Lord Shaw of Dunfermline said parties have to wait :

> "... a little before definitely treating the contract ..as at an end..(and) this was exactly what they did.".[77]

Because in fact the owners waited three months to see whether there was any prospect of release, and this did not appear to be so, they were therefore justified in treating the contract as frustrated. Another guidance was given by Lord Sumner; referring to the speech of Bailhache J in the case of Anglo Northern Trading Co V Emlyn Jones & Williams ([1917] 2 K.B.78), where Bailhache J said that in deciding whether a contract is frustrated or not, we have to look at the probable duration of the deprivation (e.g. requisition) and the period left for the expiry of the charterparty.[78]

---

case concerns a damage to a ship, but they are very similar. More accurately it might be said that the test in the Jackson case (see p. 75 infra) was applied here (ie in Bank Line).

[76] The Bank Line case p. 442 'that is not what I promised to do'.

[77] The Bank Line case at 449. But it is not necessary that the length of the delay, estimated by the party who treats the contract as frustrated, was subsequently proved to be as he forecasted. To this effect Bailhache J in Anglo Northern [1917] 2 K.B.78, said:" The question will ...be what estimates would a reasonable man of business take of the probable length of the withdrawal of the vessel from service with such materials whether his anticipation is justified or falsified by the event.". Cited by Mc Elroy, op.cit at p. 174 (emphasis is of Mc Elroy). Lord Atkinson in Horlock V. Beal [1916] 1 A.C 486, said at 502 :"It is not necessary, therefore, in such a case to wait till the delay has occurred. It is legitimate to come to the conclusion that the delay [caused here by war] will be so long and so disturbing to commerce as to defeat the adventure and to act accordingly at once. Cited by Mustill J. in Finelvet A.G. V. Vivana Shipping Co Ltd [1983] 1 W.L.R.1469, at p. 1479. Cf with what is said under imprevision (infra at p. 258) to the effect that whether a party can claim imprevision before his performance becomes onerous if he knows that by his performance, the contract would be ruinous to him.

[78] But Cf with Lord Sumner's speech in Bank Line at p. 458 where he said "Delay even of considerable length and of wholly uncertain duration is an incident of

From the cases given above, it can be said that in cases of requisition, one should look at the probable duration of the interruption and at the same time take into account how long is left before the expiry date of the charterparty. If the probable duration was to last a long time as to make performance of the contract, if enforced, a thing radically different from what was undertaken, then the contract might be frustrated.

II- Requisition under French law.

Normally under French law -and this may also be applied under Algerian law- the requisitioning of a thing is considered as a case of force majeure, since it is what is called a 'fait du prince' (an act of prince).[79] But it is possible -as will be seen- that the requisitioning will not constitute a case of force majeure. It depends therefore on the circumstances of each case. The requisitioning can occur during war-time or peace-time.[80] The cases given below will illustrate the position of the French jurisprudence.

The first principle to start with in dealing with cases of requisition is the one held in Chavenon V. Espie (Soc.Feb 28th.1947.D.1947.212) where the Court of Cassation decided that the requisition constituted for the debtor a case of force majeure "exonerating him from his obligations every time it has put him in an impossibility to perform his obligations.". Such an impossibility is illustrated in Coulbeaux V. Gautier (Paix-Mantes sur-Seine, June 24th 1941, Gaz.Pal.1941.2.205), (C) lent his motorbike to (G), this is called a 'loan for use' (pret a usage ou commodat) (see art. 1875 French C.C).[81] A

---

maritime adventure, which is clearly within the contemplation of the parties... so much so as to be often the subject of express provision. Delays such as these may very seriously affect the commercial object of the adventure, for the ship's expenses and overhead charges are running on.... None the less this is not frustration.". See Anson *Law of Contract* (25th ed., 1979), at p. 503.

79 'Fait du prince' can be defined as any intervention of the authority, in the performance of the contract. See Guy Fraikin, *Traite de la Responsabilite du Transporteur Maritime* (Paris L. G. D. J. 1957), at para. 247. The debtor who is prevented from performing his contract because of a fait du prince will be excused for his non performance (ie the non delivery of the thing promised) and will not be liable to pay damages (ie dommages-interets). The payment of damages is normally due when there is a breach of contract, ie a fault of the debtor, but not in the case where the non performance is due to a case of force majeure.

80 G. Fraikin at para. 248.

81 This article provides that "A loan for use...is a contract whereby one of the

military officer took the motorbike from (G) for the purpose of a connection with another department of the army. (G) was therefore in the impossibility to restore the motorbike to (C). Before the court, (C) claimed that (G) was liable and that he should have asked the military for a written order of requisitioning. The court rejected his claim saying that (G) was right in his act of giving the motorbike to the officer since it was a military order, ie from an authority. Even if the order was irregular, this would be sufficient to constitute a case of force majeure. Therefore (G) was exonerated from his obligation to restore the motorbike.

In the case of Cie du Midi V. Dausse (Cass.Chambre Civ.Sept 29th.1940. Bulletin des Transports, Jan-Feb.1941.p.11. See Guy Fraikin para. 248), before the second world war and because of an inundation the 'maire' of the city in which the event took place, requisitioned a quantity of goods (eggs), in order to be sold to the population of that city. The Court of Cassation considered the requisitioning as a case of force majeure and therefore the debtor was exonerated from his obligation to deliver the goods he promised. Here again the case involved an impossibility (or an irresistibility) of performance.

It is worth noting that the question of requisitioning does not only concern the case of a contract of sale or a loan for use or even a contract of carriage[82], but it may also apply to a contract of employment. Thus in the case of Dame Tiffon V. Ste Souistre etc (Soc.May 31st 1945.D.1946.21), the contract of employment of (T) was terminated by the requisitioning of the plant of the employer (D). When (T) claimed damages, her action was rejected because it was impossible for (D) to employ her (which means to perform his obligation). Since this impossibility was not due to the fault

---

parties delivers a thing to the other to make use of it, on the responsibility of the borrower to return it after having used it.". The borrower will be liable for the loss of the thing borrowed even if it is caused by force majeure, and this if he employs the thing for another use or for a longer time than he should. (See art. 1881 French.C.C and see art. 538 Alg.C.C) Furthermore, art. 544/2 Alg.C.C (and similarily art. 1882 Fr.c.c) states that: "If the thing loaned perishes through a fortuitous event against which the borrower could have guaranteed by employing his own, or if, being able to preserve only one of the two, he preferred his own, he is liable for the loss of the other."., and see El Sanhoury, *El Wassit* vol. 1 at pp. 1546-47.

[82] See to this effect Ste Sallier V. Etat Français et S.N.C.F. Trib. Orleans. Oct.10th & 17th.1946. D.1947 somm. 23.

of (D) but to a case of force majeure, he was not responsible for the termination of the contract. The Court of Cassation confirmed this judgment.[83]

It can be deduced from these cases that the requisitioning is generally considered as a case of force majeure, if it is legal, even if it is irregular, as is the case where it is made without a written form (as in the first case).[84] But in all these circumstances there must not be any fault of the debtor connected with the occurrence of the event of force majeure.[85] However, when the requisitioning is illegal this cannot constitute a case of force majeure.[86]

The legal effect in a case of requisition is that the contract can be terminated where the requisition is permanent. However, when it is temporary the contract will be held suspended.[87]

We may note from the cases discussed under both laws, that English courts are always using the common test to the effect that the performance of the contract if enforced after the interruption caused by the requisition, would be a performance of a totally different thing from that undertaken. French courts on the other hand, require the traditional conditions of force majeure. Thus it has been seen that the requisition was in several cases insurmountable for the debtor. It may also be treated as a fait du prince. It may also be said that French or Algerian courts would consider cases like Tamplin or Port Line as constituting force majeure, and would probably suspend the contract. Whereas English courts treated them as still binding. The Bank Line case too would be considered under French and Algerian laws as a case of force majeure and the contract would be either terminated or suspended depending on the delay. This dissimilarity

---

83 In the case where the plant of an employer is destroyed by fire and this was not due to his fault, this event may constitute a case of force majeure. See Ibrahim Zaki Akhnoukh, *The Algerian Law of Employment* (2nd ed., Algiers. O. P. U. 1988), at p. 47.

84 See Mazeaud, *Responsabilite*(1970), at para. 1580 footnote. 2.

85 See the comment made on the case of Coulbeaux V. Gautier.

86 See Civ.May 16th.1922.D.P.1922.1.130. See also Marty, *Droit Civil Les Obligations* (1962), at p. 531, para. 487.

87 See Georges Pequignot, "Requisition" (1959) 2 Encyclopedie Dalloz. Repertoir de Droit Public et Administratif.765, at para. 127-28.

would not have existed if suspension were used under English law in cases of frustration. English courts -if they were given the possibility of suspending a contract in a cases of frustration when this is met- would probably have treated cases in which the interruption in performance was not so long as to terminate the contract, as suspended only. This would therefore make the position of French and Algerian laws on one hand and the one of English law on the other very similar.

As to the two tests used in both laws, it is easier -under Algerian or French laws- when bearing in mind the traditional conditions of force majeure, to decide whether a contract will be treated by courts as a case of force majeure or not. Such a forecast is very difficult (in certain cases) when dealing with cases of frustration.[88] This is because, although the English test cited above, is an objective one, nevertheless it lacks the precision as that under French law. Thus under English law, we do not really know what is this 'fundamentally different obligation' after the requisition. But in other cases such as in the cases of Tatem and the coronation cases (e.g. Krell infra) this test is clear; because by the frustrating event the purpose of the contract was defeated, and if the contract was enforced, it would have been a contract of a different character. In other words what is to be done with a room viewing nothing interesting, whereas it was let for the purpose of viewing the procession of the king.

§.2. Seizure of Ships and Confiscation.

The question of seizure of ships under English law is similarily treated by courts as the one of requisition. That is to say, English courts base their decisions on whether the interruption caused by that event is long enough to make further performance of the contract totally different from that undertaken. French courts on the other hand look at events closely related to seizure such as the confiscation of goods in deciding whether it can constitute a case of force majeure by having the traditional conditions. Since these events are differently treated under both laws, they will be studied separately and then some comments of a general character will be made.

[88] See Jeffrey Price, op.cit at p. 91 who holds the same opinion.

I- Seizure of Ships under English Law.

As will be seen English courts are always using the common test as stated above (ie performance if enforced would be a totally different thing from that undertaken). This test was also used in the case of W.J.Tatem V. Gamboa. ([1939] 1 K.B.132.) This was a time charterparty for one month, made for the purpose of evacuating civilians from Spain to France. The charterparty was to run from July 1st, 1937. On July 14th - because of the war in Spain- the ship was seized and kept till September 11th. Charterers on August 18th,1937 wrote to the owner saying that they disregarded that charterparty, since the purpose of it viz the evacuation of civilians could not be realised by its seizure for a long time. The owners then brought an action claiming the hire from August 1st till September 11th,1937.

The question which the court had to answer was whether that seizure frustrated the contract, bearing in mind that both parties contemplated such an event ie the seizure, at the time they contracted.

In giving his judgment Goddard J referred to the case of Larrinaga & Co V. Societe Franco-Americaine (39 T.L.R.316.), where Viscount Finlay said that where in a given contract, risks are foreseen, parties may provide that in the case of their occurrence they will be released. But if parties did not so provide 'it may be clear' that parties contracted on the basis of the continued existence 'of a certain state of facts'.[89]

If that foundation or basis is defeated then the contract is at an end. Then Goddard J commented on the speech given by Viscount Finlay, saying that if the basis of the doctrine of frustration is that it depends on the continued existence of a state of facts, then there is no difference whether the frustrating event was or was not foreseen; because:

> "If the foundation of the contract goes [-by the destruction of the subject matter, or by a long delay-] it goes whether or not the parties have made a provision for it..".(Tatem p. 138)

and therefore the contract is frustrated, because by such interruption its performance would be performance of a different contract.(Tatem p.

[89] Tatem p. 137.

139.)

All this discussion brings us to the conclusion that although an event is foreseen, this does not rule out frustration ; because if the foundation of the contract (like to evacuate civilians) is destroyed (by seizure) then the contract is at an end; in other words frustrated.

We may note that seizure in this case was temporary, the ship was seized on July 14th, and was released on Sept 7th 1937. Under French law, confiscation, as will be seen in the following cases, is permanent. The traditional conditions of force majeure were used.

II- Confiscation under French Law.

Before studying the cases on this subject it is of interest to quote a judge in the first case. "... in order to save [the goods] delivered to the [debtor] the debtor was not obliged to risk his life or his freedom for that purpose.".[90] This has certainly been applied in the second case but apparently not in the first. This will be appreciated after having studied that case.

The first case viz Wilck V. Dlachasse (Fontainebleau.March 20th.1946.Gaz. Pal.1946.1.217), concerns a contract of bailment (depot) in return for a remuneration (salarie).[91] The bailee (depositaire) in the performance of his contract (ie keeping the thing bailed) has to use normal care. This is called in French law an 'obligation de moyens' (see art. 1927 Fr.C.C, and see art. 592/2 Alg.C.C. See El Sanhoury, *El Wassit* vol. 7 part 1 pp. 704-05). In that case (W) gave on bail some goods (meubles) to (D). During the war the German authorities, confiscated all those goods which belonged to (W) who was a jew. (D) argued that the confiscation was a case of force majeure and was therefore exonerated from his obligation to restore the goods. Another argument he gave was that the association to which he is a member, sent him a notice that all the members were ordered by German authorities to give a list of all the goods in their possession which belong to jewish people. Any refusal were to be declared to the authorities. (D)

[90] Under English law too "the law will not compel a man to risk his life" in performing his contract. See Mc Elroy, *Impossibility of Performance* op.cit. at p. 18.

[91] Art. 1915 Fr.C.C defines bailment as:"an act whereby one receives the thing of another, with the duty of keeping it and returning it in kind."., and similarly art. 590 Alg.C.C.

therefore gave that list (ie of (W)) and as a result these were confiscated. The question was therefore whether (D) could be considered as having breached his obligation to conserve the goods of (W) when he gave that list?.

The tribunal after having cited the sentence quoted above decided that (D) was liable for the confiscation; since he could either not send a list at all to the Germans or send a partial list of the goods in his possession only. Since he did not act that way he was liable and should pay damages to (W).

The second case is Goujon V. Goujon (Trib. Paix. Cande. Nov. 27th.1945. Gaz. Pal. 1946. 1. 17). It concerns a contract of loan for use. Henri Goujon (HG) lent to Louis Goujon (LG) a shot gun, and (LG) gave his gun on loan to (HG). After France has been occupied by the Germans, an order was issued to those who possessed arms to the effect they should return them to the German authorities otherwise they would be sanctioned; one of the sanction being the death of the possessor of any arms not returned. (HG) returned the arm of (LG) to the Germans, whereas (LG) retained the gun of (HG) during the whole period of occupation. After the war ended, (HG) asked (LG) to restore his gun. The latter refused arguing that (HG) should restore (LG) gun in order to receive his.

The tribunal decided that (HG) was not at fault through his act since he was ordered by the Germans to do so. He also risked his life by refusal. Therefore he was exonerated from any liability, whereas it was decided that (LG) should return the arm of (HG).

The comment which can be made on the first case, depends in fact on our assessment of the notion of risk. In other words is it possible and acceptable to say that the refusal of giving the list of that jewish person, was not really dangerous. We have also to take into account how the Germans considered the jewish people, and what consequences do we expect in the case where a person protects a jew.[92]

---

[92] See to this effect Henri & Leon Mazeaud, cases and comment (1950) n:18 Revue Trimestrielle de Droit Civil.501, at p. 501. These authors note that the court referred to arts. 1927 & 1929 Fr.C.C, to decide whether there was a case of force majeure or not, and this as if the bailee has to prove the event of force majeure, and that his proof that he had no fault, was not sufficient to exonerate him from his liability. This conception is not exact; because the obligation of the bailee is one to use a general care (ie obligation de moyens). This means that it is for the creditor to prove that the debtor was at fault when performing his contract, and this in order that he can be liable.

In another case viz, (Cour de Paris. May 3rd.1950.Gaz.Pal.2.71), the German authorities in 1940 , during the occupation of France, opened the "safe in a bank" of a customer which contained bars of gold. The gold was not taken out until 1944. The customer sued that bank claiming damages, because the bank, as he alleged, could have hidden the gold between 1940 and 1944, so that the Germans could not find it. The Court of Paris rejected these allegations because, it is said, the order of that authority to leave the gold as it was in the safe was irresistible and put the bank in an absolute impossibility to do otherwise. Therefore that order was a case of force majeure, which exonerated the bank from any responsibility concerning the act of the Germans in confiscating that gold. The Court also noticed that the bank could refuse to apply the order but it risked the life of its employees and that "we are not obliged to behave as heros".

It is to be remembered that if the debtor -who has to restore a thing delivered to him- was at fault before the event of requisitioning took place, that event would not be considered as a case of force majeure. In an illustrative case[93] a garage-keeper was liable for the requisitioning of a car which was in his garage, and did not restore that car to its owner although the latter asked him to do so by the French (as well as the Algerian) procedure called the "mise en demeure". After the garage-keeper refused to restore the car it was requisitioned.

§.3. Ships Trapped.(Shatt-al-Arab cases)

The following cases involved the problem of ships being trapped in the waterway Shatt-al-Arab, as a result of the war between Iran and Iraq. What will be discussed here is the effect of such an event on ships which were in this area. The question was whether,being trapped, there could be frustration of the contract.

In the case of Finelvet A.G.V. Vivana Shipping Co Ltd ([1983] 1 W.L.R 1469.), there was a time charterparty, where a vessel had to carry goods

---

This is also true for both Algerian and Egyptian laws. See art. 592 Alg.C.C., and see *El Wassit* vol. 7. part. 1 pp. 701 to p. 705.

[93] Nogaret V. Charoulet Civ April 7th.1954.D.1954.385. See also Henri Lalou, *Traite Pratique de la Responsabilite Civile* (5eme ed., Paris, Librarie Dalloz. 1955), at para. 291.

from North America to the Persian Gulf. Having discharged the cargo at Basrah, the vessel was prevented by Basrah port's administration, from leaving the port, because of the outbreak of war. Because of the war, as Mustill J said (Finelvet A.G at 1473.e.):

> "..the obstacles were such that vessels were unlikely to be able to leave for several more months at best, and probably much longer.".[94]

Therefore the charterers cancelled the charterparty. When this case came before Mustill J he upheld the decision of the arbitrator, that the contract was frustrated.(Finelvet A.G at 1471.)

But the problem which remained was whether the war itself or the detention consequent to war which frustrated the contract. Having agreed with the arbitrator that it was not the war itself which prevented performance and therefore put an end to the contract, he said:

> "In my judgment..., it is the acts done in furtherance of the war which may or may not prevent performance..".(Finelvet A.G at 1481.)

Those acts can be explained in this case by the fact that the ship was trapped, and because this act is related to the probable duration of the war itself, therefore the contract may or may not be frustrated, depending on such duration of war.

Two points have to be made here before discussing the second case. The first is that, even if war does not in itself frustrate a contract, nevertheless it does frustrate a contract if it has as a consequence, a supervening illegality, such as trading with the enemy.(Finelvet A.G at 1481) In such a case the contract is frustrated by the simple fact of war. The second point is that, in the reported case and in the subsequent one, the main question was not the frustration itself, but the specific time of frustration. This is not studied here, because we are concerned with

---

[94] This suggests that the test put by Lord Loreburn in Tamplin , and the one put by Lord Dunedin in the Metropolitan case (both are cited in pp.62-63 supra) will be applied in this case.

instances of frustration and not the time at which it occurs.

The second case is International Sea Tankers Inc V. Hemisphere Shipping .Co Ltd (The Wenjiang) ([1983] 1 Lloyds Rep.400.). This case is similar to the first one because here again, in a time charterparty for twelve months, a vessel was chartered to carry goods from Basrah to India, but she was trapped, and was prevented by the authorities from sailing. The detention lasted a long time. As a result of this, the charterers treated the contract as frustrated. The arbitrator as well as the court held that the contract was frustrated since the vessel was retained over two months, and what remained was only four months, which means that if the contract was enforced it would be a contract radically different from that undertaken.(The Wenjiang at 404.) Bingham J in deciding whether or not the contract was frustrated in this case, used the test of:"..the probable length of the total deprivation of the use of the vessel as compared with the unexpired duration of the charterparty."[95], and said that a "short delay" cannot frustrate the contract.(The Wenjiang at 406.)

So it can be seen from the two cases above, that war itself is not a frustrating event. However, when it involves trading with the enemy, or when the duration of the delay, such as ships being trapped, is such as to make further performance of the contract a thing radically different from that undertaken, then the contract is to be held frustrated.[96]

Under French as well as Algerian law, such an act (ie ships being trapped) would be considered as a 'fait du prince'. Therefore if it meets the conditions of force majeure, then it may exonerate the debtor from his liability for non performance of his obligations. As to the effect of this event of force majeure, it may either suspend the contract or terminate it if there is a long delay as to be intolerable for the creditor.

---

95 The Wenjiang at 406., as in the case of requisition.

96 Therefore whether a contract can be frustrated by delay depends on the length of the delay. David M. Walker, Vol. 2 (3rd ed., 1983), p. 137. So it is a matter of degree depending on the surrounding circumstances of each case. See Schmitthoff, *Export Trade* (1986), at p. 148, and see Schmitthoff, Helsinki.. at p. 142, where he rightly pointed out that the disadvantage of this is that it would be uncertain to hold when a contract is frustrated, that is to say when the delay frustrates a contract, and this is difficult to state. It is for this reason that some contracts state the length of the delay beyond which the parties are allowed to treat their contract as at an end. See for a clause of this kind infra p. 115.

§.3. Ships Damaged *(break down, going aground)*.

The non-availability of a ship through damage caused by an event outside the control of the parties, may also frustrate the contract. It is not the event itself, but what results from it (ie the delay). In the cases discussed under this heading, the long delay caused by a ship going aground was held to frustrate the contract. Here the impossibility concerns a thing essential to the performance of the contract.

The first case is Jackson V. Union Marine Insurance Company Ltd.((1874) L.R.10 C.P.125.) In this case the defendant chartered a vessel in order to transport a cargo of iron rails from Newport to San Francisco. On January 2nd,1872 the ship sailed from Liverpool for Newport, a day later she went aground. Her repairs were not completed till the end of August 1872 (ie seven months). Meanwhile the charterers, chartered another ship for the same purpose, and treated the first contract as terminated (ie frustrated) because of the delay.

The question to be answered was whether such a delay frustrated the contract and justified the charterers in treating the contract as such. The jury were asked by BrettJ whether :

> "The time necessary to get the ship off and repairing her so as to be a cargo-carrying ship was so long as to put an end in a commercial sense to the commercial speculation entered into by the shipowners and charterers".

The jury having answered in the affirmative, BrettJ held the contract as frustrated.[97] The Court of Appeal affirmed that decision. Bramwell B in giving his judgment, said that the jury found that the contract if enforced after the ship being repaired, it would impose on the parties a different voyage, because parties

> "intended (it) to be a spring voyage, while the one after the repair would be an autumn voyage"[98], which means :"... a new adventure, a new

[97] Jackson, cited by Bramwell B. at 141.

[98] Jackson 141. It may be noted that a "...marked similarity" existed between saying -in this case- that the contract would be something different (ie from a spring voyage to an autumn one) and the test used by Lord Dunedin in Metropolitan at p. 128; where he said that, the interruption must be "so long as to destroy the identity of

agreement."[99]

It has also been said that the non-availability of the ship for the voyage, means the non-performance of a condition precedent viz, that the "Ship will arrive in time (or) shall arrive in a reasonable time.".(The Jackson case (above) at 145.)

The contract being frustrated, both parties were released; the owner from giving another vessel and the charterers from paying the rent.(Fifoot (1986), p. 569.)

The second case is Nickoll & knight V Ashton, Edridge & Co ([1901] 2 K.B.126.). The defendants agreed to sell to the plaintiffs a cargo of cotton-seed. This was to be shipped in a steamship called "Orlando". The loading was to be made at an Egyptian port on January 1900 and goods were to be shipped to the U.K. On December 1899 and owing to perils of the sea, and without fault of either, the ship was so badly damaged as it could not arrive at the loading port at the agreed time (ie January 1900). The buyers therefore brought an action claiming damages for failure to ship the goods. The question to be answered was whether such an event (stranding) frustrated the contract and released the sellers from their obligation. It was held that the contract was frustrated, because an implied condition was to be read into that contract, which is that where performance of the contract depends on the continued existence of a thing (here the ship), and that thing ceases to exist, then the contract is at an end. This is because it was agreed that shipment should be made by the "Orlando" and not any other ship. Therefore parties knew from the beginning that performance would become impossible unless that

---

the work or service when resumed with the work or service when interrupted". Mc Elroy, *Impossibility of performance* (1940), at p. 166.

99 Per Bramwell B at p. 148., cited by Anson (1979), at p. 497. It is to be noted that there was a provision in that contract "excepting dangers and accidents of navigation". However, the frustration in this case can be explained by the fact that although dangers and accidents of navigation were excepted, which clearly shows that "the parties were contemplating and providing for the case of some delay arising from these causes, but they were evidently not contemplating a delay so great that the spring voyage would become altogether impossible.". Per Lord Parker in Tamplin case [1916] 2 A.C.397, at 424 referring to Jackson V. Union etc, and see the speech of Lord Justice Scrutton in the Acetylene case at footnote. 7 chapter four.

steamship continued to be in a fit state "down to and during the month of January,1900". (Per A L Smith M R., the Nickoll case p. 132).

So the foundation of that contract viz, the continued existence of the ship, has disappeared, and the obvious consequence was the frustration of the contract.

The concept "ceases to exist" has to be understood in a commercial sense; because it was explained as to mean that the ship ceases to be a "cargo-carrying" ship, which rendered the performance impossible. An example was given by A.L.Smith MR (in the court of Appeal) when he said that a "ship being at the bottom of the sea" is the same thing as the one "being stranded upon a rock in the Baltic, as the Orlando was, thereby wholly unable to take in a cargo pursuant to the contract.".[100]

What can be said -concerning English law- after having discussed the question of impossibility regarding the subject matter of a contract or a thing essential to its performance (this would include cases of destruction of subject matter as Caldwell, Appleby, Howell and those of requisitioning and seizure as well as those involving the fact that ships have been trapped or damaged) is that two tests are used to base the frustration of contracts. These are that the foundation of the contract would go by the destruction of a subject matter or a thing essential to its performance. The second one is that performance of the contract after the delay caused by a frustrating event, would render the performance a thing radically different from that

[100] The Nickoll case at 133., here the principle of Taylor was applied. See also Gloag op.cit at para. 11.5 (London & Edinburgh Shipping Co V. The Admiralty, 1920 S.C.309., a ship so injured as to be totally unfit for the purpose for which it was chartered). So the delay involved in the cases of requisition, seizure, stranding -apart from Nickoll -, ships being trapped, all these must have some qualifications, like for example to"render the adventure absolutely nugatory"[see Bensaude & Co V. Thames and Mersey Marine Insurance Co,[1897] 1 Q.B.29, per Lord Esher M.R. at 31, [1897]A.C.600 at 611-12-14]. Or to "make it unreasonable to require the parties to go on, [see Metropolitan Water Board..[1918] A.C. 119, per Lord Atkinson at p. 131]; or to "destroy the identity of the work or service when resumed with the work or service when interrupted" [see Metropolitan.. above , Lord Dunedin at p. 128]; or "to put an end in a commercial sense to the undertaking" [see Jackson V. Union...(1874) L.R.10 C.P. 125]. Cited by Anson, op.cit (1979), at 503. Or that the delay defeats the "commercial venture" of the contract. Cited by John Tillotson, *Contract Law in Perspective* (London, Butterworths. 1981), at p. 144 .

undertaken. It is possible to use these two tests interchangeably -although it might be inaccurate to use one test in one case rather than the other- in the different cases studied above. Thus in the Jackson case -where the radically different test was used- it can be said that by the damage of the ship the foundation of the contract viz the spring voyage was defeated. Or that the availability of the ship (ie its continued existence) at the time of the performance, was the foundation of the contract and this in order to perform the contract at the agreed time. The delay (by the fact of the ship being damaged) has defeated that foundation and would make as a consequence the performance of the contract after the delay a thing radically different from that undertaken.

Again in the case of Tatem (seizure) -where the test of the disappearance of the foundation of the contract was used- it can be said that the performance of the contract after the seizure (ie after being released) would be a performance of a different thing.

The interchangeability between these two tests might seem clear in the speech of Goddard J. in the Tatem case (supra p. 69) where he said that :".. the foundation of the contract goes by the destruction of the subject matter, or by a long delay...". Thus he used the test of the "foundation" for cases involving long delay which as we have seen were generally based on the test of "a thing radically different". We may also notice that in the same case it was said that after the interruption the performance of the contract would be one of a different thing.(See supra p. 69)

As to French law, suffice it to say that any case involving the release of the debtor from his obligation is based on the traditional conditions of force majeure. However, holding a contract terminated or suspended only, may depend -in certain circumstances e.g.'illness'(infra)- on the length of the interruption involved.

Generally speaking, it can be said that under English, Scottish as well as French or Algerian laws, requisition, seizure, ships being trapped, can all be considered as force majeure or frustrating events if they meet the conditions required under both doctrines, in other words, the English test of 'performance if enforced would be a thing totally different from that undertaken', and the traditional conditions of force majeure. The main difference between the two systems is that whereas English law decides

for the radical solution (ie the termination of the contract) French or Algerian law provide two solutions viz, the termination and the suspension of the contract. Thus if the impediment is permanent the first solution would be adopted, whereas if it is temporary then it would be the second which would be adopted, unless the delay or the interruption is very long as to be intolerable. In this last case, courts may held the contract terminated. Another important remark should be added which is that, the English cases already discussed and which were held not to be frustrated simply because the common test was not met, would be decided under French or Algerian law as involving cases of force majeure if its traditional conditions are met. This is so even if by the interruption the English test is not met.

Thus Tamplin or Port Line in which the contract was not frustrated and the freight was to be paid during the period of requisition, might be considered under French or Algerian law as involving force majeure and the contract may be held suspended during the time of requisition which would mean that the effects of the contract are also suspended. This difference -as has already been pointed out- is due to the fact that the English and the Scottish doctrine of frustration provides an "all or nothing" solution that is to say, either the termination of the contract if the common test is met, or its enforcement if the test is not met. Whereas if -under the English and the Scottish doctrine of frustration- the suspension of the contract were provided for cases where the delay for example was not so long as to make further performance, if enforced, a different thing, then such a contract might probably be suspended. This would make the decisions of French and English courts similar in a similar set of facts of a given case.

CHAPTER THREE. IMPOSSIBILITY AS REGARDS PARTIES TO THE CONTRACT

The impossibility of performance involved in a contract is not always related to the subject matter of the contract but it may concern its parties. It is this type of impossibility which will be discussed in this chapter. The impossibility here is the one dealing with the non availability of one of the parties to the contract. These instances are death, incapacity, mobilisation, imprisonment and strike.

Section One. Death.

A contract which requires specific skills from a party to a contract, may be frustrated by his death or incapacity.[1] Such a contract is called a personal contract[2], or a contract for personal services[3] (commonly called under French and Algerian laws 'contracts *intuitu personae*' ie those which cannot be performed unless by the debtor himself).[4]

Under English law a general rule is laid down by Pollock C.B in the case of Hall V. Wright[5], where he said:

> "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."[6]

---

1 See David M. Walker, Vol. 2 *Principles of Scottish Private Law* (3rd ed., 1983), at p. 135, and see Hudson's, *Building and Enginering Contracts.Including the Duties and Liabilities of Architects, Engineers and Surveyors* (by I. N. Duncan Wallace 10th ed., 1970), at p. 360, and see G. M. Sen at p. 144 .

2 Treitel (1983), defines it as a contract where:"one party relies on the skill and judgment of the other" p. 567.

3 Chitty Vol. 1 (1968), para. 1287.

4 As to French law see Marty (1962), at p. 529, and Mazeaud, *Responsabilite* (1970), at p. 712, and Marcel Planiol & Georges Ripert, *Traite Pratique de Droit Civil Français* Tome 6. *Obligations* 1ere Partie. (2eme ed., Paris, L.G.D.J. 1952), at p. 514, and Christian Larroumet, *Droit Civil. Les Obligations* 1ere Partie. Tome 3. (Ed Economica. 1986), at pp. 699-700, and G. Thery (1948), at p. 98.

5 (1858) E. B & E. 746, 793. Death is also a frustrating event under Scottish law. See J. Smith V. Mrs Ann Riddell (1886) 14. R. 95, and see D. M. Walker, *Principles..* Vol. 2 (3rd ed.) at p. 135.

6 Approved by Kelly C.B. in Robinson V. Davison (1871), 6 E.X.269, see

Therefore the contract would be frustrated in such a case.

A judgment in the same direction was given in the case of Stubbs V. Hollywell Ry Co ((1867)L.R.2 EX.311.),where the judges were of the opinion that the contract was one for personal services and that it was terminated by the death of the employee (Stubbs). In the case of Graves V Cohen and others ((1930) 46 T.L.R.121.), the defendant (Cohen) engaged the plaintiff to ride his horses for the "flat racing season" of 1928. But the defendant died before that date. It was held that the contract was frustrated by the death of the defendant. MR Justice Wright in giving his judgment said that this contract was either a personal one or that its performance depended on the existence of both parties.(Graves V Cohen at p.123.)

Obviously if the contract is not one which depends for its performance on the skill of a particular person then it will not be terminated by frustration. This is what was decided in Phillips V. Alhambra Palace Company ([1901] 1 Q.B.59.), where the plaintiffs, a troupe of four music-hall performer, entered into a contract with the proprietors of a music-hall called Alhambra.. This company was in fact a partnership of three persons, this fact was not known to the plaintiffs. After performing the first part of their engagement, they were told that their contract was terminated by the death of one of the partners. The question to be answered was, as Alverstone CJ (in the court of Appeal) said, whether the contract depended on "the personal conduct of the deceased party".[7] If that is so then the death is to put an end to the contract.".(Phillips V. Alhambra pp. 63-64).

The court found that this contract was not one for which personal skill was required, because plaintiffs did not know who were the partners. This was further explained by Kennedy J.[8] where he said that it does not matter to the plaintiffs, by whom they were to be paid, since as the counsel of the plaintiffs said "all the defendants had to do was to pay money, and

---

Gottschalk *Impossibility of performance* at p. 12., and see H. Lesguillons at p. 511. But see Mc Elroy, op.cit at p. 17, where he says that it is not necessary to base the discharge of personal contracts on an implied condition, since such excuse was recognised a long time ago.

[7] Phillips V. Alhambra pp. 62-3.

[8] Phillips V. Alhambra p. 64.

that could be done equally well by any one else.", therefore the contract was not frustrated.

Under French and Algerian laws the death of the debtor is also a case of force majeure[9] especially when the contract is concluded in consideration of the person of the debtor, (ie a contract *intuitu personae*). Some authors say that there is a tacit clause included in these contracts to the effect that the contract will be terminated by the death of the person in consideration of whom the contract was concluded.[10] (Cf with the principle put by Pollock supra in the case of Hall V. Wright)

Therefore it may be seen that English French and Algerian laws, consider the death of a debtor as an event putting an end to the contract. It is possible to say that the rule laid down by Pollock C.B, is a good theoretical basis for the solution held under French and Algerian laws in cases of death.

Section Two.Illness or Incapacity.

It has already been said that a general rule was laid down by Pollock C B in the case of Hall V. Wright (above). There it was said that in personal

[9] However, this is not always true. Bournan V. La New York , (Ch. des Requetes. June 15 th.1911.D.1912.1.181), was a case concerning a contract of insurance. The insured party was subject to an apoplexy (stroke) at the due date of payment of the premium. The death of that person followed immediately his attack, and therefore he was unable to pay the premium. His death was not considered as a case of force majeure. See Radouant, op.cit at p. 147, and Barry Nicholas, *French Law of Contract*, at p. 197.

[10] See Marc Vericel, "La Consideration de la Personne dans les Contrats Civils" (1982) 4 Travaux Juridiques de l'Universite de Saint-Etienne.185, at p. 193. However, where the contract is not concluded on this consideration, the death will not terminate the contract. See to this effect: Paris May 30th. 1969. Gaz. Pal. 1970. 2. somm.78. For other examples where the death of one of the parties to the contract puts an end to the contract see:art. 2003 Fr.C.C and art. 586 Alg.C.C. (contract of agency), and see art. 1795 Fr.C.C and art. 569 Alg.C.C (contract of hire of work,"contrat d'enterprise"), and see art.439 Alg.c.c (contract of partnership). See Travaux Juridiques op.cit at p. 194 (for the French articles only). It is also to be noted that where a worker (as in the case of art. 568 Alg.C.C which is almost similar to art. 1787 Fr.C.C et seq) undertook to do a work, died or was incapacitated by an event of force majeure after he begun the work, in such a case his death or incapacity may put an end to the contract he made, if that contract was *intuitu personae*.

contracts the death of either party puts an end to the contract. The same principle applies also where one of the parties is incapacitated by illness.[11]

Under French law the illness cannot be treated as a case of force majeure unless it meets the conditions of force majeure, that is, being unforeseeable, irresistible[12] and not imputable to the debtor. This is in fact an application of the principle which states that:"one does not have to promise a thing unless able to do it.".[13] Thus if a debtor knew that he would be ill but nevertheless made a contract to do (perform) a thing, he cannot thereafter invoke his illness which prevented him from performing his obligation, as a case of force majeure.(G. Thery at p. 100.) (See supra under 'unforeseeability')

An English example of the type of impossibility under discussion is the case of Boast V Firth ((1868) L.R.4 C.P 1.), where the defendant agreed to serve the plaintiff (Boast) as an apprentice for five years. Later the defendant could not perform the contract since he was prevented by permanent illness.[14] It was decided that the contract was terminated; because it was for personal services and the continued state of health of the apprentice which enabled him to perform the contract must be implied. To that effect Montague Smith J said:

> "It must be implied from the nature of the contract that the continued existence of the apprentice in a state to perform his part of it, was understood by the parties; and that, if prevented by the act of god, the performance was to be excused."(Boast V Firth p. 8.)

Brett J. said in the same case both parties considered that the performance of the contract depended on the continuing state of health of

[11] See Anson (1979), p. 499, and Fifoot (1986), p. 559, and Treitel (1983), p. 654, and see Konrad Zweigert & Hein Kotz (1987), at p. 221.

[12] G. Thery, op.cit at p. 132.

[13] Mazeaud, *Responsabilite* (1970), op.cit at p. 713.

[14] Where the illness is temporary only it was held that the contract cannot be frustrated, Patten V Wood (1887) 51 JP 549, cited in Dix & Crump, *On Contracts of Employment* (6th ed., London, Butterworths. 1980), para. 3.54. For a different conclusion see post. Normally under French and Algerian laws, when the illness is permanent, this would terminate the contract if the conditions of force majeure are met (for more details see infra).

the apprentice.

In this case, the incapacity was permanent. What is the position when the incapacity is only temporary?. Two cases can illustrate the position taken by courts. These are Poussard V Spiers & Pond ((1876) 1 Q. B. D. 410.), and Hart v. A.R.Marshall & Sons.([1977] 1 W.L.R.1067.) In the first case the plaintiff was engaged by the defendants to play in an opera, the engagement was for three months, from November 28th. On November 23rd the plaintiff ie Poussard fell ill, and on November 25th the defendants entered into a contract with another person to play at the opera. On December 4th, (ie about the eleventh day of the illness of Poussard) the plaintiff recovered and was ready to take her place, but she was refused. The court held that the contract was frustrated by her failure to attend the opera for the play. In arguing this decision Blackburn J said that:

> "... the failure on the plaintiff's part went to the root of the matter and discharge the defendants.".[15]

This is because the illness of Poussard was "serious and of uncertain duration".[16]

The second case is Hart V. A.R.Marshall & Sons ([1977] 1 W.L.R. 1067.) Hart in this case was employed in 1968. In April 1974 he fell ill, and on August 1974 his employer took another employee replacing Hart for a permanent period.[17] In 1976 Hart recovered and offered to take his

[15] The Poussard case p. 415. It may be noted that the principle has changed here, it is neither a question of 'performance depending on the continued existence of a person'(as in cases of death), nor is it a question of 'performance depending on the continued state of health' (as in cases of permanent incapacity). The question involved in the category of the present case is one of delay; in other words how long do we have to wait before treating the contract as frustrated. This is only possible where the delay is so long as to go to the root of the contract, or that further performance of the contract would render it a thing radically different from that undertaken.

[16] Treitel (1983), p. 583 see the Poussard case p. 415 and this is because as it is thought, courts cannot speculate as to the duration of incapacity, and this -as will be seen later- is the same principle where contracts have been frustrated because of a delay caused by war, because there too courts cannot speculate as to the duration of war.

[17] Colin Manchester, "Frustration or Dismissal?" (1978) 128.2 New Law Journal. 674 at p. 675. col. 1.

place, but he was refused. In bringing his action for unfair dismissal (which entitles him normally to compensation) the court of Appeal (EAT) held that the defendant was justified in not accepting him, and treating the contract as frustrated. In giving his judgment Phillips J. said:

> "It is..impossible to say that unless the employee is dismissed the contract must always be taken to continue. To do so would be tantamount to saying that frustration cannot occur in the case of short-term periodic contracts of employment.".[18]

A further argument is that Hart was a "key worker", therefore the employer could not continue during the illness of Hart by engaging other employees temporarily. It was not reasonable "to continue with temporary arrangements".[19] Such unavailability destroys the "business purpose of the contract".[20] It should be added that during the illness of Hart (the employee) he was always sending medical certificates to his employer. In reply to this the court said:

> "We do not think that these acts are inconsistent with the contract having come to an end. Employees like to keep in touch and employers are content that they should in case in the future there may be some opportunity of re-employment.".

What has been said about the employer might be true, but certainly not of the employee. This is because the employee treated the contract as still continuing, and the sending of the certificates is an evidence of that. Although the employer's intention to terminate the contract was made clear by his engagement of another person, what the employee claimed was that since the employer has accepted those certificates, by this act he showed that he treated the contract as still binding. This act has the effect to estop him from claiming frustration of the contract. The Tribunal rejected this, saying that:

---

[18] The Hart case p. 1070. It is interesting to note that under Algerian law -as will be seen- the illness of an employee, when it is considered as a case of force majeure, can suspend the contract for one or two years as a maximum duration. See infra.

[19] The Hart case p. 1071.

[20] Dix & Crump para. 3.49.

"there is no evidence whichever that the employee acted upon such representation, if there was one, whether to his detriment or otherwise.".

But this cannot be sustained, because if we look at the definition of estoppel, Lord Widgery C.J--in Norfolk C.C V. Secretary of State for the Environment ([1973] 3 ALL.E.R.673, at 677), said:

"The whole point of estoppel... as I understand it is that if a man has been induced to act to his detriment, he ought to be protected.".

In the case of Hart it can be said that Hart has acted to his detriment since he did not look for another job, relying on the assumption that his contract was still binding. (See Colin M., (1978) 128.2 N.L.J at p. 675 col. 2 & 3).

The two cases above show that even a short period of illness (eleven days in the Poussard case) may frustrate the contract. Again in the Hart case an illness of four months put an end to the contract. This may suggest that long duration of illness is likely to frustrate the contract. However, in another case, an illness which lasted eighteen months did not frustrate a contract, this was the case of Marshall V. Harland[21] which was decided in the court of Appeal and the contract was held as still binding. Sir John Donaldson said that to hold a contract as frustrated, we have to ask ourselves whether the illness was of such a nature -this is before dismissal- or "appear likely to continue for such a period"[22] that the performance of the contract becomes either impossible or radically different from that undertaken when making the contract. As to the present case, he said that, further performance of the contract was not impossible and would not be a thing radically different from that undertaken.(The Marshall case p. 905.)

Further guidance necessary in dealing with cases of illness, in order to know whether it will frustrate the contract or not, are laid down in Marshall V Harland (above) by Sir John Donaldson such as "how long employment was likely to last in the absence of sickness" and the "nature of performance" (perhaps he meant whether he is a key worker or not) and the;

---

21 [1972] 1 W.L.R. 899, cited by Dix & Crump ibid.

22 The Marshall case p. 904.

"nature of illness and how long it has already continued and the prospects of recovery- the period of past employment".(The Marshall case pp. 903-04.)

We may summarise what has been discussed by saying that in cases of illness we have to distinguish between two situations. The first one is where the illness is permanent. In this case the principle upon which courts base their decisions is the one put by Pollock C B in the case of Hall V. Wright. In such cases the continued existence of the debtor in a state of health to perform his contract is an implied condition to be read. The second is where the illness is temporary only. In this case the commonly used test of "the contract if enforced after the delay would be a thing radically different" is the one to be relied on in deciding cases of that type.

Under French law, in the following case the contract was not terminated because there was a lack of unforeseeability. Thus in Herviers et autres V. Ste Buffalo etc, (Dijon. July.19th.1945. Gaz. Pal. 2.139) a number of persons who were carried in a vehicle, were injured in an accident caused by a cerebral haemorrhage of the driver. The carriage was 'a titre onereux'.[23] The court decided that the driver's company (ie the Ste) was liable for damages. The argument of the court was that the illness could be known by a simple medical examination. This measure was not taken, therefore the (Ste) could not allege that the illness, which cannot be considered as unforeseeable, constituted a case of force majeure. It should be added that in addition to the unforeseeability of the illness, it must also be irresistible, or really dangerous as to put the debtor in an impossibility to perform his contract.[24]

[23] In such a contract the carrier has to carry the passengers to their destination in a safe condition and they should arrive as such. This obligation is called under French law as obligation of 'resultat'. In the case of breach of this obligation, the driver would be liable unless he can prove a case of force majeure -considering only our subject of study- which has prevented him from performing that obligation. (See this case). For a brief discussion of such an obligation as compared with English principles, see David Pugsley, *Le Droit Contemporain des Contrats. Bilan et Perspectives* Loic Cadiet. (Edition Economica. Paris. 1987), at pp. 160 et seq .

[24] Mazeaud, *Responsabilite* (1970), at p. 713. See also Epoux Damiette V. Epoux Fournier (Civ. Com. Jan 23rd.1968.D.1968. somm.65 and see Alain Benabent (1987), at para. 251. The illness of a buyer of a bakery which prevented him from using it did not constitute force majeure since it could not be considered as unforeseeable or insurmountable). The condition of insurmountability should be

In addition to the conditions cited above, ie that the illness should be unforeseeable and insurmountable, another condition is also required which is that it must not be due to the fault of the debtor. (e.g. alcoholism)[25] (cf with prima dona) But this is thought to concern cases where that fault was deliberately made in order to be released from the contractual obligation and does not appear to concern cases of illnesses caused by carelessness.

It should not be concluded from the cases above that the illness of a debtor could never constitute a case of force majeure. In two cases for example the jurisprudence was considered as indulgent.[26] Thus dental problems of an author who promised to write a book did constitute a case of force majeure exonerating him from his liability for non performance.[27] In another case an actor who promised to give a play in a city did not perform his obligation because of an epidemic 'qui regnait dans cette ville'. He was therefore exonerated from his obligation and was not liable for his non performance since that epidemic was considered as a case of force majeure.[28]

It is to be noted that in a contract of employment when the illness of an employee is temporary only, this will suspend his contract and not terminate it. The employee as well as the employer will not perform their obligations. That is to say the first will not provide his work and the latter will not pay him his salary, but the contract will be performed as soon as the employee is able to work. However, if the illness continues for a long

understood in a broad sense. That is to say "dans un large esprit d'humanite". See also Planiol & Ripert (1952), at p. 515 where it is said that the debtor who is ill is not obliged to perform the work he has promised, if that performance would be harmful to his health.

25 Mazeaud, *Responsabilite* (1970), at p. 712, and G. Thery at p. 100, and Radouant at p. 184.

26 Jean Carbonnier, *Droit Civil. 4/ Les Obligations* (9eme ed., P.U.F. 1976), at p. 267 , and Marty (1962), at p. 530.

27 See Paris Jan.7th.1910.D.10.2.292, and see Carbonnier id, and Marty id, and Radouant at p. 23, and Barry Nicholas, *French law..* at p. 197. This is also the case under English law, see Treitel (1987) at p. 669.

28 See Trib.Civ.Seine Apr.17th.1869.D.P.69.5.221, and see Alex Weill (1971), at p. 439 footnote. 1, and the (1986 edition) at p. 433 footnote. 254, and Marty (1962), at p. 530, and Ghiho (1983), at para. 643, and Fiatte at p. 14.

time as to affect the activity of the plant, it will be considered as a cause for the termination of his contract without the employee being paid what is called the indemnity of termination "licenciement".[29]

It can be said that under French as well as Algerian laws, permanent illness is likely to be considered as a case of force majeure (bearing in mind the exception under Algerian law, ie the incapacity due to the work itself). Here again, the principle put by Montague Smith (above) is a good theoretical explanation for cases of release because of permanent illnesses. Where the illness is temporary, we have seen that English courts use the test 'whether performance after the recovery of the employee would be a performance of a radically different thing from that undertaken'. Theoretically, it can be said that a similar consideration is also taken, although not discussed, by French and Algerian courts, when deciding cases of temporary illness which lasts for a long time, either for the suspension or the termination of the contract. Under Algerian law an illness which exceeds one and two years (see supra) puts an end to the contract. This is because further performance of the contract of employment, would be intolerable for the employer, since it

[29] Camerlynck G. H & Gerard Lyon-Caen, *Precis de Droit du Travail* (6eme ed., Librairie Dalloz.1973), at p. 156, and Carbonnier (1976), at p. 267. The illness which lasts for such a long time is a case of force majeure exonerating the employee. See also Brun A. & Galland H, *Droit du Travail* (Sirey. 1958), at p. 522, and Planiol & Ripert (1952), at p. 518, and P. Malaurie (1985), at p. 335 who says that the jurisprudence considers the illness of an employee as a case of force majeure where it is 'grave' or lasts for a long time., and see Encyclopedie Dalloz "Force Majeure" (1978), at para. 59.

Under Algerian law the illness of an employee -in the private sector- may either suspend his contract of employment or terminate it. Three situations should be distinguished. The first one is where there is what may be called an ordinary illness. If it does not exceed one year its effect would be to suspend the contract only. (See art. 20/1 Ordonnance n:75-31 du 29 Avril 1975 relatif aux Conditions Generales de Travail dans le Secteur Prive. J.O.R.A. n: 39 du 16 Mai 1975). The second one is where there are a certain type of illnesses the contract would also be suspended if the period does not exceed two years. (See art. 20/2 Ord.id). In the two situations mentioned if the illness exceeds one and two years, this would terminate the contract of employment. The third one is where the illness is due to an accident which happens during the work, or the illness is due to the work itself. In this case it would suspend the contract until the employee becomes able to continue his activity. (See art. 21 Ord id) See Ibrahim Z. A., op.cit at pp. 33-34. The contract would also be suspended in the case of a 'femme en couche'(pregnancy).(See art. 24/1 Ord id), and see Ibrahim Z. A. at pp. 34-5.

would be radically changed from that undertaken at the time of the conclusion of the contract. what has been said only applies when deciding either for the termination or the suspension of the contract, and not when deciding whether there is or there is not a case of force majeure, since this last decision is based on the settled conditions of force majeure.

Section Three. Imprisonment or Internment

The cases which will be discussed will show how this supervening event may discharge the contract.

In Horlock V. Beal ([1916] 1 A.C.486.) a British ship was detained in Germany after the war broke out between the two countries. The detention was for an indefinite period and the crew of the ship was imprisoned. The wife of the plaintiff (one of the crew) claimed his wages. The House of Lords in deciding this case held that the crew could not claim the wages, after the detention of the ship[30], since the contract was frustrated and further performance of it was impossible; because the ship was detained. Furthermore, the impossibility of Beal to perform his contract ie to serve on board the ship for the voyage was "so indefinite and so long that the adventure which was the whole basis of the contract has failed.".[31] Here the principle of Taylor was applied.[32] So we see that the adventure which was the foundation of the contract has failed, and its purpose defeated by the interruption.[33]

On the other hand, it was decided in the case of Nordman V. Rayner & Sturges L.T.R.((1916) 33 T.L.R.87.), that an internment which lasted one month did not frustrate the contract, because such internment was not sufficient as to destroy the basis of the contract, as was in Tamplin ([1916] 2 A.C. 397.) where it was laid down that "the interruption of business must be serious before the contract failed.".[34]

---

[30] (1919) 35 L.Q.R. p. 91.

[31] Per Lord Wrenbury at p. 526. Cf this with 'illness' supra (ie the illness was of uncertain duration.).

[32] Lord Wrenbury p. 526.

[33] Fifoot (1986), p. 559. In Unger V. Preston Co [1942] 1 ALL.E.R.200, Cassel J. at 203 said that the internment of the plaintiff was so long as to "frustrate the business purpose of the contract.". It has to be borne in mind that it is not the imprisonment itself which frustrates the contract, but the delay caused by it. See Christine Mogridge, (1982)132.2 New.Law.Journal., at p. 798 col. 3.

The last case which can be cited here is Chakki V. United Yeast Co.Ltd. ([1982] 2 ALL.E.R 446.) In this case an employee was sentenced to eleven months imprisonment, and was released on bail, pending an appeal against the sentence.[35] At the hearing he was placed on probation. When the employer was informed of the sentence of Chakki, he engaged another person instead of him. When the employee brought an action for unfair dismissal, the Industrial Tribunal held that the contract was frustrated at the date of the sentence. The employee appealed, and the Employment Appeal Tribunal, held that the contract was not frustrated. To that effect Neill J. said that the previous decision "erred in law in deciding" the contract as being frustrated "immediately on the imposition of the sentence of imprisonment.."(The Chakki case p. 450.)

The test to be used therefore, in deciding whether in such circumstances the contract is frustrated, is as Neill J said (The Chakki case id.), referring to the speech of Evershed MR in the case of Atlantic Maritime Co Inc V. Gibbon ([1953] 2 ALL.E.R. 1086 at 1095-6.):

> "Would a reasonable man in the position of the party alleging frustration, after taking all reasonable steps to ascertain the facts then available, and without snapping at the opportunity of extricating himself from the contract, come to the conclusion that the interruption was of such a character and was likely to last so long that the subsequent performance of the contract would amount to the performance of a new contract ? ".

When this test is applied to the aforementioned case, it is clear that the engagement did not comply with it. Especially when the employer engaged another employee at the same time when he knew of the sentence of his employee. Further guidance was suggested in the case of Harrington (above) such as the employment period as a whole and the length of time the employee is expected to be absent from his work, and "the importance of getting someone else to do his job meanwhile" (ie whether he is a key worker or not).[36] It may be noted that there is some

34 The Nordman case p. 88.

35 The fact that there is an appeal against a sentence imposed does not prevent frustration from being applied. Per M.R.Justice Talbot in Harrington V. Kent County Council [1980] I.R.L. 353, at 355 col. 2.

similarities between the guidance already cited and the one cited in cases of illness.

However, both Harrington (contract held frustrated by imprisonment) and Chakki (see above), were held to be of 'doubtful authority' in Norris V. Southampton City Council ([1982] I.R.L.R.141), because it is said in this last case that an impossibility caused by one's own conduct cannot be treated as frustration but as repudiation, which entitles the employer to dismiss the employee.[37]

All this means that imprisonment for a criminal offence cannot amount to frustration, since it is inconsistent with the rule that frustration must not be self-induced. However, Lord Denning M.R took another view in the case of Hare V. Murphy Bros Ltd ([1974] I.C.R. 603 (Court of Appeal)). In this case a sentence of 12 months imprisonment was held to put an end to the contract of employment. His Lordship said:

> "If Mr Hare had been grievously injured in a road accident -due to his own fault- and incapacitated for eight months the contract would be frustrated. If a prima donnathoughtlessly sits in a draught and loses her voice, the contract may be frustrated by illness even though it may be said to be self induced frustration. So also here, where the man committed an unlawful act and was sentenced to 12 months imprisonment, the event was so unforeseen and the delay so long that the contract of employment was brought automatically to an end when the sentence was imposed.". (Cited in (1982) Solic Jou at p. 651).

But Lord Denning's arguments were met with doubt by Mr .. Justice Kilner Brown in Norris (see above). He said that it was Lord Denning only who declared -in Hare- that the contract was frustrated. The other two judges viz Stephenson L.J. "left open the question whether it was frustration or repudiatory breach." (ie the imprisonment), whereas Lawton L.J. "made no reference to the question at all.". (Per Kilner Brown at 142 col. 2). However, in F C Sphepherd & Co Ltd V. Jerrom ([1986] 3 All.E.R 589 (C A)), Lawton L.J. speaking of Hare -in which he was himself a judge- said that "Since it is not clear

---

36 Cited in Keith Gibson, "The Effect of Imprisonment on Contract of Employment" (1982) 126 Solicitors' Journal.651, at p. 651, and see further (1982) 132.2 N.L.J at p. 795 col. 2.

37 See (1982) Soli.Jou at 651 col.b., and this means that it is a self-induced frustration. See (1982) 132.2 N.L.J at pp. 795 col. 1, & 797 col. 3. This is also the opinion of Treitel (1987), at pp. 700 & 703.

on what grounds the court as such decided Harre's case I do not regard it as a binding authority".

But it cannot be doubted now that imprisonment can constitute a frustrating event. In Jerrom (above), it was held that the imprisonment of an employee can constitute a frustrating event, though in this case there was no frustration because the test of the "performance would be radically different" after the interruption caused by the imprisonment was not met.

We may conclude from what has been said that imprisonment can be treated as a case of frustration if it fulfills the test that the performance of the contract after the delay caused by imprisonment, would be a performance of a radically different thing from what was undertaken. The allegation that imprisonment itself is a self induced frustration was not convincing and this relying on the cases cited above.

As to French law it seems that an imprisonment of a debtor can never constitute a case of force majeure; since it supposes a fault in the part of the debtor. Thus in Diagola V. dewinter, (Civ.May 14th. 1969 .D. 1970. somm.44) (contract of lease of houses), a lessee who had to pay the rent, invoked his imprisonment as a case of force majeure exonerating him -as he alleged- from his obligation to pay the rent. This allegation was rejected because an event of force majeure supposes its unforeseeability and its non imputability to the debtor, whereas the imprisonment supposes a fault in the part of the debtor[38], and therefore could not constitute a case of force

---

[38] When the supposed event of force majeure is due to the fault of the debtor there cannot be any exoneration. It is for this reason that the bankruptcy of the debtor cannot constitute a case of force majeure. A shortage of both materials or personnels (used in the performance of the contract), are not cases of force majeure for the debtor who invokes them. As to the question of unemployment, the Court of Cassation in Epoux Levy V. Soc. Cooperative. Civ. 3eme Ch. April 19th. 1972. D. 1973. 205 C. Cass, made it clear that unemployment can constitute a case of force majeure. In this case the Court of Cassation quashed a judgment which did not consider the possibility of exoneration because of unemployment. When this case was reheard in the Court of Appeal of Orleans October 25th. 1973. D. 1974.66. the Court decided that the unemployment of a debtor in this case could not constitute a case of force majeure unless it has the traditional conditions of non imputability, unforeseeability at the time of the conclusion of the contract, and irresistibility. That is to say that unemployment had put the debtor in an absolute impossibility to perform his contract. These conditions were not met -said the Court of Appeal- therefore the debtor was not exonerated. See the comment of H. Souleau under both cases. See also Alex Weill

majeure.

Section Four. Mobilisation.

As we will see, since mobilisation or calling up involves an interruption on the part of the debtor of his obligation to perform the contract, English courts mainly use the common test of `performance if enforced would be a radically different thing from that undertaken'. Where this test is met then courts may hold the contract frustrated. French courts on the other hand require the traditional conditions of force majeure in order to decide whether there is a case of force majeure or not. It is even possible to say that French courts consider the length of time in which the debtor is unavailable and this in order to opt for the appropriate effect of force majeure. That is to say either the suspension or the termination of the contract.

§.1. Mobilisation Under English Law.

In this context two cases can be cited viz Marshall V. Glanville ((1917) 33 T.L.R.301.) and Morgan V. Manser ([1948] 1 K.B.184.). In these cases the contract was held to be frustrated when the employee was called up for military service (compulsory). In the first case MR Justice Mc Cardie said:"... the operation of the Conscription Act was to sweep away the basis of the arrangement between the parties.."[39], the basis of that contract was that parties made their agreement on the footing that performance of the contract would continue to be lawful, and this was defeated by that Act.[40]

(1986), at p. 431, and see Carbonnier (1976), at p. 266, and see P. Ghiho (1983), at para. 640, and P. Malaurie (1985), at p. 334. It has already been said that unemployment should not be imputable to the debtor. H. Souleau gave an illustration of this. Thus if an employee by breaching his contract is sacked, his unemployment cannot be considered as a case of force majeure. See also C. Larroumet (1986), at p. 700 footnote. 299. But even if the unemployment constitutes a case of force majeure, it would exonerate the debtor temporarily. See Georges Durry, cases and comment (1976) n: 21 Revue Trimestrielle de Droit Civil.151, at p.151.

39 The Marshall case p. 302.

40 See McNair (1940) 56 L.Q.R. p. 189 where he says that it was sufficient for Mc Cardie in that case to say that the contract was frustrated, as the performance was unlawful, instead of referring to Tamplin (the ground upon which that case was decided was that the war will be so long as to put an end to the contract), but he did not say that

Moreover, the interruption in the performance of the contract caused by the conscription, was so indefinite as to destroy the purpose of the contract.[41]

The same thing can be said for the second case[42]; because the conscription was of an indefinite duration, to enforce the contract would be to impose upon the parties a new contract. Streatfield -in that case- put the question whether the contract after the calling up would be radically different "having regard to the prospective delay" as to put an end to the contract.(The Morgan case p. 192.)

It can be said that in a case of calling up, a contract can be frustrated on the base of illegality. But since this illegality might be temporary only, another test should be added. Thus if the interruption caused by the calling up is of an indefinite duration, the contract should be held frustrated where performance after the delay would be radically different from the one undertaken.

§.2. Mobilisation Under French Law.[43]

In the case of Ste Dumas V. Dlle Tiberghien,(Seine Feb.14th. 1941.Gaz. Pal.1941. 1.355), an employee of the (Ste) was mobilised. The (Ste) stopped as a consequence of this its activity and sacked 18 of its employees arguing that the mobilisation of an employee did put it in the impossibility

---

it was incorrect to refer to that case, but that it was sufficient to say that performance was illegal. This is in fact what Mc Cardie -inter alia- held in that case. He said that parties made their contract on the footing "... that it would continue to be lawful to perform and to accept the contemplated service..". See Mc Cardie in the Marshall case (above) p. 302, and see Mc Elroy and Williams, *Impossibility of performance* (1941), pp. 92-3.

41 Fifoot (1986), p. 559, and Treitel (1983), p. 656. Notice the similarity with cases of temporary illness supra.

42 In that case the contract was entered into in 1938 for 10 years. In 1940 the defendant was called up, and was demobilised in 1946. The question before the court was whether such calling up frustrated the contract. It is to be noted that both parties during the period of the calling up treated the contract as still subsisting. See R.E.M "notes" (1948) 64 Law Quarterly Review.179 at 180.

43 Under Algerian law the calling up is a cause of suspension of the contract of employment and this during the period of that service (two years). See art. 16 Ord.75-31., and see Ibrahim Z. A. at p. 32.

to continue its activity. The tribunal declared that the (Ste) should prove that it was in a real impossibility to continue the activity in question, that the event was insurmountable and that it actually stopped the production. None of these were proved, therefore it was decided that the (Ste) should pay damages for the termination 'licenciement' of Dlle.[44]

However, where the mobilisation puts the debtor in an impossibility to perform his contract, this constitutes a case of force majeure.[45] As to the effect of this event, it will either suspend the contract or terminate it.[46]

In Nord-Sud V. Robert, (Trib. Civ.Seine. March 2nd.1915. Rec. Gaz. des Trib.1915. 2. 158., and see Fiatte at p. 81), an employee was mobilised on August 11th 1914, and was freed on August 22nd (ie 11 days). The tribunal declared that such an event should only suspend the contract. Which means that there is a case of force majeure, but that its effect would be to suspend the contract.

In another case (Trib.Civ.Seine.Apr.21st.1915.Rec.Gaz.des.Trib.1915.2.158), a director of a plant was mobilised by mistake, and shortly after was freed. The tribunal decided that his contract was suspended and not terminated. Here again the effect of force majeure is the suspension of the contract.(Fiatte p. 81)

In the case of Ste des Hauts Fourneaux V. Couturier, (Cour de Caen. Feb. 2nd.1916.Gaz.des Trib.1916.2.413)[47] the court decided that the mobilisation of an employee should suspend his contract. The argument was that during the event, the employee was not replaced by another person, which proved that the employer himself treated the contract as suspended only and not terminated.

Possibly when French or Algerian courts decide either on the

---

[44] In Begnier V. Legion Proust, (Trib.Civ.Melle.Oct.23rd.1915.D.1916.2.83) a farmer was not exonerated from her obligation, regarding her customers, when she invoked the mobilisation of her husband and sons. it was decided that this could not constitute a case of force majeure because she could get the help (farming) of the army who received such instructions. (Lack of irresistibility). See Radouant at p. 34.

[45] P. Ghiho (1983), at para. 461.

[46] Fiatte at pp. 80-81 and the reference to cases cited there.

[47] See Fiatte at p. 83 and see also Balland V. Kahn,Trib.Com. Nancy. Dec 6th.1915. Gaz. Pal. Nov 4th.1916 (in this case the contract was suspended). Fiatte at p. 83, and see Acquitaine V. Ravaud, (Cour de Bordeaux.Jan 10th.1917. Gaz. Pal. Feb 7th.1917 (contract was also suspended in this case), see Fiatte at p. 84.

termination or the suspension of the contract, the English test of 'performance after the interruption would be a thing totally different from that undertaken' may be a good element to be used when opting for one of the two solutions cited above.

Regarding the question of impossibility as regards parties to the contract, as it can be seen under English, French and Algerian laws, death is a frustrating event (a case of force majeure). As to permanent illness, under French law it appears that the traditional conditions of force majeure are also required otherwise no release would be allowed. However, under English law such a requirement (ie requiring the conditions of frustration, e.g being self-induced or the common test) does not appear to be necessary. As to temporary illness, English courts, as we have seen, require the common test of 'performance if enforced..'. As to French courts they also require the traditional conditions of force majeure. Thus English law as regards cases of illnesses appears to be less rigorous than French law.

As to the case of imprisonment, the solution is totally opposite in the two systems. Whereas English law treats it as any other frustrating event, French law considers it as lacking the condition of non-imputability. As to the case of mobilisation, English courts decide for the termination of the contract when the common test is satisfied, whereas French courts base the decision on the conditions of force majeure. The French cases in which one of the parties to the contract was mobilised for a short period and was freed later on, would not be considered as frustrating events under English law, and the contract of employment would be treated as still in force (ie during the time of mobilisation). This is true unless time is of essence.

It can be said that in all cases where the performance of the contract is hindered because of a legal impossibility (which under French or Algerian law would be considered as a 'fait du prince') but that prevention is short, the contract will not be held frustrated under English law, whereas it would be considered as suspended by force majeure under French and Algerian laws. This would include cases of requisition, seizure, ships being trapped, calling up or mobilisation.

As has already been pointed out, if English courts were allowed to

suspend contracts in cases of temporary frustrating events, ie those which involve some delay, then they would probably hold them as frustrated and opt for their suspension rather than their termination. This would have made the solution of English, French and Algerian laws similar.

Section Five. Strike.[48]

A strike in a company may stop its production of goods, or the delivery of the promised goods to the creditors (e.g. buyers). In general terms it can put the owner of a plant in the impossibility to perform his contract. The question to be decided is therefore whether a strike can be considered as a case of force majeure and in what circumstances.

The strike is not in itself a case of force majeure.[49] Therefore it has to be unforeseeable as well as irresistible[50] and not imputable to the debtor.[51] An example of the last condition is where the employer for example did not care about the revendications of his employees, although he was able to satisfy them [reasonably].[52]

---

[48] Under Algerian law strike is allowed in private companies only. This right is affirmed in art. 61/2 of the Constitution of 1976 (and see art. 54 of the Decret Presidentiel n:89-18 28 Fevrier 1989 relatif a la publication au J.O.R.A. de La Revision Constitutionnelle adoptee par referendum du 23 Fevrier 1989. J.O.R.A. n: 9 du 1er Mars 1989). See also art. 21 of the 'Loi.n:78-12 of august 5th.1978'. The effect of the strike is to suspend the contract of employment and not to terminate it (see art. 27 of the Ordonnance n:75-31 du 29 Avril 1975 relatif aux Conditions Generales de Travail dans le Secteur Prive. J.O.R.A. n: 39 du 16 Mai 1975.). See to this effect Ibrahim Zaki Akhnoukh, op.cit at p. 40, and see Rached Rached, *Studies of the Algerian Law of Employment* (Algiers. O. P. U. 1985), at p. 102.

[49] Lalou, *Responsabilite* at para. 285.

[50] See Mazeaud, *Responsabilite* (1970), at p. 710.

[51] See Mazeaud, *Leçons* (1985), at p. 637, and Carbonnier (1976), at p. 266.

[52] Carbonnier (1976), p. 266, and see Radouant at p. 141 with reference to cases. It is in fact Carbonnier who uses the word 'reasonably'. This may presume that the employer is not obliged to give satisfaction to the revendications of his employees. It is in this respect that the court of Poitier decided the case of Morel V. Ste St Gobin.(Jan.12th.1903. D.1903. 2. 389). However, such conception will in fact dismiss the condition of irresistibility. This is because in order that an event constitutes a case of force majeure, the performance of the contract has to be absolutely impossible. Therefore the employer should always satisfy the revendications of his employees, and this in order that he can perform the contract he may conclude with a customer (creditor). The same opinion is hold by Radouant at p. 143, and see Fiatte at

The cases which will be studied concern the conditions of unforeseeability and irresistibility. It is important to say that these two conditions have to be met together. In other words they are not alternative but cumulative.[53]

In the case which will be studied below it was decided that the strike did not constitute force majeure because it was not unforeseeable. But in two other cases it was considered as constituting a case of force majeure.

In Bouvier V. E.D.F,(Trib. Gde Instance April 29th.1963.D.1963. 673) (E) in Feb 16th 1961 concluded with (B) a contract for the supply of electricity. In May 29th 1962 the employees of (E) went on a strike which covered the whole territory of France. In other words it was a general strike. (B) sued (E) for damages since he suffered damages by the interruption in the supply of electricity. The tribunal remarked that the strike was in fact irresistible for (E) since it concerned all the employees and covered the whole territory. It also remarked that it was impossible for (E) to provide the electricity during the period of the strike. However, it was decided that (E) was not exonerated because the strike was not unforeseeable. This is due to the fact that before that strike, there was some dissatisfaction (mecontentement) amongst the employees of (E)

---

p. 10.

[53] See Trib.Gde Instance de Lavale. April 29th.1963.D.1963.673 at 673 col. 2. Almost all the decisions require the two conditions, and this in every case and not only in the case of a strike. See Larroumet (1986), at p. 702. It was decided in (1ere.Civ.March 7th.1966.Bull. Civ.1966.1.130.n:166.Gaz.Pal.1.409) that "the irresistibility of an event is sufficient to constitute force majeure, where its foreseeability would not have changed the situation of the debtor.". This in other words means that where the event of force majeure is unforeseeable when the contract was made, but that event became foreseeable at the time of the performance of the contract, and that foreseeability could not help the debtor when performing the contract, such as to prevent the damages which that event may cause, in this case the foreseeability of the event would not prevent it to constitute a case of force majeure.See P. Ghiho (1983), at para. 642, and see Henri Mazeaud et François Chabas, *Exercises Pratiques de Droit Civil* (1986), at p. 102, and see Encyclopedie Dalloz (1978), under "Force Majeure" at para. 80-81. However, if the promisor foresees the impossibility of performing the contract, but nevertheless makes the contract, in this case he will be presumed to have taken the risk of its non performance. Therefore it is rightly decided when the courts require that the event of force majeure must be unforeseeable as well as irresistible.

and that the negotiations (pourparlers) between the representatives of both the employer and the employees were negative. The consequence of this is that the strike cannot be considered as a case of force majeure.

What should be noted is that the unforeseeability of an event should be considered at the time of the conclusion of the contract and not at the time of its performance. In this context the Court of Cassation declared that an event cannot constitute a case of force majeure"where the debtor could normally foresee the event (of force majeure) at the time he concluded the contract.". (See the comment of G. Durry, (1966) R. T. D. C p. 823, n:27). What can be said about the reported case (ie Bouvier), is that although the unforeseeability should be considered at the time the contract is concluded (in this case 16th Feb.1961), at that time the strike was unforeseeable, but not at the time of its performance (in this case May 29th 1962). Nevertheless the Tribunal referred to the last date.

The Tribunal remarked that when the strike occurred EDF could not do anything to prevent it or its consequences, therefore it was irresistible. Following the principles of force majeure, the Tribunal should not base its decision (liability of EDF for the strike) on the fact of the foreseeability of the strike at the time of performance of the contract. Therefore it can be said that since the strike was unforeseeable at the time the contract was concluded, and it was irresistible when it did happen and therefore put EDF in an impossibility to perform its contract, EDF should have been exonerated from its liability for non performance.

However, in the following case the condition of unforeseeability was met. Thus in Ste Anon. Musee Grevin V. E.D.F, (Civ. Com. Nov. 21st. 1961 .D.1968. 279.C.Cass) (E) in 1958 concluded a number of contracts with (SA) for the supply of electricity. In 1961 a strike of the employees of (E) interrupted that supply. (SA) sued (E) for damages. The Court of Appeal decided that the strike constituted a case of force majeure, therefore (E) was not liable for any damages caused to (SA). In this case the only question dealt with was the unforeseeability of the strike. It was decided that the strike was unforeseeable for (E) since "the situation depended on the government.". The Court of Cassation confirmed this decision.

What can be said about the unforeseeability of the strike in this case,

although its consideration was not explained in the law report, is that at the time the contract was made "there was not any reason which may suggest the eventuality of a strike".[54] The Court of Cassation itself has deduced the unforeseeability of the strike at the time the contract was concluded, from what the Court of Appeal decided when it remarked that until the occurrence of the strike, (E) could not foresee its happening, and this means (as it appears to the C.Cass) that at the time the contract was made, the strike was certainly unforeseeable for (E).[55]

It was during the performance of the contract (not at the time of its conclusion) that the strike occurred and this was due to government's decisions. It was therefore impossible for (E) to prevent that strike; since every thing depended on the government. It can be said for example that the government reduced the wages of the employees of (E), and this if the revendication concerned the problem of wages.[56]

This judgment was commented upon by Helene Sinay (see Ste Anon. Musee Grevin V. E.D.F, supra), who considered it as one of principle. That is to say, every time the solution of such problems depends on the government, any strike would be considered as unforeseeable for (E). However, it is submitted that it may be the case that at the time the contract of supply of electricity between (E) and a customer was concluded, there was already a conflict between the representatives of the two parties (employer-employee) concerning for example the wages. This situation would probably, as a result, induce the occurrence of a strike. This means that the strike could not be said to be unforeseeable, even if it is supposed that the policy concerning the wages was within the competence of the government alone. This would mean that there was a reason to expect, sooner or later, a strike.[57]

---

[54] Mazeaud, *Leçons* (1985), at p. 633.

[55] This was the deduction of the Court of Cassation of the unforeseeability of the strike. See to this effect the comment of G. Durry, (1968) R. T. D. C p. 733 n:25.

[56] See Larroumet (1986), at p. 701. This author, in citing the decision in Ch.Mixte. Feb 4th.1983.3 arrets.J.C.P.1983.iv.123, says that one of these decisions noted that the cause of the revendications of the employees was unforeseeable at the time of the conclusion of the contract of supply of electricity.

[57] See P. Ghiho (1983), at para. 644, who says that the industrialist who promised to supply some goods to his creditor, cannot invoke a strike which stopped the production, if it is proved that the strike was in preparation when the contract was

In Ste Boulonneries etc V. E.D.F,(D.1984.IR.165.C.CASS) after (E) concluded a contract with (Ste) for the supply of electricity, the government took certain measures concerning the wages of the employees. A strike of the employees followed those measures. In this case the government's decisions were unforeseeable at the time the contract was concluded. For this reason the Court of Appeal decided that the strike constituted a case of force majeure for (E) exonerating it from any liability. This is because the strike was unforeseeable and it was impossible for (E) to get other employees.

This case was concerned only with the question of unforeseeability of a strike. Other cases however, considered the other conditions of force majeure, such as the irresistibility of the strike. This condition may or may not exonerate the debtor depending on the circumstances of each case.[58]

In two other cases viz, Alibert V. Cie des Forges etc (Trib. Civ. Montluçon. Feb.21st.1951.D.1952.279) and Cie des Forges V. Bardonnet, (Civ.Soc.Oct 18th.1952.D.1953.149) an employee was prevented from working in the plant in which he was employed because of a strike, since the entry to the plant was blocked by some bars brought by the strikers. The employee sued therefore his employer for the wages due to him for the days in which he was prevented from working (ie during the strike). In the two cases (above) it was decided that the employer should pay the wages to the employee, since the strike was not insurmountable. It was also pointed out that the employer could obtain by a special procedure[59] the expulsion of the strikers, which would give the employee the possibility of providing his services.

---

concluded.

[58] In one case a carrier by sea, who had to carry passengers, was prevented from doing so because of a strike. Nevertheless it was decided that he was liable, since he could charter a plane to perform his contract of carriage. See Cass.Com.Nov 12th.1969.J.C.P.1971.ii.16791. Mazeaud, '*Leçons*' 1985 at p. 634. For other examples see Jacques Flour et Jean-Luc Aubert, *Droit Civil.Les Obligations* vol. 2. *Sources*: *Le Fait Juridique* (Armand Colin. 1981), at para. 779. See also for a case where the condition of insurmountability was not met Epoux Butin V. E.D.F.,G.D.F., (Trib.d'Instance.Saint-Denis, August 25th.1983.D.1985. 26).

[59] For more details on this procedure see Camerlynck G. H & Gerard Lyon-Caen, *Droit du Travail* (11eme ed., 1982), at pp. 989-90-91.

This decision was confirmed in the second case by the Court of Cassation.

In this case the employer did ask for the help of the authorities (the attorney general and of the 'prefet'). But the court decided that no real measure was taken in order to clear the plant of the strikers. In general what the employer did was insufficient to exonerate him from his liability. As is seen in this case, it is the condition of irresistibility which was not met. Therefore the strike could not constitute a case of force majeure.[60]

A less rigorous position is manifested in the case of Dunlop V. Dumarcay, (Civ.Soc.Oct.28th.1957.D.1958.somm.88). Since the strikers who occupied the plant of the employer put him in the impossibility to control the entry to the plant, it was decided that this event constituted a case of force majeure exonerating the employer from his obligation to pay the wages of the non strikers.[61]

In another case (Com.Beziers.Dec 5th.1938.Gaz.Pal.1939.1.306)[62] an

---

[60] It is interesting to note the comment made by Pierre Mimin on this case. The tribunal -said that author- was considering the question of force majeure regarding the employer, whereas it was the employee who has to prove that he was in an absolute impossibility to provide his work. That is to say that he was in a case of force majeure exonerating him from performing his obligation to work. The argument of this author was that the employer is not under the obligation (in a contract of employment) to bring the employee to his work.[" L'obligation d'amener l'ouvrier a pied d'oeuvre..."]. see this case at p. 282.2. This in other words means that the plant was there and it was open, therefore it was for the employee to get in.

[61] It might be said that the obligation of the employer is to pay the salary of the workers. The natural deduction from this concept would be that there cannot be any impossibility for the employer to perform his obligation even in cases of strike. Because paying money (the wages) can never be impossible. However, the jurisprudence has not accepted such a concept. The obligation of the employer as well as of the employee should be considered as inter-related. This means that the employer is not obliged to pay the wages unless the employee provides his work. This is called in French law the connection of the promises in synallagmatic contracts. It is for this reason that the employer in such cases should be exonerated. See Radouant at p. 19 reference to cases are cited there, and see G. H. Camerlynck etc, *Droit du Travail* (1982), at pp. 978-79.

[62] See Mazeaud, *Responsabilite* (1970), at p. 711 footnote. (4 bis). In another two cases viz, E.D.F V. Ste Anon.Gaillon Nov 8th. 1979 D.1980. IR. p.441, and June 4th.1980. J.C.P. 1980. 19411. concl. P. Besnard, a strike was considered as a case of force majeure, and therefore exonerating the E.D.F from its obligation to supply

owner of a garage who promised to repair a vehicle, was prevented from so doing, because his employees were occupying his garage. It was decided that such an event constituted a case of force majeure for the debtor (the owner).

---

the electricity. Because that strike was unforeseeable and inevitable. See the comment of G. Cornu, (1981) R. T. D. C. p. 171 n:4. What should be noted in this case is that the strike was certainly exterior to the debtor -although not discussed in that case-, because it was due to a blocage of salary decided by the government. However, it can also be said that this character was not met if we consider E.D.F as a part of the government (a public enterprise).(Cf the Rolimpex case supra under the condition of non-imputability). See also the case of Ste Boulonneries etc. V. E.D.F. (supra), where EDF (which is a public enterprise) was exonerated from its obligation to supply electricity because of the strike of its employees. The strike was in fact due to some decisions taken by the government concerning the wages of employees. Here it can be said that there should not be any exoneration, if we consider EDF as the state itself (ie the condition of 'cause etrangere' was not met.). See to this effect the comment of J. Goineau under this case. A similar question can be found in the case of Greard V. Cie Air France (1ere espece) and Cie Air France V. Tremoulet (2eme espece) (Ch. Soc. April 15th. 1970. 2 arrets. D. 1971.107 C. Cass. this case is discussed under "non-imputability" supra).

CHAPTER FOUR. LEGAL IMPOSSIBILITY and ILLEGALITY (OR 'FAIT DU PRINCE')[1]

The performance of the contract may become illegal after the contract is made. What are the effects therefore of such an illegality on the whole contract. From the cases discussed hereafter two types of illegality will be seen. One is where performance is prevented by a subsequent government prohibition which may result from an outbreak of war or for other reasons. The other is where such illegality arises when there is a state of war, which involves trading with the enemy.

In the first type there is no intercourse with the enemy, but it is the legislator who intervenes and prohibits the performance of the contract. Although legal restrictions can be studied together with government prohibitions, it is here preferred to treat these two subjects seperately under three headings; the first is government prohibitions, the second is legal restrictions and the last is trading with the enemy.

In what follows we will see that English courts usually use the common test of 'performance if enforced would be a thing different from the one undertaken'. This is so when the prohibition is for an indefinite period. In some cases public policy is the reason of holding a contract frustrated

[1] Fait du Prince is the equivalent concept of legal impossibility. Under English law it has been suggested that the discharge of a contract by illegality is based on public policy, and not upon impossibility in performance, or that the circumstances have become radically changed. See John Tillotson, *Contract Law In Perspective* (1981), at p. 144. However, this may be true for certain cases but not all cases of illegality, otherwise those contracts would be frustrated at once. But as will be seen, this is not true for the Cricklewood case (post). In that case the "radical change in the obligation" test was used to decide the non frustration of the contract. See also Mc Elroy op.cit (cited at footnote. 7 this chapter) when commenting on the Metropolitan case says that both the question of illegality and the "radical change" were involved and neither alone would have been sufficient to frustrate the contract . Apart from this nothing seems to prevent one from saying that in cases of illegality there is an imposssibility of performance. The only difference with the other cases of impossibility is that it is here a legal one though materially it can be done. We will note that under French law, even in cases of illegality, courts require the conditions of impossibility of performance, that is, whether the intervention of the authorities has put the debtor in an absolute impossibility to perform the contract. This could with benefit be adopted by the Algerian law.

(such as the act of trading with an enemy). It should be said that French courts will treat any case involving a prohibition by an authority as a 'fait du prince', in other words as constituting force majeure. However, all the traditional conditions of force majeure should be met even in the case of a 'fait du prince'. In the following Section we will study government prohibitions as understood in English and French laws.

Section One. Government Prohibitions

§.1. English Law Regarding Government Prohibitions.

In the cases discussed here it will be seen that the interference of government in the undertakings of parties may frustrate the contract they have made. This depends in each case on whether the performance, if enforced, would be something different or not (as in Metropolitan and Baily), or whether the probable length of the prohibition will destroy the basis or the identity of the performance of the contract (as in the Crickelwood case).(which in fact means the previous test.)

In the case of Baily V. De Crespigny[2], premises were leased for a period of 89 years. The lessee covenanted that :"..neither he nor his assigns.."[3] would permit anyone to build on the land which joined those leased premises. By an Act of Parliament and being empowered to do so, a railway company acquired compulsorily that land and built a railway station. The plaintiff alleged that the defendant (the lessee) breached his covenant by assigning the title to land to the railway company. Before the court, the question to be answered was whether the defendant was discharged or not by that Act of Parliament.

Hannen J. in applying the maxim *lex non cogit ad impossibilia*[4],

---

[2] (1869) L.R. 4 Q.B.180. See Mc Elroy, op.cit. at pp. 34-35.

[3] Ibid.

[4] Which means "The law does not compel the impossible" Osborn's, *Concise Law Dictionary* (7th ed., London. Sweet & Maxwell. 1983). The same judge held that the assignment created by the subsequent legislation cannot be in the contemplation of parties when the contract was made, because the defendant could not compel the new asignee (the company) not to build on the premises, as he could with an ordinary assignee. See the speech of Hannen J at 186. See also Atiyah, *Introduction to the Law of Contract* (1975), at p. 202 who explains the termination of a contract because of illegality (by change in the law) on the ground that "there cannot be default in not doing what the law forbids to be done.", and see D. M. Walker, *Principles*.. Vol. 2 (3rd ed.)

held that the contract was terminated and to

> "..hold a man liable by words, in a sense affixed to them by legislation subsequent to the contract, is to impose on him a contract he never made." or " an entirely new contract for the parties".[5]

The second case where the contract was held frustrated by a government prohibition is Metropolitan Water Board V. Dick Kerr Company Ltd ([1918] A.C.119.). This is a case where reservoirs were to be built within six years. The contractors had started the work in 1915, but in 1916 they were ordered by the Ministry of Munitions to cease the work. Therefore they treated the contract as at an end, whereas the plaintiff (Metropolitan..) treated it as still binding.

Before the House of Lords, Lord Finlay affirmed the decision of the Court of Appeal, as the contract had become impossible of performance.[6] It is to be noted that there was a provision in the contract which extended the time of performance if supervening events hindered further performance. But Lord Dunedin said that such a provision was intended to deal with temporary difficulties and could not cover circumstances, where :

> "...a set of occurrences...would make the contract when resumed a really

at p. 136, and Gloag (1987), op.cit at para. 11.12.

[5] Baily at 186-87. Hannen J. refered to the case of Brewster V Kitchel 1Salk 198, where it was said:" Where H covenants not to do an act which was lawful to do, and an Act of parliament comes after and compels him to do it, the statute repeals the covenant. And where H covenants to do a thing which is lawful, and an Act of parliament comes in and hinders him from doing it, the covenant is repealed. For cases illustrating this see Mc Elroy, *Impossibility of Performance* op.cit at pp. 33-34, and see, for another suggested ground of release in cases of illegality as in the Baily case, (1940-41) 4 Modern Law Review at p. 243.

[6] Chitty Vol. 1 (1983), para. 1540, and see Mc Elroy, *Impossibility of Performance* p. 166, where he says that the prohibition here was temporary, if permanent the contract would be illegal. But it is thought that if an act is prohibited, it is in fact, illegal, therefore impossible of performance. See also David Walker, Vol. 1. (2nd ed., 1975), at p. 673. In another case viz Denny Mott & Dickson V. James B Fraser & Company [1944] A.C.265, there was a contract for the sale of timber, and with the outbreak of the war that trading became illegal. The House of Lords held that the contract was frustrated by that event.

different contract from the contract when broken off".[7]

So the delay caused by that order will make the performance of the contract, a performance of a different contract, and this is because the interruption was likely to last for a long period.[8]

However, a different conclusion was reached in the case of Crickelwood Property & Investment Trust Ltd V. Leighton's Trust Ltd ((1945) A.C.221.), where a building lease for 99 years was at issue, in which there was a covenant to build a number of shops on the land "forming part of a building estate".(Crickelwood A.C.221.) Subsequently, an order was issued by the government, suspending building and making the erection of shops, as intended by the lessees, impossible.

---

[7] Metropolitan ibid 130 and see Lord Atkinson's speech at p. 136, and of Lord Parmoor at p. 139 in the same case. Lord Justice Scrutton in Acetylene V. Canada Carbide Co (1921) 8 L.L.L R.456 said at p. 460 :"It may be put there is an implied term in any contract with any clause in the nature of suspension clause, excepted peril or allowances of extra time, which may extend the performance of the contract, that the suspension which is an ancillary to the main contract, shall only be valid for a reasonable time; and that a time is unreasonable which makes the resumed contract an entirely different one from the interrupted contract.". Cited in Mc Elroy, *Impossibility of Performance* op.cit at p. 211 (emphasis is mine). See also (1919) 35 L.Q.Rev at pp. 93-94., and see Mc Elroy, *Impossibility of Performance* op.cit at p. 166, where he says that this case involved the application of two principles viz illegality and frustration, and says:"Neither alone would have been sufficient .". This may be true because if the prohibition was permanent, the contract would be frustrated at once. But since the prohibition was temporary- if it is supposed to be so- this does not frustrate the contract, because it may last for a short period only. Therefore illegality itself as a test of frustration is insufficient, and another test viz "whether the interruption would last for a long period as to make the performance of the contract a thing radically different from that undertaken", is necessary in order to decide whether the contract can be frustratedor not. In this case illegality was reinforced by the second test as expressed above.

It is also worth noting that where the performance of the contract becomes unlawful by a change in the foreign law, where the contract is to be performed, then the contract would be dissolved. See Ralli V. Compania Nviera Sota Y Aznar [1920] 2 K.B. 287. Cited in Mc Elroy, *Impossibility of Performance* op.cit at p. 44.

[8] Chitty Vol. 1 (1983), para. 1540, and see P. S. Atiyah, *An Introduction to the Law of Contract* (3rd ed.) at p. 201 who says that "businessmen must not be left in indefinite suspense.". This principle seems to be of a general application and might be similar to what was already said by Lord Shaw of Dunfermline at p. 64 supra, and see footnote. 7, chapter two supra esp. the speech of Lord Atkinson.

The question to be answered in this case was, whether the lessees were excused from not paying the rent agreed (for the demised premises ie the building). That is to say whether the lease was frustrated or not.(Per Viscount Simon at 227.)

This in fact depended on whether the event which occured or the change in the circumstances was:

> "so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement.".[9]

The fact was that the prohibition may last for a long period and therefore destroy the basis of that contract, Viscount Simon L.C said that the government regulation was "presumably a small fraction of the whole term"[10], and this is true; because the lease was for 99 years.

So what can be said as an explanation for that decision, differing from the precedent cases, is that the interruption here was not such as to destroy the basis of the contract after the prohibition was over and even though the interruption lasted for ten years Lord Goddard said"..that is very small part of the lease".[11] As a result it was decided that the lease was not frustrated and the lessee was not discharged from his obligation to pay the rent.

Having studied the cases dealing with the question of illegality it may be interesting to draw the general idea or principle underlying them. It might be said that they are all concerned with doing or not doing an act. Therefore the principle as already expressed at footnote.5- to the effect that:

> "Where H covenants not to do an act [as in Baily] which was lawful to do, and an act of Parliament comes after and compels him to do it, the statute repeals the covenant. Where H covenants to do a thing [as in Metropolitan, or

[9] Crickelwood 231 emphasis is mine. What is emphasised is in fact similar to what Blackburn J said in Poussard case (1876) at p. 84 supra. It might be said that this is similar to saying that performance if enforced would be a radically different thing from that undertaken.

[10] Crickelwood p. 232.

[11] Crickelwood p. 243.

> in Cricklewood (to build shops), or in Denny (to provide goods)] which is lawful, and an Act of Parliament comes in and hindered him from doing it, the covenant is repealed",- is applicable to them.

However, this principle will have its full effect when the prohibition is permanent only and by the prohibition the contract is frustrated immmediately (see Baily). But where the prohibition is temporary then another test is to be added to the one of illegality in order to decide for the frustration of a contract. This is that the interruption caused by the prohibition was to last for a long time or for an indefinite period and if the contract were enforced after that interruption, it would make the performance a radically different thing from that undertaken. This test was for example used in the Metropolitan case.

In fact the test of 'performance if enforced would be a different thing' may also be used in cases of permanent illegality. Thus in Baily , we may say that if the defendant were held liable, this would mean that we have imposed on him a contract to the effect that he has agreed to pay damages when an order of an authority -without his fault- compeled him to do what he covenanted not to do. Such an agreement is surely one which he never made not even thought about.

As to the position where parties provide in their contract for the contingency, then the pinciple as stated by lord Parmoor in the Metropolitan case ([1918] A.C.119, at 137) to the effect that:

> "If the parties have provided...in the contract for their mutual rights or liabilities, [if a certain contingency occurrs] then it would be the duty of any court to give effect to such provision.", is applicable.

An exception, which is expressed in the same case, is that the provision of parties may not be adequate and cannot be held to cover what happens and its effects. This can be illustrated by the speech of Lord Parmoor (above) in Metropolitan, from which we have extracted some words to state the general principle. But the full text is thus:

> "If the parties have provided by apt words in the contract for their mutual rights or liabilities, in the event of the contract works being stopped, or indefinetly hindered by the operation of a subsequent law and such provision is

not contrary to public policy, then it would be the duty of any court to give effect to such provision."

Looking at the case of Cricklewood, it may be said that although the prohibition was similar to that involved in the three other cases, the difference here is that the contract was for a long period (99years). Therefore the prohibition cannot make further performance of the contract if enforced after the delay a thing radically different. This means that the basis of the contract cannot be said to have been destroyed as in Metropolitan or in Baily.

It may be noted that several cases already studied under different headings involve some similarities. Temporary incapacity, imprisonment, mobilisation, requisition as well as the seizure and the damage of ships and trapped ships, and even some cases of illegality like the one involved in Metropolitan and Cricklewood, all involved the question of delay in the performance of the contract. Looking at the principle upon which those cases were decided (being frustrated or not) it can be said that the courts relied mainly on whether the performance of the contract if enforced, would be a thing radically different from that undertaken. The other test used in certain cases is that the delay was of an uncertain duration and that it was not possible for them to speculate as to the duration of that delay. Therefore it can be said that these are the two tests used by courts when dealing with cases of delay.

§.2. French and Algerian Laws Regarding Government Prohibitions.

We have already pointed out that questions of illegality are known under French or Algerian law as a 'Fait du prince'. 'Fait du prince' can be defined as any order issued by a public authority which prevents the performance of a contract.[12] This clearly shows that what has been studied under English law would under French as well as Algerian laws be treated as involving the question of a 'fait du prince'. The 'fait du prince' should, as any event of force majeure, have the conditions of unforeseeability, irresistibility and non imputability to the debtor.[13]

12 Or "tout empechement qui resulte des commendements ou des prohibitions de la puissance publique.".(See Com.Oct 26th.1936.Gaz.Pal.1936.2.845). Lalou defines it as "un ordre de l'autorite legitime". Id at p. 237.

The cases given below will illustrate the impossibility of performance which may result from this event.

In Ste Bata V. Farge, (Caen.Oct 11th.1937.Gaz.Pal.1937.2.797.) (B) leased a premise in order to carry on a business of sale of shoes. The contract was entered into on March 18th 1936. (B) established himself in the premises on March 20th 1936, and continued to trade until May 24th 1936. On this date, (B) was notified he was in default in continuing his activity of selling shoses; since a law had been issued on March 22nd 1936 to the effect that:"during two years no new shops are allowed to be open, without an authorisation of the ministry of commerce". (B) argued therefore that, taking into account the fact that the law was subsequent to the conclusion of the contract of sale, it was impossible for him to continue his activity as it was intended. (B) alleged that the contract should be terminated because of an event of force majeure viz the passing of that law.

The court remarked that a subsequent law which prevents the carrying on of the business of (B) cannot constitute a case of force majeure, unless it was unforeseeable at the time of the conclusion of the contract. It has been proved that (B) foresaw the passing of that law and that the contract of lease was entered into at that date exactly (ie 18th /03 /1936), in order not to be subsequent to the passing of the law of 22nd /03/ 1936. It was therefore decided that (B) should perform his contract (ie the paying of the rent).

In the second case viz, Lamy V. Bailles, (Paris.June 9th.1961.D.1962.297. C.d'App) (L) concluded on October 1953 a contract of hire of services (louage de service) with (B). (B) was engaged to make arrangements between persons involved in road and railway accidents (ie victims and responsibles). This is called "demarchage". At the time the contract was concluded there was a law which regulates such contracts. (L) concluded that contract relying on a certain interpretation of that law which made

13 See Radouant at p. 183 (who cites the non imputability only.), and see Aguado V. de Bearn.. Cour de Paris, May 1st. 1875. D. 1875. II. 204. Cited by J. Denson Smith "Impossibility of Performance as an Excuse in French law : the doctrine of Force Majeure" (1936) 45 Yale Law Journal 452, at pp. 456-57, and see Seine.March 24th.1905.G. des T. 1905.2.2.436. See Fiatte at p.15, and Houcine Amer, op.cit at p. 403 both cases will be discussed later on.

such contracts legal. However, it was known or at least foreseeable to (L) that this 'interpretation' was controversial, and that there was a possibility that a subsequent 'interpretation' by the jurisprudence would render the contract he made illegal. This last 'interpretation' was what the Court of Cassation decided on on November 26th 1953. Therefore the contract between (L) and (B) became illegal. (See Marie p. 41.)

(L) alleged that the decision of the Court of Cassation constituted a case of force majeure, and consequently, notified (B) that his contract should be treated as being terminated. (B) sued (L) for damages because of that breach. The court declared that the subsequent 'interpretation' of the legislation which made the contract illegal was foreseeable to (L). Therefore the condition of unforeseeability was not met . It has also been remarked that even with that subsequent 'interpretation' the performance of the contract did not become impossible, since (L) could use (B) for other services. That is to say other than those prohibited. This would mean that the other condition of force majeure viz the impossibility of performance was not met. For these reasons the court decided that (L) was liable in damages since he terminated the contract with (B).[14]

In the case of Maiano V. Simard (Bordeaux Nov. 26th. 1940. Gaz. Pal. 1941 .1.29.) (M), an Italian, contracted to build a number of houses for (S). Five months later and before having finished them, he was expelled from France. It was held that (M) was liable to pay damages since his expulsion was foreseeable because of the international situation which prevailed at that time. (See Mazeaud, *Responsabilite* (1970), at p. 704).

The condition of irresistibility was also involved in Ste d'Assur etc V. Dumesnil, (Civ.1ere Civ. May 11th.1954. D. 1954. 611. C. Cass)[15] (D) leased

14 However, a debtor would be liable even if an event is one of force majeure when the promise of the debtor is unconditional. That is to say he has taken the risk of his non performance. Id [cf this with imprevision].

15 In Boix V. Boutles etc, Com.Oct 26th.1936.Gaz.Pal.1936.2.845, by a contract of charterparty BX promised to carry goods from Italy to France. It happened that a prohibition was imposed on all goods which may come from Italy. This made further perfomance of the contract impossible. This was held to constitute a case of force majeure, and the charterparty was terminated. In another case viz, Union des Proprietaires etc V. Trufault Le Havre December 14th.1929.Gaz.Pal.1930.1.346 an authorisation to be obtained from the authorities in order that any construction (which constituted the promise of the debtor) can be carried out, was considered not to constitute a case of force majeure, since it makes further performance of the contract

his apartment to (Ste) which was the insurer of the proprietor of that apartment. Because of the war, (D) was ordoned to leave the apartment, and therefore could not perform his obligation which was to look after the apartment. A fire destroyed it after (D) left it. It was decided and affirmed by the Court of Cassation that (D) was not liable for that fire. Therefore he was exonerated since his non performance of the obligation viz to look after the apartment was due to force majeure (ie the order).

It has already been said that 'fait du prince' should be unforeseeable and irresistible. Another condition is also required, which is that the event must not be due to the fault of the debtor. Thus a lessee (locataire) expelled from a country because of his attitude, cannot invoke that event as a case of force majeure exonerating him from his obligation to pay the rent.[16] The same logic should be applied for the employer who employs more foreigners than allowed by law. Therefore if the authorities oblige him to sack some of those to bring their number to its legal limit, he cannot allege that the event constitutes a case of force majeure, since this was due to his fault.[17]

It can clearly be seen from what was studied above that courts always require the conditions of force majeure. We may say that English cases already discussed may be regarded by French or Algerian courts as involving a 'fait du prince'and therefore releasing the debtor from his obligations. The principle stated by Hannen J. (footnote. 5 supra this chapter) might also represent the French as well as the Algerian law, but we have to add to it the traditional conditions of force majeure.

---

more onerous only. In Lyon March 1st.1943.S.1944. chr p. 46, it was decided that the prohibition of construction without an authorisation could not constitute a case of force majeure. The only effect it had is that it delayed the performance of the obligation. See Mazeaud, *Responsabilite* (1970), at p. 704.

16 Mazeaud, *Responsabilite* (1970), at p. 703.

17 See Ste des Etabli Barmone V. Fritz Civ. Soc. Dec 30th.1954. D. 1955. somm.77, Mazeaud, *Responsabilite* id. A person who leased a 'fonds de commerce' in order to carry on a business, cannot invoke the order of closing down of that premise as a case of force majeure exonerating him from paying the rent due, if this was due to his fault. See Civ.3eme.Nov 20th.1985.Bull. iii. n:148, see A. Benabent, *Droit Civil* (1987), at para. 252.

Section Two. Legal Restrictions (Import and Export Prohibitions).

Sometimes, as will be seen, the performance of the contract is restricted ie, the obligation of one or both parties to the contract is effected according to statutory regulations. One example of this is the licencing system. These are cases where the performance of the contract and more specifically the importing or exporting of goods where the contract so provides, cannot be undertaken unless the concerned party obtains such a licence from the authorities.(See Benjamin's, *Sale of Goods* (1987) p. 1002)

In this respect it is to be noted that under French law the debtor who does not promise a specific thing, cannot invoke a prohibition of export to exonerate him from his performance, and this especially if those goods can be bought from elsewhere.[18]

The following English cases will illustrate the effect of such restrictions on the contract and whether parties are excused if they do not perform their contract, on the ground that such a licence was not granted.

In the case below, after parties had made their contract, and intended the goods to be exported, a government order was issued and prohibited such exports. In Walton (Grain & Shipping) Ltd V. British Italian Trading Company Ltd ([1959] 1 Lloyd's. Rep.223.), a contract for the sale of goods was entered into between the two named parties, on October 11th, 1956. The goods were to be shipped on December 1956 and January 1957 from India to Genoa. There was a force majeure clause (15-b) which provided that:

> "Should shipment be delayed[19] by fire, strikes, lockouts, riots, revolution, prohibition of export or any executive or legislative act done or on behalf of the government of the territory where the port and/or ports of shipment named therein is or are situate, or any cause comprehend in the term

[18] See Com. Marseille. March 18th.1927. Rec. Marseille.1927. 1. 322. Mazeaud , *Responsabilite* (1970), at p. 703, see also Pelliot V. Gaillard, Trib. Com. Seine. July 6th.1915.D.1917.2.47, Radouant at p.34, and see Fiatte at p.11 (an export prohibition -he says- constitutes a case of force majeure). A prohibition of export is to be considered as a 'fait du prince'. See also to this effect Jean Virole "Incidence des Mesures d'Embargo sur les Contrats Internationaux" (1981) 7. n:3 International Trade Law & Practice.311.

[19] The word delay here was construed by the court as to mean 'impossibility'. The Walton case p. 235.

"force majeure" other than the reasons given in clause (a)[20] the time of shipment shall be extended by two months. Should shipment not be possible within these two months contract be void.".

When parties made their contract, they knew that goods cannot be shipped unless a licence was obtained, which was possible. But on November 21st, 1956 the government of India issued a notice making export impossible, and no licences were to be granted, and in fact they were not granted during December, January and March. Therefore every shipment was illegal. The sellers then claimed that they were entitled to rely on the force majeure clause.

Before the court Mr Justice Diplock treated the matter by asking himself whether the refusal of granting any licence was covered by that clause, bearing in mind that the performance was illegal by that prohibition notice. He then concluded that it did, and therefore sellers could rely on it in order to be excused from their failure to perform the contract. As to the question whether the contract was frustrated, he held that it was because performance became unlawful, therefore an implied condition is to be read into this contract to the effect that performance should be legal in the place where it had to be performed. He added that even if there was no force majeure clause, the contract would still be held frustrated because the sellers had not undertaken an absolute obligation to perform the contract.[21]

Two other cases commonly called "*soya bean meal*" cases (soya bean meal hereafter called goods), involved the same problem of export being prohibited. The first is Bunge S.A. V. Deutsche Conti Handelsgesellschaft M.B.H[22], which was about a contract entered into on August 17th, 1972,

[20] Which reads:"In the event of war, hostilities or blockade preventing shipment during the period, this or any unfulfilled part thereof shall be cancelled.".

[21] The Walton case p. 237. As may be seen the release in this case can be based on the fact that the force majeure covered what happened. Alternatively, it can be said that if there was no force majeure clause, the performance of the contract would have been illegal.

[22] [1979] 2 Lloyd's. Rep 435. In Bremer Handelsgesellschaft M.B.H V. C. Mackprang. J.R, [1979] 1 Lloyd's Rep.221, shipment of goods was imposssible due to an embargo imposed by the U.S government. The court of Appeal held that the sellers were in default and that they could not rely either on the export prohibition

for the sale of goods, to be shipped in April, May, June and July, 1973. It contained a clause dealing with the event where the export is prohibited, which reads as follows:

> "In case of prohibition of export..or in case of any executive or legislative act done by..the government of the country of origin..preventing fulfillment, this contract or any unfulfilled portion thereof so affected shall be cancelled.".(The Bunge case [1979] 2 Lloyd's. Rep 435.)

In June 1973, the U.S government prohibited the export of the goods, but with two exceptions viz, where the goods were "already on lighter destined for an exporting vessel"[23] or were in the course of being loaded. Sellers then contended that performance was impossible through the embargo which was imposed and which was total, and claimed their release under the aforesaid clause.

Before the Court of Appeal it was held that sellers were in default and could not rely on that clause to be released, because"to say that it was impossible for them to perform the contract, they ought to prove that they could not have got the goods through either of the loopholes"[24] (ie the two exceptions above). This means that the embargo should put them into a situation of impossibility, and this was not the case here, because the embargo was not absolute but subject to the two exceptions stated in the embargo. They had not proved not to be within the two exceptions, therefore they were not excused for their non-performance.

Lord Denning in Bremer V. Mackprang (footnote. 22 this chapter) said that if the embargo was total ie without exceptions, then sellers would be

---

clause or the force majeure clause. They were held liable because they could not show that "the shipper had no goods on lighter and none in course of loading." (per Lord Denning at p. 223 col. 2). These were the two loopholes in the embargo.

In another case viz Congimex Companhia Geral De Comercio Importadora E Exportadora, S.A.R.L. V. Tradax Export S.A. [1981] 1 Lloyd's.Rep.250 (C.A), a buyer of goods claimed frustration of his contract, because importing goods into his country was prohibited. This plea was rejected, because the buyer could accept the goods and divert the ship to another port (here France) where there is no such prohibition.

[23] The Bunge case., per Lord Denning ibid 436. col. 2.

[24] The Bunge case., per Lord Denning ibid.

released by proving the existence of the embargo. For the sellers reliance on the force majeure clause his Lordship said that the same thing -as in the prohibition clause- would apply here; because they had to give good reasons to justify their failure and this could not be done since there were the two exceptions.[25]

As may be inferred from the two cases the sellers failed to prove not to be within the loopholes, because they might have in fact goods on lighter or in the course of being loaded, but nevertheless they had not asked for a licence.[26]

Some questions might be asked when dealing with cases of export prohibitions, or restrictions. These can be stated as follows: who is under the duty to obtain such a licence, whether such a duty (or obligation) is absolute or a party could be discharged if he uses due diligence only, and whether such a duty is wholly imposed on one party only, or it is shared ie, the other party is also under the duty, of what is called, to "co-operate" in order to obtain such a licence (3). These three questions will be dealt with below.

1- Whose Duty is it to Obtain the Licence.

To know that we have to look first at the provision of the contract, whether it imposes on one party, such a duty or not. If it does, then no

---

[25] But cf. Bremer Handelsgesellschaft m.b.H V. Vanden Avenne Izegem P.V.B.A. [1977] 1 Lloyd's.Rep 133 (Q.B.D) and Affd in the H. L [1978] 2 Lloyd's.Rep.109. This is an s.b.m case, with two clauses as in the two s.b.m cases above. Here goods were to be shipped in June 1973. In June 27th,1973 an embargo was imposed which prevented the sellers from delivering the goods. It was held that the sellers were released, since they proved that there was an absolute impossibility. Case cited by Lord Denning [1979] 1 Lloyd's.Rep at 223., emphasis is mine.

[26] Lord Denning in the Bremer case at p. 224 said:"Such being the burden of proof, I'am quite clear that the sellers did not discharge it. For aught that appears, it may well be that the shippers had already loaded, on or before June 27, 1973, goods which they could have appropriated to the contract; or, it may be that they had goods on lighters, or in the process of being loaded, which they could have appropriated to the contract. In the absence of proof that the shippers had no such goods available, they have not discharged the burden of proof. They have not showed that they were prevented by the embargo from fulfilling the contract. So they have not brought themselves within the exemptions in cl 21.". Cited by Lord Denning in the Bunge case at 437 col.2.

problem can arise. However, the situation may differ where no such provision is included because there is no rule of law which imposes such a duty on one party rather than on the other.

It can be said[27] that looking at the different cases,[28] such a duty is imposed on the party who is in the best position to get it; because he will be familiar with the rules of export of his country and all the requirements which have to be met in order to export or import the goods.[29]

2- Whether the Duty is Absolute or merely Limited to the Use of Due Diligence.

Here also the contract may provide for the nature of the duty imposed on parties in obtaining the licence. The real problem arises where there is no such provision.

If the contract is made "subject to licence", then the party, upon whom the duty falls to obtain the licence, is only required to use due diligence. He does not therefore warrant to get it.[30] But where the contract is not

---

27 Benjamin's, *Sale of Goods* (1974), at 1473.

28 In one case viz, H.O.Brandt & Co. V.H.N.Morris & Co [1917] 2 K.B.784 where there was an f.o.b contract for the sale of goods, it was held that the duty was upon the buyers to obtain the export licence and not the sellers.(See Benjamin's, *Sale of goods* (1974), at 1473) In another case viz, A.V.Pound & Co Ltd V. M.W.Hardy & Co.Inc, ([1956] A.C.588. See Benjamin ibid,) there was an f.o.b contract for the sale of goods, and it was held that it was the duty of the sellers to obtain the export licence and not the buyers.

29 However, the "more naturally fitted to take the necessary steps" to get the licence is in practice, but not necessarily, the seller. For example in the Brandt case (above) it was the duty of the buyer. See Basil Eckersley, "International Sale of Goods- Licences and Export Prohibitions" (1975) Lloyd's Maritime & Commercial Law Quarterly.265, at p. 266. Sometimes the duty is upon the two parties (co-operation) as in the Cyprianou case(post). Lloyd's Maritime.. ibid , Benjamin id at 1474 adds that in a c.i.f or c & f contract for the sale of goods, from one country to another, it is generally the duty of the seller to obtain the export licence and of the buyer to obtain an import licence.

30 Benjamin's *Sale of goods* (1974), at 1478., and see Joseph D. Becker "The Rolimpex Exit from International Contract Responsibility" (1978) 10 New York University Journal of International Law and Politics.447, at p. 451, reference is made to the case of Brauer Co..V. Clarke..[1952] 2 All.E.R. 497, 499, 500 (C.A). So if the concerned party fails to obtain the licence the contract is discharged. See (1975)

made 'subject to licence', then following the construction of the contract, that party may be held to be under an absolute obligation to obtain such a licence.[31] An example is given in the case of Peter Cassidy Co.Ltd V. Osuustukkukauppa I.L.[32] A seller in Finland sold ant eggs to an English company, f.o.b. There was a provision in the contract which reads:"delivery:prompt, as soon as export licence granted". The sellers having used all due diligence to obtain an export licence failed in their application, because they were not members of the Finnish Ant Egg Export Orters' Association. It was held that their obligation was absolute and not only to use due diligence, because "as soon as", does not mean 'subject to licence'.[33] Therefore they were liable to pay damages for such failure.

In another case viz, J.W.Taylor & Co. v. Laundauer & Co ([1940] 4 ALL.E.R. 335.), there was a contract (c.i.f), for the sale of goods to be shipped from Madagascar to London. The contract was entered into before the second world war broke out. The bill of lading dated Oct/Nov 1939. In September the war broke out and on the same day the Cereal & Cereals Products (Requisition & Control) Order 1939 was issued coming into force the day after introducing a licencing system on selling or buying cereals. After some delay the seller, asked the cereal control board for information on the licences, whether they were granted or not, and if obtainable, what was the earliest date on which they could be obtained. The reply was negative and no licence could be granted. Then the sellers claimed that they were released and excused for non-performance (shipment).

Before the court Singleton J. in giving his judgment held that the contract was not terminated and the sellers were held liable. This was because they (sellers) did not in fact, try to get the licence,

"Their duty -said Singleton J- was to take the steps necessary[34] to enable

Lloyd's Maritime etc at p. 266. But the concerned party has to prove that he used all his best, or as it is said "he has left no stone unturned". Ibid at p. 267.

31 Whether the duty is absolute or to use due dilligence only is a question of construction. See Benjamin's, *Sale of Goods* (1974), at 436.

32 [1957] 1 W.L.R.273. Schmitthoff, *Export Trade* (1986), at p. 158., and see Benjamin's, *Sale of Goods* (1974), at 436.

33 Per Delvin J. in the Cassidy case, supra.

them to perform their contract, and to...apply for a licence (which) they did not. They did nothing... until February 14th, 1940, and even then they did not apply for the licence necessary - namely, a licence to enable them to deal in the goods..".(The J.W.Taylor & Co. case at 341.)

He later on said "... if application for a licence had been made in the proper way at the proper time, it would have been granted.".(The J.W.Taylor & Co. case at 341.)

So, as is seen here, the sellers were required to use due diligence to obtain the licence and if they had proved that they did their best to get it but they nevertheless failed, then they would have been excused and the contract would have been frustrated.[35] They would have been also excused if they had not asked for a licence since it would have been useless to do so, knowing that it would be refused.[36]

3- Duty to Co-Operate.

An illustrative case is Kyprianou v. Cyprus Textiles Ltd ([1958] 2 Lloyd's.Rep.60.). This involved a contract for the sale of cotton seed to be shipped from Syria to the buyers in Cyprus. The seller made several applications to obtain an export licence, but he was refused. The reason was that the buyers should have sent a certificate endorsed by the Syrian consul in Nicosia, stating that the goods -after being exported to Cyprus-

---

34 What amounts to reasonable steps in obtaining the licence is a question of fact. Benjamin's *Sale of Goods*(1974), at 1479.

35 Schmitthoff, *Export Trade* (1986), at p. 157. What is important to note is that the buyer should not repudiate the contract before the seller takes any steps to get the licence, otherwise the buyer will be held liable in damages because of his repudiation of the contract, notwithstanding the fact that the seller would not have obtained the licence if he made such steps. See (1975) Lloyd's Maritime etc at p. 268.

36 Benjamin's (1974), 1479, and he has to prove that or that he could obtain that licence "on terms entirely outside the contemplation of the parties". See Brauer & Co (Great Britain) Ltd v. James Clark (Brush Materials) Ltd [1952] 2 ALL.E.R.497. Benjamin (1974) at 1480. Denning L. J in the Brauer & Co V. James case said at p. 501 that the one who is under the duty to get the licence, has to show that he took such steps, or that " it was useless " to do so since " it was quite impossible to obtain a licence.". Cited in Schmitthoff, Helsinki.. at p. 154. This may be supported by what Mocatta J said in Bremer Handelsgesellschaft m.b.H V. Vanden Avenne-Izegem P.V.B.A [1977] 1 Lloyd's Rep.133 (Q.B.D.) at p. 160 col. 2, :"the law does not usually oblige someone to do something which is useless '*lex non cogit ad inutilia*'.".

would not be resold to Israel. The buyers did not send such a certificate until the end of July, whereas the period of shipment was between June and July, and this made it impossible for the seller to ship the goods to their destination. After that the buyers claimed damages for non-performance.

In the court of Appeal Lord Justice Parker said:

> "..there must be some express or implied term in the contract which will excuse him. For my part, I think, on the facts of this case, that an implied term is to be found, to the effect that, if export takes place from a place where an export licence is necessary, the buyer will co-operate in getting that licence- or at any rate will do nothing to prevent it being obtained..".[37]

From the cases discussed above, we can summarise the whole question of government restriction through the licencing system. In the first category, parties make their contract, to export or import goods. At that time there is no licencing system, but afterwards such a system is imposed. The party who is -depending on the circumstances of each case- under the duty to obtain such a licence, fails to obtain it although he uses all due diligence. Then the contract might be frustrated.[38] We do not have to ask ourselves whether the contract is made 'subject to licence' since there is none. The case which can be related to this first category is Taylor v. Landauer (above).[39]

---

[37] Kyprianou at 64 col. 2 & 65 col. 1. As may be seen, the court of Appeal based its decision on the fact that there is an implied condition that the buyer should co-operate to get the licence. See also Scmitthoff C. M, "Conflicting Decisions on Suez Frustration" (1959) Journal of Business Law.58, at p. 60, where it was said that this is the first case where the duty to co-operate was extended to the other contracting party, viz the buyer, in getting the licence. It is also to be noted that the duty to co-operate applies to a C.I.F contract (as in Kyprianou) as well as to an F.O.B contract (as A.V.Pound, Ltd V. M.W.Hardy, Inc [1956] A.C.588., Lord Simonds at 608) cited by Andrew J. Bateson, "The Duty to Cooperate" (1960) J.B.L.187, at pp. 187-88.

[38] See (1975) Lloy's Maritime etc at p. 268, here there must be no provision in the contract.

[39] [1940] 4 All.E.R 335 this is to be infered *a contrario* from this case, because Singleton J., said that if that party asked for the licence in the proper way at the proper time, he would have been granted such licence. So it can be said that, if he has fulfilled such an obligation; ie to apply in the proper way.., and failed, then he could be released and the contract be held frustrated. See to this effect the case of Ross T.Smyth & Co. Ltd. (Liverpool) v. W.N.Lindsay Ltd. (Leith) [1953] 1 W.L.R.1280. In that case

In the second category there is already a licencing system and licences could be granted if applied for. Subsequently the prohibition of export becomes total ie no licence could be granted. The cases related to this is Walton.. V. British..(1959), and also Bremer V. Izegem (1979). So in this situation the contract would be frustrated by that event.

In the third category there is already a licencing system and licences could be granted if applied for. Subsequently a prohibition of export is imposed, but it is not total , it is subject to some exceptions. The related cases here are the soya bean meal cases, viz, Bunge (1979), Bremer..V. Macprang (1979). Here there was a licencing system before the contract was made, but after that, the government prohibited the export. The prohibition was not absolute, but subject to the two loopholes (see above). If the concerned party proved that he was not under the two exceptions then he could claim frustration, and the contract could be held frustrated.[40] The other case is Congimex ([1983] 1 Lloyd's. Rep. 250), it might be said that the contract would have been frustrated if the buyer had no alternative in performing the contract, viz to divert the ship to France.[41]

The fourth category, is when there is already a licencing system and the concerned party applies for a licence but it is refused.[42] Would a

---

there was a contract where the goods had to be shipped from an Italian port c.i.f. Glasgow, on October 20th, 1951. The government issued a regulation on October 20th, 1951, which prohibited export unless under a licence. But such a regulation was only applicable from November 1st, 1951. The sellers did not ship the goods in the meantime, and therefore they were held liable since they could have shipped the goods during the ten days left. It is suggested by Schmitthoff, *Export Trade* (1986), op.cit at p. 153 that, if the prohibition was "instantaneous" ie on the same day where the goods were to be shipped, then the sellers would have been excused and the contract be held frustrated. And this may also be the case in Taylor V.Landauer (1940), ie the prohibition was instantaneous, and the sellers had applied for a licence and were refused - without any fault on their part- therefore the contract would be frustrated.

[40] Schmitthoff, *Export Trade* (1986), op.cit at p. 153.

[41] In the Congimex case the contract was not frustrated, because the buyer had another alternative in performing the contract (viz to divert the ship to France). But where it is said that the contract would be frustrated, this was infered by supposing that the buyer did not have such an option.

[42] It is possible here to say that the refusal is a supervening event, which frustrates the contract. See Treitel (1983), at p. 668," This is a possible interpretation -

contract be frustrated in this case?.[43] The answer depends on whether the contract was made subject to licence or not. Where the contract is made 'subject to licence', the obligation is to use due diligence. If the party concerned fails to obtain it then the seller will be excused; ie not liable to pay damages. Where the contract is not made 'subject to licence' the obligation may be absolute, and if the party concerned fails to obtain it then he will be held liable. But if his obligation was only to use due diligence, and he fails to obtain it, he will not be held liable and the contract may be frustrated.(Schmitthoff, *Export Trade* (1986), p. 157.)

Finally what is worth noting is that in order to be treated as a frustrating event the prohibition must last during the whole period of performance. But if that prohibition ceases before the time for performance expires, then the parties are still required to perform their obligations, otherwise they will be treated as having breached their contract, and could not rely on frustration.[44]

---

he says- of a dictum in A.V.Pound & Co. Ltd v. M.W.Hardy Inc. [1956] A.C 588, 604.". For the other interpretation that author prefers see p. 669, and see Benjamin's, *Sale of Goods* (1987), at p. 1000.

43 See Mc Elroy, *Impossibility of Performance* op.cit at pp. 36-37, where he says that the contract would be frustrated, and this following the case of Anglo-Russian Merchant Traders and John Batt & Co's Arbitration [1917] 2 K.B.679. In that case Viscount Reading C.J., at 685 said "There was at the time of making the contract and at all times a prohibition against the export of [goods] except under a licence. If a licence cannot be obtained [goods] cannot be shipped, and I cannot see why the law should imply an absolute obligation to do that which the law forbids. A shipment contrary to the prohibition would be illegal, and an absolute obligation to ship could not be enforced. I cannot see that, in order to give to the contract its business efficacy, it is a necessary implication that the sellers undertook an obligation to ship whether a licence was or was not obtained.". Cited by Mc Elroy, op.cit at p. 37.

44 Schmitthoff, *Export Trade* (1986), ibid at p. 153., and see Benjamin's, *Sale of Goods* (1974), at para. 435, and see the case of Ross..V. Lindsay.. [1953] 1 W.L.R. 1280., and see (1975) Lloyd's Maritime etc at p. 268. It is to be noted that it is not open to a debtor to consider himself freed from his contract, where he expects that some future events will put him in the impossibilty to perform his contract. That is to say he should not rely on the fact that some future events will probably hinder him from performing his contract. See Gloag, op.cit at para. 11.13. This implicitly would mean that there must be more than a mere probability in the happening of that event. There must be a certainty as to its happening. Cf with imprevision infra.

Section Three. Trading With The Enemy.[45]

Another instance of frustration of contract, is where the performance of the contract involves intercourse with the enemy.[46] In the United Kingdom this is defined as being every act which is advantageous to the enemy country or would be to the detriment of the United Kingdom. The following cases will illustrate the principle although there are exceptions.

In Ertel Bieber & Co v. Rio Tinto Co[47], there was a contract for the sale of goods, between a British company and a German one. The contract was entered into before the war. The seller (the British), delivered some instalments, but after the outbreak of war, he claimed that the contract was abrogated[48], and that he was released from further performance. But the fact was that, there was in this contract a clause providing for such contingency, and that the contract would be suspended only, where war prevented its performance.

The question was therefore, whether the war put an end to the contract or merely suspended it.

Before the court (lower), it was held that the contract was abrogated, since it involved trading with the enemy which means that the contract was illegal.[49] As to the suspensory clause, it was treated as void since it was against public policy. The decision was upheld in the House of Lords. Lord Dunedin cited Pickford L.J's speech in the case of Robson (supra)[50],

---

[45] For a discussion on the Trading With The Enemy Act see Clive Parry, "The Trading With The Enemy Act and the Definition of an Enemy" (1940-41) 4 Modern Law Review.161, at pp. 161 et seq. As to the definition of trading with the enemy see S.1 (2) & (3) of this Act, and as to the definition of enemy see S. 2 (1) & (2). As to the term 'war' it is to be understood in its technical sense. See Arnold D. MacNair, "The Law Reform (Frustrated Contracts) Act, 1943" (1944) 60 Law Quarterly Review.160, at p. 164.

[46] See Benjamin's, *Sale of Goods* (1974), at 431. This is because in "forbiding commercial intercourse with enemy subjects, the nation is particularily concerned that no money or intelligence pass into the enemy country, to aid and strengthen the opposing forces.". John M. Hall, "The Effect of War on Contracts" (1918) 18 Columbia Law Review.325, at p. 327.

[47] [1918] A.C.260. For another case involving the act of trading with the enemy see Robson v. Premier Oil And Pipe Line Company (Ltd) & others([1915] 31 T.L.R.420.

[48] The Ertel Bieber case at 261.

[49] The Ertel Bieber case at 263.

where Pickford LJ said :

"The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction.".[51]

In another case viz, Badische Co. Re ([1921] 2 Ch.331.) , there was a contract for the sale of dyestuffs entered into before the first world war between a British company and a German firm installed in England. The goods were to be supplied from Germany. With the outbreak of war, the Board of Trade, under S.1, of the Trading With the Enemy Amendment Act, 1916, ordered the winding up of the German company and a controller was appointed. The buyer (a British subject) claimed damages for non-delivery of the installments due after the war. The controllers, on their part, pleaded that -inter alia- firstly, the performance of the contract would constitute trading with the enemy, secondly, that the basis of the contract, that is the importation of the goods, should continue to be possible and this became impossible by the war.

Russel J. held that the contract was illegal. This was either because it involved intercourse with the enemy, or that, if the contract was enforced, it would have created some advantages either "immediate or future benefits" to the enemy. Therefore the contract was void.

The same decision would have been given even if the traders were both British subjects, if their trade would confer a benefit to the enemy.[52]

[50] [1915] 2 Ch.124.136. Lord Dunedin referred to this Law Report.

[51] The Ertel case at 268, and McBryde, *The Law of Contract* (1987), at p. 348, and see Mc Elroy, *Impossibility of Performance* op.cit at p. 42, and similarly see Davis Primose Ltd V. The Clyde Shipbuilding & Engineering Co. Ltd. 1917, 1 S. L. T. 297, at pp. 298.2 & 299.1, where Lord Dewer said that where a party to a contract becomes an alien enemy, the contract becomes illegal.

[52] The Re Badishe case at 373. in Esposito V. Bowden (1857) 7 E.X.B.763, a charterparty contract was held to be dissolved because performance involved loading at an enemy port, and this although the shipowner was neutral with a British subject. See Mc Elroy, op.cit at p. 42. Looking at the 1939 Act any benefit which is conferred to an enemy is to be treated as trading with the enemy. For example a contract between two resident in U.K, or between one in this country and the other in a neutral country, will

This was Russel J's answer to the first question. He also said that parties made their contract on the footing that peace would remain between the country of supply, and the one to which such goods would be supplied. Therefore,:

> "... a term should be implied providing for the dissolution of the contract in the event of war breaking out between those two countries, whereby the source of supply became blocked for an indefinite period of time.".[53]

The implication of such a term was no more than what "contracting parties must as businessmen deemed to have intended"[54], because in fact, the "commercial object has been frustrated".(The Re Badishe case per Russel J. at 383.)

In Stockholms Enskilda Bank V. Shering ([1941] 1 K.B.424 and [1943] 2 ALL.E.R. 486), an English company entered into a contract with a Swedish bank (the creditor of a German company). It was agreed that the English co should pay to the Swedish Bank part of the debts of the German co, by instalments over a period of 8 years. The Swedish Bank on its part was to assign the equivalent amount of that payment to the English co in the form of "the Swedish bank's claim against the German co". However, when the first instalment was due on October 1939, the English co refused the payment, its main allegation was that such an act would constitute trading with the enemy, since the payment to the Swedish Bank would be a benefit conferred to the enemy.

This allegation was upheld before the court, because the German co by such payment would be discharged of its obligation. On the other hand, the payment by the English co, would give it a claim against the German co, and since that claim could not be enforced during the war, therefore

---

be treated as trading with the enemy if it confered certain benefit to the enemy country. See S. 2 (a) of the Act.

[53] The Re Badishe case per Russel J at p. 380. But see Larrinaga etc. 39 T. L. R. 316 where Lord Atkinson at 320 said:"... I failed to apprehend...what was the unexpressed condition which ..., formed the foundation of the contract,.... It certainly was not,...that England should not be at war with any power" and this during the period of the contract, and how can parties made their contract on the footing of peace, if they did not anticipate the war at all.

[54] The Re Badishe case per Russel J at p. 380.

this constituted an advantage to the enemy (the German co). That is to say "to have an English rather than a Swedish creditor" was considered as an advantage.[55]

Another example of frustration by reason of war is where the port of shipment in an f.o.b. contract becomes an enemy port. But a contract is not frustrated where no terms as to the destination was stated in the contract and where the buyer instructed the seller to ship the goods to a port which, before shipment, becomes an enemy port. This is because here the buyer has to give other "fresh shipping instructions" to the seller.(Benjamin's, *Sale of Goods* (1974), at 1715)

A c.i.f. contract is also frustrated where the port of destination became an enemy port, and this before the seller tendered the documents.[56] The same view was held, even where the "ultimate" port of destination was in a neutral territory.[57]

It has already been said that the principle (in cases of trading with the enemy) as stated above has its exceptions. These are to be found firstly in the case of Hugh Stevenson & Sons Ltd v. Aktiengesellschaft Fur Carton Nagen-Industrie ([1918] A.C.239.). This was a case of partnership between a German and an English company, to carry on business in England. The legal effect of the war which broke out between Germany and U.K, was to put an end to such a partnership.[58] But the fact was that the English company continued that business, after the war, using the machinery which was the property of both the German as well as the English partners. The question raised in this case was whether, by the dissolution of the partnership, the German partner was entitled to the profits made by the British company after the outbreak of war in using the machinery or in continuing to carry on the business.

Before the House of Lords, it was held that, the German partner was entitled to such profits made by the English partner in using the

[55] See Mann F. A, "Trading with the Enemy" (1943-44) 7 Modern Law Review. 159, at p. 160.

[56] See Benjamin's, *Sale of Goods* (1974), at para. 1585.

[57] Ibid 1585, citing the case of Fibrosa [1943] A.C.32.

[58] And this since it becomes unlawful for parties to continue their business as partners. See Schmitthoff C. M. & David A. G. Sarre, *Mercantile Law* (14th ed., London, Stevens & Sons. 1984), at p. 273.

machinery between the outbreak of war (August 1914) and the time when this action was brought ie (June 1915). But on the other hand the German partner had no right to profits made by the English partner, resulting from the use of his skill.(The Hugh Stevenson case per Lord Finlay at 245.)

However, being entitled to such profits, the German partner will be deprived of it during the period of war. He could only claim it during peace time. The question which can be asked here may be, whether such payment would not be a kind of trading with the enemy?. As to this allegation made by the counsel for the English company. Lord Atkinson responded in giving his judgment, by referring to what Lord Parker of Waddington said, in the case of Daimler Co v. Continental Tyre & Rubber Co ([1916] 2 A.C.307, 311, 347.),:

> "..the prohibition against doing anything for the benefit of the enemy means the doing of it while he is an enemy and does not contemplate some possible advantage to him when peace comes.".[59]

To give an enemy rights to profits -as in the present case- is an application of the principle that the property of an enemy is not confiscated though his right to it (ie property) is suspended during war-time.[60]

The second exception to the rule is, where a husband by a separation agreement undertakes to "pay regular maintenance to his wife". Such an agreement will be enforced even if the wife becomes an alien enemy. This is because in this kind of agreement, no public policy is involved in the enforcement of such agreement. But the payment has to be given to the Custodian of Enemy Property.[61]

Having studied cases of legal impossibility and 'fait du prince' it can be said that although under English, French and Algerian laws, government prohibitions are likely to constitute frustrating events (and force majeure), nevertheless the solution as regards certain cases may differ. Thus in Cricklewood because the English common test was not met, the

---

59 The Hugh Stevenson case at 249.

60 The Hugh Stevenson case., per Lord Finlay 245.

61 See Chitty Vol. 1 (1968), at para. 1284, refering to the case of Bevan v. Bevan [1955] 2 Q.B.277.

contract was not frustrated. Under French and Algerian laws such a case might have been decided as involving an instance of force majeure and since the prohibition was temporary, the contract would probably be decided as suspended. Cases of legal restrictions and trading with the enemy may also be similarly decided, that is to say as instances of force majeure under both French and Algerian laws.

CHAPTER FIVE. LEGAL EFFECTS (OR CONSEQUENCES) OF FRUSTRATION AND FORCE MAJEURE

It has been seen that the doctrine of frustration applies when the performance is strictly speaking impossible and to cases where further performance, if enforced, would be a thing different from the one undertaken. The effects of frustration are the same whether we are concerned with the first category or the second one. However, the effects of the doctrine of force majeure are concerned with the first category only. To avoid repetition of the effects of frustration in the second part of this work, it is preferred to study the legal effects of the two doctrines in this chapter. In the second part we will study the effects of the doctrine of imprevision, which concerns the cases where the performance of the contract has become onerous. The effects of this doctrine is totally different with those of the above two doctrines. But it should be noted that instances of frustration are also studied in the second part of this work.

The legal effects of frustration and force majeure, will be studied separately. Having understood the principles involved in cases of frustration and force majeure we will then give -as far as possible- a comparison of the principles of the common and continental laws including the Algerian law. We will also see to what extent these laws are similar or dissimilar in their treatment of cases of impossibility. Then conclusions might be made concerning the rigidity or the flexibility of one system or the other.

Section One. Effects of Frustration.

A contract being held frustrated, the question which should be asked is what is the position of the parties regarding further performance of the contract. What is to happen when one party makes advance payments in return for the performance of the other party?, what is the position of the party who performs his contract in part and then the contract is held frustrated?. Questions of this kind and others are dealt with in this last chapter of the first part of this work.

Legal effects of frustration were formerly decided upon the principles of the common law rules. But they are now regulated by the Law Reform (Frustrated Contacts) Act 1943.[1] Since some contracts are expressly excluded from its operation, which means that they are regulated by common law rules, it is therefore necessary to see these rules as to the effect of frustration. This is also important because the Act was issued as a consequence of those rules.

§.1. Common Law Rules as to the Consequences of Frustration.

At common law, the frustrating event puts an end to the contract automatically.[2]

In order to show the rules stated at common law two cases can be cited here. These were described as harsh rules.

In Chandler v. Webster ([1904] 1 K.B.493.), a room was hired in order to see the procession of the king. The price was £141 15s, to be paid in advance, but £100 only was so paid. After that, the procession was cancelled. It was held that, the hirer could not recover the £100, and was liable to pay the balance of £41.15s, though the contract was frustrated. The plea for recovery of the sums paid, on the ground of total failure of consideration, was rejected, because, frustration -as it was said- releases both parties from further performance, and does not make the contract void *ab initio*.[3] Therefore what has been accrued before frustration

[1] For a full discussion of this Act see Glanville L. Williams, *The Law Reform (Frustrated Contracts) Act, 1943* (1944). It should be noted that this Act does not apply to Scotland.

[2] Lord Wright in the Joseph Constantine case [1942] A.C.154 at 187, said :"Frustration operates automatically. It does not depend on the choice or election of the parties to the contract.". But the termination of the contract does not mean that it becomes retrospectively void "as it had never been made". Salmond (1927), at 310. Under Scots law -as well as under English law- frustration puts a end to the contract at the time of its happening, and both parties are freed from further performance of the contract. However, what has been performed before frustration, should be paid for. See D. M. Walker, *Principles...* Vol. 2 (3rd ed) at p. 138.

[3] Treitel (1983), at p. 685, and Fifoot (1986), at p. 569. In the Chandler case Collins M.R said at 499 :" If the effect were that the contract were wiped out altogether, no doubt the result would be that money paid under it would have to be repaid as on failure of consideration. But that is not the effect of the doctrine [of frustration]; it only releases a party from further performance of the contract. Therefore the doctrine of

remains undisturbed.[4]

It was the second case viz, Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd ([1943] A.C.32), which mitigated the harshness of this rule. In that case, an English company agreed to sell certain machinery to a Polish company, and to deliver it c.i.f Gdynia. The price was £4800. £1,600 was payable in advance. Owing to the outbreak of war, between Britain and Germany (1939), Gdynia was occupied by Germans. The contract was therefore frustrated by that event. The Polish company then claimed the recovery of £1600. It was held by the House of Lords that, that sum was recoverable on the ground of a total failure of consideration.[5]

Therefore the rule in Chandler -as stated above- was overruled. The problem with this decision was expressed in that case by Viscount Simon L.C., where he said[6] that although the present decision mitigates the harshness of the previous rule it nevertheless leaves the 'recipient who has to return the money at a grave disadvantage', because he may have incurred expenses in the partial performance of the contract,

> "which are equivalent, or more than equivalent, to the money which he prudently stipulated should be prepaid but which he now must return for reasons which are no fault of his. He may have to repay money, though he has

failure of consideration does not apply.". Cited in Fifoot (1986), at p. 569. Emphasis is mine.

[4] This is an application of the maxim that 'the loss lies where it falls'. See Chitty (1977), at para. 1448. Under Scots law the loss does not lie where it falls. See McBryde, Jurid. Rev. op.cit at p. 17, see also McBryde, *The Law of Contract* (1987), at p. 355. As to the question of advance payment, it should be said that it is an established rule of law in Scotland that "... if money is advanced by one party to a mutual contract, on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance, on the ground of failure of consideration.". Per Lord President at p. 152 in the case of William Watson & Co, V. Robert Shankland & Others (1872) 10 M. 142, and see Gloag (1987), at para. 11.7 (advance payment is recoverable if no performance is done).

[5] See Glanville L. Williams, "The End of Chandler V. Webster" (1942-43) 6 Modern Law Review.46, at 47. Under the Chandler rule such sum was irrecoverable. See Anson (1979), at 518. Therefore this would bring the law into accord with that of Scotland. See Gloag (1987), op.cit at para. 11.7 footnote. 23.

[6] Fibrosa at 49, cited by Chitty Vol. 1 (1977), at para. 1451.

executed almost all of the contractual work, which will be left on his hands. These results follow from the fact that English law does not undertake to apportion a prepaid sum in such circumstances...."

On the other hand, the party who seeks recovery of money paid might receive a small part of the performance of the contract which can be considered as a benefit, therefore there would be no total failure of consideration and he could not consequently claim recovery of his money.[7] It was for these reasons that the Law Reform etc was enacted.(See Cochin (supra) at p. 96)

§.2. The Law Reform (Frustrated Contracts) Act 1943

This Act came into operation on July 1st, 1943[8], it applies to contracts which:"become impossible of performance or been otherwise frustrated.".[9] It concerns the consequences of frustration, and does not deal with its instances.[10] This Act covers instances where the contract is discharged by subsequent physical impossibility (as in Taylor). It also applies to contracts discharged by subsequent illegality, and to those where there is a fundamental change in the circumstances.[11]

S. 1(2) provides that:

"All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as "the time of discharge") shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the

---

7 Anson (1979), at p. 518, and see Fifoot (1986), at p. 570.

8 See Fifoot (1986), at p. 575. Therefore the common law rules apply to contracts in which the time of discharge is before July 1st 1943 (see S.2 (1), because this Act is applicable to contracts frustrated after that date). See Glanville, *Law Reform* (1944), at p. 1.

9 But not those terminated by agreement or breach. See Chitty Vol. 1 (1983), at 1574, and see Glanville, *Law Reform* op.cit at pp. 20, 23. This Act applies to contracts governed by English law, and includes those to which the crown is a party. Chalmer's *Sale of Goods Including the Factors Acts 1889 & 1890* (16th ed., London. Butterworths. 1971), at 22. A contract governed by English law means that its proper law is English law. See (1944) 60 L.Q.Rev at p. 162, and see Glanville, *Law Reform* op.cit at p. 18, therefore it does not apply to contracts governed by Scots law or Northern Ireland law. Ibid at p. 19.

10 See (1944) 60 L.Q.Rev at p. 161.

11 S. 1 (1) of the Act, and see (1944) 60 L.Q.Rev at p. 162.

case of sums so payable, cease to be so payable:

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract[12], the court[13] may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred."

So all sums which are payable under the contract, before frustration, cease to be so payable. Under the present Act,[14] the claim to pay £41,15s in Chandler v. Webster, could not be upheld.

As for the sums which were already paid before frustration, these are recoverable.[15]

Since that subsection does not mention total failure of consideration, sums paid can be recovered even if there is partial failure of consideration only.[16]

As to the case of Fibrosa (above), it was said that the party who incurs expenses before the time of frustration, is thus left without remedy. Section 1(2), provides that remedy by giving to the party who receives the advance payment and which he has to return, the right to claim to be paid a sum of money for the expenses incurred by him, before frustration of the contract.

The court is not bound to order such recovery, but may -in its discretion- allow him to retain or recover in whole or in part those sums

---

[12] An example of the expenses incurred in the performance of the contract is, where a shiprepairer, had made part of the repair, but subsequently the ship was destroyed by fire. An example of the expenses incurred for the performance of the contract, is where a manufacturer, in order to manufacture goods (which are the subject matter of the contract), installed some machinery for the purpose of performing the contract. So if he had incurred expenses in the installation he is entitled to such a recovery. (1944) 60 L.Q.Rev at pp. 165-66, and see Glanville, *Law Reform* op.cit at p. 43.

[13] And arbitrator S. 3 of the Act, and see Glanville L. Williams, "The Law Reform (Frustrated Contracts) Act 1943" (1943-44) 7 Mod.L.Rev.66, at p. 69, and see Glanville, *Law Reform* op.cit at p. 91.

[14] Treitel (1983), at p. 686.

[15] Treitel (1983), at p. 686., this is as in the Fibrosa case, but in Fibrosa the failure of consideration must be total. See Glanville, *Law Reform* op.cit at p. 30.

[16] Treitel (1983), at p. 686, and see Chitty Vol. 1 (1983), at 1575, and Glanville, *Law Reform..* op.cit at p. 30.

paid or payable to him before the time of discharge of the contract, without exceeding the amount of his expenses.

Another harsh rule is stated in the case of Appleby v. Myers.((1867) L.R. 2 C.P.651) In that case the plaintiff agreed to erect machinery on the defendant's premises. A sum of £459, was payable on completion of the work. Before such termination, a fire destroyed both the premises and the machinery. In an action to recover £419 for "work done and materials supplied"[17], it was held that, the plaintiffs were not entitled to such a sum, as frustration excuses both parties from further performance of the contract. Here further performance is understood to be the erection of new machinery (by the plaintiffs), and the payment for what was done (by the defendants). Therefore the payment could not be upheld, until the completion of the whole work. In other words, even if there is partial performance of the contract, nothing is recoverable for what has been done. This rule is well expressed by Glanville, (*Law Reform* op.cit at p. 2) where he says:

> "Where a party enters into an entire contract and performs in part but fails to complete, otherwise than as a result of a breach of contract by the other party, he can recover nothing.".

The rule under Scots law where the performance of the contract is partial only and the contract is frustrated, is stated by Lord President in William Watson & Co V. Robert Shankland & Others ((1872) 10 M.142), where he said (at p. 152) that:

> "... if [a party to a contract] perform a part and then fail in completing the contract, I shall be bound in equity to allow him credit to the extent to which I am lucratus by his materials and labour, but no further; and if I am not lucratus at all, I shall be entitled to repetition of the whole advance, however great his expenditure and consequent loss may have been.".

We may note here that in comparing Scots law with the provision of S. 1 (3) 1943 Act above, they are now similar.

Another rule under Scots law is that where a person was in the course

[17] Fifoot (1986), at p. 573.

of constructing a building and before terminating the construction, it was destroyed by a frustrating event, he is in this case entitled to claim remuneration for the work he did and for the materials he used. This is so because under Scots law, the property in the unfinished building passes to the owner of the ground, and consequently the risk of destruction of the building is upon him by application of the maxim *res perit domino*. (See Gloag (1987), op.cit at para. 11.6 and the Scottish cases cited there).

However, the harsh rule as stated in Appleby has been mitigated in the provision of S. 1(3) of the Act which reads:

"Where any part 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 to which the last foregoing subsection applies) 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 the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case, in particular,

(a) The amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under the last foregoing subsection, and

(b) The effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.".[18]

So this section applies where one party to the contract, by his partial performance of the contract, has conferred a benefit to the other party.

Therefore, under this section the recovery of a sum of money is now possible, subject to the conditions stated above.

It may be said that, looking at the case of Appleby V. Myers, no valuable benefit was conferred to the defendant, since the whole work and the benefit were totally destroyed. Therefore no award should be given to

[18] "Benefit" in this section was explained as being "not the cost of performance incurred by the claimant, but...the end product.". See B.P.(Exploration) Libya Ltd v. Hunt [1979] 1 W.L.R.783.affd [1981] 1 W.L.R.236. Cited in Treitel (1983), at p. 688, which in other words means the end product of the services and not the services themselves. See Francis Rose, "Restitution After frustration" (1981) 131.2 New Law Journal.955, at p. 956.3. For an example of the valuable benefit see (1944) 60 L.Q.Rev at p. 166. It is to be noted that this case is the first one where the 1943 Act was applied. Baker J. H, "Frustration and Unjust Enrichment" (1979) Cambridge Law Journal.266, at p. 268.

the plaintiff, who erected the machinery. This is because the court in giving such an award must take into account "the effect, in relation to the said benefit, of the circumstances giving rise to the frustration.". But if part of the work which was erected remained untouched, then there would have been a valuable benefit.(Anson (1979) p. 520.)

However, such arguments are inconsistent with the provision of the Act viz S. 1(3), where it is provided:

> "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...before the time of discharge,...".

Therefore in Appleby, the work which was the valuable benefit was conferred to the defendant before the time of discharge of contract by frustration.[19]

§.3. Contracts to which the Act Does Not Apply.

It has already been shown that, there are some contracts excluded from the application of the present Act. It is provided that:

> "This Act shall not apply:-
> **(a)** to any charterparty, except a time charterparty or a charterparty by way of demise, or to any contract (other than a charterparty) for the carriage of goods by sea; or
> **(b)** to any contract of insurance...
> **(c)** to any contract to which section seven of the Sale of Goods Act 1893 applies or to any other contract for the sale, or for the sale and delivery, of specific goods, where the contract is frustrated[20] by reason of the fact that the goods have perished."

I-(a) 1- The rule is that, where a freight is to be paid in completion of a

---

[19] Fifoot (1986), at p. 574, and Treitel (1983), at p. 689, and Glanville, *Law Reform* op.cit at p. 49, so if it is supposed that the defendant sold the property before the perishing, this would certainly have increased the price of the property as a result of the plaintiff's work. Glanville, *Law Reform* at p. 49.

[20] It is to be noted that the word 'frustration' is not used in S. 7 of the S.G.A. 1893. But it is suggested that there is no difference in saying frustration in this Act (ie the 1943), and in the 1893 Act. This is because in 1893 the word 'frustration' was not commonly used. Glanville, *Law Reform* op.cit at p. 90.

voyage, and that voyage is not completed owing to an impossibility (like loss of vessel or cargo), then the shipowner cannot claim the freight

2- Where that freight has already been paid for, it cannot be recovered, not even a part of it.[21]

(b) In the carriage of goods, if a vessel cannot complete the voyage, the shipowner cannot claim the payment of the freight *pro rata*[22], and this even if the non completion was due to an excusable impossibility. As may be noted this is in fact an application of the common law rule as stated in Appleby.(Glanville, *Law Reform* op.cit at p. 79).

As regards 2 & (b) (above), English law is totally different from that of Scotland and "all the nations of trading world". The law of Scotland as well as of other nations is to the effect that any advance payment of freight made by a charterer to a shipowner is recoverable if the ship and the cargo were lost. The only exception is where parties expressly provide (or it clearly appears) that the advance freight shall not be recoverable. The English principle is criticised as being 'artificial and unsound'. (Per Lord Justice Clerk). Lord President on his part said (at p. 153) "... the law and practice of the other nations of the great trading community is in my judgment in accordance with sound legal principle, and that the English rule is not.". The two quotations are from the Scottish case William Watson & Co V. Robert Shankland ((1872) 10 M. 142).

II-As to the contract of insurance, it is also established that, once the risk begins to run, no apportionment of premiums under an insurance policy, can be allowed.(See Generally Treitel (1983), pp. 692-93.)

III-Regarding the non application of the 1943 Act to cases where S.7 of the Sale of Goods Act applies,[23] it has ben said[24] that, the only difference between the common law rules and that of this Act is related to

---

[21] Glanville, *Law Reform*.. at p. 72.

[22] See St Enoch Shipping Company, Ltd v. Phosphate Mining Company [1916] 2 K.B.624.

[23] The reason behind this extension is that "the case of impossibility by the perishing of goods is peculiar to the law of sale, and the special rules applicable to the perishing of specific goods have been long established, and are well understood by the commercial community, so that there is no point in disturbing them.". Chalmers *Sale of Goods* (1971), at p. 22. The 1943 is applicable in cases other than those of the perishing of goods, an example is war. See Atiyah, *Sale of Goods* (1975), at p. 175.

[24] Atiyah, *Sale of Goods* (1975), at p. 175.

cases where there has been advance payment and part delivery.

1- Advance payment.

Where the buyer, for example pays for the goods in advance, but does not get them, he can recover what he has paid since there is a total failure of consideration. There is no difference in that situation, were the 1943 Act not to apply.

The difference would be in the case where the seller has incurred expenses, such as to put the goods in a deliverable state.[25] Under the Act -if it were not excluded- the seller has a right of recovery for the expenses, but not under the common law rules as has been seen.(See Atiyah, *Sale of Goods* (1975), at p. 175.)

2- Part delivery.

Where the buyer, after having paid in advance for the goods, gets only part of them and then the undelivered part is destroyed by an event amounting to frustration, he cannot recover back what he has paid (ie for the perished quantity of goods) -under common law rules-; since the failure of consideration is only partial.[26] Neither can he rely on the Act since it is excluded.

Where the seller delivers part only of the goods, but is not paid anything and then is unable to supply the remaining goods, and the contract is assumed to be frustrated, he can rely neither on this Act as if there has been a valuable benefit conferred to the buyer, because this Act is excluded, nor can he obtained a part of the agreed price under common law rules.[27] However, it has also been pointed out[28] that under common law, he can recover payment -on a quantum meruit basis[29]- for

[25] See S. 18 r. 2 of the Sale of Goods Act 1979.

[26] However, it has been suggested that the buyer can recover back what he has paid for the undelivered part. This is because in this case the risk was on the seller at the time of the perishing. See Atiyah, *Sale of Goods* (1975), at p. 176, and see Benjamin's, *Sale of Goods* (1974), at para. 429.

[27] See Atiyah, *Sale of Goods* (1975), at p. 176., citing the case of Appleby.

[28] Atiyah (1975), at p. 176, and Treitel (1983), at p. 693, and see Macleod, *Sale & Hire-Purchase* at p. 258.

[29] Benjamin's, *Sale of Goods* (1974), at para. 429.

the delivered part. This is only possible if a new contract can be implied between the parties, arising from the acceptance of the buyer of that benefit, after frustration. This is even though the contract is not severable and the price of the goods was to be paid on the delivery of the whole goods. But it is required that the buyer in this case should have the option of retaining or returning the goods.(Benjamin's, *Sale of Goods* (1974), para. 429.)

Following the second part of S. 2(5)(c), the Act does not apply to contracts for the sale or the sale and delivery of specific goods, and the contract is frustrated by the fact that the goods have perished. This provision may refer to the case where the risk has passed to the buyer.[30] But it was pointed out that, it is hard to see how a contract can be frustrated after the risk has passed to the buyer.

The distinction brought by the Act does not seem to rest on clear reasons. In other words, the Act does not apply where the goods are specific and where frustration occurs by the perishing of the goods, whereas it would apply if the goods are unascertained or that the cause of frustration is for example requisition of goods, or where there is a supervening illegality.(Treitel (1983), at p. 694.)

It is suggested that, the exclusion may be to avoid disturbing the rules as to risk in such contracts. But even this cannot be sustained since all contracts for the sale of goods should have been excluded, and not only part of them.[31]

It is also to be noted that, the provisions of this Act can be excluded by agreement of the parties.(S. 2 (3) of the Act.)

As to the services which a party to a contract may render to the other

---

30 Treitel (1983), at p. 693.

31 Treitel (1983), at p. 694. It is also observed that this second part does not add anything. Because it is known that where there is a sale of specific goods which have perished, the contract cannot be frustrated unless by operation of S.7 of the S.G.A. See Atiyah, *Sale of Goods* (1975), at p. 174. However, Macleod ((1971), p. 258) points out that the second part applies to cases where the risk has passed to the buyer, but not the ownership. It also applies to cases where the ownership has passed to the buyer but not the risk, and 'probably' where both the ownership as well as the risk have passed. Therefore in these cases the destruction of the goods may frustrate the contract.

after frustration in order to protect his interests, he can claim remuneration for those services, under the quantum meruit principle. (Chitty Vol. 1 (1983), at 1585.)

Section Two. Effects of Force Majeure in Synallagmatic Contracts.[32]

In principle by the occurrence of an event of force majeure the debtor is discharged totally and permanently from further performance and will not not be held liable for his non performance of the contract. This general principle has its exceptions. An example is the cases of partial and temporary impossibility. In what follows the general principle as well as its exceptions will be studied. Since however, the creditor is also concerned with the question of non performance, the problem is to decide whether he will be exonerated as the debtor is or not. This question is also dealt with in this section.

§.1. The General Principle.

Article 1147 Fr.C.C. states that:"A debtor is judged liable, the case arising, to the payment of damages, either by reason of the inexecution of the obligation or by reason of delay in the execution, at all times when he does not prove that the inexecution came from an outside cause which cannot be imputed to him, and further

[32] The effects of force majeure in synallagmatic contracts is also known as the "Theorie des Risques".. As to the definition of a synallagmatic contract, art. 1102 Fr.C.C, states that:"A contract is synallagmatic or bilateral when the contracting parties obligate themselves reciprocally towards each other.". There is no problem in the case of a unilateral contract. This is because in such a contract there is only one undertaking on the part of the debtor. An example is the contract of 'loan' (pret). Thus if the thing borrowed was destroyed by an event of force majeure, the debtor is exonerated. The risk of destruction is on the creditor since he can ask for nothing (it is the maxim *res perit creditori* which applies here or *res perit domino* if it is a specific thing and the creditor is the owner. See Henri De Page, op.cit, at pp. 609 & 811, and see Leon Marie pp. 8 & 177. See also art. 1884 Fr.c.c., and art. 542 /2 Alg.C.C (loan for use) and art. 1929 Fr.C.C (contract of bailment {depot}). Marie at pp. 179-80, and see *El Wassit* Vol. 1 at pp. 725-26. But it is to be noted that where the loan is for consumption (art. 1892 Fr.C.C., and art. 450 Alg.C.C), as in the case of loan of money or things which are consumed by their use, the borrower has to return the same quantity and quality. In this contract the borrower becomes the owner of the thing lent to him, (see art. 1893 Fr.C.C). Marie at p. 178, and see *El Wassit* Vol. 5 at pp. 451 et seq.

that there was no bad faith on his part.".[As to Algerian law see art. 176 C.C.]

Article 1148 Fr.c.c. states that:"No damages arise when, as a result of a force majeure or a fortuitous event, the debtor was prevented from giving or doing that for which he had obligated himself, or did what was forbidden to him.".

Following these texts, a debtor who cannot perform his obligation because of an event of force majeure is exonerated from his liability (ie to pay damages)[33] for such non performance, and will not be obliged to perform that obligation. This is so because the damage caused to the creditor is not in fact a result of the debtor's act but due to the event of force majeure.[34] The problem which arises from deciding that a debtor

---

[33] Carbonnier (1969), at p. 242, and Ripert (1952), at p. 517, and Weill (1971), at p. 440, and Dupont (1986), at p. 105, and see Barry Nicholas, *French Law of Contract* (1982), at p. 196. Some authors add that where the debtor -in a case of force majeure- is exonerated, this does not mean that he has no other duty. His duty, following the principle of good faith (see art. 1134 Fr.C.C, and art. 107 Alg.C.C.), is to inform the creditor of the situation of impossibility. Such an act would certainly prevent other extra-expenses to be borne by the creditor. See Fiatte at p.18 [cf with the English duty to cooperate in cases of import and export prohibitions supra] A breach of such obligation -as these authors say- is considered as a contractual fault, and the debtor would have to pay any damages caused to the creditor. Id at p. 20.

This may also be the case under Algerian Civil Code. Thus art. 577 Alg C.C [and art. 1993 Fr.C.C] (concerning the contract of agency) disposes that the agent should inform the principal about the performance of the agency. See also art. 497 (concerning the contract of lease). In the contract of insurance, the insured party should inform the insurer of any event which may happen in the course of performing the contract. (See art. 15. Loi. August 9th.1980). See to this effect Benslimane Hadj Mokhtar Leila, *De la Theorie de l'Autonomie de la Volonte et de ses Effets dans le Droit Contractuel Algerien* (These de Magister. Oran. 1983), at p. 70. This also seems to be the opinion of an Egyptian author where he says that the debtor should inform the creditor of the impossibility and that this is an application of the principle of good faith in the performance of contracts as formulated in art. 148/1 Egy.C.C., see Houcine Amer, op.cit at p. 396 .

[34] Mazeaud, *Responsabilite* (1970), at p. 733, and Michel Le Galcher-Barron, *Droit Civil. Les Obligations* (3eme ed., Francis Lefebvre. 1979), at para. 463. For examples where there is a case of force majeure and therefore a total exoneration see art. 1302 Fr.C.C. (loss of the thing owing), and art. 1722 Fr.C.C [art. 481 Alg.C.C.] (destruction of the thing rented), and see art. 1795 Fr.C.C. (death of the worker, architect or entrepreneur). See Fiatte at p. 59, and *El Wassit* Vol. 1 op.cit at p. 880.

Under **German law** where there is a permanent impossibility of performance then the contract would be terminated. Where the impossibility is temporary only then the contract would be suspended. See P. Van Ommeslaghe at p. 22.

is released because of an impossibility of performance (ie force majeure) is to determine whether the creditor can also be released in this case. Such a question is dealt with in what follows.

The following example will illustrate this question. (A) leases his house to (B). Subsequently that house is destroyed by an event of force majeure. It is established that the debtor (A) is exonerated from performing his obligation since this has become impossible.

Does this mean however, that the creditor (the lessee) of the obligation which has become impossible, is also exonerated ?. This problem is in fact one of risks. In other words, a decision has to be made as to, which of the parties will bear the risk of the obligation which has become impossible. Is it the lessee (creditor) or the lessor (debtor) ?. Is the creditor obliged to pay the rent of the house he leased although it is not in his possession ?.[35]

Two solutions to resolve this problem have been given. One is general, the other special.

I- The General Solution: The Principle of Connection Between Obligations in Synallagmatic Contracts.

In synallagmatic contracts because of the reciprocal character of parties' obligations, when one obligation is terminated by force majeure, the other disappears at the same time. In such a case the risk of the impossibility is on the debtor of the obligation which has become impossible. This means that the debtor cannot ask the other party to perform his obligation, since it was terminated because of that connection.[36] This solution is the application of the rule *res perit debitori*.[37]

[35] Weill (1971), at pp. 518 et seq, and Benabent (1987), at para. 258. It can be said regarding articles of the French civil code that "the force majeure which terminates the obligation of one party, should terminate at the same time the obligation of the other party.". Fiatte at p. 104.

[36] De Page at p. 808, and Henri et Leon Mazeaud & Jean Mazeaud, *Leçons de Droit Civil* Tome. 2 1er Vol. *Obligations Theorie Generale* (5eme ed., Paris, Editions Montchrestien. 1973), at p. 1036, and see Carbonnier (1969), at p. 279, and Barry N, *French Law of Contract* (1982), at p. 199, and *El Wassit* Vol. 1 at p. 725, and see Benslimane H. M. L. (1983), op.cit at pp. 65-66.

[37] Weill (1971), at p. 518, and Dupont Delestraint, *Droit Civil.les Obligations* at

It might be interesting to note that some authors base this solution (ie the termination of the creditor's obligation) on the fact that each party's obligation is considered as the 'cause' of the other, and where one obligation is terminated because of force majeure, the other is also terminated but by absence of 'cause'. (See Marie, op.cit at p. 186, and Alex Weill (1971), at p. 519). However, the important thing to note is that this is a doctrinal controversy and the law itself is the same whether we base the solution on the concept of 'cause' or on the connection between obligations. (See to this effect De Page at p. 808).

Under both **Quebec** and **German** laws in synallagmatic contracts, where the performance of one of the parties to the contract becomes impossible, the other one is also terminated because of the connection existing between the two obligations.[38]

The general principle as explained above (ie the connection of obligations) is not expressed by the French Civil Code, but there is a large number of its applications.[39] What has been said above concerns the French Civil Code only. The Algerian Civil Code declares this principle expressly. Thus art. 121 Alg.C.C provides that in synallagmatic contracts, when the performance [of the contract] is impossible [due to a case of force majeure] the obligations of the other party (creditor) are terminated automatically by that impossibility. This solution is also adopted by the Egyptian law.[40] The examples given below will illustrate the principle of connections between obligations.

A- Article 1722 Fr.C.C states that:"If, during the period of the lease, the

p. 116, and Benabent (1987), at para. 259, and M. Le Galcher (1979), at para. 412, and Radouant at p. 264, and see Henri De Page at p. 808.

38 See to this effect for Quebec law G. Wasserman at pp. 387-88, and M. Tancelin at p. 159, and for German law J. Cohn at p. 16, Texas.. at p. 294, *Manual of German law*.. at p. 225, J. Shuster at p. 172, P. Van Ommeslaghe at pp. 22-23.

39 M. Le Galcher, op.cit at p. 411, and Mazeaud, *Leçons* (1973), at p. 1036.

40 See to this effect *El Wassit* Vol. 1 pp.724 to 726, and Houcine Amer, op.cit at p. 398. In the opinion of these authors, there is no need for the intervention of the judge; since the termination of the contract is automatic. Even if he does intervene all that he can do is to be sure that there is a real impossibility, and therefore the contract would automatically be terminated. See id. The same opinion (ie no need for the intervention of the judge) is expressed by Ahmed Lourdjane, *Le Droit Civil Algerien* (Editions l'Harmattan. Paris. 1985), at p. 70 (he refers to art. 121 C.C).

thing rented is wholly destroyed by a fortuitous event, the lease is terminated as a matter of law...", and there is no damages to be granted.[41] (See art .481 Alg.C.C). However, there is an exception -under French law- concerning the lease of buildings (bail d'immeubles), where the premises are destroyed by events related to war. This is provided for in art. 70 of the L. Sept 1st. 1948 (under art. 1778 Fr.C.C). In this case the lease is not terminated but will be transferred to the premises repaired or the premises reconstructed, and this even if the reconstruction was in another site. This means that such a contract is not terminated but is suspended only. The contract will have its effects as soon as the reinstallation in the new premises is possible. (See Weill (1971), at p. 519 footnote. 1).

B- Articles 1787-88-89-90 declare that where a person undertakes a job (to do a work) and the materials are provided by the person for whom that job is to be done or by the worker himself, if the thing, before it is finished and delivered, is destroyed, the worker cannot ask for a remuneration for the work he has provided in making that thing.[42]

The general solution as already explained, is inferred from the different applications as provided for in the French Civil Code. This, obviously, concerns French law only. Because as has been seen under Algerian law, that principle is expressly formulated (art. 121.C.C). However, the French jurisprudence, in applying this principle, refer to art. 1184 C.C. which reads:"**1/** A resolutory condition is always understood in synallagmatic contracts for the case where one of the two parties does not satisfy his engagement.**2/** In such case, the contract is not rescinded as a matter of law. The party toward whom the engagement has not been executed has the choice either to force the other to execution of the engagement when it is possible or to ask the rescission of it with damages.**3/** Rescission must be requested at law, and the defendant may be granted a delay according to the circumstances.". This article concerns the 'judicial' resolution of the contract when the impossibility is due to the fault of the debtor. To base the principle on that article is an erroneous application of the law. This is because art.1184 c.c., speaks of the non

[41] See Weill (1971), at p. 519, and P. Dupont (1986), at p. 116, and Benabent (1987), at para. 259, and M. Le Galcher (1979), at para. 411.

[42] Weill (1971), at p. 519, and Dupont (1986), at p. 116, and Benabent (1987), at para. 259. What has been said supra at pp. 39-40 is applicable here.

performance due to the fault of the debtor, whereas the principle concerning the 'theory of risks' in synallagmatic contracts -ie the question which we are discussing in this section-, is related to the non performance due to an event of force majeure. Another difference is that by applying that theory, the resolution (ie the termination of the contract) will be effected automatically (ie without the need for the intervention of the judge), but in the case of art. 1184, the resolution should be pronounced by the judge; since it is considered as a sanction against the debtor[43] who breached his contract. Another argument is that art. 1184/2 C.C., speaks of 'dommages-interets' (ie damages) to be granted when terminating the contract. Whereas it is known that in case of force majeure, no damages are granted. This means that this article concerns the non performance due to the fault of the debtor rather than that due to a case of force majeure.[44] However, these criticisms have not influenced the position of the French jurisprudence and the Court of Cassation. Thus in a case of March 12th. 1985. Bull. Civ. i.n: 94. p. 87, the first 'chambre civile' of the Court of Cassation reaffirmed its position by saying that art. 1184 was of a general application, that is, regardless of whether in a case the non performance is due to the fault of the debtor or due to a case of force majeure.

Other authors however, approve the position of the Court of Cassation. That is to say even if the non performance is due to a case of force majeure, the judge should intervene and pronounce its termination. The argument given is that, it is not always a question of resolution when there is a case of non performance due to force majeure. Thus sometimes the contract is to be suspended only, or that there should be a partial exoneration (ie in cases of partial impossibility). In these cases the judge should intervene to determine the position of both parties to the contract, or that one of the parties contest the existence of a case of force majeure. Therefore practically the intervention of the judge is necessary.[45]

---

[43] See Weill (1971), at p. 521, and De Page at p. 814. For the reason which induced the jurisprudence to refer to this article see De Page at p. 813.

[44] See Radouant at pp. 268-69.

[45] See J. Mestre (1986) R. T. D. C p. 345 n:4, and De Page at p. 814. Under Algerian law in the case of partial impossibility (e.g. partial destruction of the thing sold. See infra), the intervention of the judge is necessary in order to reduce the price or

II- The Special Solution.*res perit domino*[46].(Contracts Involving the Transfer of Ownership of a Specific Thing)

Where there is a contract in which a specific thing is transferred (for example a contract of sale) and that thing is destroyed after the contract was concluded and before its delivery, it is the buyer who bears the risk of its destruction. This principle is stipulated in art. 1138/2 Fr.C.C.[47] This article states that:"1/ The obligation of delivering a thing is perfect by the consent alone of the contracting parties. /2 It makes the creditor the owner and places the thing on his risks from the moment when it should have been delivered, although the [delivery=tradition] has not been made, unless the debtor [was 'mis en demeure'] to deliver it, in which case the thing remains at the risks of the latter."

This solution is based on the fact that by the conclusion of the contract (for e.g. of sale), the property is transferred to the buyer even if the thing sold is not delivered to him. Therefore the creditor (ie the buyer) is the owner and if that thing perishes, it is the owner who bears the risk, and this by application of the maxim *res perit domino*. Article 1138 Fr.C.C is therefore based on this maxim (ie to make the owner of a thing the risk-bearer in the case of its destruction.).[48] We may notice here that under English law

---

to terminate the contract. As to the case of suspension it can be said that the intervention of the judge is necessary.

[46] unless otherwise stated this solution concerns French law only.

[47] Marie at pp. 239-40.

[48] Weill (1971), at pp. 522-23, and Dupont (1986), at p. 117, and Benabent (1987), at para. 260, and Radouant at p. 262. It should not be concluded from what has been said that the rule *res perit domino* applies only to contracts of sale. Thus in the contract of 'loan for use (pret a usage)' the lender is always the owner (see art. 1877 Fr.C.C). If the thing borrowed has perished by an event of force majeure, the risk of such destruction is on the lender. The same rule applies on the contract of 'hire of work and skill'(louage de service) (see arts. 1788-89-90 Fr.c.c) see Marie pp. 400 to 407 (and see art. 568 Alg.C.C). Thus if a jeweller has to do a work on a jewel, which was provided by him (ie la 'matiere'). In this case he is considered as the owner until he delivers it to the customer. Therefore if that thing perishes by an event of force majeure, it is the jeweller who will bear that loss, ie the risk of that destruction, and this by application of the maxim *res perit domino*. In this case he cannot ask for a remuneration for the work he has done (and this as has been seen). However, the solution would be different where the jeweller has provided his work only and not the material ('matiere'). In this last case the risk of the destruction of the jewel is on the customer since he is the owner. But here again the jeweller cannot ask for a remuneration for the work he has done. (see generally supra) and see Benabent (1987),

the ownership of a specific thing in a deliverable state passes at the time the contract is made. The risk passes with the ownership. Therefore French and English laws are similar.

However, parties are allowed to stipulate in their contracts that the buyer will not become the owner unless the thing is delivered or unless the whole price is paid[49] or any other clause to the same effect.

It can therefore be concluded from what has been said that, in synallagmatic contracts in which the property of a specific thing is transferred, the risk of its destruction should be borne by the owner.[50]

De Page says that it is open to the parties to a contract to stipulate that one of them will still be under the obligation to perform his contract although the other was prevented by an event of force majeure and even though he does not receive any counterpart of his performance since the performance of the other party has become impossible. (De Page, op.cit, p. 817).

As has already been noted the above solutions concern French law only. Under Algerian law as well as Egyptian law the solution is different.

Under Algerian law, although the property of a specific movable thing as well as of an unmovable, is transferred to the buyer (if speaking of a contract of sale) by the conclusion of the contract, the risk of the total destruction of the thing is not transferred to him until the seller has delivered that thing to the buyer.[51] This means that before the delivery of that specific thing, the risk rests with the seller even if the property of it has been transferred to the buyer. Whereas after the delivery, the risk is on the buyer even if the property has not been transferred (see art. 369 Alg

---

at para. 260. Marie (1896), (pp. 400 to 407) says -when commenting on art. 1790- that this proves that the legislator intends that the owner of a thing on which a work is carried on, is not obliged to pay for that work unless the owner has benefited effectively from the work done. [cf with the Appleby case, and the Law Reform (Frustrated Contracts) Act 1943, supra].

49 Dupont (1986), at p. 117.

50 The same solution would apply in the case of a sale of things which are not specific ('de genre') before they are individualised, because in this case no property has passed to the buyer. See Weill (1971), at p. 524, and De Page at p. 822.

51 This rule is also held under Islamic law . See *El Wassit* Vol. 4 at pp. 611-12, and under the German Civil Code. See De Page at p. 819 footnote. 2.

C.C.).

The only exception to this rule[52] is where the seller has 'mis en demeure' the buyer to take delivery of the thing sold, but he did not. In this last case the risk of destruction of the thing sold rests with the buyer, although there has been no delivery (see art. 369.C.C. & 270 Alg. C.C.).(See Mohamed Hassanine, *The Contract of Sale* (1983), pp. 121-22-24).

What has been said, is essential in understanding the rules concerning partial impossibility, such as the partial destruction of the thing sold where this is caused by an event of force majeure. Thus regarding art. 370 Alg.C.C, where the thing sold was partially destroyed by an event of force majeure, the rule of 'delivery', as shown above, should be applied. This article stipulates that where there is a partial destruction of the thing sold and this happens before its delivery, and that destruction is <u>very substantial</u> as to prevent the buyer from contracting if it did happen before the conclusion of the contract, in this case the buyer has the choice between asking for the <u>termination</u> of the contract of sale or <u>accepting</u> what is left from the thing sold. In this last case he has to pay according to what he has received that is to say a partial payment.

Where the partial destruction was <u>not very substantial</u>, the buyer can ask for a reduction of the price to be paid, and cannot ask for the termination of the whole contract.

What should be noted is that where the destruction of the thing sold is total (art. 369 Alg.C.C) the contract of sale is terminated and the buyer can restore what has already been paid.[53] In this case the termination is automatic. Whereas in the case of partial destruction (art. 370 Alg.C.C) the termination should be decided by the judge, and the buyer is also allowed

---

[52] However, this rule is not imperative. That is to say the parties are allowed to provide in their contract that the risk passes with the property and not with the delivery. Such a stipulation would obviously make the solution similar to that under French law. See Mohamed Hassanine, *The Contract of Sale in the Algerian Civil Law* (Algiers. O.P.U. 1983), at p. 124.

[53] See *El Wassit* Vol. 4, at p. 611. Therefore the contract of sale is terminated by impossibility of performance (ie the destruction of the thing sold), and the buyer is exonerated from his obligation , and this by application of art. 121 Alg.C.C (ie the principle of connection of obligations in synallagmatic contracts as has been explained. See <u>supra</u>.).

to restore what he has paid.

What is of further importance is that the answer to the question of whether the partial destruction is substantial or not, is left to the discretion of the judge.(See to this effect Mohamed Hassanine, *The Contract of Sale* op.cit at pp. 123-24.)

III- The Risks in Contracts of Sale made under a Condition or a Term.

A- Term: (see arts. 1185 et seq Fr.c.c, and art. 209 Alg.C.C) Under French law if the parties stipulate in their contract that the property does not pass to the buyer by the conclusion of the contract but on the day of the delivery, any destruction of the thing sold rests with the seller although the contract is formed.[54] But it has been seen that under Algerian law the question of risks is not related to the passing of ownership but to the delivery of the thing sold.

B- Sale made under a Condition.[55]

The condition as defined, can be either suspensive or resolutory.

1. Suspensive Conditions.[56] (See art. 1181 Fr.C.C, and art. 204 et seq. Alg.C.C)

An example may illustrate this type of conditions. (A) promises to sell his car to (B) if the latter succeeds in his exams. It happens that the car is destroyed before the realisation of that condition. In this type of sale the ownership of the car is still with the seller. Therefore, the risk of the destruction of that car rests always with the seller and not the buyer. The seller cannot in this case ask for the price of the sale and this even if the condition was realised after the destruction of the car. This is because the buyer cannot become the owner of a thing - and this after the realisation of the condition - since the contract does not have an object (viz the car).

---

[54] See Marty (1962), at p. 259.

[55] See art. 203 Alg.C.C., and art. 1168 Fr.C.C this last states that an "obligation is conditional when it is made to depend on a future and uncertain event, either in suspending it until the event happens or in cancelling it accordingly as the event happens or does not happen.". See also Smith J. D., at p. 459.

[56] See Weill (1971), at p. 525, and Dupont (1986), at p. 117, and Marie at pp. 273-74 & p. 283, and *El Wassit* Vol. 3 at p. 42.

2. Resolutory Conditions. (See art. 1183 Fr.C.C, and arts. 204 et seq Alg.C.C)

To take the example which has already been given, the parties to the contract of sale may stipulate that the contract would be terminated if the brother of the buyer fails in his exams. In this type of sale, the ownership of the thing sold is transferred to the buyer by the conclusion of the contract. This would remain as such unless the condition was realised. In this last case the contract should be terminated. Therefore if the thing sold was destroyed before the realisation of the condition, the risk of such destruction is on the buyer since he is the owner.[57] This solution is also applicable under Algerian law, taking into account the fact that the risk is transferred by the delivery and not by the transfer of the property.

§.2. The Exceptions.

The general principle already discussed under Subsection one has its exceptions, these are[58]:contractual risks, legal risks, case of 'mise en demeure', partial impossibility, temporary impossibility, partial exoneration and partial exoneration and the predisposition of the victim.

I- Contractual Risks. It may happen that the debtor undertakes in his contract to perform it even though there might be a case of force majeure.[59] This means that his promise is unconditional. Such undertaking is in general formulated as contractual clauses. Normally

[57] See Weill id , and Dupont id, and Marie at pp. 284-85, and see *El Wassit* Vol. 3 at p. 43.

[58] See in general Alex Weill (1971), at pp. 440-41.

[59] See De Page at p. 609. See art. 1772 Fr.C.C. where it is said that the lessee may be made responsible for fortuitous events but that should be through an express stipulation.[As to Algerian law a clause which may make the debtor responsible for a case of force majeure is also allowed. see art. 168/2 Alg.C.C] But it should be noted that under French law "such a stipulation is understood only for ordinary fortuitous events, such as hail (grele), lightning (feu du ciel) and blight (gelee), and not for extraordinary fortuitous events, such as the ravages of war or a flood, to which the country is not ordinarily subject, unless the lessee has been made responsible for all fortuitous events, foreseen or unforeseen.".(See art. 1773 Fr.C.C.). See also art. 1302/2 Fr.C.C.. However, a real exception to such clauses is art. 1811/1 Fr.C.C. which states that:" It may not be stipulated that the lessee bears the total loss of the live stock having happened through fortuitous event and without his fault.", and see Dupont (1986), at p.105, and Weill (1986), at p. 434.

such clauses should be express. However, it is always possible to infer that undertaking indirectly. Thus if the debtor enumerated the cases in which he will be exonerated, it is understood *a contrario* that in the other cases he should not be exonerated.[60]

II- **Legal Risks**. In other cases, the debtor bears the risk of an event of force majeure, not by a contractual stipulation but by the law itself. This is the case for example of art. 1881 Fr.C.C which states that :"If the borrower employs the thing for another use or for a longer time than he should, he is liable for loss occurring, even through fortuitous event.". Article 1882 Fr.C.C (and art. 544/2 Alg.C.C.) is another example since it states that:"If the thing loaned perishes through a fortuitous event against which the borrower could have guaranteed by employing his own, or if, being able to preserve only one of the two, he preferred his own, he is liable for the loss of the other.".[61]

III- **Case of 'Mise en Demeure'**. In the case where the debtor has promised to deliver a specific thing, and that thing is destroyed by an event of force majeure, he will nevertheless be liable for such destruction, if he was already 'mis en demeure', to deliver it but he did not. ([see art. 1302/1, and art. 1929.Fr.C.C], and see art. 168/1 Alg.C.C.)[62]

IV- **Partial Impossibility**. Sometimes the performance of the contract is partially impossible. This means that the impossibility concerns some obligations but not all of them. In this case the debtor will be exonerated from the obligations which have become impossible, whereas he should perform the others.[63] However, in such a case the obligations which can

---

60 Alex Weill (1971), at p. 440 footnote. 4, and id in the (1986 ed.) at p. 434. However, it should be said that his inference is open to question.

61 See to this effect Weill (1986), p. 434. footnote. 266, see also (art. 1825 and art. 1302/4) Fr.C.C., this last art. concerns the case of the thief, who will be held liable for the fortuitous destruction of the thing stolen, and has therefore to pay its price. See De Page at p. 610, and Fiatte at p. 16. This solution is also formulated in art. 168/3 Alg.C.C.

62 Weill (1986), at p. 435, and De Page at p. 609. However, he will not be liable even if he was 'mis en demeure', if he can prove that the thing would have perished similarly in the hands of the creditor if it had been delivered. See art. 1302/2 Fr.C.C, and see Weill 1971, at p. 440, and see art. 168/2 Alg.C.C.

still be performed should be taken into account. That is to say in giving effect to the partial impossibility, the obligations which will have their effect must have some usefulness to the creditor. It should also be considered whether -according to the intention of both parties- they will accept such partial performance.[64] This is because, it may happen that the parties to the contract, insist on the performance of the whole contract and do not accept its partial performance.(Radouant p. 330.)

In the case where the obligation which cannot be performed is essential in the intention of the parties, the contract should be terminated.[65] Thus in Cecaldi V. Albertini, (Ch.Civ.Apr.14th.1891.1.329.C. Cass) the Court of Cassation declared that, it is the duty of the tribunal to decide, in a case of partial impossibility, whether the non performance is important enough

---

63 See G. Thery at p. 94, for an example see Barry N, *French Law..* (1982), at p. 201, and see of the same opinion Houcine Amer, op.cit at p. 399.

64 Weill (1971), at p. 441, and the (1986 ed), at p. 435, and see Radouant at pp. 329-30, and Fiatte at p. 42. It should also be taken into account whether -in the intention of the parties- the contract is divisible. This is such in a contract of sale where the goods sold are to be delivered successively for a certain period, and if it is possible to consider each delivery as a distinct obligation. See Fiatte at p. 42. It has been said 'if it is possible', this is because the parties may consider the contract as indivisible. See Fiatte id. In the case where the contract is not divisible, it will either be terminated or suspended. See Benabent (1987), at para. 257, p. 124., and see Houcine Amer, op.cit at p. 399,. There is no problem where the contract being divisible, each obligation has its price (a sale of goods which are grouped and the price of each item can be determined., ie there can be a reduction). The problem arises where the value of the counterpart of an obligation cannot be determined.

A solution has been given in the case of a contract of 'lease of houses'. Thus regarding art. 1722 Fr.C.C. the judge can reduce the price of the rent when there is a partial destruction of the thing leased. Benabent suggests that this solution should be generalised to the other contracts since the jurisprudence has not given any solution concerning them (ie contracts). The same suggestion has already been made by Fiatte at p. 45. That is to say in the case of partial impossibility, the creditor can either ask for a reduction of the price or its termination, and it is for the judge to decide what solution should be adopted. Fiatte at pp. 45-46.

65 Radouant p. 330, and see Fiatte at p. 49, Houcine Amer, op.cit at p. 399 is of the same opinion. Regarding Algerian law, there seems to be no reason in not applying this solution. Because under art. 370 Alg.C.C (sale, as has been seen) and art. 481/2 (contract of lease), the seller or the lessee can ask for a reduction of his obligation to pay the price (for the first) or the rent (for the second), or for the resolution (termination) of the contract. See *El Wassit* Vol. 6 part.1 at pp. 294-95 (lease).

as to be decisive for the termination of the contract.[66] An example where there is a partial impossibility, is where a seller after having concluded the contract of sale, could not send the goods because their carriage was impossible (being blocked). The partial impossibility is the sending of the goods. It can be said that in this case the contract should not be terminated since the essential obligation viz, the transfer of the property, has been made. However, if the buyer proves that the sending or the delivery of the goods was essential in the intention of both parties, and that its non performance puts an end to the contract, in this case the contract should be terminated.[67]

Having seen that in cases of partial impossibility the debtor is released in part only, the question which may be asked is, whether the creditor is also exonerated in part from his obligations?. Regarding art. 1722 Fr.C.C (art. 481 Alg.C.C. almost exactly the same, and see *El Wassit* Vol. 6 part. 1. pp. 288 to 291), where there is a destruction of the thing rented, the lessee can ask for a reduction of the rent. Therefore it can be seen here that the creditor of the obligation which has become partially impossible (destruction) is exonerated in part since he can pay a part only of the initial due price. Although this solution concerns the contract of lease (of leases of houses), it should be generalised to all the other obligations (ie to do or to give a thing). (See Fiatte p. 115, and Smith J. D. p. 462).

But it should be noted that where there is a contract of sale concerning a specific thing and not a ('chose de genre'), and that its ownership (or delivery under Algerian law) has been transferred to the creditor, any destruction, whether total or partial, is to be borne by the creditor (ie the owner) who should pay the whole price. (See Fiatte p. 111). This seems to be in accord with what S. 7 of the Sale of Goods Act 1979 states because if the risk passes to the buyer no question of frustration arises. (See Chitty, Vol. 2. *Specific Contracts* (1983), para. 4189. As to the passing of risk see S. 20 (1) of the Sale of Goods Act. Chitty id para. 4209).

---

66 Radouant at p. 333.

67 Radouant at p. 335. It has been has suggested that the judge should terminate the contract if in treating it as still existing would in fact substitute a new contract in place of the initial one. This may mean that it would fundamentally change the contract already made if the contract after the partial impossibility occurs, is treated as still existing. See Fiatte at p. 53.

In the case where the ownership (or delivery under Algerian law), has not been transferred, and the thing is partially destroyed, the creditor (ie the buyer) has the choice between accepting a part only of that thing and obviously paying the equivalent of what he receives, or rejecting the whole and ask for a termination of the contract as a whole. (See Fiatte p. 115).

However, this solution seems to have an exception formulated in art. 1182/3 Fr.C.C.(concerning obligations made under a suspensive condition) which states that:"If the thing deteriorates without the fault of the debtor, the creditor has the choice either to rescind the obligation or to demand the thing in a state in which it is found, without diminution of the price.". This exception seems to concern French law only. (Fiatte at pp. 112-13). No similar article can be found under Algerian or Egyptian. C.C.. (See to this effect *El Wassit* Vol. 4 pp. 617-18). Even under French law that rule should not be extended by way of analogy to other contracts. (See Ripert, *Obligations* (1952), p. 568).

In the case of a sale of a 'chose de genre' which has perished in part, the buyer -if he so accepted- should pay for what he receives only (ie to pay in part). (See Fiatte pp.111 to 114). What is important to remember is that the question of the risk of the destruction of the thing sold does not arise when the thing is only of 'chose de genre' ie not specific. In this case it is the debtor (ie the seller) who will bear that risk. (See Mohamed Hassanine, *The Contract of Sale* (1983), p. 119). Under English law the ownership in a contract of sale of unascertained goods does not pass until they are ascertained. (See Chitty, Vol. 2. (1983), para. 4185).

V- Temporary Impossibility. In other cases although there is a real impossibility this is temporary only.[68] In such a case the debtor is not

[68] A general principle put by the jurisprudence is to the effect that where there is a temporary impossibility, the debtor is not exonerated, and the contract should be suspended until that impossibility ceases. See Dame Saurin V. Dame Bonnafous Civ.1ere.Feb 24th.1981.D.1982.479. Benabent 1987, at para. 254. This principle has been formulated by the Court of Cassation in the case of Ste d'Assur etc V. Guilhem (Ch.Civ.15th.Feb.1888.1.203. See Radouant at p. 275., and reaffirmed by the court of Nimes.Jan 4th.1918.Gaz.Trib.2.313. See Fiatte at p. 58. What should also be noted is that the French Code Civil (and the Algerian one apart from the suspension provided for in cases of illness and calling up) have not stipulated for the case of temporary impossibility. Id at p. 57.

totally exonerated, but will be exonerated for the delay in performance of his contract.[69] The effect of such a type of impossibility is to suspend the contract which will have its full effects when the obstacle has disappeared.[70] Thus in (Req. Oct 24th.1922.D.1924.1.8 C.Cass), the state of war was considered as a cause of suspension of the contract and not a cause of termination. The argument given by the Court of Cassation was that the war was not a perpetual obstacle to the performance of the contract.(See Fiatte at p. 61).

The only requirement in case of suspension, is that the performance of the contract after that delay should not become useless for the creditor, and that the delayed performance still conforms to the intention of both parties,[71] that is to say, they do not object to the delayed performance. It is so for example in the contract of employment[72] and the contract of lease.[73] In one case the contract was terminated because the obstacle to

---

[69] Mazeaud, *Responsabilite* (1970), at p. 733, and P. Ghiho (1983), at para. 643. This means that the debtor will not be held liable for damages for the delay in performance. Such damage is called under French law 'dommage-interets moratoires'. See François Chabas Encyclopedie Dalloz (1978), under "Force Majeure" at para. 118.

[70] Weill (1971), at p. 441, and Ripert (1952), at p. 517, and Benabent (1987), at para. 254, and C. Larroumet (1986), at p. 703. See also Dame Saurin V. Dame Bonnafous Civ.1ere.Feb 24th.1981.D.1982. 479., and Mohamed Hassanine, *El Wadjiz* at p. 121, and Ahmed Lourdjane, *Le Droit Civil Algerien* at pp. 70-71.

[71] Weill (1971), at p. 441, and in the (1986 ed), at p. 435, and Ripert (1952), at p. 517, and Philippe Malinvaud, *Les Mecanismes Juridiques des Relations Economiques.Droit des Obligations.* (4eme ed., Paris.Librairies Techniques.), at p. 214, and Fiatte at pp. 60-61. For the same opinion see Houcine Amer, op.cit at p.400. Therefore if the creditor can prove that it was in the intention of the parties and it was essential that the contract should be performed in that time only, in this case there should be a termination of the contract and not its suspension. See Houcine. A, id at p. 401, and Mohamed Hassanine, *El Wadjiz* at p. 121.

[72] See supra the question of illness, and Ripert (1952), at p. 518.

[73] Ripert (1952), at p. 518. If the suspension continues for a long time as to be intolerable for the other party, that party is allowed to terminate the contract. See as an example art. 1724 esp. para. 3. In case of a contract of employment the employer can sack an employee who is frequently ill, or he was ill for a long period. The employer will not be liable for having sacked that employee. See Benabent (1987), at para. 254. Under Algerian law it has been seen that if the illness of the employee exceeds one year (for an ordinary illness) or two years (for those certain types of illnesses), this would terminate the contract of employment. art. 20. Ordon. 75-31 op.cit, and see supra under 'Death & Illness'.

the performance of the contract did not end until after the time in which that contract should have been performed. An illustrative example is that a travel agency promised to take some passengers to see a certain exhibition, but due to an event of force majeure, it could not fulfill its promise until the end of that exhibition. In this case the contract should be terminated and not suspended. (See Fiatte at p. 68) It should also be noted that in the case where the debtor of the obligation which has become impossible of performance, is exonerated, the creditor is also exonerated. (Fiatte pp. 117-18, and see p. 155 supra).

The question which should be answered now, is in a case of temporary impossibility under what conditions could there be a suspension of a contract ? and what happens after the end of the impossibility?.(See generally Radouant pp. 272 to 304.)

A. The Conditions of Suspension.

At least three conditions are required in order that the contract could be suspended. There must be an obstacle to the performance of the contract, that obstacle should be temporary, and the obstacle should be simultaneous with the performance of the contract.

1. An Obstacle of Force majeure. This has already been discussed.(See supra)

2. A Temporary Obstacle. An obstacle is temporary when there is a possibility that it will end in the near future. This is true even if this possibility is one per cent (1%). Because if there was not such possibility, this would mean that there is no prospect that the impediment will end before the time in which the contract should be performed. In this case the contract should be terminated.[74] Thus it was decided in a case that a contract of employment of an employee, who was mobilised in 1914, should be suspended and not terminated. This is because nothing could make it foreseeable that the war will continue during almost five years. At the same time, no one could be certain that the employee would not be

[74] See Fiatte at pp. 60-61.

freed a short time after his mobilisation.[75] That is to say the period of the war and of the mobilisation were uncertain.

3. The Obstacle Should be Simultaneous With the Performance.

This means that no suspension would be allowed unless the obstacle arises at the same time as when the contract should be performed. Thus if the impediment ceases before the beginning of the time in which the contract should be performed, no question of suspension would arise.

It is derived from this condition that, in order for a contract to be suspended, the obstacle should cease before the end of the time-limit for the performance of the contract.[76] Thus if an artist who undertakes to decorate a place for a certain celebration, but becomes ill and can not therefore perform his obligation before the end of that celebration, his contract should be terminated and not suspended.(See Fiatte at p. 64.)

What has been said so far concerns in fact the case where the parties to the contract have determined a time-limit for the performance of their contract. The problem would be more difficult when no such determination exists in the contract. In this case it is the duty of the judge to infer, even implicitly, such a time-limit for the performance of the contract.(Radouant p. 288, and Fiatte p. 65.)

In determining that time-limit the judge should take into account the nature of the contract.[77] Thus for example, contracts of sale of goods the price of which are subject to great fluctuations should be terminated if the performance of such contracts is delayed.[78]

What should be noted is that where the parties stipulate a time-limit for the performance of their contract, this does not mean that by the expiration of that time-limit, the judge must automatically decide for the termination of the contract. This, in other words, means that the judge

---

[75] See Radouant at p. 279 (for the e.g. only). An English or a Scottish court may decide for the termination of the contract by frustration; since it cannot speculate as to the duration of war See supra.

[76] See Radouant at p. 273, and Smith J. D, at p. 464.

[77] Radouant at p. 287, and Smith J. D at p. 464.

[78] See Ripert (1952), at p. 518. it is in this "sense" that the court of Paris gave its decision in : Paris. Nov 14th. 1873. Bulletin des arrets de Paris de 1873 p. 142. See Fiatte at p. 65. Smith J. D., holds the same opinion at p. 464 (he cited a case as an example).

should decide whether that time-limit was really essential as to justify at its expiration the declaration of the termination of the contract, since further performance after the time-limit, will be useless.[79]

Sometimes and especially in cases of a contract of employment in which an employee was mobilised, the tribunals refer to the intention of parties in deciding whether his contract should be terminated or suspended only. Thus in certain cases the decision that the contract should be suspended relied only on the fact that the employee who was mobilised was not replaced, or that his house was not given to another employee when he was mobilised.[80] All this means that the employer treated the contract as suspended only and not terminated.

B. The Effects of Suspension.

When there is a suspension of a contract, the parties are excused from performing it without being at fault. Thus in a contract of employment, the employee will not provide his work and the employer will not pay him his salary and this during the suspension.[81] After the suspension the contract should be performed as it was initially concluded.(Radouant at p. 294). Even if there is a fundamental change (e.g. rising or falling of the prices) in the obligation of one of the parties, this will not be sufficient to terminate the contract. Especially if the contract has still some usefulness for the creditor. (Fiatte pp. 136 to 138).

The question which is worth discussing now is the possible partial exoneration of the debtor. This is when the event of force majeure is not the only cause of the damage to the creditor by the non performance of the contract.

---

[79] See Radouant at p. 282, and see Rungeard etc V. Gaillard. Ch. des Requetes.Feb 13th.1872.D.1871.2.177, and see Fiatte at pp. 74-75.

[80] Radouant at p. 292.

[81] The suspension in this case is automatic and does not need to be declared by the judge. Radouant at p. 274.

VI- The Question of Partial Exoneration.[82]

It may happen that the damage to the plaintiff was the result of an event of force majeure as well as of the fault of the defendant. In this case the event of force majeure is totally independent of the fault of the defendant. That is to say that the damage has two distinct causes. One is the event of force majeure, the other is the fault of the defendant. The question which may be asked is whether the defendant can be exonerated in part only[83] since the damage was caused partly by his fault, for which he will be held liable and partly by an event of force majeure, for which he is asking for his exoneration for this part of the damage.

The jurisprudence admitted partial exoneration in the case where the damage is caused partly by the fault of the plaintiff (ie the prejudiced party) and partly by the fault of the defendant.

In relation to the question with which we are concerned, the Court of Cassation in the well known case of "Lamoriciere" Transport Maritime de l'Etat V. Brossette etc, (Civ.Com.June19th.1951.2 arrets.D.1951.717) decided that this type of exoneration was possible. In that case a person was carried in the ship called "Lamoriciere", but due to an event of force majeure viz a violent storm, the ship sunk and the person died. The company of carriage was sued on the base of art. 1384/1 Fr.C.C (as a keeper of a thing). The Court of Appeal as well as the Court of Cassation, declared that the company was liable for that accident. However, the liability was for 1/5 only; which constituted the fault of that company. On the other hand it was exonerated for 4/5 which constituted the damage caused by the event of force majeure.

This tendency (ie partial exoneration) as established in the above named case was followed in subsequent decisions.[84] The question is therefore whether it is still followed ?.

Looking at a number of decisions[85], it can be said that this tendency

---

[82] It has been said that this question was raised in cases of 'delictual responsibility' and not in 'contractual responsibility'. See Yvaine Buffelau-Landore, *Droit Civil* (3eme ed., Masson. 1986), at p. 259.

[83] See Mazeaud, *Responsabilite* (1970), at pp. 734-35.

[84] Mazeaud, *Responsabilite* (1970), at p. 735.

[85] Mazeaud, *Responsabilite* (1970), at p. 735., and Mazeaud, *Leçons* (1985), at p. 637, and M. Le Galcher (1979), at para. 463, where he gives other recent decisions:Civ.June 15th.1977.J.C.P.1978.ii.18780., and C. Larroumet (1986), at pp.

seems to be abandoned. Thus in four decisions given by the 'chambre civile' of the Court of Cassation in 1970 -although they were concerned with the fault of a third party they are nevertheless applicable here- it was decided that:"the 'keeper (gardien)' of a thing, who has caused a damage, unless he proves it was <u>due totally to an event of force majeure</u>, will be fully liable.".[86] Therefore there is either a case of force majeure and the debtor is totally exonerated, or there is no case of force majeure and the debtor is fully liable. (See also P. Malinvaud, *Les Mecanismes...* p. 214, and Yvaine B. L (1986), p. 366). An example of a decision of the Court of Appeal is given (ie there was a fault of the defendant and a case of force majeure) where it held for a partial exoneration, but Yvaine B. L, regards this decision as an inferior one, and points out that the Court of Cassation no longer admits such partial exoneration where the event is not a real case of force majeure ie that event was the only cause of the non performance.(Yvaine B. L (1986), p. 366) Radouant (p. 249), and Fiatte (pp. 93-94) are also of the general opinion in not admitting the partial exoneration.

VII- <u>Partial Exoneration and the Predisposition of the Victim</u>[87]

Another question worth discussing is that it may happen that a debtor (a doctor) causes an injury by his fault to the creditor (his patient). However, the problem is that, that injury would not have been caused if that person himself was not in a state of health which facilitated that injury to him. In

---

705-06.

[86] Mazeaud, *Responsabilite* at p. 737., and cf to a certain extent with footnote. 26 chapter one of the first part. The same solution is also admitted under Egyptian law. That is to say where the damage is caused by an event of force majeure and by the fault of the debtor, there is no partial exoneration and the debtor is fully liable. See *El Wassit* Vol. 1 at p. 907, and Ali Ali Souleimane, *Studies of the Civil Liability in the Algerian Civil Law* (Algiers. O. P. U. 1984), at p. 147, and Antoine Vialard, *Droit Civil Algerien.*(1986), at p. 142, this author is of the same opinion and said that this solution should also be applied under Algerian law, and Anouar Soltane, <u>op.cit</u> at p. 338, and Houcine Amer, <u>op.cit</u> at p. 402, and Mohamed Hassanine, *El Wadjiz* at p. 165. All these authors hold the same opinion.

[87] See Mazeaud, *Responsabilite* (1970), at pp. 737-38, and Guy Raymond & Pierre Billard, *Droit Civil* (1986), at para. 353, and see Michel De Juglart (1982), at p. 312, see also Jacques Flour et Jean-Luc Aubert, *Droit Civil.*(1981), at para. 780 p. 306.

such a case it can be said that the fault of the debtor was not the only reason of the injury, but that the predisposition of the patient was also the second reason of it. This should lead us to say that the debtor should be exonerated in part. The question is therefore whether this solution can be maintained ?.

In fact the doctrine is divided on this point. Mazeaud, in *Responsabilite* (1970), rejects this solution[88] arguing that:

1)- For humanistic reasons, persons who are ill also have the right to be protected as those who are not.

2)- Without the fault of the defendant there would not have been any injury, therefore his fault was the only cause of it.

3)- There are a great number of sick people therefore it is not unforeseeable that the defendant will meet them.

The jurisprudence is also divided. But in Paris March 5th.1957.D. 1957. 299. C.d'App, the predisposition of an ill person was rejected as constituting a case of force majeure. The Court of Appeal declared that :"The predisposition of a person, if it is not due to his fault, does not reduce the liability of the doctor.". In a recent decision it was decided that the predisposition of a victim cannot constitute a case of force majeure justifying a partial exoneration from liability. (Mazeaud, *Responsabilite* (1970) p. 738., and see Encyclopedie Dalloz (1978) "Force Majeure" para. 130). As to Egyptian law, its jurisprudence has refused to consider the predisposition of a victim as a case of force majeure and to exonerate the defendant in part only. (See *El Wassit* Vol. 1. at p. 907 footnote. 1.)

What should be noted concerning the effects of force majeure in general, is that where the contract is terminated, this effect would be for the future only and has no retroactive effect. Therefore what has been previously performed is considered as valid.[89] However, when a sum of money has been paid in advance for a promise to be performed in the future and is not performed because of a case of force majeure, in this case the restitution of what has been given is allowed.[90]

Having studied the effects of the occurrence of a frustrating event (or

---

88 For the opposite view, see Mazeaud id at p. 738 footnote. 3.

89 Radouant at pp. 267-68.

90 De Page at p. 816, and Barry Nicholas, *French Law of Contract* (1982), at p. 199, and Planiol & Ripert (1952), at p. 569.

of one of force majeure) under French and Algerian laws, as well as under English and Scottish laws, what is worth discussing now is the possible **inferences** which can be made regarding the principles involved in those effects.

First, we have seen that the only solution provided by English law in cases of frustration is the termination of the whole contract. Under French as well as Algerian law, two solutions are provided. These are the termination of the contract or its suspension depending on the nature of the event of force majeure and of the obligations.

Second, under English, Scottish, French and Algerian laws, by the occurrence of an event of force majeure (or frustration) both parties are released from further performance. The only point to be made here is that whereas under English, Scots and Algerian (art. 121.C.C) laws this is provided expressly[91], under French law this is inferred (for the exoneration of the creditor) from the principle (and its application), of the connection between obligations in synallagmatic contracts.

Third, what has been paid in advance for a performance to be made in the future but is not made is recoverable under all the laws under discussion, English (Law.Reform.Frustrated.Contracts.Act.), Scottish law (see <u>supra</u> footnote. 4 this chapter) and French law (see <u>supra</u> p.163) and this is also the solution under Algerian law.

Fourth, as to the question whether a party can claim a remuneration for what he has done (ie for labour and materials provided) when he partly performs his contract and then is prevented by a frustrating event from further performance, the solution given by different laws under comparison is similar. Thus under Scots law no claim is to be sustained unless the party for whom that work is supposed to be provided, has <u>benefited</u> from it. English law is not different since the passing of the 1943 Act. Because the court, under that Act, can allow with its discretion, a remuneration for the party who has provided that work and this if he has conferred a <u>benefit</u> to the other contractor. Under Algerian law (arts. 569 & 570 Alg.C.C. <u>supra</u> p. 40) it is stated that the heirs of the worker who dies before finishing the thing he promised to do, are not allowed to ask for a remuneration for the work done unless the party for whom that work was

[91] See for English law Treitel (1987), p. 688.

to be done has effectively benefited from that unfinished work. We have also remarked, above that if that party has not gained any benefit from the unfinished work, no remuneration is to be allowed even if great expenses were made in the completion of that work.

Fifth, we have discussed the question of the expenses involved in the performance of the contract which has been frustrated. We have said that under English law there can be a recovery of those expenses under the 1943 Act. As to French and Algerian laws it appears that such a question is not dealt with. For Scots law see (p. 136 supra).

Sixth, as to the question of advance freight, we have seen that English law differs from all other legal systems . We have therefore to rely on what was expressed by their Lordships (supra p. 139).

Seventh, we have remarked when discussing the English case of Appleby that it has been said that the machinery can be considered as a benefit conferred to the other contracting party, even if it was subsequently destroyed. Therefore the worker could get a remuneration for his work under the 1943 Act. As regards Algerian and French laws, a different solution would be given in such a case. Because following art. 1787 Fr.C.C (and art. 568 Alg.C.C.) the worker whose work before its delivery is destroyed by force majeure cannot claim any remuneration whether he provided the materials or his skill only. In addition to this, when we have said that the heirs of the worker who dies without finishing the work he promised, cannot ask for a remuneration unless the other contracting party has benefited from it, this is understood to be such while the unfinished work is still in existence. Whereas if it was totally destroyed, no remuneration is allowed. This would therefore differ substantially from the solution which can be held under the 1943 Act. Because the argument we cited when discussing that case was that what was installed could be sold before frustration, and this is said to be a benefit. Such an argument under French and Algerian laws cannot in our view be sustained, because the ownership in the unfinished work, as the one in Appleby, does not pass to the other contracting party unless it is finished and delivered. Consequently no risk is deemed to have passed. It derives from what is said, that no question of the possibility of selling that

work arises while it is still the property of the worker.

Eighth, as to the question already put (at pp. 136-137 supra) to the effect that under Scots law, where a person was in the course of constructing a building on a land owned by another and then that building was accidently destroyed before it was finished, and that the builder can ask for a remuneration for the work done and the materials supplied. With these facts, French law is strikingly the same as the one of Scotland. This solution is an application of the principle -and this under both laws- that the ownership in the unfinished work passes to the owner of the land on the principle of accession. Therefore the maxim *res perit domino* applies here. That is to say the risk of destruction is on the owner.(For Scots law see pp. 136-137 supra, and for French law see Mazeaud, *Leçons* Tome. 3, Vol. 2 *Principaux Contrats* (1968), p. 544) This similarity as regards Scots law might be explained by what has been said under footnote 2 page. 5 supra.

Ninth, as to the question of partial impossibility, we have said that under French as well as Algerian laws, the debtor is released for the part which have become impossible, whereas he has to perform the part of the contract still possible of execution. As to English law the case of Howell V. Coupland discussed above might involve the same question.(See also Chitty Vol. 1 (1983), para. 1534)

Tenth, as to the question of part delivery under English law, it has been said that when a buyer gets a part only of the goods whereas he has paid in advance the full price for the whole quantity, he cannot recover the money paid for what remains undelivered. However, we have also remarked that there is an opinion saying that he can recover his money on another ground. Under Algerian law -as we have said- where there is a partial destruction of the goods sold, the buyer has the choice, -if the destruction is considered as substantial- between accepting the goods left and paying accordingly, or asking for the termination of the whole contract. It does not appear that there would be a difference -under Algerian law- if the price of the goods was paid in advance. Therefore we see that under both laws the buyer pays for what he receives only.

As to the second case where the seller delivers part only of the goods sold and the remainder is destroyed by a frustrating event, he receives no payment at all. We have said regarding this situation that normally the

seller has no claim, but it has been pointed out that he can get a remuneration of what he delivered on other grounds. As to Algerian law what has been said above is also applicable here. But the buyer can either -depending on the substantiality of the destroyed goods- accept the remaining goods and pay for them, or reject the whole and claim the termination of the contract. Therefore both laws are similar in their solution to the problem although different principles are used.

Eleventh. (A). We have noted that under Algerian and French laws, the risk in synallagmatic contracts is upon the debtor of the performance which has become impossible when no ownership of a thing to be transferred is involved. That is to say *res perit debitori,* since he cannot ask the creditor to perform his obligation. This is also the solution under English and Scottish laws.

(B). As to the cases where there is a transfer of ownership, the rule under French law is *res perit domino.* This is also the solution under English law. Algerian law bases the bearing of the risk of impossibility not upon the passing of ownership but upon the delivery of the thing sold. Thus both French and English laws are similar in this respect

It can be said (and this applies to English, Scottish, French and Algerian laws) that by the occurrence of a frustrating event, both parties to the contract are released from further performance of it. The risk of the impossibility of performance is upon the debtor since he cannot ask the creditor, whose performance is still possible, to perform his contract. Another effect is that, what has to be paid ceases to be payable and what has already been paid for a future performance which cannot be done is recoverable. In cases where the contract is performed in part only and what remains becomes impossible, no remuneration is to be given to the debtor unless the performed part is considered as a benefit conferred to the other contracting party. In case of partial impossibility, the debtor is normally released for that part. As to the question whether the debtor is still required to perform what remains possible, this is in fact what French and Algerian laws hold in such a case. In English law this question seems to be not yet clearly discussed.(See Chitty Vol. 1 (1983), para. 1534)

The main difference which can be noted under the different laws is that, whereas under English and Scottish laws there is only one effect in

cases of frustration viz either the termination of the contract or its enforcement, under French and Algerian laws on the other hand the contract can be suspended in addition to the radical solution viz the termination of the contract. The "all or nothing" solution provided by English law is described as "short sighted, and harmful to business relations.". (Neville M. G, (1985) Int'l.Bus.Lawyer p. 506 col. 1)

Section Three. Contractual Clauses Concerning Force Majeure and Frustration.

What has been so far examined as to instances of frustration and force majeure, as well as their effects, is applicable where no contractual clauses are included in order to give new instances of release or to set certain conditions not normally found in the legal systems in question. The question which is worth studying in this respect is how English and French courts deal with such clauses. We will then make a comparison between the different laws under discussion and see whether they are rigid or not in their construction of contractual clauses concerning the question of exoneration from responsibility.

§.1. Contractual Clauses Concerning Force Majeure.

The parties to a contract are allowed to put in their contract clauses which may change the conditions of force majeure or its effects. This is because the rules concerning the force majeure are not imperative or 'd'ordre public'.[92]

Therefore the parties may stipulate that where the performance of the contract has become difficult only and not impossible[93], the debtor will be exonerated. In other cases the parties may stipulate that the debtor will bear the risk of an event of force majeure.

Such clauses are valid[94] since in the French Code Civil itself there are

92 Radouant at p. 126, and *El Wassit* Vol. 1 at pp. 880-81, and Anouar Soltane, op.cit at p. 338.

93 Mazeaud, *Responsabilite* (1970), at p. 742, and Mazeaud, *Leçons* (1985), at p. 639, and Weill (1986. ed), at p. 434 footnote. 265 (see Com. July 8th.1981.Bull.Civ.iv. n: 312), and Radouant at p. 127.

94 Mazeaud, *Responsabilite* op.cit id, Mazeaud, *Leçons* id, and Philippe Malaurie (1985), at p. 333, and p. Malinvaud, *Les Mecanismes* at p. 214, and

some articles to the same effect, (see arts. 1772, 1773, 1825, 1883[95], 1302/2[96] Fr.C.C, and arts. 178/1 & 168/2 Alg C.C.).

However, the jurisprudence constructs such clauses in a strict manner. Thus if for example a clause speaks of impossibility, the jurisprudence will not consider the difficulty of performance or the danger in performing the contract, as included in the meaning of that clause, therefore it will not exonerate the debtor.[97] In the case where the clause is general in its meaning (or connotations), this does not mean that other events not expressly stipulated in the clause, will be included. Thus if a clause speaks of 'strikes, lock out or any other impediments'. It cannot be concluded from this that 'war' can also be included. This is because the two stipulated events are short in time, whereas the war is generally longer than that.[98]

It is also true that any clause which is rigorous for the debtor, as the one which makes him bear the risk of any event of force majeure, should be express, (see art. 1772 Fr.C.C).[99] This solution is applicable to any contract.[100]

The problem with a clause which makes the debtor bear the risk of force majeure, is in determining its real sense. That is to say how much of the risk will the debtor bear?. According to Marie, reference should be made to the intention of both parties to the contract as it is declared in art. 1156 Fr.C.C. We should also take into account art. 1773. (Marie at pp. 128-29) This means that where a clause of force majeure uses the term 'force majeure' without any other precision, this should be understood to mean the events of force majeure which are ordinary and not those which are

---

Radouant at p. 127, and Marie at p. 120, and see Pierre Wigny M, "Responabilite Contractuelle et Force Majeure" (1935) R. T. D. C.19, at p. 88.

95 Mazeaud, *Responsabilite* (1970), at pp. 742-43. But it should be noted that there is a certain limitation on such clauses. See art. 1811 Fr.C.C, and see Marie at p. 120.

96 Marie at p. 120.

97 Radouant at p. 128.

98 Radouant at p. 129. See also *ius generis* rule, and cf English law of construction.

99 As to Algerian law art. 178.C.C, is not precise whether the clause by which the debtor takes the risk of an event of force majeure should be express or can be implied.

100 Marie at pp. 121-22.

extraordinary, as it is the case in arts. 1772-73, & 1811 Fr.C.C. (Fiatte at p. 17). However, if there is no clause concerning the bearing of the risk of the events of force majeure, it should not be presumed that the debtor has taken the risk of force majeure, not even of those which are ordinary. (See Wigny, (1935) R. T. D. C p. 88, and see art. 1148 Fr.C.C). But if the event was foreseen he will be presumed to have taken its risk.

As to the Algerian law, the Code Civil does not make a distinction between events of force majeure which are ordinary and those which are extraordinary. Therefore it might be said that, the question as to what extent a debtor bears the risk of an event of force majeure is left to the discretion of the judge deciding the case in question.

The question which is worth discussing now is whether a tribunal will give full effect to the clauses concerning force majeure without looking at whether the condition of impossibility is met or not ?. Thus if a clause states that in a case of 'requisitioning' the debtor should be freed from his obligation to perform the contract, the question is whether a Tribunal should exonerate the debtor simply by the occurrence of the event stipulated in the contract, or should it look at the other conditions and see whether they are met or not. It can be said that a Tribunal should give effect to such clauses. However, this should not be automatic. There must be a real obstacle to the performance of the contract, for a Tribunal to give effect to that clause of force majeure. This does not mean that there must be an absolute impossibility of performance, -doing such a thing would, in fact be, a refusal to give any effect to that clause- but it is sufficient that there is a real obstacle to the performance of the contract.[101]

§.2. Contractual Clauses Concerning Frustration.

Under English law the question of the effects of contractual provisions (or clauses) is not substantially different.

Thus normally, where the parties expressly provided for the

[101] Radouant pp. 131 to 136, reference to cases are cited there. This author did not discuss the interpretation of the other conditions of force majeure such as the inevitability and the unforeseeability, but what has been said, should also be extended to the appreciation of the other conditions. As to Algerian law there seems to be no reason in not applying this solution.

contingency, the doctrine of frustration cannot be applied.[102] Thus in Joseph Constantine Steamship Line,Ltd v. Imperial Smelting Corporation Ltd ([1942] A.C.154.) Viscount Simon L.C.referred to the case of Tamplin etc ([1916] 2 A.C.397.403, 404.) where it has been settled that:

> "there can be no discharge by supervening impossibility if the express terms of the contract bind the parties to performance notwithstanding that the supervening event may occur."

In the Eugenia case ([1964] 2 Q.B.226.) Lord Denning M.R said that when deciding cases of frustration we have to look at whether parties provided for that contingency. If they have,then the contract will govern such a supervening event.[103] They may for example stipulate that, some instalments of the performance of the contract will be cancelled, or that, the performance of the contract will be postponed.[104] In all these circumstances their stipulations will prevail, ie the doctrine of frustration has no application.

But an exception to this is where the performance of the contract involves trading with the enemy.[105] Lord Sumner in the case of Ertel Bieber And Company v. Rio Tinto Company, Ltd, ([1918] A.C.260.) said:

> "Does a suspensory clause oust the application of the general rule? (which is -as he explained-):"The rule as to the dissolution of trading contracts on the outbreak of war, when they are executory on both sides...(he then said)...if upon public grounds on the outbreak of war the law interferes with private

[102] Chitty Vol. 1 (25th ed., 1983), at 1537, and see John Salmond, op.cit at p. 298. This is an application of the maxim *expressum facit cessare tacit*, which means that "when there is express mention of certain things, then anything not mentioned is excluded", ie no implication -in the context of frustration- is to be allowed in order to dissolve the contract, for contingencies other than those dealt with in the provision. See Mc Elroy, *Impossibility of Performance* op.cit at 204, and see the speech of Bailhache J in Banck V. Bromeley (1920) 37 T.L.R.71, cited in Mc Elroy, *mpossibility of Performance* op.cit at p. 216. See also the speech of Lord Sumner in Bank Line [1919] A.C.435, at 455 where he said that when parties make a provision which is 'full and complete' dealing with the frustrating event,"it is not for the court to import into the contract some other and different provision for the same contingency called by a different name.".

[103] The Eugenia case at 239.

[104] (1940) 56 L.Q.R. at 199.

[105] Treitel (1983), at pp. 676-77.

executory contracts by dissolving them, how can it be open to a subject for his private advantage to withdraw his contract from the operation of the law and to claim to do what the law rejects, merely to suspend where the law dissolves?" (he then said)...discharge of a contract by reason of the outbreak of war between the countries to which the parties...belong should be effected simply by operation of law independently of their arrangements ."(Ertel Bieber 288. Emphasis is mine.)

Furthermore, the contract may be held frustrated even though no question of illegality is involved in its performance and the frustrating event was provided for in the contract. This can be explained by the fact that, the provision cannot cover the entire effects of the event. In other words the provision is limited in extent.[106]

Therefore parties to a contract are not only required to provide for the contingency in question in their contract, but they have to provide for it by apt words. It is this which may explain the decision in the case below. Thus in Metropolitan Water Board v. Dick Kerr And Company,Ltd, ([1918] A.C.119.) although there was a clause in the contract which granted an extension of time, where the performance of the contract is either prevented or delayed, and although the event in question fell within the terms of that clause it was nevertheless held that the contract was frustrated.

Lord Finlay L.C, said that, the clause:

> "...does not cover the case in which the interruption is of a such character and duration that it vitally and fundamentally changes the conditions of the contract, and could not possibly have been in the contemplation of the parties to the contract when it was made."[107]

[106] Professor Ian McNeil says:"No contract can ever be fully planned; every contract presents the possibility that events will occur for which the planning was incomplete by reason of omission or ineffectiveness, or both.". Cited by Richard E. Speidel "Excusable Nonperformance in Sales Contracts: Some Thoughts about Risk Management" (1980) 32 South Carolina Law Review.241, at p. 242, but cf this with what Berman says about international transactions (post)].

[107] The Metropolitan case at 126, and see Fibrosa...[1943] A.C.32, esp the speech of Viscount Simon at p. 40 (a provision in the contract does not prevent frustration from application)., and see Parkinson (Sir Lindsay) & Co LD V. Commissioners of His Majesty's Works & Public Building [1949] 2 K.B.632 at 667 per Asquith L.J., a provision in the contract "though literally applicable, did not apply to a delay (which is

In Bank Line Ltd v. Arthur Capel And Company,([1919] A.C.435.) Lord Sumner said:

> "A contingency may be provided for, but not in such terms as to show that the provision is meant to be all the provision for it. A contingency may be provided for, but in such a way as shows that it is provided for the purpose of dealing with one of its effects and not with all."[108]

Therefore, even an express provision in the contract dealing with the frustrating event does not prevent the doctrine of frustration from being applied, unless the provision shows that parties intended to be bound whatever might be the consequences of that event, even if 'disastrous'.(See Fifoot (1986), at p. 564 (reference is made here to the Jackson case)).

However, it has been suggested (Berman) that in dealing with international contracts the courts should give effect to the provision of the parties in their contract. In other words, if they have provided for the contingency and that the contract should be frustrated, then their intention should prevail. As to other events not provided for, the writer suggests that no release should be given to contracting parties since what is left is intended by the parties to be borne by the obligor (ie the debtor).[109] If it is supposed -says the same writer- that the parties insert clauses for the events A.B.C. and that by their occurrence the contract would be frustrated, if it is permitted to courts to release parties by the occurrence of X.Y.Z. events, this would make the draftsman who provides for contingencies which discharge the contract,

> "insert what may be called an anti-frustration clause, stating that neither party shall be excused from liability for non performance caused by any event not expressly covered by particular contractual provision.". (Ibid at p. 1417).

---

the contingency in question)...so extreme as to throw the work from the summer into the winter months and so revolutionize its character.". This is in fact an application of what Lord Justice Scrutton said supra at footnote.7, chapter four.

108 Bank Line at 456., see further Acetylene Corporation of Great Britain v. Canada Carbide Company (1921) 8 Lloyds Rep.456, and see the speech of Lord Justice Bankes at 458.1., and see Tamplin [1916] 2 A.C 397., esp Lord Haldane's speech at 406. And see (1940) 56 L.Q.R. at 199.

109 See Harold J. Berman, "Excuse for Nonperformance in the light of Contract Practices in International Trade" (1963) 63.2 Columbia Law Review.1413, at p. 1416.

Even by such clauses the draftsman has further to specify which events do not discharge the contract.

A doctrine which gives release even if there is an express provision in the contract, can be qualified as being a "liberal doctrine of excuse", and does not therefore take into account the fact that businessmen in international transactions made their contracts "with open eyes". (Ibid pp. 1417-18). Moreover since the parties are from different legal systems, they rely more on the terms of the contract than on doctrines of release of one country or another.(Ibid pp. 1419-20).

He further says that a:

> "return to the spirit of *clausula rebus sic stantibus* poses special dangers in the sphere of international trade, where the parties understand each other better...than they understand each other's legal systems and where they rely not upon an equity that overrides contract but upon the equity of the contract itself- an equity that has its source in the body of international commercial customs which traders throughout the world have developed throughout the centuries.".(Ibid p. 1438)[110]

However, what Berman says (above) is criticised by M. G. Rapsomanikis, who says that what is left by the parties without provision, does not necessarily mean that they took its risk, they may have intended to terminate the contract by the occurance of that event, or they did not provide because of the fear that the contract would not be concluded. (See Rapsomanikis, (1980) 18 Duquesne L.Rev at p. 563). Rowlat J, says that although there may be a provision in the contract, this does not prevent frustration from being applied, where the effect caused by the frustrating event is beyond what is ordinarily contemplated.(Pacific Phosphate Co V. Empire Transport Co (1920) 4 L.L.L.R.189, cited in Mc Elroy, *Impossibility of Performance* op.cit at pp. 212-13).

From what has been discussed above it can be said that under English as well as French laws, parties are allowed to provide that the debtor will not be released even in case of impossibility of performance. Another

---

[110] See also (1980) 13 Vanderbilt etc at p. 131 (where an event is foreseen parties are assumed to have taken the risk of its occurrence.).

remark concerning English law is that a contractual clause will have its effects unless its application would be contrary to public policy. This is for example the case where the performance of the contract has become illegal because of an outbreak of a war, and a clause stipulates for the suspension of the contract only whereas in such a case it should be terminated. Such a principle might also be held under French or Algerian law.

The other similarity between English, French and Algerian laws, is that courts construe those clauses in a strict manner. Thus under English law[111], in order that a contractual clause can have its full effects as intended by the parties, it should cover all aspects of the event in question (ie its effects and any other question related to it). Therefore, generally speaking, French law does not appear to be different from what has been said under English law. The strictness in construing clauses dealing with force majeure and frustration, and especially those which are rigorous for the debtors, is certainly in favour to debtors. This might show that courts are not reluctant to adhere to the "laisser faire laisser passer" principle (intended in its largest sense). This may be supported by what Lord Wilberforce said (infra page.210).

[111] See also for the opinion that English courts follow a strict construction of clauses dealing with instances of frustration, such as force majeure clauses, Atiyah P. S., *The Sale of Goods* (7th ed., Pitman Publishing. 1985), at p. 256.

PART TWO

WHERE THE PERFORMANCE IS NOT STRICTLY SPEAKING IMPOSSIBLE (frustration stricto sensu)[1]

Introduction.

What has been so far studied concerns instances where the performance becomes impossible in fact -such as death-, or in law -such as trading with the enemy-. It has been seen that the contract under these instances may be frustrated depending on the surrounding circumstances in each case. However, the doctrine of frustration is not limited to cases of impossibility. It can also apply to those instances where the performance is literally speaking possible. It is these instances which will be studied in what follows.

Contracts which are held frustrated, can be classified under two headings. The first one is where the performance of the contract becomes valueless to the party who seeks release from his obligation. The second is where it becomes burdensome.

As to force majeure we have said that it is devoted to cases of absolute impossibility. In what follows the doctrine of frustration will be compared with another doctrine dealing with instances of performance having become onerous.

As to the cases where the performance becomes valueless (infra) we will see that French courts dealt with this question, but the solution in those cases was based on other principles and not upon the principle of force majeure. As to the question of performance having become onerous, we will compare frustration with the theory of imprevision as admitted in Algerian law as well as in other laws.

---

[1] See (1944) 60 L.Q.Rev at p. 162.

CHAPTER ONE. WHERE THE PERFORMANCE OF THE CONTRACT BECOMES 'VALUELESS'[2] (or the purpose of the contract being defeated)

The illustrative cases in English law where the performance of a party's obligation becomes valueless to the other contracting party, are what is called the "coronation cases". These are Krell v. Henry[3], and Chandler v. Webster. ([1904] 1 Q.B.493.)

In the Krell case, Henry hired rooms for two days excluding nights[4], in order to view the procession of the King Edward VII. Such a purpose was not stated in the contract, but there was in fact an announcement of the procession and that rooms were to be let, and this induced the defendant to enter into the contract. (See the Krell case). The defendant (Henry) paid a deposit of £25, but the balance of the rent remained unpaid. Owing to the illness of the King, the procession was cancelled.[5] Therefore the defendant refused to pay the balance, and sought to recover what had already been paid. Vaughan Williams L.J, in giving his judgement, applied the principle as laid down in Taylor. There it was said:

> "Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for

[2] See (1946-47) 21 Tulane Law Review at p. 604.

It appears that under **Swiss law** the frustration of purpose does not release a debtor from his contractual obligation. Thus following a note under article 97 of the Swiss Code of Obligations, the lessee, who is prevented from using the premise he leased for the purpose he had in mind because of a prohibition of his activity, cannot claim his exoneration. This is true unless the purpose of the lease was stipulated in the contract.

[3] [1903] 2 Q.B.740, in such cases there is no real impossibility but there is frustration of purpose. See The Juridical Review (1980), at p. 11.

[4] Treitel (1983), at p. 666 footnote. 58.

[5] If there was a destruction of the room and this before the procession took place then this case would fall within Taylor V. Caldwell principle, and the performance would be impossible. Since there was a cancellation of the procession only, there is a failure of the purpose of the contract. See Salmond, *Principles of the Law of Contracts* (1927), at p. 291. However, -as will be seen- the rule in the Taylor case ie the excuse for non performance when there is an impossibility of performance, was extended to cases such as the one under discussion, where a state of things (event), being of the essence of the contract in the eyes of both parties, fails to happen. See G. M. Sen at p. 160.

the fulfillment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor"(The Krell case at 748.)

And because the Taylor case is limited to instances where performance becomes impossible through the perishing of a thing which was in this case the subject matter of the contract, his Lordship said:

"...the case of Nickoll v. Ashton[6] makes it plain that the English law applies the principle (of Taylor case) not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or *state of things*, going to the root of the contract, and essential to its performance."[7]

But because, following the reasoning in Nickoll, such condition or state of things[8], has to be expressed in the contract as the foundation[9]

---

[6] [1901] 2 Q.B.126. It is to be noted that the Nickoll case was decided on the basis of the Taylor principle. This is because in Taylor the performance of the contract depends on the continued existence of a given thing, which perishes, and in Nickoll the reference to the 'Orlondo' was considered to be a 'given thing'. See (1940-41) 4 Mod.L.Rev at p. 242. Furthermore, it is not necessary for the application of the Taylor principle that the thing which perishes, must be the subject matter of the contract because in Nickoll the subject matter was the cargo carried by the 'Orlondo', and it was its stranding (ie of the "Orlando") which frustrated the contract. See Mc Elroy, *Impossibility of Performance* op.cit. at p. 29.

[7] So his Lordship has extended the principle of Taylor as stated above in order that it would cover the "non-existence of a state of things"[ie the procession in this case], even if it is not mentioned in the contract. See (1940-41) 4 Mod.L.Rev at p. 255. However, what his Lordship said when referring to the Nickoll case was opposed as being not the one upon which Nickoll was decided. See (1940-41) 4 Mod.L.Rev at p. 251.

[8] The condition or state of thing in Krell is -as understood from Vaughan William L.J's speech- the procession of the King, or its occurrence. See (1980)13 Vanderbilt Jou etc at p. 110.

of the contract and this was clearly not the case in Krell v. Henry, Vaughan William L.J, said that, it was not necessary for the condition or state of things to be expressed but can be evidenced by extrinsic evidence. By that reasoning his Lordship could really bring the Krell case, within the principle of the Taylor case.[10]

Then his Lordship proposed the test to be used in determining whether a contract is frustrated or not. The first step is to determine the foundation of the contract (here the procession), and then, whether the event which prevented the performance[11] of the contract (here the cancellation) was of such a character that it cannot be said to be in the contemplation of both parties when the contract was made.[12] Having answered these

---

[9] Which means that parties to the contract contemplated the continued existence of that condition or state of thing as the basis of their contract without which no contract would have been made (see the Taylor principle). It has also been said that even in the Nickoll case the reference to the shipment by the 'Orlondo' was not only express, but can be said to be implied. See (1919) 35 L.Q.Rev at pp. 86-87.

[10] The implication of a term or condition in Krell, following the Taylor principle is described as being a "legal fiction" and not as a "matter of construction according to the usual rule,...". See Mc Elroy, *Impossibility of Performance* op.cit at p. 202. The usual rule of construction referred to here is the one stated by Lush J in Churchward V. The Queen (1866) L.R.1 Q.B. 173, at 211, where he said:"I think the court ought to be extremely cautious before they arrive at a conclusion that the parties intended more than they expressed. In order to raise what is called an 'implied' covenant, I apprehend the intention must be manifest to the judicial mind, and there must be also some language, some words or other, capable of expressing that intention,-not that any formal technical phraseology is required, but you must find words in the instruments capable of sustaining the meaning which you seek to imply from them.". See Mc Elroy, op.cit at p. 200.

[11] Here the performance has to be understood in the sense of the coronation cases, in other words, as the purpose of hiring the room, viz viewing the procession. Because literally speaking the performance was the payment of money.

[12] See the Krell case at 751. But notice that Romer L.J, although agreeing with Vaughan William, that the contract was frustrated, nevertheless he said "The doubt I have felt was whether the parties to the contract now before us could be said, under the circumstances, not to have had at all in their contemplation the risk that for some reason or other the coronation procession might not take place on the days fixed;... and whether, under this contract, that risk was not undertaken by the defendant. But on the question of fact as to was in the contemplation of the parties at the time, I do not think it right to differ from the conclusion arrived at by Vaughan William, L.J...". Ibid at 755, cited in 4 Mod.L.Rev at p. 250. What Romer L.J., said might concern the case where

questions in the affirmative, he concluded that parties were excused from further performance of the contract.[13]

The second case viz Chandler v. Webster ([1904] 1 Q.B.493.), is similar to the first one in its facts and conclusion. The only difference was that in the present case the viewing of the procession was stated in the contract. Romer L. J. put the principle upon which this and other similar cases were decided as follows:

> "Where there is an agreement which is based on the assumption by both parties that a certain event will in the future take place, and that event is the foundation of the contract and, through no default by either party, and owing to circumstances which were not in the contemplation of the parties when the agreement was made, it happens that, before the time fixed for that event, it is ascertained that it cannot take place, the parties thenceforth are both free from any subsequent obligation cast upon them by the agreement...".[14]

---

the cancellation of the procession was a mere probability in the minds of the contracting parties. But in fact it is not the probability of the happening of an event which should be taken into account to decide whether that event was or was not in the contemplation of the parties. There should be some reasons which made it possible that a certain event will occur. See to this effect the appreciation of the condition of unforesseability under French law supra.

[13] Per Vaughan William L.J, cited in H. G. Beal at p. 297. It has been suggested that the principle in Krell can be applied to a sale of goods. For example if after the conclusion of the contract, these become of no use to the buyer, in other words, the purpose for which they were bought was defeated, in this case the contract may be frustrated, provided that that purpose was, for both parties, the foundation of the contract and that it should continue (ie the purpose). See Benjamin's, *Sale of Goods* (1974), at 441. However, it has also been observed that it is a matter of speculation whether a certain state of things was or was not contemplated by both parties to be the foundation upon which the contract was made. See Mc Elroy, *Impossibility of Performance* op.cit at p. 72.

[14] Chandler v. Webster at 501. As regards Scots law, it has been said that the question of failure of purpose (as in Krell) is not clearly settled. That is to say whether it would frustrate a contract or not. See McBryde, Jur. Rev., op.cit at pp. 12-13, and McBryde, *The Law of Contract* (1987), at p. 351. This is because in some cases the contract was held to be frustrated by failure of the purpose of the contract as in the Tay Salmon case 1929 S. C. 593, where the contract of lease of salmon fishings, was held to be frustrated because a subsequent law had made the major part of the fishing spaces impossible to use and rendering therefore the contract almost 'valueless'. Therefore the purpose of that contract viz the fishings, was almost entirely defeated by that law. (see also A. E. Abrahams, Ltd V. W. Campbell. 1911 S. C. 353) However, in other cases

It was in fact the third case viz Herne Bay Steam Boat Company v.Hutton ([1903] 2 Q.B.683.), which created a difficulty for this type of cases. Being almost similar to the two cases above, it was nevertheless decided differently.

The plaintiffs in this case, owners of a steamboat, agreed with the defendant, to put the steamship at the defendant's disposal "to take passengers"[15] "for the purpose of viewing the naval Review at Spithead and for a day's cruise round the fleet.".[16] These purposes were stated in the contract. Later on it was announced that, the naval review was cancelled. Therefore the plaintiffs asked the defendant for instructions, since the steamboat was ready to be used. Receiving no reply from the defendant they used the steamboat as usual and afterwards claimed the balance of the hire, which was not paid.

Before the Court of Appeal, it was held -for the balance sued for- that the contract was not frustrated by the cancellation of the naval review. Therefore the defendant was held liable to pay the balance, the arguments given being that, the naval review was not the basis of the contract[17], and that such purpose was the concern of the defendant alone not the plaintiff.[18]

It was further argued that, the object of the hire of the steamboat was not solely the naval review, but a day's cruise round the fleet as well, and this was still capable of performance.

To differentiate this case from Krell, it was said[19] that, the example of the cabman given in Krell was similar to this one. Thus if a cabman, was engaged to drive a person to Epsom on a Derby day to see the race, and that was subsequently cancelled, then the contract could not be held

no frustration was held although the purpose of the contract failed.

15 Chitty Vol. 1 (1983), para. 1547.

16 The Herne case at 683.

17 The Herne case at 691, for example the procession of the King in Krell was the foundation of the contract whereas the naval review in Herne was a motive only, which induced the defendant to charter the plaintiff's vessel. See (1919) 35 L.Q.Rev at p. 86, and see Konrad Zweigert (1987), op.cit at p. 221.

18 Per Romer L. J., ibid at 690. This suggests that it is the common purpose of parties which has to be frustrated and not of one party only. See Schmitthoff, Helsinki.. at p. 133.

19 Romer L. J (Herne case), cited in H. G. Beale at p. 299.

frustrated, because the seeing of the race was the purpose of the engager alone, and not the foundation of the contract (as the procession of the King in the Krell case was). Furthermore, the :

> "...cab had no special qualifications for the purpose which led to the selection of the cab for this particular occasion. Any other cab would have done as well."[20]

Applying this to the Herne case, Romer L.J.said:

> "The ship itself had nothing to do with the review or the fleet it was only a carrier of passengers to see it, and many other ships would have done just as well" (See H.G. Beale, at 299 (emphasis is mine)).

And comparing the rooms in the Krell case to the ship or to the example of the cabman, it was said that the position of the rooms themselves were the foundation of the contract for both parties as well as the procession of the King on those days.[21]

The decision of their Lordships in the Herne case could be criticised, as follows.

a- It has been said that in Herne, the naval review was not considered as the foundation of the contract. It was the defendant's concern[22], or at least it was not the sole basis of the contract, because a day's cruise round the fleet was still possible.[23] This means that the foundation of the contract, was not totally defeated.

To defeat this argument it can be said that, the hirers relied on the happening of the naval review as a result of which they could attract

[20] Per Vaughan Williams (the Krell case), cited in H. G. Beale, at p. 297 (emphasis is mine), this distinction (ie the cab and Krell) was described as being "a distinction without a difference"., and "why is the lessor (as in Krell) any more concerned with the use to which the hirer wishes to put the rooms than the cabman is with the purpose for which the hirer wants the cab.". See Ross Anderson, "Frustration of Contract in the High Court" (1948-50) 1 Annual Law Review (University of Western Australia).50, at p. 68.

[21] Per Vaughan Williams (the Krell case), cited by H. G. Beale at p. 297.

[22] Per Romer L.J (the Herne case), cited in H. G. Beale p. 299.

[23] Per Stirling L.J. (the Herne case), cited in H. G. Beale at p. 299.

passengers.[24] If that event did not take place, then the reliance upon which the contract was made, was defeated, and with it the foundation of the contract.

If we take the case of Taylor (see above), where the Surrey gardens and the music hall were let, there the destruction concerned the music hall only, but the gardens remained untouched.[25] Nevertheless Blackburn .J held that the contract was frustrated, and did not say that "...there had been no failure of the contract.".(Gottschalk at p. 18.)

b- As to the example of the cabman, by which the court purported to differentiate the Herne case from the Krell case, this was described as to be not "convincing".[26] Furthermore, in that example, the sum to be paid by the passenger was - as it appears - a usual one. Whereas in Herne , the sum was more than usual.[27]

Romer L.J in Herne pointed out that the ship had no particular qualification for the review, any other ship would have done the same thing. But it can also be said in the Krell case that the rooms let, had no particular "fitness". Any other room "overlooking the route of the procession", could fulfill the purpose of the contract.(Mc Elroy 4 Mod.L.Rev at p. 254.)

It can also be said that, in the Herne case, the ships suitable to take passengers to see the review, were limited,[28] which means that, the ship in Herne was the one suitable in this case just as the room in the Krell case was.

These criticisms suggest therefore that the decision in Herne was wrong and it should have followed the conclusion reached in Krell, since they are similar and the arguments invoked were shown to be not convincing.

---

[24] Gottschalk, *Impossibility of Performance* at pp. 17-18.

[25] Gottschalk -as it is thought- indicates that normally, if we bear in mind the reasoning upon which the Herne case was decided, the court would have decided, as it was decided in the Herne case, that there was no total failure of the foundation of the contract, and that the concerts could have been held in the gardens, therefore the contract could not have been held frustrated.

[26] Gottschalk p. 17.

[27] Gottschalk p. 17., it is here implied by Gottschalk that, if the sum was high, this surely meant that the hire was for a particular purpose which both parties knew and contemplated, otherwise it would not have been too high.

[28] Mc Elroy, 4 Mod.L.Rev at p. 254.

In comparison with the Herne case a totally different conclusion was reached in Civil Service Co-operative Society v. General Steam Navigation Co, ([1903] 2 Q.B.756). This is a case where in a charterparty, the defendant let his boat to the plaintiff for three days, to see the procession of the King (as in Herne). The procession being cancelled, it was held that the contract was frustrated and both parties were released from further performance. The defendant was not liable to return the sums paid to him and to take the plaintiff to see the procession. Earl of Halsbury. L.C said (p. 764) that,"...I think that, substituting "naval review" for "procession," every word is applicable to the case before the court".

It is interesting to add that Benjamin (*Sale of Goods* (1974), para. 441), says that a contract of sale the purpose of which can no longer be attained (e.g., a subsequent event preventing the buyer from using the goods as he intended) will not be frustrated unless it is proved that the continued existence of that purpose is the basis or foundation upon which the parties to the contract entered into it. Relying on the Amalgamated case (infra) it should be added that the frustrating event must be unforeseeable otherwise there can be no frustration even if the condition as stated by Benjamin is met.

But more generally, it has been pointed out that, :

> "Although the actual decision in Krell appears to be justifiable on the construction of the contract, the case has scarcely ever been followed in England." (Treitel (1983), p. 666.)

Lord Wright in Maritime National Fish Ltd v. Ocean Trawlers Ltd[29], said -speaking of Krell - that it:

> "is certainly not one to be extended: it is particularly difficult to apply where...the possibility of the event relied on as constituting a frustration of the adventure...was known to both parties when the contract was made, but the contract entered into was absolute in terms as far as concerned that known possibility.".[30]

These remarks seem to have been applied in Amalgamated Investment

[29] [1935] A.C.524, 529.

[30] Cited by Chitty Vol. 1 (1983), at 1546., emphasis is mine. This might be considered as a limitation to the principle held in the Krell case.

& Property Co.Ltd v. John Walker & Son Ltd.[31] There was in that case, a contract for the purchase of a property which, the buyer intended to redevelop. It was held that the contract was not frustrated, although the property was listed as one of "special architectural or historic interest".[32] This means that any redevolopment was impossible. The purpose of the contract being defeated by what occurs, the contract became valueless for the purchaser.[33] This decision can be explained by the fact that the purchasers were assumed to have known that the building bought might be listed. In other words that that risk was foreseen by them (See Buckley L.J. at 173 the Amalgamated case), and therefore they could not be released.

The following French cases might have some bearing on what is under discussion. Thus in Aguado V. de Bearn.. (Cour de Paris, May 1st. 1875. D. 1875. II. 204) , a party to a contract leased a land for the purpose of hunting on it. Due to a subsequent law this purpose was no longer possible to be attained (ie the firing of guns in the region being prohibited). That purpose was the reason in entering that contract. It was decided that the passing of the law constituted a case of force majeure.[34] In another case (Seine.March 24th.1905.G.des.T.1905.2.2.436) certain premises were leased (loue), but a subsequent law made that contract worthless since the purpose for which the premises were leased could not be attained. It was decided that the rent should not be paid, and if already paid should be returned. (See Fiatte p. 15, and Houcine Amer, op.cit p. 403.)

Following Soc.des Etabl.Barmone V. Fritz (Civ.Soc.Dec 30th. 1954 .D . 1955.somm. 77., Mazeaud, *Responsabilite* p.703.) a person who leased a 'fonds de commerce' in order to carry on a business, cannot invoke the order of closing down of that premise as a case of force majeure exonerating him from paying the rent due, if this was due to his fault. (See A. Benabent, *Droit Civil* (1987), para. 252.) Therefore it can be said that if the closing down of

---

[31] [1977] 1 W.L.R.164, cited in Treitel (1983), at p. 666.

[32] Treitel ibid.

[33] The property's value was reduced from £1,710,000 to £210,000, which means a difference of £ 1,500,000. See (1980) 13 Vanderbilt Jou etc at p. 136.

[34] Cited by J. Denson Smith (1936) Yale Law Journal at pp. 456-57. (this author says that the foundation upon which the contract concluded had ceased to exist), p. 456., and this is true.

the premises was not due to the fault of the lessee, he might have been released.

In fact looking at the above cases, especially the first and the second, it might be said that though there is a failure of the purpose for which the contract was concluded that would make these cases similar to those of the coronation cases, it is hard to say that the decisions of release were based on the fact that the purpose was defeated. The underlying principle in the first and the second cases, is the one of the "quiet enjoyment" to be provided to the lessee in a contract of lease. Therefore the passing of those legislations have made the obligation of the lessor (see art. 1719/3 Fr.c.c) impossible of performance. As a consequence the obligation of the lessee should also be terminated.

Thus the solution to the problem of the purpose of the contract being defeated by an event of force majeure, might be found in the theory of "cause". The concept of 'cause' is said to include the purpose or the end for which the contract was made.[35] Therefore it might be said that where such a purpose cannot be attained then the contract should be terminated because of absence of 'cause'.

The solution of cases involving the fact that performance has become valueless, may similarly be reached under English, French and Algerian

[35] See Alex Weill (1971), at pp. 297 & 203, and see Carbonnier (1969), at pp. 90 & 101. But it is interesting to note that these French authors did not discuss the question where the purpose cannot be attained, although they remark that the concept of 'cause' includes the purpose for which the contract was made. See also Louis Fyot, *Essai d'une Justification Nouvelle de la Theorie de l'Imprevision a l'egard des Contrats portant sur des Objets Autres qu'une Somme d'Argent* (Dijon. 1921), at p. 21. If I am right in what I have said, then French courts would also terminate a contract as the one involved in the Krell case and release both parties from further performance by the application of the theory of 'cause'. This would mean that the coronation cases would not be treated -under French and Algerian laws- as involving the application of force majeure but the one of 'cause'. P. Ommeslaghe at p. 17., holds the same opinion . But Cf Stoyanovitch at p. 114, who gives an example similar to the one of the coronation cases (if it is not the coronation cases, because he did not cite any reference) when illustrating the condition of generality of the event which may constitute a case of 'imprevision', and says that the contract should be terminated. This might induce one to say that this author is of the opinion that in such a case it is the doctrine of 'imprevision' which should apply. See also A. H. Puelinckx at p. 49 where he says that in a case like Krell, French courts would enforce the contract. (ie there can be no release).

laws. However, the principle used for that end is fundamentally different. Thus English courts regard these cases as ones of frustration, whereas French courts would decide them on the bases of the principle of "Cause".

CHAPTER TWO- WHERE THE PERFORMANCE OF THE CONTRACT IS ONEROUS.

As has been seen when discussing the theory of force majeure and frustration, each party to a contract has to perform his obligations and this by application of the maxim *pacta sunt servanda* . However, it has also been noted that there is an exception to this rule viz, the maxim to the effect that no one is called to perform the impossible *impossibilium nulla est obligatio*. As an outcome of this exception, it has been seen that in a case of force majeure, that is where the performance of the contract is impossible, the debtor is exonerated from his obligation to perform it. The other question which remains to be studied is whether there can be any release when the performance would be very onerous for one party to the contract. Under French and Algerian laws when discussing this question, the theory of imprevision is generally referred to. Thus a contract is concluded under certain conditions, or at least under known conditions, and in favour -to a certain limit- of both parties to the contract. This contract becomes economically destabilised by supervening extraordinary events. These events would therefore, radically change the conditions under which the contract was concluded. This in other words means that the foundation (la base) upon which the expectations of both parties is based (ie benefit and loss), is totally destroyed. The position of the parties becomes totally opposite. One of them benefits from the destabilised contact, whereas the other suffers a great loss. Generally this means that the performance of one party (the debtor or the creditor)[1] becomes very onerous although not impossible.

Regarding the problem of destabilisation of contracts it might be said that there are two solutions. One is to apply the maxim *pacta sunt servanda*, and therefore the party suffering the loss has to perform his contract. The other is to readapt the contract, ie to modify it in order to stabilise it again.

---

[1] Therefore the doctrine of imprevision -as will be discussed later- if applied, would be claimed either by the debtor or the creditor, that is to say the one who suffers the loss in performing the contract. See to this effect Cornesse Fernando, *Quelques Aspects Contemporains de la Theorie de l'Imprevision* (Lyon. 1946), at p. 2 footnote. 1, and see Stoyanovitch at p. 17.

It should be said from the start that French law rejects the idea of release when the performance is onerous and not impossible. As to English law it is not very certain that onerousness if it is very extreme, cannot frustrate a contract. As to Algerian law, onerousness can be a case of release for the contracting party concerned with the hardship.

Before discussing this theory under French and Algerian laws as well as under English (ie the performance of the contract being onerous) it is of interest to give a brief historical summary of this question in early times.

A Brief Historical Survey.

The theory of imprevision is not a recent theory. Although in Roman law this theory was not known, Roman philosophers such as Cicero and Seneca, discussed the question of changed circumstances and whether it releases a party from his obligation. Seneca for example said that there is no breach of contract, if a contracting party does not perform his obligation because of a change in circumstances.

The Canonists for their part in the 12th and 13th Centuries were also of the opinion that a contractor is not to be blamed for his non performance if he relies on a change in circumstances which affects his obligation. The Postglossators were also of the same opinion.[2]

Because of the autonomy of the will theory, and the stress which was put on the sanctity of contracts, this theory of 'imprevision' lost its weight as a valuable principle in contracts. But due to subsequent circumstances such as wars and economic crises, this theory was again revived, and many legislators adopted it.[3]

At the present time it can generally be said that there are two opposite positions regarding the theory of imprevision[4], one admitting this

[2] See Stoyanovitch pp. 214 to 218, and see Corneliu-Mihail Popescu, *Essai d'une Theorie de l'Imprevision en Droit Français et Compare* (Paris. L. G. D. J. 1937), at pp. 10-11 (imprevision -he says- has its origin in Canon law), and S. Litvinoff at p. 3 (where he says that *rebus sic stantibus* was recognised by Roman writers). See also Abd Arrahim Anbar, *Encyclopedia of Legal Principles in Egypt and in the Arab Countries* at p. 247.

[3] See Abd Arrahim Anbar at pp. 248-49, and Abd El Mounem Faradj *Contract Theory in the Laws of Arab Countries* (Beirut. 1974), at pp. 480-81, and see Peter Hay, "Frustration and its solution in German Law" (1961) 10 American Journal of Comparative Law.345, at pp. 345-46.

theory the other totally rejecting it. As to English law it is not very certain whether the theory of imprevision (understood in the context that the performance of the contract has become onerous) is admitted or not. These different positions as well as their foundations, will be studied in what follows.

Section One. The English Position.

The performance of the contract having become onerous is also one of the instances -and the last one in this work- of the doctrine of frustration in English law. We will show the position of courts when dealing with cases of this type (§.1). Then we will consider (in §.2) what is called the 'theoretical basis underlying the doctrine of frustration'. This would explain the decisions of judges when holding a contract either terminated or as still subsisting.

§.1. THE PRINCIPLE.

We have seen that a contract may be frustrated where the performance of one party to the contract becomes valueless to the other party, and if, following what has been said, the decisions in cases such as Krell (see what Lord Wright said supra p. 184) were not to be extended, then we may ask, what would be the position where the performance of the contract becomes onerous only.[5] Can the party who suffers such hardship, claim frustration of his contract and therefore be released from his obligation to perform the contract?.

In Carapanayoti & Co Ltd v. ET.Green, Ltd ([1959] 1 Q.B 131.), and Societe Franco-Tunisienne D'Armement v. Sidermar S.P.A ([1961] 2

---

4 'Imprevision' means 'unforeseeability'. Its name in French comes from the fact that the event or its consequences (ie the destabilisation) is unforeseeable. See Jean Auverny-Bennetot, *La Theorie de l'Imprevision. Droit Prive, Droit Administratif, Droit Ouvrier.* (Paris. 1938), at p. 4, and see Stoyanovitch at p. 117

5 This may be the opposite of what has been discussed under the heading 'performance becoming valueless', because the negative effects of the subsequent event is suffered in the case of the performance becoming onerous by the supplier, and in the case where the performance has become valueless by the recipient. See Treitel (1983), at p. 665.

Q.B.278.), the contract was held frustrated. This was as a result of the closure of the Suez Canal in 1956 owing to the war between Egypt and Israel. Such closure had the effect of making further performance burdensome.

In the Carapanayoti case there was a C.I.F.contract dated September 16th, 1956 for the sale of cottonseed to be shipped from port Sudan to Belfast, during October/November. The usual route at that time was via the Suez Canal. The contract contained a clause which stated:

> "In case of...blockade or hostilities...where the port or/ports of shipment named herein is/are situate, preventing fulfillment, this contract or any unfulfilled portion hereof so prevented shall be cancelled..."

Owing to the hostilities between Egypt and Israel the Suez Canal was closed on November 2nd 1956 and was not reopened until April 9th, 1957. On December 10th 1956, the sellers claimed that they were released from further performance, and that they could rely on the clause above and treated the contract therefore as cancelled.

The question was, whether the closure of the Canal put an end to the contract, in other words frustrated.

McNair J. questioned this as follows:

> "Must the parties have made their bargain on the basis that, if the canal was no longer available when the sellers elected to perform, the contract would be off? Was the closure of the Suez Canal a circumstance fundamental enough to transmute the seller's obligation into an obligation of a different kind, which the contract did not contemplate, and which it could not apply? "(Carapanayoti p. 148.)

Having answered these questions in the affirmative, he held that the contract was frustrated, because to impose the contract upon the parties would have been to impose on them a totally different obligation[6]

---

[6] The Carapanayoti case at 149. So the "continued availability of the Suez route..., was viewed as a fundamental assumption upon which the contract was made.", per McNair J at 149, and its 'closing therefore "transmuted the seller's obligation into an obligation of a different kind.". See also (1980) 13 Vanderbilt etc at p. 132. It is to be noted that the distance between port Sudan via the Suez was about 4,068 miles, and via the Cape -which is the alternative route- about 10,793 m. See

As to the reliance on the clause (above), it was unnecessary to deal with it -said McNair J-.

McNair's decision was criticised, because even if it is assumed that the parties intended to ship the goods via the Suez "was there not an ancillary implied obligation on the sellers in the emergency which had arisen to co-operate by shipping via the Cape". (See (1958) J.B.L at p. 411). This was supported later in the case of Tsakiroglou ([1962] A.C.93), where it was said that, where there is no customary route through which the ship could proceed, then a reasonable route has to be used. In Carapanayoti this would mean, proceeding via the Cape of Good Hope. This in fact means that parties to a contract have the duty to co-operate in the performance of the contract. (See Schmitthoff C. M, "The End of Suez" (1961) J.B.L.184, at p. 185).

Rapsomanikis (Duq.L.Rev) however, is of the opinion that the decision of McNair -in Carapanayoti- was justified since it was the first case involving such a problem. Therefore the closure of the canal was unforeseen. But it is to be noted here that although this author disapproves the overruling of the Carapanayoti case (as will be seen), he nevertheless approves the decision of Tsakiroglou (infra), because in this case the closure of the canal was foreseen. ((1980) 18 Duquesne L.Rev at p. 585). The same writer also approves the fundamental difference between shipping via the Cape and via the Suez as pointed out by McNair. (Ibid at p. 583). The correctness of what this author says might be doubted since in 1956 all businessmen foresaw the closure of the Suez Canal (see infra).

In the second case viz Societe Franco etc (supra), the probability of the closure of the Suez Canal existed because on July 26th, 1956 Egypt had announced the nationalisation of the Canal, whereas the contract of charterparty was made on October 18th, 1956. The charterers in this case, chartered a vessel called "Massalia", to carry goods from Masulpitan to Genoa. On November 20th, 1956, the canal was closed when the vessel was on her route to Genoa.

The shipowner therefore alleged that the charterparty was frustrated by that event. Since the shipment was only possible via the Cape of Good Hope (which he did), he claimed that he should be paid the total freight of 209s, instead of 134s as agreed.

Schmitthoff C. M, "Frustration and Suez" (1958) J.B.L.409, at p. 409.

The charterers replied that the shipowners were still bound by the contract at the agreed rate.

The court held that the charterparty was frustrated. It was emphasised that, the shipowners were under an obligation to proceed through the Suez Canal. This was inferred from a clause in the contract which reads:"Captain also to telegraph to "Maritsider Genoa" or on"passing the Suez Canal".[7] Therefore, by the closure of the canal the shipment was rendered impossible. It was also said that, the shipment via Cape was a "fundamentally different voyage"[8] from that via the Suez Canal.

Concerning this case it has been observed that in 1956 all businessmen were aware of the fact that the canal might be closed . Therefore to decide whether a contract can be frustrated or not, we should look at the provisions of the contract. If no express terms can be found in "commercial understanding relating to the allocation of the risk of non-performance caused by the type of contingency that occurred", then the contract should not be discharged. ((1963) 63.2 Col.L.Rev at pp. 1423-24). If these arguments are right then the decision in the Sidermar case is wrong. (Ibid at 1424).

The two cases above were overruled[9], Carapanayoti overruled by

[7] Per Pearson J at 303, which means that proceeding via the Suez was a fundamental assumption upon which the contract was made. See (1980) 13 Vanderbilt etc at p. 134, (and this as it was said in the Carapanayoti case).

[8] The Sidermar case at 307. See also Schmitthoff C. M, (1964) J.B.L at p. 53, where he suggests that this decision should be overruled. But see (1980) 18 Duquesne Law Rev at p. 588, where a different view is taken saying that the court -in the Sidermar case- reached the 'the fair and reasonable result'.

[9] It might be said that the decision in both cases, ie in Carapanayoti and Sidermar, was influenced by what Maule J. said in (1850) 9 C.B. at 94:"In matters of business a thing is said to be impossible when it is not practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost.". Cited in (1940) 56 L.Q.Rev at p. 552.

However, "there are plenty of cases to show that this idea has gained little, if any, hold in English law;...".Ibid at pp. 553-54. This, as will be seen later, is true and the overruling of Carapanayoti and Sidermar is an evidence of that. But in other countries, like the U.S.A., this idea was favoured . Ibid at 553. As to the submission that the decision in Carapanayoti was justified since the alleged frustrating event was not foreseen, and that it was foreseen in Tsakiroglou, this cannot be sustained, since the foreseeability of an event is not the sole criterion in holding a contract frustrated. See supra (under unforeseeability) and see Tatem V. Gamboa [1939] 1 K.B.132 (supra).

Tsakiroglou & Co.Ltd v. Noblee Thorl G.M.B.H., ([1962] A.C 93.) and Societe Franco etc, by Ocean Tramp Tankers Corporation v. V/O Sovfracht.The Eugenia. ([1964] 2 Q.B.226.)

In Tsakiroglou , the goods sold were to be shipped to Hamburg, but the usual and customary route via the Suez, was closed. The question therefore was whether the contract could be held frustrated by that event. Performance via the Cape would be onerous, but this could not be a ground for holding a contract frustrated.(Per Viscount Simonds p. 115, and see Schmitthoff, Helsinki.. p. 137.)

In fact sellers did not allege frustration on that ground but on the ground that performance via the Cape would be a totally different obligation from that via the Suez Canal. (Per Lord Hudson pp. 128-29.)

In response to this it has been decided that there was "no change of circumstances to justify the application of the doctrine".(Per Lord Guest p. 133, and see Schmitthoff, Helsinnki.. p. 138.)

Viscount Simonds pointed out (at pp. 114-15) that shipment of the goods via the Suez or via the the Cape was immaterial to the buyers.[10] Nothing prevented the seller from using the alternative route, unless they were impliedly bound to use the Suez Canal route only. Such an implication could not be read into this contract[11], because the contract "does not say so".[12]

---

[10] Since it is a C.I.F. contract. See Vanderbilt etc op.cit p. 132.

[11] Per Lord Radcliff at 122, he said at 123 that:"A man may habitually leave his house by the front door to keep his appointment; but, if the front door is stuck, he would hardly be excused for not leaving by the back.". Sellers were in fact bound to use the route practicable in the circumstances, since no route was stated in the contract. See Fifoot (1986), at p. 563. In response to what Lord Radcliff said above (the example) it has been said:" But of course if you live on the 18th floor of an apartment house and there is only one door, which is stuck, you aren't expected to jump. Even if the door works you might be excused if the elevators were closed down by a strike, though it was *possible* for you to walk down and, (in theory) back up.". Andreas F. Lowenfeld, *International Economic Law* Vol. 1 *International Private Trade* (2nd ed., New York. 1981), at p. 67 (italics are of F. Lowenfeld).

[12] Per Viscount Simonds at 112. It has been suggested that the conclusion reached in this case viz that the contract was not frustrated, can be attained without referring to the doctrine of frustration. Since the contract was a C.I.F. contract, the transporter, is by "common understanding of merchants of all the countries", the one who has to bear the risk of any increase in the cost of transportation of goods. (1963) 63.2 Col.L.Rev at p. 1422, and see Atiyah, *An Introduction to the Law of Contract*

In the case of Ocean etc, a vessel called The Eugenia was chartered to carry goods from the Black Sea to India. Parties to that contract of time charterparty were aware of the possibility that the Suez Canal might be closed, but they did not make any provisions to that effect in their contract.

When the canal was closed the vessel was in that area. She was then trapped, although there was a clause in the contract prohibiting her to enter into a dangerous area. When the charterers claimed that, the contract was frustrated, it was held that they could not rely on a self induced frustration.(Per Lord Denning M.R p. 237.)

However, charterers alleged that even if they were outside and did not get into the canal, the contract would be frustrated by the mere fact of the closure of the Suez Canal, because performance via the Cape would have made the voyage a totally different venture from that undertaken in the contract.

In response to this allegation, it has been said that, the closing of the Suez Canal did not create a "fundamentally different situation".(Lord Denning ibid at 240.) In fact proceeding via the Suez would take 108 days and via the cape 138 days, therefore the difference was not so "radical"[13] as to frustrate the contract.

In two recent cases viz, Palmco Shipping Inc v. Continental Ore Corporation (The " Captain George K.") ([1970] 2 LIoyds Rep 21.) and American Trading And Production Corporation v. Shell Int'l Marine Ltd ("The Washington Trader") ([1972] 1 LIoyds Rep 463)[14] it was held,

---

(1981), where he says at p. 211 that in a C.I.F. contract (like the one in Tsakiroglou) the seller pays the freight, but such freight is included in the price of the goods. Therefore, the seller bears the risk of any increase in the freight, and when there is only one way of performance available (like in Tsakiroglou, the route via the Cape) the contractor cannot be released since he has to use the still available route. But in (1980) 18 Duquesne L.Rev at p. 583, it is observed that the sellers are understood to bear the risk of normal increase in the cost of freight, and not to " lock them in the prison of absolute liability...", ie to make them bear the risk of abnormal rise in the cost of freight.

[13] Lord Denning ibid. It made the voyage more expensive but did not create an unexpected fundamentally different situation. See (1964) J.B.L. at p. 54 .

[14] This is an American case decided by the United States Court of New York.

affirming the decisions in the two last cases above, that the closure of the Suez Canal in 1967, by reason of the war did not frustrate the contract. The reason, as stated above, was that such an event did not make the performance of the contract via the Cape route a thing radically or fundamentally different from that via the Suez Canal[15], or commercially impossible.[16]

What can be deduced from the Suez Canal cases is that the expectation of both parties to a contract, that shipment should be via the Suez Canal does not make it a term or condition in the contract, that shipment should be via that Canal. (See Hamson C. J, (1960) Camb.L.Jou.10, at p. 11) It is of interest to note here that Puelinckx (see p. 51) comments on Albert D.Gaon V. Societe Interprofessionnelle des Oleagineux Fluide Alimentaire ([1959] 3 W.L.R. 622., one of the Suez cases)[17], where the closure of the canal did not frustrate the contract, and says that it was frustrated because the routing through the Suez Canal was expressly provided for in the contract. Referring to the same law reports we find that the contract was not held frustrated. Apart from this, it can be said that under English law when a specific route is no longer available (e.g. the Suez Canal being closed) then the contract may be held frustrated.[18]

Puelinckx says (at p. 51) when commenting on the Albert D.Gaon case - accepting his view that the contract was frustrated because the route was expressly provided for- that such a situation would not be considered under French law and also under Algerian law as a consequence as a case of force majeure but one of imprevision and the French judges would

---

[15] Per Mocatta J at 30.2 in the Captain George case, but it may be noted that "if an increase of fifty seven percent in time and ninety percent in distance is considered insufficient to produce frustration, the test of the "radically different" performance becomes nothing more than a dead letter.". (1980) 18 Duquesne. L.Rev at p. 594.

[16] The Washington Trader case at 467.1. Section 2-615 of the Uniform Commercial Code, was cited , it is said:" Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance". Ibid at 467.1.

[17] Puelinckx refers to this case in (1960) 2 Q.B.334 affirmed (1960) 2 Q.B.348 (C.A.).

[18] See to this effect the speech of Sellers L.J in the Tsakiroglou case ([1960]2 Q.B. at p. 360., and what Viscount Simonds said at p. 194 supra, and see p. 198 infra what Treitel says.

enforce the contract. It seems that the value of the inference of this author is open to question. This is because even under French law, when a special method of performance (provided for in the contract) becomes impossible, this would constitute a case of force majeure even if other methods of performance are still possible for use. (See to this effect Fiatte at p. 33., and see footnote. 62 chapter one of the first part).

In the Scottish case Blacklock & Macarthur V. G. G. Kirk (1919 S. C. 57), a seller promised to supply certain goods to a buyer. The two parties had already made previous contracts with each other. In the contract made in 1915 the buyer asked for 189 tons of those goods. The seller refused to deliver the whole quantity arguing that this was not the usual requirement that the buyer made in previous contracts. He also argued that because of the war he was unable to supply that quantity. It was held that the 189 tons, constituted a usual requirement in comparison with the previous contracts and that the seller was not unable to provide that quantity, but it was more onerous for him to provide such a supply because of an increase in prices of the raw materials.[19]

Although it became clear that the mere increase in expenses in performing a contract, even inflation[20] or currency fluctuation, cannot be a ground to frustrate the contract,[21] there are nevertheless instances where that doctrine could be applied. For example in Tsakiroglou , their Lordships pointed out that, if the goods were perishable or that a definite date was fixed for the delivery (not shipment[22]) of goods, the contract may

[19] See also the case of Hong-Kong And Whampoa Dock Co. Ltd V. The Netherton Shipping Co. Ltd 1909 S. C. 34.

[20] But see National Carriers Ltd V. Panalpina Northern Ltd [1981] A.C.675, 712 where Lord Roskill said that "inflation which was invoked as a frustrating event, was held sometimes to frustrate the contract, and in other circumstances did not have such effect.". See Treitel (1983), at p. 665 footnote. 53. In fact all this shows that the doctrine of frustration as a whole is a matter of judicial discretion. See Schmitthoff, Helsinki.. at p. 138.

[21] See Treitel (1983), at p. 651, and see the case of Davis Contractors Ltd V. Fareham Urban District Council [1956] A.C. 696, commented on in Hudson's *Building contracts* (1970), at p. 358, and see Treitel ibid at 663, and see G. M. Sen, op.cit at p. 169, and D. M. Walker, *Principles*.. Vol. 2 (3rd ed), at p. 136.

[22] Chitty Vol. 1 (1983), at para. 1559, and see John Tillotson, *Contract Law in Perspective* (2nd ed., London.Butterworths. 1985), at p. 202.

be frustrated. (See Anson (1979), at p. 501) Furthermore if the contract provided that shipment should be effected through the Suez Canal only or "exclusively", then the contract may be held frustrated.(Treitel (1983), p. 661.)

On the other hand Harman L.J.said that:

> "Frustration is a doctrine only too often invoked by a party to a contract who finds performance difficult or unprofitable, but it is very rarely relied upon with success. It is, in fact, a kind of last ditch, and, as Lord Radcliffe says in his speech in the most recent case [Davis Contractors v. Fareham U.D.C.[1956] A.C.696, 727] it is a conclusion which should be reached rarely and with reluctance"[23]

Though what has been said above should be taken into account it is nevertheless interesting in this respect to say that, when the courts decide that there is a fundamental change in the obligation and accordingly hold the contract frustrated, such a result is reached by a comparison between the obligation as originally undertaken, and the one under the new circumstances. What is worth adding is that in Chitty (Vol. 1 (1983), at para. 1526), it is said that to know whether there is a fundamental change in the obligation:

> "will depend on the court's estimate of what performance would have required in time, labour, money and materials, if there had been no change in the circumstances existing at the time the contract was made.".

And this is to be compared with what is required under the new circumstances. Therefore, relying on what is said there, it is possible to deduce that if the obligation which the debtor is required to perform under the new circumstances, would involve more time, labour, money and materials, to an excessive extent, then the contract should be frustrated. This would mean that the contract is frustrated because its performance has become excessively onerous.

Gorman J.J, (Vanderbilt at p. 137) is of a different opinion since he says that under English doctrine of frustration it is not clear whether an

[23] Per Harman LJ in Tsakiroglou [1960] 2 Q.B.318, 370, cited by Schmitthoff, *Export Trade* at p. 156, and see Schmitthoff, Helsinki.. at p. 138.

increase in the performance of the contract -ie in terms of cost- can frustrate the contract. The same writer -speaking of the fact that an increase in expenses is no excuse- says (at p. 126) that the "rule of Paradine V. Jane and the deep-rooted notion of sanctity of contract are still very evident in the modern English doctrine of frustration.". However, it is interesting to note that Denning L. J, in the Brauer case ([1952] 2 ALL. E. R. 497, 501), said -as expressed by Schmitthoff, Helsinki.. (at p. 140)- that:

> "... if the price which the seller had to pay to get the licence would have been one hundered times as much as the contract price, that would have been a fundamentally different situation justifying the court to treat the contract as frustrated.".

In another case one of the judges suggested that an 'astronomical' increase may frustrate a contract. (See (1980) Vanderbilt etc at p. 137).

After what has been discussed above, one is left with the conclusion that a real astronomical and extraordinary increase in prices or costs of performance of a contract, which has never occurred before to such an extent, may frustrate the contract.(See also McBryde, *The Law of Contract* (1987), at pp. 346-47) If this is right, then the 'test of the radical change in the obligation' is to be considered as an umbrella concept; involving both cases of a real impossibility of performance as well as of cases of performance having become very onerous. If this is right then the French law is the only one -considering the laws under discussion- which does not recognise onerousness as a ground to release a party to a contract who suffers such a hardship. This is because French courts continually emphasise the fact that there should be a real impossibility of performance and no mention is made of the possibility that a severe hardship might have a certain weight in considering cases of force majeure.

Thus generally speaking in principle both English law and French law do not allow any release in such cases (the Algerian solution is totally opposite). However, we have remarked that if the onerousness reaches an extreme level, English courts might probably decide for the frustration of the contract. If this is correct, then in principle English and French positions would be different regarding such cases of hardship.

What should be said concerning the English and the Scottish test to the effect that "if the contract is to be enforced , it would be a performance of a radically different contract from that undertaken" is that though this test is very useful since it gives to courts a valuable tool to use when dealing with cases of frustration, its disadvantage lies in that it gives no clear idea of what is considered in it when it is used by courts.

§.2. THE THEORETICAL BASIS UNDERLYING THE DOCTRINE OF FRUSTRATION.

What will be studied under this heading is the different theories explaining the ground the doctrine of frustration is based upon. The main theories are the implied term theory, the radical change in the obligation theory, the just and reasonable solution theory, the disappearance of the foundation of the contract theory and lastly the construction theory.[24]

I- The Implied Term Theory .

This theory -which is the oldest theoretically ((1940) 56 L.Q.Rev p. 173)- is well illustrated by Lord Loreburn in F.A.Tamplin Co.etc[25], where he

[24] It has been seen that in some cases, only one party's obligation is impossible but not the other's. The illustrating example is the coronation cases. In these circumstances both parties are released from further performance and are not liable for their non-performance; ie the contract is held frustrated. It has been pointed out that the party whose obligation is impossible, is discharged on the ground of impossibility. However, the other party (especially he who has to pay money) is released on the ground of failure of consideration and not upon impossibility. That is to say he did not get what he bargained for. See generally Mc Elroy, *Impossibility of Performance* op.cit .

This explanation was rejected by the House of Lords in National Carriers Ltd. V. Panalpina (Northern) Ltd [1981] A.C.675, 687, 702. It is also known that the failure of consideration must be total, whereas in cases of frustration many contracts were partly performed, nevertheless the contract was held frustrated. To this effect Lord Hailsham at p. 687 (the Panalpina case) said:"...many, if not most, cases of frustration which have followed Taylor V. Caldwell have occurred during the currency of a contract partly executed on both sides, when no question of total failure of consideration can possibly arise.". See Treitel (1983), at p. 697.

[25] [1916] 2 A.C.397, at 403, cited by Anson (1979), at p. 506. It is upon that ground, ie the implication of a term that the case of Taylor v. Caldwell, was decided. See Mc Elroy, *Impossibility of Performance* at p. 61.

said:

> "A court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract [that it should continue to exist[26]].... Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the court proceeded. It is in my opinion the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was a foundation on which the parties contracted...were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said, 'if that happens, of course, it is all over between us'?"[27]

This means that, although the parties did not expressly provide in their contract that, if an event whatever puts an end to the thing contracted for, the contract will be dissolved, an 'implied term' to that effect is to be read into their contract. Because parties did not intend their contract to be absolute, the court will not regard it as absolute. (Treitel (1983), p. 694.)

In other words, as Lord Sumner put it in the case of Hirji Mulji...etc[28]:

> "Frustration...is explained in theory as a condition or term of the contract, implied by the law ab initio, in order to supply what the parties would have

[26] (1980) Vanderbilt etc at p. 127.

[27] See Salmond, op.cit (1927), at p. 295 where he says that parties may have intended their contract to be conditional on the existence or the continued existence of a state of facts, which was the foundation upon which the contract was made. Then if that state of facts is no longer available, the contract is to be at an end. In other words the court will read the condition *rebus sic stantibus*. The res is the thing whose continued existence is the basis of the contract, and contemplated by both parties to be such. Ibid p. 295. This condition is ascertained from "the terms of the contract...the purposes which underly it , and the circumstances in which it was made.". Ibid at p. 300.

[28] [1926] A.C.497 p. 510, cited in (1940) 56 L.Q.R. p. 174.

inserted had the matter occurred to them..."

So what the court does is no more than to give effect to the "real intention"[29] of parties when they entered into the contract.[30] Or as Lord Sumner said in the Bank Line case:([1919] A.C.435.)

> "The theory of dissolution of a contract by the frustration of its commercial object rests on an implication, which arises from the presumed common intention of the parties.". ((1940) 56 L.Q.R p. 174)

Looking at the passage from Lord Loreburn in Tamplin (above), it can be said that there is both a subjective and an objective test.

The subjective one is that, the implication of the term was to give effect to the intention of the parties. However this test was criticised as it involves "speculation as to the intention of the parties.".[31] However, the objective test is that, the implication is only what a reasonable man would have done in the circumstances of the case.[32] Or as Lord Watson, in Dahl v. Nelson, Donkin & Co[33], said:

29 Anson (1979), at p. 506, which means that if parties have contemplated the contingency they would have 'tacitly' agreed to terminate the contract. See Sturge L. J, "The Doctrine of Implied Condition" (1925) 41 Law Quarterly Review.170, at p. 171.

30 That is to say to "...give the parties what they would have given themselves had they foreseen the nature of the risk at the time of contracting." Leon E. Trakman, "Frustrated Contracts and Legal Fictions" (1983) 46 Modern Law Review.39, at p. 41.

31 Treitel (1983), at p. 696. See also (1983) 46 Mod.L.R at p. 41, where it is said that a "fiction underlies this analysis.", and this is because the court "can only speculate as to what the parties would have agreed upon when they entered into their agreement.". This is supported by what Lord Hailsham said in the Panalpina case infra footnote.40.

32 This test is further explained in the case of Re Badische [1921] 2 Ch.331, at 379, cited in (1940) 56 L.Q.R. at p. 175. In that case Russel J said:"If the supervening events or circumstances are such that is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain expressed in the documents, a term should be implied dissolving the contract upon the happening of the event or circumstances.". It is to be noted that the test of the 'reasonable man' is to be used *in abstracto* not *in concreto*; which means without taking account of the ability and qualifications of that person. See Hamed Zaki, op.cit at p. 227. The test as stated by Russel J (above) was favoured and as"Nothing more than this test is required. It can be applied to all kinds of contract, in all circumstances ,... ". (1948-50) 1 Annual.L.Rev at p. 63.

"The meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence."

This theory was subject to several criticisms:

It was described as being "artificial and fictitious".[34] It is not true that the common intention of the parties to a contract, would have been to terminate the contract if the frustrating event happens, because parties may very often differ in their view, as to the effect of the frustrating event.[35] For example, a party who is in a strong bargaining position, would certainly have refused to terminate the contract. Whereas the different view would have been taken by the weaker party to the contract.[36]

Another criticism is that how could they have provided tacitly for something which "they neither expected nor foresaw". (Anson (1979), p. 507)

Even if it is assumed that they did foresee that event, they would

---

[33] (1881) 6 App.Cas.38, 59 cited by Chitty, *General Principles* Vol. 1. (24th ed. 1977), at 1409.

[34] Chitty Vol. 1 (1977), at 1409, and McBryde, *The Law of Contract* (1987), at p. 344, and also described as a legal fiction. See (1940-41) 4 Mod.L.Rev at p. 255, and see Knut Rodhe, "Adjustment of Contracts on Account of Changed Conditions" (1959) 3 Scandinavian Studies In Law.151, at p. 168.

[35] See Atiyah, *Introduction To The Law Of Contract* (1981), at pp. 207-08.

[36] Treitel (1983), at pp. 694-95. Other criticisms are also directed to the use -in this theory- of the term 'common intention'. This is because "the court -in saying that- is trying to discover an intention as to something which may never have occurred to the parties, and is also trying to insist that the intention is common to both parties. The blunt truth of the matter is that the court is looking for something which is not there." Atiyah, *An Introduction To The Law Of Contract* (1981), at p. 208. But it is thought that where it becomes clear from the terms of the contract that, the parties have made their contract on the footing of the continued existence of a thing or the happening of an event, whether it is the intention of both parties or of one only , and the other has consented to this, then it is possible to say that both parties have, at least tacitly, agreed to terminate the contract, when that thing ceases to exist or that event does not take place.(CF German law (Geschaftsgrundlage theory).

probably not have agreed to terminate the contract, but:

> "on the contrary, they would almost certainly on the one side or the other have sought to introduce qualifications or reservations."[37]

Furthermore it had already been said that, this theory rests on a subjective test. As pointed out this test cannot be sustained; since parties very often, will not have a common intention as to the frustrating event. But it has been noted that, the theory also rests on an objective test, viz the reasonable man. This means that, as reasonable men, the parties would have agreed to terminate the contract, if that event were to happen. The criticism directed to this latter test was that this theory cannot be sustained even by 'objectifying'[38] it; because here the reasonable man is in fact the court itself. (Anson (1979), p. 507) In saying that, we are far from the aim of this theory, viz to give effect to the parties' intention (Treitel (1983), p. 694.), and not the court's intention, through the device of the reasonable man. To this effect Lord Radcliffe said:[39]

> "By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself."

Therefore contractors are left at the mercy of the judges' discretion;

---

37 Per Lord Wright in Denny Mott & Dickson Ltd v. James B. Fraser & Company, Ltd [1944] A.C.265, at 275., cited by Anson (1979), at p. 507.

38 (1983) 46 Mod.L.R at p. 44. Since the idea of the common intention of parties ie the subjective test, cannot be sustained, the court has adopted instead of it the test of the 'reasonable man'. But even this test can be criticised, because the court here is saying what parties as reasonable men should have said, had they thought of the possibility of the occurrence of that event, and not what they would have said had they thought of it. See Atiyah, *Introduction..* at p. 208. This means that frustration is applied "...irrespective of the individuals concern, their temperaments and ....circumstances." Per Lord Sumner in the Hirji Mulji case at 510. Therefore speaking of the intention of the parties is a misleading term, since it is the court which considers what a reasonable man should have said in the circumstances of the case, in other words what is reasonable in those circumstances in its eyes. Atiyah, *Introduction...* at pp. 208-09.

39 [1956] A.C.696 at 728, cited by Treitel (1983), at p. 695.

since all depends on their determination of what is a reasonable result in the circumstances.

This is well illustrated by Lord Wright[40], when he said:

> "[W]hat is often called an implied term or a term implied by law simply means that there is no agreement or intention at all on the point, but the law imposes the term in order to do justice."

Another criticism is that, it cannot be said -esp for businessmen- that, the frustrating event did not occur to them, because by their experience in the field of their business, they could foresee those events. ((1983) 46 Mod.L.R p. 52)

However, it should be noted that the implied term theory does not apply when there is an express provision, in the contract.

To this effect, Lord Sumner said[41]:

> "Where the contract makes (that is, full and complete provision, so intended) for a given contingency it is not for the court to import into the contract some other and different provision for the same contingency called by a different name."(Emphasis is mine)

It might be said -summarising what has been said- that the main idea in the implied term theory is that, where it appears from a contract that a certain state of facts (e.g. the continued existence of a thing) is the foundation

---

40 *Legal Essays and Addresses* (1939), at p. 258. Cited in (1983) 46 Mod.L.R. at p. 46. But is it impossible to say that the court in the first stage tries to find the intention of parties (ie the common) but if no such intention can be ascertained then it uses the test of the reasonable man?. This is because no provision is found in the contract, which may compel the court to hold that parties intended to be bound absolutely. But see the Panalpina case where Lord Hailsham said at 687 that it is impossible to know what would be the position of parties if a frustrating event was brought to their minds, "I'have not the least idea what they would have said or whether [they] would have entered into the [contract] at all.".

41 The Bank Line case [1919] A.C.435, at 455, cited by Anson (1979), at 508. Russel J in Re Badische [1921] 2 Ch.331, 379 said:"The term to be implied must not be inconsistent with any express term of the contract.". Cited in (1940) 56 L.Q.Rev at p. 175. But it might be said -as it appears from the speech of Lord Sumner in the Bank Line case above- that the implication of a term to dissolve a contract can be justified even if there is a provision in it, and this is where such provision cannot cover fully and completely what happens. An illustration is to be found in the case of Metropolitan (see supra).

upon which the contract was made, then an implied condition is to be read into that contract to the effect that, if that state of facts ceases to exist then the contract should be terminated. This is no more than the real intention of parties being considered as reasonable men.

The implied term theory, being described as a 'fiction' has been largely abandoned.[42]

II- The Radical Change in the Obligation Theory.

This theory has been described as the "most acceptable" theory, and the one which "received the warmest commentation".[43] The gist of this theory, is explained in Lord Radcliffe's observation in the Davis Contractors case([1956] A.C.696.), where he said

> "Frustration occurs whenever the law recognizes 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

42 Chalmer's, *Sale of Goods Act 1979 Including the Factors Acts 1889 & 1980* (1971), at p. 21. Lord Wright in Denny V. Mott.. [1944] A.C.265 said at 275 that the implied term theory "has never been acted on by the court as a ground of decision, but is merely stated as a theoretical explanation.". See also The Eugenia [1964] 2 Q.B. 226 at 238-39, per Lord Denning M.R. However, it might be said that it is not incorrect to add that this theory, although being a fiction created by courts, "is really a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands". Per Lord Sumner in the Hirji Mulji case [1926] A.C.497, at 510, cited in Anson's, *Law of Contract* (1979), at p. 507. Therefore this theory as used in the Taylor V. Caldwell case had mitigated the harsh rule put in the Paradine case. See also of the same opinion "La Revision des Contrats Par Le Juge", IN Travaux de la Semaine Internationale de Droit. (Paris. 1937), at p. 42 (M. Gutteridge's Report).

43 Anson (1979), at p. 511, and see (1982) 2 Legal Issues etc (1982), at p. 52, and Chalmer's, *Sale of Goods* (1971), at p. 21. Bingham J in The Wenjiang [1983] 1 Lloyd's Rep.400 at p. 404 col. 1 said that this doctrine "met with approval of the court of Appeal in Pionner Shipping Ltd V. B.T.P.Tioxide Ltd (The Nema) [1980] 2 Lloyd's Rep.339", and also by Lord Hailsham in Panalpina [1981] 2 W.L.R.45, and this may be true because it is the prevailing theory or test used actually by courts. For example, as has been seen, it was used in cases involving delay (imprisonment, requisition, mobilisation, ships trapped, ships damaged..), and also in cases where the performance becomes onerous, as in the Suez Canal cases. See also Schmitthoff, Helsinki.. at p. 137, and see G. M. Sen, op.cit at p. 164, and Fengming Liu, "The Doctrine of Frustration: An Overview of English Law" (1988) 19 Journal of Maritime Law & Commerce.261, at p. 271.

radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this I promised to do"[44]

In other words the circumstances in which a contractor is called to perform his obligation are:

> "...fundamental enough (as) to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply."[45]

In order to know whether there has been such a change in the obligation of one party, we have to ask ourselves[46] :

> "....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."[47]

---

44 This can be explained by the fact that since the contract was based on the consent of both parties, a contracting party cannot be held bound, where the circumstances in which he gave his consent have radically changed since his consent was given. See Amin S. H, "The Theory of Changed Circumstances in International Trade" (1982) Lloyd's Maritime & Commercial Law Quarterly.577, at p. 579.

45 Per Asquith L.J. at 667 in Parkinson (Sir Lindsay) & Co LD v. Commissioners of His Majesty's Works & Public buildings [1949] 2 K.B.632, and see (1980) 8 Australian Bus. L. Rev. at p. 370.

46 It is in fact the court which decides whether there has been a radical change in the obligation. See (1982) 2 Legal Issues etc at p. 52, and it is indeed a change in the obligation not of the circumstances which call for the application of frustration. See G. M. Sen, op.cit at p. 163.

47 Per Lord Reid in the Davis Contractors case (above) at 721, cited by Chitty Vol. 1 (25th ed., 1983), at 1525. The same test was used in other cases; for example the Metropolitan Water case etc [1918] A.C.119, where Lord Dunedin at 128 said:"... the contract when resumed would be a contract under different conditions from those which the contract was begun.". A good illustration of the theory is to be found in the British Movietonews etc case [1952] A.C.166, given per Viscount Simon at 185 where he said:" The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate - a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point....". (Emphasis is mine).

Further guidance were given by Lord Radcliffe in the Davis Contractors case ([1956] A.C.696 at 729) where he said:

> "There is no uncertainty as to the materials upon which the court must proceed. The data for decision are, on the one hand, the terms and the construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred"

The objection made to this theory was that, the determination whether the obligation of one party to the contract has become radically changed, is "a matter of juridical speculation"[48] and has to be left to a skilled man who can compare what has happened with what was contemplated by the parties. To ascertain this, the court can only make a reasonable guess, since the judge was not present when the contract was made, and that courts "can merely surmise what degree of change the parties would consider to be "radical" in the circumstances."[49]

III- The Just and Reasonable Solution Theory.

This doctrine has been described as a "radical theory"[50], because in the altered conditions caused by a supervening event, it imposes on the parties to the contract, what is just and reasonable, in the eyes of the court.[51]

Thus Denning L.J. in British Movietonews ([1951] 1 K.B.190 at 201-02), said that the courts:

---

48 (1983) 46 Mod.L.R at p. 48. A further question which may be asked is "how fundamental the change in circumstances must be to frustrate the contract". Michael Aubrey, (1963) 12 International & Comparative Law Quarterly at p. 1169. However, it is to be noted that the same writer at p. 1170 refers to the speech of Lord Radcliff in the Davis Contractors (above) and qualifies it as the "best definition", and that the question of the fundamental change in the circumstances is a question of degree. See also Schmitthoff, Helsinki.. at p. 140. For example "a week would not normally be enough to frustrate a contract unless time was of the essence whereas a delay of a year" would frustrate it. Michael Aubrey, ibid at p. 1173.

49 (1983) 46 Mod.L.R at p. 48. What can be said however, is that, even a skilled man can only use his guess since he was not present at that time. Therefore, there is no difference between a judge and a skilled man in such a case.

50 Chitty Vol. 1 (25th ed., 1983), at 1531 and Anson (1979), at p. 510.

51 Per Lord Wright, *Legal Essays and Addresses*, cited in Anson (1979), at p. 510, and see Fengming at p. 269.

"...will not allow the words, in which they happen to be phrased, to be tyrannical masters. The court qualifies the literal meaning of the words so as to bring them into accord with the true scope of the contract. Even if the contract is absolute in its terms, nevertheless if it is not absolute in intent, it will not be held absolute in effect. The day is done when we can excuse an unforeseen injustice by saying to the sufferer "it is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself". We no longer credit a party with the foresight of a prophet or his lawyer with the draftsmanship of a chalmers. We realize that they have their limitations and make allowances accordingly."

And Lord Wright in the Constantine case ([1942] A.C.154 at 186.), said:

"...the court is exercising its power, when it decides that a contract is frustrated, in order to achieve a result which is just and reasonable.".(Emphasis is mine)

Lord Wright[52] said:

"This whole doctrine of frustration has been described as a reading into the contract of implied terms to give effect to the intention of the parties. It would be truer to say that the court in the absence of express intention of the parties determines what is just."(Emphasis is mine)

However, what is to be noted is that holding a contract frustrated and imposing what is just and reasonable, because of a mere 'uncontemplated turn of events' as expressed by Lord Denning was rejected in the House of Lords.[53] To this effect Viscount Simon in the same case (House of Lords) ([1952] A.C.166 at 185.) said that:

"The parties...are often faced [in performing their contract], with [an unforeseen] turn of events.... Yet this does not...affect [their contract]. If on the other hand, a consideration of the terms of the contract...shows that [parties] never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point- not because the court in its discretion thinks it just and reasonable to qualify the

52 In *Legal Essays and Addresses* at p. 258, cited in (1940) 56 L.Q.Rev at p. 180.

53[1952] A.C.166, and see Schmitthoff, Helsinki... at p. 135.

terms of the contract, but because on its true construction it does not apply in that situation.".[54]

A different view seems to be taken by Lord Wilberforce in National Carriers Ltd v. Panalpina (Northern) Ltd[55],where he said:

> "I think that the movement of the law of contract is away from a rigid theory of autonomy towards the discovery -or I do not hesitate to say imposition- by the courts of just solutions, which can be ascribed to reasonable men in the position of the parties."

As the implied term theory was, this one was also criticised. It gives to courts "too much discretion" (Chitty Vol. 1 (1977), at 1411) and the court is concerning itself with the harshness caused to one party where the contract he made is imposed upon him and without therefore, looking whether there has been any radical change in his obligation.(Chitty Vol. 1 (1977), at 1411). Lord Hailsham in the Panalpina case ([1981] A.C.675 at 687) and speaking of the just and reasonable theory said that, although it "admirably expresses the purpose of the doctrine, it does not provide it with any

---

[54] Emphasis is mine. It is to be noted that the House of Lords has rejected the qualifying power as suggested by Lord Denning, but on the other hand, it has favoured the implied term theory. See Grunfeld C, "Traditionalism Ascendant" (1952) 15 Mod.L.Rev.85, at p. 86, and Atiyah, *Introduction etc* (1981), at p. 209. The reason behind that rejection may be the fear that the use of the qualifying power will create "uncertainty as to the sanctity" of the contract. See also Schmitthoff, Helsinki... at p. 136. But this is in fact untrue; because such power will be used in the light of other precedents, which give some guidance to the court, to decide when it is reasonable to hold a contract frustrated. It is indeed the use of the implied term theory which creates such uncertainty, because it involves a speculation into the intention of the parties, an intention that never existed. Atiyah ibid.

[55] [1981] A.C. 675, at 696, and see (1982) 132.2 New.Law Journal at p. 796 col. 1, where it is said that frustration "is now judicially recognised to be simply a 'device' used by courts to achieve a just and reasonable solution between the parties in new circumstances.". Donovan L.J.in The Eugenia [1964] 2 W.L.R 114 said that the test to be used is " was there such a fundamental change in the circumstances relevant to the performance of the contract that it is just and reasonable that the parties should be relieved of their obligations?". Cited by Paul B. Fairest, "Self-Induced Frustration - The Implied Term Theory Burried" (1964) Cambridge Law Journal.186, at p. 188, it may be noted that here both the fundamental change theory as well as the just solution theory are involved. This can also be found in the speech of Lord Denning in The Eugenia [1964] 2 Q.B.226, at 238-39.

theoretical basis at all.".[56]

IV- The Disappearance of the Foundation of the Contract Theory.

Where in a contract, it appears that, a set of circumstances[57], is essential to the performance of the contract and contemplated by both parties to be the foundation upon which the contract was made and where that set of circumstances ceases to exist, by reason outside the parties' control[58], and no provision was made for what is to happen in that event[59], then the contract is to be regarded as at an end (ie frustrated). This is not because of an implied term or condition read into it[60], but because the foundation of the contract has disappeared (Anson (1979), p. 508), and with it the contract itself.[61]

To this effect Lord Wright in the Joseph Constantine case ([1942] A.C.154 at 187.) said :

> "...I should prefer to rest the principle simply on the true meaning of the contract as it appears to the court. The essential feature of the rule is that the court construes the contract, having regard both to its language, its nature and the circumstances, as meaning that it depended for its operation on the existence or occurrence of a particular object or state of things, as its basis or foundation. If that is gone, the life of the contract in law goes with it, at least as regard future performance."[62]

---

56 But see Fifoot (1986), at p. 558 who considers the just and reasonable solution theory as being the "more generally accepted view".

57 Russkoe Abschestvo D'Liazgstovlenia Dov I'voennick Pripassov v. John stiek & sons Ltd [1922] 10 LI.L.R.214. Per Atkin L.J. at 217, cited by Anson (1979), at p. 509., and see the Tatem v. Gamboa case, the speech of Goddard J. at 139. Cited by Anson, op.cit at p. 509.

58 The Tamplin case, Lord Halden's speech at 406, cited in Treitel (1983), at p. 696.

59 Per Goddard J. at 139, the Tatem case, cited by Anson (1979), at p. 509.

60 Anson (1979), at p. 509 and see the Russkoe case (above) where it is said:"There are many positive rules of law imposed upon contracting parties which govern the whole creation, performance, and dissolution of a contract which are quite independent of the intention of the parties.". Cited by Anson, op.cit at p. 509.

61 Cf the German theory of Geschaftsgrundlage.Infra.

62 The emphasis is mine. Lord Haldane in the Tamplin case said at 406 that when parties enter into a contract in which its performance depends on the continued existence of a specific thing [in that case a ship on charter] and that thing ceases to exist

This theory was favoured by Goddard J in the Tatem case ([1939] 1 K.B.132 at 137), where he said:

> "That seems to me the surest ground on which to rest the doctrine of frustration, and I prefer it to founding it on implied terms."

This theory has also been described as being "appropriate" where the contract depends on the continued existence of a specific thing and that thing is destroyed.[63] It can be added that the use of this test is also adequate in cases where the performance becomes illegal by a subsequent change in the law, or where, in a personal contract, the performance is prevented by the death or illness of the performer. However, the test of the 'foundation of the contract' is inadequate when it is used in cases other than the three instances already cited. This is especially so in cases where the performance is still possible, but the contract was held frustrated ((1948-50) 1 Annual L. Rev at 65,66). In fact that test can also be extended to cases of this kind ie like the coronation cases. This is because the contract -as in Krell- is made on the assumption that a certain event will take place. This is considered as the foundation of the contract, therefore if that event does not take place, then the foundation upon which the contract is made is destroyed or defeated. (See also Fengming Liu, at p. 268).

It can also be said that, when a contract is said to be disolved and the parties released from further performance on the ground of the disappearance of the foundation of the contract, this can also be rested on an implied condition viz, that the foundation of the contract, shall continue to exist.[64]

---

by an event beyond the control of parties then the contract is to be treated as frustrated. He then said that" although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation.". Cited in (1940) 56 L.Q.Rev at p. 176.

[63] See Treitel (1983), at p. 696.

[64] (1940) 56 L.Q.R at p. 178, and this can be supported by the speech we have referred to in the implied term theory, because there it has been pointed out that parties, must have contemplated that that thing should continue to exist and that the continued existence was the foundation of the contract. See also Schmitthoff, Helsinki... at p.

Some doubt however, is raised as to the foundation of the contract itself.[65] Another criticism is that it is a matter of speculation to tell whether or not a certain state of things (see Lord Wright speech in Joseph Constantine case at p. 188) was contemplated by both parties to the contract as the foundation upon which it was made. (Mc Elroy, *Impossibility of Performance* op.cit at p. 72).

Moreover, if the foundation of the contract can be determined by construing the contract (see supra p. 211 the speech of Lord Wright), then there is no real difference between this theory and the implied term theory. This can be well illustrated by what Lord Loreburn said, when discussing the implied term theory, in the Tamplin case:[66]

> "It is in my opinion the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted.". (Emphasis is mine.)

V- The Construction Theory.

It might be suggested (Treitel (1983), p. 696.) that, all those theories, involved a question of construction of the contract.[67] For example, speaking of the implied term theory, it was said:

134, where he says that the principle underlying the implied term theory and the disappearance of the foundation of the contract, is the same which is that frustration "rests upon the common intention of the parties....".

65 See also Treitel (1983), at p. 696.

66 [1916] 2 A.C.397 at 404, cited by Treitel (1983), at p. 696.

67 See Donald Keating, *Law and Practice of Building Contracts including Architects & Surveyors* (London. Sweet & Maxwell. 1955), at p. 81, and see Hudson's, *Building Contracts* (1970), at p. 351.2, and see the British Movietonews case [1952] A.C.166, at 183 where Viscount Simon said :"...whether the rule (ie discharge of a contract by frustration) should be regarded as arising from an implied term, or because the basis of the contract no longer exists. In any view, it is a question of construction, as Lord Wright points out in the Constantine's case [1942] A.C.154,184"., and see the Nickoll case [1901] 2 K.B.126, where A. L. Smith M.R. at 131 said"...the question is whether upon its true construction the contract is a positive and absolute contract to ship the seed, or a contract subject to any, and what, implied condition.".

"the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible...".[68]

As to the radical change in the obligation theory, Lord Reid in Davis Contractors[69] said:"...where 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.".[70] In order to know whether there has been a radical change in the obligation, the court will have to ascertain by construing the contract what the original obligation was before the occurrence of the frustrating event, and then what that obligation would be, after the occurrence of that event. Comparing the two the court will hold the contract as frustrated on that ground, if there has been a fundamental change in the obligation (and not only in the circumstances).(See Chitty (24th ed., 1977), at 1406-7, and see Anson (1979), p. 511.)

As to the foundation of the contract theory, Lord Wright in the Joseph Constantine case[71], said :

"...the court construes the contract, having regard both to its nature and the circumstances, as meaning that it depended for its operation on the existence or occurrence of a particular object or state of things, as its basis or foundation. If that is gone, the life of the contract in law goes with it....".

As to the just solution theory, Lord Wright, in the Denny Mott case[72], said:

"What happens is that the contract is held on its true construction not to

[68] Per Blackburn J in Taylor v. Caldwell (1863) 3 B & S.826, at 833, cited in Treitel (5th ed.,1979), at p. 683. Emphasis is mine. See also Konrad Zweigert (1987), op.cit at p. 222, and see footnote. 67 supra this chapter the speech of A. L. Smith MR.

[69] [1956] A.C 696, at 721 and see the speech of Viscount Simon in the British Movietonews case [1952] A.C 166 at 186. (See supra p. 209).

[70] The emphasis is mine., and see Stephen Tromans "Frustration - the Tenant's Release" (1981) Camb.L.Jou.217, at p. 218, where it is said that the construction theory was also formulated by Lord Radcliff in Davis Contractors [1956] A.C.696,729.

[71] [1942] A.C 154, at 187., emphasis in the cited speech is mine.

[72] [1944] A.C 265, at 274-75. Cited in Treitel (1983), at p. 697. Emphasis in the citation is mine.

apply at all from the time when the frustrating circumstances supervenes."(Lord Wright used the word "just" at p. 275 ".. which justice demands..")

As to the comment made on the construction theory. It was described as being "the most satisfactory explanation of the doctrine of frustration." (Treitel (1983), p. 697)

However, it might be said that, there is no practical importance in basing the doctrine of frustration upon one of the theories so far studied, because, the result would be the same.[73]

It was further submitted[74] that all these theories are not inconsistent. As to the construction theory, this is not a theory, but a technique used by courts.[75] For the just solution and the radical change theories, these are neither theories nor techniques. The just solution theory, is one of the purpose to be attained in using the construction technique.[76] However, the radical change in the obligation theory, is the condition in which the court, when using the construction technique, uses such a technique in one way rather than the other.

It might be interesting to draw a general conclusion having regard to all these theories. Thus we have noted that it has been said that the "foundation of the contract" theory was accurate when used in cases

---

73 Anson (1979), at pp. 511-12, and Treitel (1983), at p. 697. Viscount Simon L.C. in the Joseph Constantine case [1942] A.C.154 at 163 said:"The doctrine of discharge from liability by frustration has been explained in various ways- sometimes by speaking of the disappearance of a foundation which the parties assumed to be at the basis of their contract, sometimes as deduced from a rule arising from impossibility of performance, and sometimes as flowing from the inference of an implied term. Whichever way it is, the legal consequences is the same.", and see Lord Porter in Denny Mott [1944] A.C.265 at 281, cited by Lord Reid in Davis Contractors [1956] A.C. at 719, and see Diplock J in the Port Line case [1958] 2 Q.B.146 at 162. It is to be noted that when it is said that the result would be the same, it means that the contract would be either held frustrated or not. See also Konrad Zweigert (1987), op.cit at p. 223, and Schmitthoff, Helsinki... at p. 138, and Fengming at p. 285.

74 Atiyah P. S, *Essays On Contract* (Oxford. Clarendon Press. 1986), at pp. 272-73, and see the same writer in *Introduction To The Law Of Contract* (1981), at p. 211.

75 See to this effect the speeches where the term 'construction' was used.

76 Lord Hailsham in Panalpina [1981] A.C.675, 687 said -speaking of the just solution theory- that although it "admirably expresses the purpose of the doctrine it does not provide it with any theoretical basis...".

where the performance depends on the continued existence of a specific thing, in personal contracts (death & illness), contracts becoming illegal by a change in the law and also cases of frustration of the purpose of the contract (e.g.Krell). Generally speaking it can be said that the "implied term" theory as well as the "radical change in the obligation" theory can also be used in those cases. We have also seen that sometimes the "foundation of the contract" theory and the "implied term" theory are similarly phrased.[77] Therefore, we may say that practically, all these theories are the same (see footnote. 73 this chapter the speech of Viscount Simon). This possible conclusion brings us to the opinion of Atiyah (see p. 215 supra) when he says that these theories are not inconsistent.

However, what should be observed is that the "radical change in the obligation" theory is the one which is now commonly used in deciding cases of frustration.

Section Two. The Position of French Law.

We have seen that English courts do not, in principle, allow any release when there is a mere increase in the cost of the performance of the contract. But we also remarked that it is not very certain whether an enormous increase may not frustrate the contract. In this Section we will study the position of French law. Since French law rejects the doctrine of imprevision, we will try to give the main arguments advanced in order to justify this position. This rejection is maintained by the Court of Cassation, which refuses any departure from strictly applying the principle of *pacta sunt servanda.*

§.1. Doctrinal Arguments Generally Invoked in Rejecting the Theory of Imprevision.

There are many arguments which have been put foreward to justify the rejection of this theory (ie to adapt the contract to the new situation).

I. The main argument is the one of the *pacta sunt servanda*

[77] See pp. 200-201 the speech of Lord Loreburn, and see footnote. 27 this chapter what Salmond says, and see Lord Wright's speech p. 211, and cf it with the speech of Lord Loreburn at pp. 200-201 (ie similarly formulated).

principle.[78] Following this principle each party to a contract has to perform his obligations and cannot be freed from this unless there is a case of force majeure, ie an impossibility of performance.[79] This principle is formulated in art. 1134 Fr.C.C, which states that:"**1/** Agreements legally made take the place of law for those who make them. **2/** They may be revoked only by mutual consent or for causes which the law authorises. **3/** They must be executed in good faith.". A similar provision is to be found in arts. 106 & 107. Alg.C.C. As may be seen the legislator has considered the contract as the law of the parties to a contract. This in fact reflects the theory of 'the autonomy of the will' of the 19th c. This theory -at that time- gained a great success. Following this theory the sanctity of the contract is the natural consequence of the will of the parties, therefore it is not the law which is the basis of that sanctity but it is the will of the parties.[80] The will of parties should be respected, and what has been agreed on should not be revoked or changed unless by the will of those who made it. Therefore the debtor must perform his contract even if this would ruin him.[81] Thus any idea of readapting a contract other than by the consent of the parties should and must be rejected.

II. The other argument is that to admit the revision of the contract or its termination, would surely affect the stability of contracts in general. This is because the debtor who for example invokes the theory of 'imprevision', will lead his creditor to invoke that theory against his

---

78 This maxim is of a religious source (ie the canonists). See H. Deschenaux, "La Revision des Contrats par le Juge" (1942) Revue de Droit Suisse.509, at p. 518, see Maurice Tancelin, *Des Obligations* (1988), at p. 19.

79 See Rene Rodiere et Denis Tallon, *Les Modifications* .. (1986), at p. 17., Ait Ouali Ahmed, *La Theorie de l'Imprevision en Droit Algerien* (These de Magister. Oran. 1982), at p. 8.

80 See Alex Weill, *Droit Civil. les Obligations* (Dalloz. 1971), at p. 49, and see also for a detailed study of this theory Emmanuel Gounot, *Le Principe de l'Autonomie de la Volonte en Droit Prive. Contribution a l'Etude Critique de l'Individualisme Juridique* (Dijon. 1912), and Veronique Ranouil, *L'Autonomie de la Volonte: Naissance et Evolution d'un Concept* (P. U. F. Paris. 1980), and see id at p. 138.

81 "...plai d'argent n'est pas mortelle." says Carbonnier, *Droit Civil 4/ Les Obligations* (1969), at p. 249, and see Auverny. B., at p. 2, this is also the opinion of M. Esmein., cited in Jean Quesnel at p. 20.

creditors and so on. This would therefore affect the whole world of contractual relationships.[82]

III. Another argument related to the disadvantage of admitting the revision of contracts is that, the contractor, who knows that in a case of any difficulty of performance there will be an intervention to modify it, will lose his willingness to perform the contract. Such a feeling would not exist if that party to the contract knew that his non performance would make him liable for damages.[83]

However, it is possible to say that the party, who knows that where there is an unforeseeable destabilisation of his contract he will be allowed to ask for its readaptation, will do all that is possible to perform it since he is not concerned about any bad turn of events affecting his contractual rights. In other circumstances, the only way to perform the contract is by its readaptation, because otherwise there would be no performance at all (ie a breach of contract).[84]

IV. Other authors say that 'to contract is to foresee', therefore if the revision of a contract is allowed this would contradict its nature.[85]

§.2. An Illustration. (The Court Of Cassation).

This is in fact the best example which represents the position.[86] The

[82] See Anouar soltane (1983), at p. 234., and see J. L. Mouralis, "Imprevision" (1978) 4 Encyclopedie Dalloz. Repertoir de Droit Civil, at para. 26, and see Ait, op.cit. at p. 8, and R. Rodiere et D. Tallon, op.cit at p. 17.

[83] See C. Fernando, op.cit at p. 59, and Auverny. B, at pp. 40-41.

[84] See to this effect Carbonnier (1969), at pp. 224-25, a same opinion is expressed by Ramdane Zerguine, "Le Code Civil et l'Adaptation Judiciaire du Contrat" (1982) 19 Revue Algerienne des Sciences Juridiques Economiques et Politiques.291, at p. 292.

[85] See to this effect Ait, op.cit at p. 11, and Auverny at pp. 36-37.

[86] As regards other laws it appears from the Quebec civil code of 1866 (and now the 1988-89 Civil Codes) that the theory of imprevision is rejected. Litvinoff p. 56, and Fabien p. 317. Tancelin M., holds the same opinion, but he said that art. 1024 C.C is the basis of a strong argument in admitting the theory of imprevision (ie in the case the jurisprudence opted to admit this doctrine) at pp. 145-46. No general provision however, is to be found in the law of Quebec for cases such as economic crises. This means that the legislator has preferred to intervene where such perturbations occur. Fabien p. 318, for examples of such legislations see pp. 318 et seq.

Court of Cassation rejected this theory (ie of imprevision) in 1876, in the well known case of Canal de Crapone (Civ.6 March.1876.1.193, S. 1876.1. 161.). In 1560 and 1567 contracts had been entered into between a landowner and an enterprise, by which the former promised to pay a certain sum of money in return of a supply of water to be provided by the latter. Three centuries later, that fixed sum became derisory. The enterprise claimed the readaptation of its contract. The lower court allowed an increase of the fixed price. The Court of Cassation rejected this saying that:

> "In no case is it open to the courts, no matter how equitable their decision may seem to be, to take time and circumstances into account in order to modify the agreement of the parties and substitute new terms for those which have been freely accepted by those parties.".[87]

The Court of Cassation has maintained that position up till now, basing it on art. 1134 Fr.C.C. Although in the meantime there was the war of 1870 and the first as well as the second world wars and the problems which they created, all these have not effected its initial position.[88] Therefore, in the case where there is no clause providing for the modification of the contract , or where the law does not authorise such a modification, the contract should be performed as it was initially concluded.(Carbonnier (1982), op.cit p. 253.)

Regarding the French Civil Code[89], on which the Court of Cassation based its position, it can be said that there is no express provision which

[87] See Barry Nicholas, *French Law of Contract* (1982), at pp. 202-03, and see R. Rodiere et D. Tallon, op.cit at pp. 14-15, and Jean Carbonnier, *Droit Civil.4. les Obligations* (P. U. F. 11eme ed., 1982), at p. 253. Certain authors try to prove that the theory of imprevision might be admitted on the foundation of some specific articles in the Civil Code (these are: 953- 1150- 1244- 1889Fr.C.C) which themselves admit - as they allege- this theory. Stoyanovitch responds to this allegation that those articles cannot be said to admit this theory, and therefore they cannot constitute a foundation for the admission of this theory. For more details see that author at pp. 262 to 278.

[88] See Auverny at pp. 31-32, and see Andre Louveau, *Theorie de l'Imprevision en Droit Civil et en Droit Administratif* (Rennes. 1920), at p. 10, and p. 45. For examples where the performance of the contract has become very onerous and the civil jurisdictions reject any claim for a modification of the contract., see Louveau at pp. 26 et seq.

[89] What follows will be mainly based on Stoyanovitch's thesis.

clearly adopts or rejects the theory of imprevision. (Stoyanovitch p. 229) To understand the situation one should look at the period before the drafting of the Civil Code.

At that time, French authors were divided on this point. Thus we find that some authors discussed the theory of imprevision and were in favour of it, (Stoyanovitch pp. 219 & 221 et seq) whereas others such as Domat and Pothier, (17th & 18th C) who had great influence on the drafters of the Code Civil, did not. (Stoyanovitch at p. 220)

Stoyanovitch explains this silence amongst French authors regarding this theory by the prevailing economic stability at that time (Stoyanovitch id) and the belief that no major changes would happen in the future.[90]

It can also be said that one of the most influential ideas exerted upon the drafters of the Civil Code was that the Code Civil should be a complete legislation. That is to say the drafters thought that with this Code they provided all the solutions to every case which may arise in the future. Therefore this Code was considered as eternal and its provisions to cover everything prevailing at that time or subsequent to it. The idea was therefore that no substantial changes would occur after its promulgation. The rigidly drafted article 1134.C.C. (the contract is the law of the parties) reflects this idea. Therefore what is left outside of a provision such as the admission of imprevision (which supposes a substantial change in the situation under which the contract was concluded), should be ignored and the principle of *pacta sunt servanda* should prevail.[91]

The second factor which influenced the drafters was the philosophical theories of the 'autonomy of the will' of the 19th century. Thus the will of the contracting parties should prevail in all the stages of a contract. That is to say in its conclusion as well as its termination. No other will (e.g. of

90 At that time in other countries e.g. Italy and Germany, because of economic changes, the doctrine of imprevision was discussed. Thus in Italy there were Mantica (died in 1614) and Luca (1614-1683) who discussed the theory of 'imprevision'. They determined its sphere of application (ie to be applied to successive contracts) and its conditions (there should be an exorbitant loss) and its effects (either the termination of the contract or its adaptation to the new circumstances). See to this effect Stoyanovitch at p. 220 footnote. 1, and p. 221 footnote. 1.

91 Stoyanovitch pp. 232 to 240, and see Veronique Ranouil (1980), at pp. 80 & 85.

the judge) should intervene for whatever reason (e.g. subsequent changes in circumstances making the performance of a contract ruinous). Therefore the one who speaks contractually speaks justly. Because -as Rousseau- says:

> "when a person decides something for another, he might be unjust towards him. But no injustice is reasonable when someone decides for himself [as by making a contract].".

Article 1134 Fr.c.c is also an acknowledgment of this idea. (Stoyanovitch pp. 241 to 247, and Ranouil pp. 86 & 90)

However, such an idea cannot be sustained since the contract itself may sometimes be a source of injustice. Thus by the supervening of certain events, the performance of the obligation of the debtor may become ruinous for him. The debtor cannot even claim the unjust enrichment since that enrichment is said to be a result of the contract itself, and the one who speaks contractually speaks justly. Therefore, the enrichment is just.(See Mouhye Eddine Ismaiil Alam Eddine p. 394, and Ranouil p. 133).

Other ideas also influenced the drafters such as the "let him go let him pass" (laisser faire laisser passer) in the economic field.[92]

All these ideas influenced the drafters in the way they formulated the Code, that is to say, with no mention of the theory of a change in the circumstances. There was a stability which was thought to continue forever, and the parties to a contract were obliged by it as if they are obliged by the law. All these ideas were reflected in the Code Civil.

---

[92] Thus the following passage written in 1926 may perhaps reflect such ideas:

A diligent businessman should know that there might be a change in the economic or monetary situations, therefore he inserts in his contract certain clauses in order to protect himself from such changes. However, the negligent businessman does not take into account the possibility of such changes and therefore omits to protect himself. The consequence of this would be his disappearance from the market (ie because of his ruin). This in fact is a good thing for the trade itself; since businessmen who are weak will disappear whereas those who are strong enough will remain. This last category will benefit from such a happening. That is to say they will take into account that trading is not only about gaining benefit but also that they are faced with the risk of a total ruin. Therefore the rigidity of maintaining a contract although there is a change in circumstances (and which make the weaker party disappear, and the stronger remain ie the maintaining of the *pacta sunt servanda* principle) is a pedagogic role for businessmen." Stoyanovitch pp. 248 to 250.

Having said that, it remains now to decide whether what was in the thought of the drafters was correct or not. As to the thought that the Code Civil provides a solution for every eventuality, this is in fact a fiction, and no more should be said about it. (Stoyanovitch p. 315)

As to the supposed stability which would -in the thought of the drafters- continue forever after the promulgation of the Code Civil, this was not correct either. Many fundamental changes, whether economic or social or political or monetary, occurred after its promulgation. (For more details see Stoyanovitch p. 336 <u>et seq</u>.). Maurice Tancelin says (at p. 22):

> "la force obligatoire du contrat [a sa] limite...[e]lle n'est concevable en outre que dans une societe relativement stable, comme celle du <u>XIX siecle</u>. Mais si cette condition n'est pas remplie ce qui semble bien etre le cas a <u>notre epoque</u>, la force obligatoire devient une source d'injustice."[93].

All this proves therefore that the provisions of the Code Civil -including art. 1134- which were designed for a situation of stability should not be applied in cases of such fundamental changes. This means that there is no reason in not admitting the theory of imprevision in cases of such changes since the Code Civil itself does not clearly admit or reject it. (See Stoyanovitch p. 342) Thus Hauriou says :"toutes les situations juridiques sont etablies sur la base de la vie normale. Le droit est fait pour le normal et non pas pour l'exceptionnel.".[94] It can therefore be said that looking at the provision of the Code Civil, nothing prevents the jurisprudence from adopting the theory of 'imprevision'.[95]

Among other arguments given in rejecting this theory it was said that admitting imprevision will have a bad effect on the stability of contracts. This argument is in fact unfounded. Thus a representative of the 'Federation des Industriels et des Commerçants Francais' said , and this

---

93 Emphsis is mine. The above quotation means that :"The sanctity of contracts has its limits. It is conceivable in a relatively stable society as the one of the 19th C. However, if this condition is not met as is the present time, that sanctity becomes a source of injustice.".

94 Cited in Jean Foulan, *Le Caractere Provisoire de la Notion d'Imprevision* (Paris. 1938), p. 123

95 See Stoyanovitch p. 315, and Alex Weill, *Droit Civil.Les Obligations* (1975), p. 414, and Carbonnier (1982), p. 261, and R. Rodiere, *Les Mocifications..* p. 17.

after the promulgation of the "Loi. Failliot", which admitted the theory of imprevision for certain types of contracts be it temporarily, that the position of the Court of Cassation in rejecting this theory and clinging to the principle of *pacta sunt servanda*is a "... cause d'inquietude... " and that "... elle va contre les besoins... de la situation actuelle du commerce et de l'industrie... ". Therefore as can be seen it is in fact the position of the Court of Cassation which affects the stability of contracts. (See Stoyanovitch pp. 378-79)[96]

Even Failliot who introduced the Loi Failliot 1918, said that :"Notre proposition a eu pour but de faire cesser le desaccord entre le droit actuel et les besoins legitimes de l'industrie et du commerce...". (Stoyanovitch p. 474, emphasis is mine)

Another argument which can be added in favour of the theory of imprevision, is that if this theory is against public interest (interet general) then there would not have been any law which adopted this theory when there was a destabilisation of economic situations. However, we see that the Loi Failliot and the ones subsequent to it are examples of such type of laws. (Stoyanovitch p. 381) Therefore it is the public interest which requires the admission of the theory of imprevision in cases of changes in circumstances which may destabilise certain contracts. (Stoyanovitch p. 396)

The legislator -as has been said- intervened many times in order to mitigate the harshness caused to debtors because of the difficulties they faced in performing their contract. That is to say because of those difficulties the performance of their contracts became onerous and would ruin them if nothing was done to help. One example of those interventions is the above mentioned Loi Failliot 1918 under which certain types of contracts which had became onerous were terminated. Other subsequent laws for the same purpose were enacted and provided for the suspension or the revision of contracts which had become ruinous for one of the contracting parties.[97]

Having reached the conclusion that an intervention is necessary in order to help a party whose performance becomes ruinous, it remains to determine whether one should opt for a judicial or a legislative

[96] See also Auverny at p. 3 and Alex Weill (1971), at p. 388, where it is said that this position led in certain cases to some injustice.

[97] For a discussion of these laws see: Louis Fyot, op.cit at pp. 134 et seq, and Auverny at pp. 132 et seq, and J. Radouant, op.cit at pp. 311 et seq.

intervention.

As regards French law, it has been seen that the intervention was through passing of temporary laws. The French author A. Hauriou says that:"La justice ne se realise vraiment que par des decisions particulieres, en des cas d'especes.". As a consequence of this, to know whether in a particular case there is real injustice caused to one party to a contract (whether a debtor or a creditor) there should be a consideration of all the circumstances of that case. Obviously this cannot be done except by a judge. Therefore the disadvantage of admitting imprevision by temporary laws is that a whole category of debtors -presumed to have suffered a loss in the performance of their contracts- are treated similarly and without distinction. That is to say the law in question treats them as if they were all in the same position and suffering the same degree of loss which is considered as an unjust loss. Whereas it may happen that some of the debtors are not suffering a big loss as to make it unjust for them to perform their contacts without revision. Despite the disadvantages of this solution -ie legislative intervention- the French law has nevertheless adopted it. Relying on what Auverny Bennetot says (at p. 151) -commenting on those laws-, instead of resolving the bad economic conditions created by the war and the crises, the laws did in fact aggravate it and the "legislateur n'est pas, ou ne s'est pas montre´, un excellent expert economique.". This can be an argument against those who consider the judge as incompetent for such a task (ie the revision) because as they allege, this can only be done by someone who has an overview of the whole economic situation of the country, in order that he can give an appropriate remedy for any economic destabilisation. That person is, as they say, the legislator and cannot be the judge. [98]

The fact that French law rejects any idea of modifying the contract especially by giving the power to the judge, can be explained by what Ripert (in Semaine Internationale de Droit.Paris (1937), p. 216) says to the effect that:

"Nous sommes moins sures de nos magistrats (ie judges) que vous l'etes

[98] See Abd Arrahim Anbar, op.cit at p. 250. A French adage said " God save us from the justice of the parliament", Auverny added at p. 153 " and of the legislator". But this concerns these laws such as Failliot etc., and see Louveau at pp. 50-51.

des votres (speaking of Swiss law which admits the revision of the contract by the judge), et je ne sais pas, si on laissait les tribunaux libres de reviser les contrat au gre des circonstances economiques, s'ils n'abuseraient pas de ces pouvoirs.".

It appears therefore that the rejection of imprevision is not related to the fear of the destabilisation of economic relationships but to a fear regarding French judges themselves. For other legal systems there is no reason in not admitting imprevision, even through judicial intervention; because though judges have a large discretion in considering cases of this type, they are in fact very prudent in using this power. (See to this effect R. Rodiere, *Les Modifications*.. at pp. 188-89)

It would seem from what has been said about French law that the best solution would be to admit the revision of contracts by a general provision in the law and then it would be the duty of the judge to consider each case of imprevision and to give the appropriate solution as to revise the contract or to enforce it.[99] This is in fact what the Algerian legislator adopted in the Algerian Civil Code. Its provision will be studied after a brief survey of the theory of imprevision in French administrative law.

§.3 The Position of The Conseil d'Etat, or The Theory of Imprevision under French Administrative Law[100]

I- Definition of Imprevision.

An example may illustrate the circumstances in which this theory may apply. (A) makes a contract with an administration in order to run a public service (e.g. supply of gas to a city).[101] Due to exceptional events

[99] Stoyanovitch at p. 187 holds the same opinion.

[100] For a summary of this theory see: Mazeaud, *Leçons* T. 2. 1er Vol *Obligations* (1973), at p. 763 , and Alex Weill, *Droit Civil* (1971), at p. 395, and the same writer in the (1975) edition, at p. 413, and Jean Carbonnier, *Droit Civil. 4/ Les Obligations* (1982), pp. 260 et seq, and M. Planiol & G. Ripert, Tome. 6 *Obligations* 1ere Partie. (1952), at p. 529, and see J. L. Mouralis, Encyclopedie Dalloz. (1978), at para. 56 et seq.

[101] The theory of imprevision does not apply solely to this type of contracts. For other contracts to which it may apply see M. Walline, Droit Administratif (9eme ed., Ed. Sirey. 1963), at p. 623.

beyond the control of (A), the performance of the contract becomes ruinous to him and threats him with an exorbitant loss exceeding what has been envisaged when concluding the contract. In such a situation there are two solutions. The first is to oblige (A) to perform his contract although he is suffering that loss. The consequence of this would be the ruin of (A), and will oblige him sooner or later to stop the performance of his contract. This in turn means the interruption of the public service. The second is to help the contractor (A) in his performance of the contract either by modifying the contract so as to stabilise it, or by awarding a certain indemnity which would compensate him for the loss he suffered and this in order not to interrupt the public service which is in the public interest.[102]

In almost a similar situation the Conseil d'Etat has given its well known decision in the case of Gaz de Bordeaux March 24th 1916 (S. 1916. 3. 17., Concl. Chardenet, note Hauriou). It was in that decision that the theory of imprevision, as it is now settled under administrative law, has been clearly defined and determined.[103] In other words almost all the important principles of imprevision were determined in that case. Subsequent decisions of courts have added other principles, and clarified the ones already settled.(J. Foulan, op.cit at p. 15.)

II- The Principles Underlying the Admission of Imprevision.

The main reason underlying the admission of imprevision in administrative law, is the necessity of continuing the running of the public

---

102 See De Laubadere, *Traite de Droit Administratif* (6eme ed., Paris. L.G.D.J. 1973), at p. 368, para. 639. In fact 'compensation' is not used in its real juridical meaning; since it does not compensate for the loss suffered, but it is more accurate to say that it is a contribution from the administration in order to stabilise the contract. See J. L. Devolve, "The French Law of Imprevision In International Contracts" (1981) 2 International Contract.3, at p. 5 col. 2. Or to restore "the altered equilibrium of the contract". See Saul Litvinoff, op.cit at p. 16.

103 See Jean Foulan at p. 13, and see Michel Rousset, Driss Basri, Ahmed Belhaj, Jean Caragnon, *Droit Administratif Marocain* (4eme ed., Rabat. Imprimerie Royale. 1984), at p. 365. This does not mean that the solution of giving an indemnity (indemnity under imprevision is given to the party asking for its application) to the contractor who faces great difficulties in performing his contract was not known before that case. For such examples see M. Walline, op.cit at p. 622, see also Barry Nicholas, *French Law of Contract* op.cit p. 203, and see Saul Litvinoff at p. 15.

service which is in the public interest.[104] It is for this reason that the administration with which the contractor concluded the contract accepts to modify the contract in order to stabilise it , or that the judge awards the indemnity of imprevision. However, other ideas may also explain its admission such as the principle of equity or even good faith. But all these are not the main or the principal reasons.[105]

III- The Sphere of Application of the Theory of Imprevision.

This theory is solely concerned with administrative contracts (e.g. public service, public work etc).[106] Therefore private contracts, whether concluded between private parties or between an administration and a private party, are excluded from its sphere of application. The main reason of this is that private contracts are in the competence of civil jurisdictions, as opposed to administrative ones and these reject the theory of imprevision in private contractual relationships.(See to this effect De Laubadere, *Contrats...* p. 570.)

This theory can be applied in the case when the contract is an administrative one and concluded between a private party and an administration, or between two public bodies.(See De Laubadere, id pp. 573-

---

104 See Andre De Laubadere & Franck Moderne & Pierre Devolve, *Traite des Contrats Administratifs* (2eme ed., Paris L. G. D. J. 1984), at pp. 562-63, and see M. Walline, op.cit at p. 623, and see Andre De Laubadere, *Traite de Droit Administratif* (1973), at p. 366, and see Cornesse Fernando (1946), at p. 58, and Rene Rodiere, *Les Modifications* op.cit, at p. 40, and see Jean François Lachaume, *Droit Administratif* (4eme ed. Collection N. Themis P. U. F. 1987), at p. 299. Therefore if by the happening of an exceptional event the interruption in the continuity of the public service is not involved, the theory of imprevision will not be applied. See Rodiere, *Les Modifications* at p. 43 The adoption of the theory of imprevision by the 'Conseil d'Etat' of France is for reasons of public interest such as the continuity of the public service, whereas in other laws (e.g. Arab civil codes) it is admitted -in civil matters- for reasons of justice and in consideration of the position of the contractor who suffers that hardship. See Mouhye Eddine I. A. E at pp. 395-96.

105 See De Laubadere, *Contrats...* op.cit at p. 564, and M. Walline, op.cit at p. 732, and J. L. Devolve, "International Contracts.." op.cit at p. 6 col. 1 & 2., and Rodiere at p. 42, and Lachaume at p. 300.

106 M. Walline, op.cit at p. 623, and De Laubadere, *Contrats...* op.cit at p. 570. For a short definition of administrative contracts, see J. L. Devolve, op.cit at p. 5 col. 1, and see Lachaume at p. 299.

74-75)

IV- The Conditions required for the Application of Imprevision.

Four conditions are required in order that this theory can be applied. The first is that the event which destabilises the contract must be unforeseeable. Secondly it must not be imputable to the party who contracts with the administration. Thirdly there must be an economic destabilisation of the contract. Lastly the event should happen between the conclusion of the contract and before the end of the time-limit in which the contract should be performed.[107]

The destabilisation of the contract should have an economic character (e.g. rise or fall of prices). However, the event itself which causes that destabilisation may be economic, natural or an order issued by a public body.[108]

A- An Economic Event.

It may happen that there is an increase in prices of materials and this may be due to the rules of supply and demand, or because of a shortage of materials. In such a case there is an economic destabilisation.

B- A Natural Event.

The destabilisation of the economy of the contract may also be due to a natural event (e.g. earthquake etc...). In this case the theory of imprevision may apply.

C- The Intervention of a Public Authority.

It may also happen that the contract concluded becomes destabilised because of the intervention of the administration which is either the party to the contract in question or another administration or that this destabilisation is caused by a passing of a legislation. In such a case the theory of imprevision may apply if all the other conditions of imprevision are met.

Let us now consider the conditions of Imprevision already cited.

---

107 See J. Foulon, op.cit pp. 13-14, and De Laubadere, *Contrats...* op.cit at pp. 578 et seq, and Rodiere at p. 41. See also for the conditions of imprevision: Lachaume at pp. 297 to 299.

108 See generally De Laubadere, *Contrats...* pp. 579 to 582, and M. Walline, op.cit at pp. 732-33.

1- The Event Must Be Unforeseeable.

The event which destabilises the contract must be unforeseeable at the time of the conclusion of the contract.[109] Examples of such events are: war, a devaluation of money, and more generally economic crises.[110] The Conseil d'Etat applies the theory of imprevision either when the event itself is unforeseeable, or its consequences are as such, although the event itself may not be unforeseeable.[111]

2- The Event Must Not be Imputable to the Person Who Contracts With the Administration.

This condition is so formulated because the administration itself may by its acts destabilises the contract it made with the other contractor as to be ruinous for him. Therefore this condition concerns the contracting party who invokes this theory against the administration. That contractor should not be involved directly or indirectly with the supervening of the destabilising event.[112]

3- The Event Must Destabilise The Contract.

The event in question must affect the financial equilibrium of the contract concluded with the administration. This means that the contractor would suffer an exorbitant loss in performing his contract with

---

109 De Laubadere, *Contrats...* op.cit at p. 586, and De Laubadere, *Droit Administratif* p. 367, and Georges Vedel, *Droit Administratif* (3eme ed., P. U. F. Paris. 1964), at p. 607, and see M. Rousset at pp. 365-66.

110 De Laubadere, *Droit Administratif* at p. 367. Depending on the circumstances of a given case the examples given might acquire that condition.

111 For an example of this type see J. Foulon, op.cit at p. 24, and De Laubadere, *Contrats...* at p. 587, and see the examples he gives of passing of legislation and war and other events pp. 588 et seq, and see Rodiere, *Les Modifications*..who says that the Conseil d'Etat no more requires the unforeseeability of the event and accepts the unforeseeability of the consequences of the event (id at p. 44, he refers to a case decided in 1948 where, although the event destabilising the contract viz a passing of a legislation, was anterior to the conclusion of the contract, and the parties themselves provided for that contingency, nevertheless the C.E based its decision on the fact that the destabilisation caused by that event, was beyond what was reasonably foreseen by the contracting parties when making their contract.).

112 De Laubadere, *Contrats...* pp. 590 to 593, and J. Foulon at pp. 13-14, and De Laubadere, *Droit Administratif* at pp. 367-68, and see M. Rousset at p. 365.

the conditions as initially settled and may be forced to interrupt the running of the public service.

An important fact to be remembered when considering the loss suffered due to that event is that any contractor, in concluding his contract, must expect some loss. This loss constitutes in fact what -he expects- would exceed his cost price in concluding his contract. Therefore any contractor should reasonably expect an extra-cost price. This is the foreseeable loss to be borne by him. But where the event which detabilises the contract increases that loss above what was foreseeable and expected, which is called under French administrative law an extra-contractual loss (charge extra-contractuelle), the theory of imprevision should apply. It is for this type of loss that the contract with the administration should be revised or what is called an 'indemnity of imprevision' should be granted .[113]

The theory of imprevision applies when there is a real loss. If the consequences of the event were to prevent the contracting party only from getting any benefit (without making him suffering a loss) then no question of Imprevision can be raised.[114]

V- The Effects of Imprevision.

The contract being destabilised, the contractor must continue the performance of his contract although he suffers that loss. Only in this case he can ask for the application of the theory of imprevision.[115] The first effect of the application of this theory is that the parties are invited by the judge to renegotiate the contract in order to stabilise it again, and this by modifying its initial conditions. If such an agreement is not reached, the administrative judge grants what is called an "indemnity of Imprevision" to the contractor by which his loss will be lessened, since its

[113] See to this effect De Laubadere, *Contrats...* pp. 595 to 597, and De Laubadere, *Droit Administratif* p. 368, and M. Walline, op.cit at p. 730, and G. Vedel (1964), op.cit at p. 607, and Georges Vedel & Pierre Devolve, *Droit Administratif* (10eme ed., P. U. F. 1988), at p. 1150.

[114] See to this effect De Laubadere, *Droit Administratif* p. 368, and M. Walline, op.cit at p. 735, and Rodiere at p. 41, and see M. Rousset at p. 366.

[115] De Laubadere, *Droit administratif* op.cit at p. 368, and De Laubadere, *Contrats...* pp. 604-05, and Rodiere at p. 44, and see Lachaume at p. 299.

major part will be borne by the administration.

As it is only the parties who can modify their contract, it is not open to the judge to do so.[116]

In awarding the indemnity the judge must determine three preliminary questions.[117] **Firstly** of all he should determine when the extra-contractual situation starts, that is, the time in which the loss resulting from the running of the public service goes beyond what was reasonably expected by the contractor. **Secondly** he should determine the extra loss in that period (ie in the extra-contractual period). This is generally determined by comparing the revenue and the expenditure made in that period. **Thirdly** he should determine the amount of loss-bearing by both the contractor and the administration. Generally the administration bears the major part of the loss (from 80 to 90 %) and the contractor is left with the minimum amount of loss.[118] All this is in order that the public service continues to be effective.

What has been said above about the effects of imprevision concern the case where the loss suffered by the contractor in performing his contract is temporary only.[119] Therefore the solutions provided by the theory of Imprevision are for temporary detabilisations. As a consequence of this, when the destabilisation is permanent, both parties are entitled to ask the judge for the termination of their contract.[120]

---

[116] M. Walline, op.cit at p. 734. What is worth noting is that the party suffering the destabilisation of his contract can ask for that indemnity either when the destabilisation occurs in the course of the performance of the contract or after having performed the contract. See G. Vedel (1988), at p. 1152.

[117] Generally the judge refers to experts in determining them. See J. Foulon, op.cit at p. 22.

[118] See De Laubadere, *Contrats*... p. 623, and M. Walline, op.cit at p. 737, and G. Vedel (1964), op.cit at p. 607, and J. Foulon at pp. 26-27 (for secondly only), and G. Vedel (1988), at p. 1151, and Rodiere at p. 45, and see Lachaume at p. 299.

[119] This supposes that the period of imprevision causing to the contractor that loss is temporary only and will cease. This may happen either by the disappearance of the event which has destabilised the contract, or that the parties reach an agreement by which they stabilise their contract. De Laubadere, *Contrats*... pp. 626-27, and see G. Vedel (1964), op.cit at p. 608, and J. Foulon pp. 17 to 20, and G. Vedel (1988), at p. 1152, and see Lachaume at pp. 298-99.

[120] De Laubadere, *Contrats*... pp. 627-28, and De Laubadere, *Droit Administratif* p. 370.

VI- The Effect of Contractual Provisions regarding the state of Imprevision.

In fact any contractual clause which prevents the contractor from claiming the application of the theory of imprevision, should be considered as void. since it is contrary to "ordre public". As imprevision concerns the continuity of the public service, therefore it is the public interest which is involved. However, when the contractual clause is to the effect of readapting any destabilisation of the contract, such a clause is valid. Therefore, if that clause covers the whole effects of imprevision, that is the new situation which has arisen, this would exclude the application of the theory of imprevision. Whereas, if it covers only a part of the effects of imprevision, there seems to be no reason in not applying the theory of imprevision in order to supply what is left unprovided for by that clause.[121]

Where the contracting party has taken the risk of any destabilisation of the contract, he cannot thereafter claim the application of imprevision, because such a contractual clause is valid.[122]

It can be seen from what has been studied that the Court of Cassation and the Conseil d'Etat have adopted opposite positions regarding the theory of imprevision. The Conseil d'Etat considers the public interest (consisted in the "service public") as a principle which must prevail over the *pacta sunt servanda* (ie the sanctity of contracts) whereas the Court of Cassation regards the latter principle as the one which must prevail over private interest (private contracts). No matter therefore, how many debtors are sacrificed in the application of the *pacta sunt servanda* principle, a rigorous application of it, is supposed to keep the stability of contractual relationships. The Algerian legislator in this respect, has not followed - and he is indeed right in his position- the French legislator, and instead adopted the doctrine of imprevision by a general stipulation applicable to all cases of imprevision.

---

[121] See to the same effect De Laubadere, *Contrats...* pp. 599 to 601, and G. Vedel (1988), at p. 1151, and De Laubadere, *Droit Administratif* p. 366, and see Lachaume at p. 300.

[122] See J. Foulon at p. 26 where he gives a case as an example of this .

Section Three. The Position of Algerian Law and other Systems of Law.

Algerian law as well as other laws have adopted the theory of imprevision not only in administrative contracts as the Conseil d'Etat has, but extended it to civil and commercial contracts. The other fact is that the power to revise the contract is given to the judge. Therefore the position of Algerian law is in this respect totally different from the one of French law. In what follows we will give the arguments which are generally referred to in founding the admission of this theory. Then we will study the Algerian law as an example of the laws which admit the revision of contracts because of an economic destabilisation. reference to other laws will also be made while discussing the different aspects of this theory under Algerian law.

§.1. Doctrinal Arguments.

Before discussing doctrinal arguments, it should be pointed out that it has rightly been said that there is no need -under Algerian law- to justify the theory of 'imprevision' by invoking principles such as "good faith" or "clause *rebus sic stantibus*". This is because this theory is based on an article of the Civil Code, viz art.107/3. Therefore, there is a legal justification for this theory under Algerian law.[123] However, this does not mean that the theory cannot be founded on those principles.[124]

Before discussing the arguments founding imprevision, it should be said that, under **Swiss law** the theory of imprevision is admitted in several articles of the "Code des Obligations". This code provides for the termination of the contract because of 'grave' circumstances which render the performance of the contract intolerable, such as in the contract of 'bail' (arts. 269 & 291 C. O). (See H. Deschenaux, (1942) Revue de Droit Suisse. at p. 524).

Article 250/2 C. O (concerns donations) provides that the person who promises to give a thing can be discharged of his obligation if after his promise, his financial situation was modified in such a manner so that the donation has become much more onerous for him. (See id pp. 525-26) But

[123] See Ali Bencheneb, *Theorie Generale du Contrat* (1982), at p. 86.

[124] See N. Terki, "L'Imprevision et le Contrat International dans le Code Civil Algerien" (1982) 8 International Trade Law & Practice.9, at p. 12. This is true especially for the concepts of good faith and equity.

in this case the judge can only reduce the promisor's obligation and not release him completely. (Id p. 526)

Another provision where the judge can terminate the contract or revise it, is art. 373/2 C. O (contract of 'entreprise') which states that:"... if the performance of the work is hindered or has been rendered excessively difficult by extraordinary circumstances, and impossible to foresee, the judge can either raise the stipulated price or terminate the contract.".[125]

Thus the judge is entitled to modify the contract either by raising an obligation or by reducing it, and this in order to adapt the contract to the new circumstances which has arisen. Therefore it is the destabilisation of the economy of the contract which has induced such an intervention in order to bring the contract into its initial equilibrium.[126]

The problem with such a special applications of imprevision is that, in cases not expressly provided for by the law, judges have to look for other principles which may justify its application. This is in fact what happens in Swiss law.

Generally speaking (ie not specifically speaking of Swiss law) many principles have been provided to justify the adoption of the theory of imprevision, these are:

I- The Clause or Condition *rebus sic stantibus*.

This clause was used in the middle ages by the canonists to justify the modification of a contract when the obligation of one of the parties becomes onerous. Canonists stated that in any contract in which the performance does not follow immediately its conclusion, there is a tacit clause stating that the contract should be performed as it was concluded as long as the economic conditions under which it was concluded do not substantially change.[127] Canonists applied this doctrine because they

---

[125] H. Deschenaux, Revue.. p. 526. This is as the Algerian law., and see Travaux de l'Association Henrie Capitant pour la Culture Juridique. Vol.83 "Les Effets de la Depreciation Monetaire sur les Rapports Juridiques Contractuels" (Journees d'Istambul) Faculte de Droit d'Istambul. (1973), at p. 568 and see H. Lesguillons at p. 528.

[126] For examples of other articles to the same effect, see: P. Ommeslaghe at p. 34.

[127] See Stoyanovitch at pp. 435-36, and see Alex Weill, *Droit Civil. Les Obligations* (1975), at p. 407.

thought that the party to a contract who benefits from the loss of the other party (ie whose performance has become onerous), is committing a religious sin and should be prohibited. The only way to prevent such a sin was by modifying the contract as to stabilise it again.[128] Thus it can be said that under this doctrine the consent of the parties to the contact was based on the prevailing conditions, and if they foresaw that there would be such a change in the previous conditions, they would not have contracted, or at least they would have contracted differently.[129]

This might apply to French as well as Algerian law because it is said that in interpreting the intention of the parties according to art. 1156 Fr.C.C[130] (and art. 111/2. Alg.C.C), it is possible for a judge to say that the parties intended the clause *rebus sic stantibus* to be included in their contract. However, the problem with this argument is that since the parties have not included in their contract a clause to revise it, this may mean that they have accepted to run the risk of any destabilisation of the contract.[131] Alex Weill says that even if this clause is intended, it is in fact the party whose performance has become onerous (ie the debtor who for example has to provide certain goods or services) who may have such an intention and not the other, whereas in interpreting the intention of the parties to a contract we should take into account the intention of both parties (see art. 1156 Fr.c.c, and art. 111/2.Alg.C.C, which speak of common intention), and not only one of them (ie the one whose performance is onerous).[132] But the problem with this is that, it cannot be said that that intention was that of the party whose performance has become onerous; since we do not know - at the time the contract is concluded- who will suffer a hardship in the future

128 *El Wassit* Vol. 1. at p. 633, and see Abd El Mounem Faradj Essada (1974), at p. 479.

129 See J. L. Mouralis, Encyclopedie Dalloz op.cit at para. 11, and see C. Fernando, op.cit at pp. 25-26.

130 That article stipulates that:"The common intention of the contracting parties must be sought in agreements rather than to stop at the literal sense of terms.".

131 See R. Rodiere & D. Tallon, op.cit at p. 17, and Ait, op.cit at pp. 13-14.

132 Alex Weill (1971), at p. 389. See also for the fact that the interpretation should concern the common intention of the parties and not one of them only: Auverny at p. 11, H. Deschenaux, Revue, op.cit at pp. 530-31, Louveau at pp. 53 to 55, and Stoyanovitch pp. 435 to 442.

performance of the contract.

Another criticism in relying on the interpretation of a contract on the basis of art. 1156 Fr.C.C, is that this article is only applicable when there is an ambiguity in the terms of the contract. Whereas if they are clear, no interpretation is allowed and the contract must be performed as it is, even if it becomes onerous. (See Corneliu at p. 63)

Under **Swiss law** the use of the clause *rebus sic stantibus* as a foundation to modify the destabilised contract was rejected by the "Tribunal Federal Suisse".[133]

II- The Principle of Good Faith.

It has been said that imprevision can be justified by reference to the principle that contracts should be performed in good faith (see art. 1134/3 Fr.C.C, and art. 107/1 Alg.C.C). This means that the creditor who claims the performance of the contract from his debtor in the knowledge that the performance would be ruinous to him, is in fact acting contrary to good faith as required in any contract.[134] However, this argument -as the first one- was also criticised in that the principle of good faith itself requires the parties to a contract to perform as was agreed and not to give the judge the power to modify it. Therefore the creditor who is asking for the performance of the contract is not breaching the principle of good faith.(See C. Fernando pp. 43-44, and Auverny pp. 8-9, and Louveau p. 56.)

Swiss law however, does consider such an act as a breach of good faith. This principle is provided for in art. 2 of the Code Civil, and It constitutes the general provision which justifies the admission of imprevision. This article concerns both the debtor and the creditor. Thus even the right of the creditor in asking the debtor to perform his contract should be used in accordance with the good faith principle.[135] Good faith under Swiss law

---

133 Deschenaux, Rev.Droit Suisse op.cit at p. 531. For a discussion of other theories though said not to base 'imprevision' under Swiss law, see id at pp. 529 et seq, and see Hans Smit "Frustration of Contract: A Comparative Study at Consolidation" 58 (1958) Columbia Law Review.287, at pp. 289-90., and Cf with German law infra.

134 See Ait, op.cit at pp. 14-15, and R. Rodiere & D. Tallon, op.cit at p. 17, and *El Wassit* Vol. 1. at p. 634.

135 Deschenaux, Rev.D.Suisse., p. 545 and see Leo M. Drachsler, "Frustration of Contracts: Comparative Law Aspects of Remedies in Cases of Supervening

places the parties to a contract as if they were partners. Thus they have to act together in order to reach the common end in mind and not make that end illusory, (Deschenaux Revue.. id p. 547) nor that the obligation derisory and this without any modification. (See P. Ommeslaghe p. 35) There should also be a certain equivalence between the undertaking of each party.(See Deschenaux Revue.. id p. 549) In general if the contract is destabilised by supervening events it is not considered as acting in good faith, if one party asks for the performance of it. In this case he is considered as abusing the use of his right, and the abuse of right is not protected by law as formulated in art. 2/2 C.C. (Deschenaux Revue.. p. 549 and see P. Ommeslaghe p. 35)

The same principle of good faith is also referred to in the establishment of the conditions of revision as well as the process of adjusting the contract.(Deschenaux Revue.. p. 551)

III- The Principle of Abuse of Right.

It might be said that the creditor who asks for the performance of the contract, though the performance has become onerous, is in fact misusing his right. However, this argument can be criticised by saying that there is no abuse of right in asking for the performance of the contract which is in itself a right of the creditor. In this case if the creditor does not ask for the performance of the contract, he will bear the consequences of that non performance (ie he will bear the damage of the non performance), and there is no reason why the creditor should bear that risk instead of the debtor.[136]

IV- The Principle of Equity.

Other authors have said that it is in fact equity which is the basis of the doctrine of imprevision; therefore when there is a destabilisation of the contract due to unforeseen events, equity requires that the party who suffers such a loss should be helped. This in other words means that the

---

Illegality" (1957) 3 New York Law Forum (Now called N.Y.Law Schl.Law.Rev).50, at p. 77

136 Cornesse Fernando at p. 43. A French author viz Albert Wahl says that "... rien n'est plus legitime... que le fait de se reclamer d'un droit qui a ete stipule.". See Corneliu at p. 66,, and see Louveau at p. 55.

equity in such circumstances should prevail over the sanctity of contracts. This is because, the "autonomy of the will" as understood in the 19th.c., has its limits and it is not therefore true to say that the "one who speaks contractually speaks justly.".[137] Therefore it is not always the strict performance of the contract which makes it equitable.[138] This principle seems to be the one which supports the theory of 'imprevision' under Algerian law more than the previous ones. This is clear when the legislator prohibited loan with interests between private parties to a contract. The Algerian legislator was also inspired by the rules of Islamic law which is basically based on equity.[139]

§.2. An Illustration. (Algerian Law).

The laws of many countries such as Egypt, Libya, Syria, Sudan, Kuwait,[140] Iraq[141], Algeria, Swiss, Germany and United States of America (ie the doctrine of impracticability) have expressly adopted this theory. This might also be the case under Louisiana law, since it is said that a foundation can be found for the theory of imprevision and this in many articles of the Civil Code (which concerns the frustration of the purpose, or the disappearance of the reason for which the contract was made).[142] It is also adopted by the Italian civil code of 1942.[143] In the following study of this

---

[137] Said by Fouille. See Alex Weill (1971), op.cit at p. 49.

[138] See generally Ait, op.cit at pp. 17-18, and Abd El Mounem, op.cit at p. 479, and El Sanhoury, *El Moudjez* op.cit at p. 307, and Alex Weill, *Droit Civil.Les Obligations* (1975), at p. 408, and Stoyanovitch at pp. 150 & 419, who says that the theory of imprevision is based on equity which means that no one should suffer.

[139] See Ait, op.cit at p. 18, and N. Terki, "International..." (1982), op.cit at p. 12.

[140] Abd El Mounem, op.cit at p. 477.

[141] Abd Arrahim Anbar, *Encyclopedia* at p. 252.

[142] See Litvinoff at p. 23, it is to be noted that the articles to which this writer is referring are similar to the ones found under the French Civil Code. Under French law authors have tried to find a basis for the admission of the theory of imprevision by reference to such articles (footnote. 87 supra this chapter), but they failed to convince the jurisprudence or even the other French authors. However, speaking of Louisiana law Litvinoff says that even without the need for a doctrine dealing with the occurrence of unexpected change in the circumstances, Louisiana courts -through interpretation of contracts- have released parties to contracts where the performance of their contract has become excessively burdensome. See Litvinoff at pp. 51-52.

[143] See *El Wassit* Vol. 1 at p. 641, and J. L. Mouralis, op.cit at para. 19. It is to be noted that the Polish Civil Code of 1933 adopted the theory of imprevision in article

theory, although Algerian law will be the example, references to other laws will be made.

Before discussing the Algerian doctrine of imprevision it is of interest to give a brief summary of this doctrine under **German law.**

Generally speaking, German courts have used several concepts for releasing a party from his obligation where the effects of supervening events have not made the performance impossible.

Thus the concept of *clausula rebus sic stantibus*, although not embodied in the B.G.B,[144] was nevertheless used by courts for this purpose. Therefore, where, because of a substantial change in circumstances, the performance of the contract has become economically radically different from what was intended by the parties when concluding the contract, the performance of that contract can no longer be asked for.[145]

The principle of good faith as formulated in art. 242 B.G.B., was also used to grant relief for the debtor,[146] and this in cases where the performance has become a hardship, such as in the case of a change of legislation or in cases of frustration of purpose.(Norbert H, p. 19.)

Another concept was also used by courts and this during the period of inflation, when there has been a depreciation in the value of money. That concept was called the equivalence of values. Thus in a reciprocal contract, each party's performance should be equal in value. That is to say there should be "a relationship of adequacy between the performances of both

---

269, but this Code is now abrogated. See M. Fontaine, (1976) 2 International Trade Law & Practice at p. 11, and A. Puelinckx at p. 54.

144 See Joachim Meinecke, "Frustration in the West German Law of Contract" (1978) 13 Irish Jur.N.S.83, at p. 84, and Horn Norbert, "Change in Circumstances and the Revision of Contracts in Some European Law and in International Law" (1985) 3 Studies In Transnational Economic Law (Netherlands).15-29, p. 19, and Peter Hay at p. 358, and Dalhuisen H. J, "Changed Circumstances and the Role of the Judiciary" (1975) 'T Exempel Dwinght. Opstellen aangeboten aan Prof mr. I.Kisch.Zwolle.49, at p. 60 footnote. 35.

145 See Joachim p. 91, but cf Rodiere (where it is said that the jurisprudence - before 1923- could not refer to the clause *rebus sic stantibus* concept since it was expressly rejected when drafting the BGB in 1900 (see at p. 128)., and cf with the English common test supra.

146 Joachim p. 91.

parties". The Supreme Court itself treated a case as one of impossibility, where there was a lack of such adequacy.[147] Thus in one case the court (R.G) declared that the promisee was acting contrary to good faith in claiming the performance of the contract, although the promisor would not receive an equivalent for his performance.[148]

Therefore, as can be seen, until the development of the doctrine of Geschaftsgrundlage by Oertman ((1921). See S. Litvinoff p. 19 footnote. 67) - which is another concept used by courts to release a party, because of a change in circumstances-[149] the above concepts existed side by side and were used by courts.(Joachim p. 92.)

The theory of Geschaftsgrundlage is based on the idea that where the supervening events affect the basis or the foundation of the contract, this should be a ground to release the debtor from his obligation. This in other words means that the continued existence (see Peter Hay p. 361) or the coming into existence of certain circumstances are assumed by one party to the contract as to be the basis of the contract or the foundation upon which the contract was entered into. That assumption must be shared by the other party. This is so when the other party knows about that assumption or where it is obvious to him that those circumstances constituted the basis of their contract.[150] If that foundation has collapsed because of supervening events, then the contract should either be adapted to the new situation or terminated. Such a collapse of the foundation may occur when there is a fundamental disequilibrium of the contract, which leads to undue and unanticipated hardship for the concerned party.[151]

---

[147] See J. Cohn p. 19, and Joachim p. 92, and Litvinoff p. 21, See Peter Hay at p. 359.

[148] Joachim p. 92. it is to be noted that the principle of nominalism is rejected by German law. Id pp. 98-99.

[149] Texas p. 294, Geschaftsgrundlage is said to be the base of the present German doctrine of frustration: Peter Hay at p. 361, it is also said that this theory combined the concepts in existence and defined frustration as being a collapse of the foundation of the contract Peter Hay id.

[150] J. Cohn pp. 20-21, and see Joachim pp. 93 et seq, and H. Deschenaux, Revue at pp. 533-34, and Litvinoff p. 19.

[151] See Norbert p. 19, and Ole Lando, "Renegotiation and Revision of International Contracts an Issue in the North-South Dialogue" (1980) 23 German Yearbook of International Law.37, at p. 49, and Peter Hay at pp. 361 & 363, and

The collapse of the foundation may also happen when the purpose for which the contract was concluded can no longer be attained.[152] An illustration of this is given by Cohn J. Thus:

> "[a]n industrialist orders coal for a factory to be delivered regularly during a certain period. During that period his factory is closed down by order of the government for reasons of national emergency.".[153]

Therefore the basis of the contract in this example is destroyed.

That disequilibrium may be due to several causes, for example to a depreciation of money or a change in legislation.[154]

In one case (A) made a contract with (B) by which the former promised to produce a certain machinery for the latter. (B) intended to sell the machinery in East Germany. After the conclusion of the contract the import of the machinery into East Germany was no longer possible due to the Berlin Blockade. It was held by the B.G.H that the buyer's intention, that is to sell the machinery in East Germany, constituted the basis of the contract and assumed by both parties to be as such. The buyer was therefore freed from his obligation to accept the machinery and to pay for them. However, an adjustment of the contract was also decided, by which the buyer had to compensate the seller for the expenses he incurred in performing his contract, and this by application of the principle of good faith.(Joachim pp. 103-04.)

Yet, if the other contracting party does not share that assumption (concerning the coming into existence or the continued existence of certain circumstances), this doctrine cannot be applied.(J. Cohn p. 22.)

We should bear in mind that the decision of the Federal Court (Budesgerichtshof) (reported above) has been almost unanimously criticised. This is because it is an established rule under German law that the buyer who acquires merchandise in order to resell it with profits, should bear the risk of this resale contract. Thus if he wants to share this risk with the

---

Texas p. 294.

[152] See P. Van Ommeslaghe p. 25., this might be similar to the English concept of frustration of purpose. Thus the English coronation cases would probably be decided by German courts as to involve a frustration of purpose and be held as terminated.

[153] J. Cohn p. 21.

[154] See Rodiere pp. 130-31.

seller he should insert an express clause to that effect. It is also said that this decision is the only one which can be considered as a deviation by the Federal Court. (See Peter Hay at p. 363, and R. Rodiere p. 130).

In another case in which the court RG referred to the doctrine of Geschaftsgrundlage, a seller entered into a contract for the sale of a piece of land which he did not own at the time of concluding the contract, but he hoped to acquire it from its owner. The price of the sale was based on the prevailing market conditions at that time. Later on the price of land sharply increased due to a currency devaluation. The seller claimed that he was no longer bound by the contract. The RG gave effect to his claim on the ground that the "continuation of the equivalence of performance and counter-performance had been assumed by the contracting parties at the conclusion of the contract" as to be the foundation of their contract.[155] It should be noted that in this case the seller was not freed from his obligation, but had to accept a higher price which is determined by the judge, in accordance with the current land prices. This process would therefore avoid the termination of the contract. However, where the buyer refuses the new price, then the seller is entitled to claim the termination of the contract.(Joachim p. 95)

Another important point is that the doctrine of Geschaftsgrundlage is not only used in cases of hardship, but also in cases where the performance has become worthless. Thus if a money lender gets his money in a depreciated money, he can claim the application of this doctrine since he should not be obliged to accept to be paid in a depreciated money.(See Litvinoff p. 20, and *Manual of German Law* p. 49.)[156]

It can be seen from what has been said that both Swiss and German courts refer to general principles of law when admitting the theory of imprevision. As to the Algerian legislator, he declares in art. 107/3 of the Civ.C that:"

Where following exceptional, unforeseeable, general events, the

[155] Joachim pp. 94-95. In fact this does not seem to differ from the concept of *rebus sic stantibus*. That is to say the parties contracted on the basis that the conditions upon which the contract was concluded will not change as to affect the value of the performance of one of the contracting parties.

[156] As to the effects of this type of impossibility see infra.

performance of contractual obligations becomes excessively burdensome even though not impossible, in such a manner so to threaten the [debtor] with an exorbitant loss, the judge may according to the circumstances and after considering the parties' interests, reduce, in a reasonable manner the obligation which has become excessive. Any agreement to the contrary is null and void."[157]

This article is similarly formulated in the Civil Code of Egypt, Libya, Syria, Sudan and the Code of Commerce of Kuwait.[158] As may be seen from that article, the judge has the power of modifying the contract in order to stabilise it and this by reducing the party's obligation which has become very onerous.

If we compare this doctrine with other laws, we see that for example U.S.A law also provides a release when the performance of the contract has become onerous. To this effect "impracticability" (U.C.C §.2-615): is the doctrine by which the debtor will be discharged if the cost of performance has become excessively and unreasonably burdensome. Section 2-615 (a) Uniform Commercial Code provides:

> "Delay in delivery or non delivery in whole or in part by a seller... is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made..." (see Texas p. 280, and Berman, Helsinki (1961) p. 36).

Some examples were given in the official comments made on this subsection in order to give an idea of those contingencies. These are, severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shut down of major sources of supply.(See Texas p. 283)

In one case a court said: "... a thing is impracticable when it can only be done at an excessive and unreasonable cost.".[159]

---

157 N. Terki, op.cit at pp. 12-13. This article can be said to be the general principle of the doctrine of 'imprevision', as admitted under Algerian law. However, there are other articles which are particular applications of the theory of 'imprevision'. See for example arts. 510/2 & 513 Alg.C.C. We may also note that in these two articles the event of 'imprevision' has not a general character as required in the general principle put by art.107/3, but concerns the debtor himself.

158 Abd El Mounem, op.cit at p. 477.

159 See John N. S. Kirkham, "Force Majeure -Does It Really Work?" (1984) 30

But it is noted that it is not a mere increase in the cost of performance (ie the performance has become more onerous), which releases the debtor from his obligation. In fact the rise in the cost should alter the essential nature of the contract (which in fact means an unreasonable and excessive increase in the cost of performance (Vanderbilt...p. 119).[160] The Supreme Court of California said that an increase in cost of ten or twelve-fold is sufficient to constitute impracticability. (See Vanderbilt.. p. 113) But an increase of 14 % and 23 % and even of a 1/3 was not considered as impracticability. (See Vanderbilt.. pp. 119-20)

Again that rise in cost if it amounts to impracticability should be unforeseeable otherwise there could not be any release. (See Vanderbilt.. p. 116)

The court in the case of Maple Farms Inc V. School District of the City of Elmira (76 Misc.2d.1080, 352 N.Y.S.2d 784 (Sup.ct.1974)) stated the difficulty in defining the concept of impracticability by saying that:

> "There is no precise point, through such could conceivably be reached, at which an increase in the price of raw goods above the norm would be so disproportionate to the risks assumed as to amount to 'impracticability' in a commercial sense."[161]

Thus the common conditions found in the U.S.A doctrine of impracticability and the Algerian art. 107/3.C.C., are that the contingency destabilising the contract should be unforeseeable and that the performance should become excessively onerous.

Regarding art. 107/3 Alg.C.C three questions might be asked. Firstly, to which type of contracts does art. 107/3 apply?. Secondly what are the conditions of application of this article ?. Thirdly, what are the effects of the state of imprevision , that is to say the process of revising the contract

---

Rocky Mountain Mineral Law Institute.6.1, at p. 6.11, and Texas p. 281, and Richard W. Duesenberg, (1977) 32 Business Lawyer, at p. 1093 footnote. 10 (a case decided in 1916) and see Rocky pp. 6-11.

160 See also Berman p. 35, and Texas p. 281, and Vanderbilt p. 113, and Duesenberg pp. 1094-95, and see (1946-47) Tul.L.Rev p. 604.

161 See Vanderbilt.. p. 120, Alphonse Squillante at p. 9 col. 1 holds the same opinion, and Duesenberg p. 1093.

and the related problems?.

I. The Sphere of Application of Art.107/3 Alg.C.C.

Following this article, any contract governed by the Civil Code is subject to the application of the theory of 'imprevision'. This is because the provision of this article does not put any restriction as to the types of contracts to which the theory may apply.[162]

Another important point -though not provided for in the Code but it is obvious- is that there should be a certain length of time between the conclusion of the contract and the performance of the contract.[163] This is required because the event which will destabilise the economy of the contract, should take place after the conclusion of the contract and before its performance. As a consequence, where the performance of a contract follows immediately its conclusion, no question of 'imprevision' arises. It is such where (A) sells his car to (B) on a certain day, and the latter takes delivery of it on the same day (ie at the same time the contract is concluded). Such a condition is also required under Swiss law.(See P. Ommeslaghe p. 36)

It can be said that where there is a possibility that an unforeseeable event, which may destabilise the contract, may occur, the theory of imprevision can always be applied.

The problem which may arise in applying this theory is what is called 'contracts of chance' ("contrats aleatoires" see art. 1964 Fr.C.C). An example

---

162 See Ait, op.cit at p. 32, and N. Terki, op.cit at p. 15, and Stoyanovitch at p. 17. It was so formulated in a decision of the Court of Cassation of Egypt (1962). See Abd Arrahim Anbar, *Encyclopedia* at p. 254.

163 N. Terki, op.cit at pp. 13-14, and *El Wassit* Vol. 1 at p. 642, and Anouar Soltane, op.cit (1983), at p. 235, and see abd El Mounem F. E., op.cit at pp. 482-83, and Mohamed Abd Arrahim Anbar, *Encyclopedia* op.cit, at p. 250, and Louis Fyot at p. 125. What should be noted is that the time separating the conclusion and the performance of the contract, may be so because of the nature of the contract, or because the parties agree to separate the conclusion and the performance of their contract. Two Italian authors writing in the 17th Century, required this condition. See Stoyanovitch at p. 220 footnote. 1. It was also required by the Canonists when admitting imprevision. See El Fazary (1979), at p. 244. The Italian Civil Code in giving examples of contracts which are subject to the application of the theory of imprevision involve a time separating the conclusion and the performance of the contract. (See El Fazary at p. 248) However, where this time is due to the fault of one of the parties that party cannot claim the application of imprevision. See Abd El Mounem, op.cit at p. 483.

of these is the contract of insurance (see art. 619 Alg.C.C). In contracts of this kind what the two parties to the contract give and receive cannot be determined (or at least for one of them) at the time the contract is entered into, since this depends on an uncertain future event (or if it is certain its date cannot be known e.g, death). Thus for example in a contract of insurance the insured party knows the amount of money he pays when concluding the contract, but he cannot know how much he will receive from the insurer, since this depends on the occurrence of the event insured against. Therefore the two parties are exposed to a considerable benefit or loss.

This situation (contracts of chance) has divided the opinion of authors. Some say that the theory of imprevision cannot apply to a contract of this kind[164], because the two parties are assuming the risk of a [great] benefit or a [great] loss. Others on the other hand, say that it applies to this kind of contracts.[165] An example may be given to illustrate the possibility of its application to such contracts. The insurer, who has to pay a certain amount of money upon the occurrence of the event insured against, may suffer a great loss because of an increase in the value of money, whereas it

---

164 See Abd El Mounem, op.cit at p. 483, and the majority of Arab authors are of this opinion. See Hassbou El Fazary at p. 270, footnote. 1 & p. 271. A part of the Italian doctrine is of the same opinion. El Fazary id, and Stoyanovitch at p. 26.

165 See N. Terki, op.cit at p. 15, and Hassbou E. F., op.cit at pp. 272-73. This author is of this opinion. See at p. 274. The Court of Cassation of Syria, in a judgment of 1955, adopted the same view. See N. Terki, op.cit at p. 15. Stoyanovitch is of the opinion that the doctrine of imprevision can be applied to speculative contracts. The argument he gives is that even in speculative contracts the risk of a considerable loss or benefit -which is of the essence of this type of contracts- has its limits. Therefore if the change in circumstances had an exceptional effect on the contract, this should allow the application of imprevision. He also gives another argument to the effect that the Loi Failliot 1918, was applied to contracts which were speculative in character. Id at p. 29 However, it is thought that where a contract is a speculative one, the theory of imprevision cannot be applied. It has been seen that under the English doctrine of Frustration the speculative character of a contract prevents the debtor from claiming the frustration of his contract. We have also seen that under the French doctrine of Force Majeure, when a contract is speculative there cannot be any exoneration (see footnote. 14 chapter four). Another argument is that under a speculative contract, parties are expecting a big loss or a big benefit, therefore the destabilisation is not unforeseen. Whereas one of the conditions of imprevision is that the event or its consequences should be unforeseen. All these prove or at least sustain the idea of rejecting the application of imprevision in speculative contracts.

is the insured party who will suffer that loss if there is a decrease in the value of money, at the time of the payment of that sum to him. Therefore it should be permitted to both parties to claim the application of the theory of imprevision, in order to stabilise the contract by its modification.[166]

II. The Conditions of Imprevision.

Article 107/3 Alg.C.C, states that:"Where, following exceptional, unforeseeable, general events, the performance of contractual obligations become excessively burdensome even though not impossible in such a manner so to threaten the party with an exorbitant loss...". As may be seen, four conditions must be met before the debtor can ask for the revision of his contract. These are that the event is exceptional, unforeseeable, general, and that it renders the performance of the contract onerous and not impossible. Another condition is also required, although it is not expressed, -and this is because it is obvious- that is the non-imputability of the event to the party who claims the revision. This condition was also required in a decision given by the Court of Cassation of Egypt (1963). (See Abd Arrahim Anbar, *Encyclopedia* p. 255)

Apart from the condition of exceptionality, the above conditions are also required under Swiss law.[167]

This article does not give any indication as to the event which must have the conditions set above. It could be therefore any event whether natural (e.g. earthquake, fluding, volcanoes...) or human (e.g. war, strikes, a passing of laws...),[168] and the event may be permanent or temporary. In

[166] See in general Ait, op.cit at pp. 45-6. However, one restriction on the application of the theory of 'imprevision', should be noted as formulated in art. 95 Alg.C.C (see to the same effect art. 1895 Fr.C.C, and art. 134 Egyptian C.C.), which states that where the object of the obligation is a sum of money, the obligation " is always only the numerical sum stated in the contract " independently of any " increase or diminution of the currency " " at the time of payment ". Therefore as can be seen, the debtor has to return the same amount of money he received, and this at the time of payment. This article is clearly a derogation to the theory of 'imprevision'. See Ait, op.cit at pp. 47-8, and Anouar Soltane, op.cit at p. 235. Thus the example of application of the doctrine of imprevision to contracts of chance, cannot be sustained under Algerian law, and this relying on art. 95 Alg.C.C.

[167] See also for these conditions P. V. Ommeslaghe at pp. 35 et seq.

[168] See El Fazary, op.cit at p. 235, and Abd Arrahim Anbar at p. 254.

this last case the revision of the contract will be the suspension of the contract, until the event, which has made the performance of one of the parties to the contract onerous, has ceased.(El Fazary at p. 296.)

The destabilisation of the contract may be due to one event only, or to several events. In this second case the destabilisation of the contract may be caused by a number of the events coming together, though no such destabilisation would have occurred had one or two of the events happened. El Fazary rightly says (at p. 294) that the conditions of exceptionality, unforeseeability, and generality etc, should be met for all these events and if one of them does not have one of these conditions, there could be no application of the theory of imprevision, though all the conditions are met in the other events. It is also possible that though there are several events, nevertheless the conditions of destabilisation can be met by any one of them. Therefore, the theory of imprevision will apply for the event which has all the conditions stated above.

However, the author El Fazary says (at pp. 307-08), that in the case where there is a decrease in the value of money (this is an example he gives), this may be due to several events or factors (economic, political or social). It may happen that one of these factors does not have the condition of "exceptionality", nevertheless if there is a destabilisation of the contract due to those factors together, the theory of imprevision should apply. In this example , no imprevision should be allowed because of the absence of one of the conditions of imprevision viz the exceptionality. To say the contrary would contradict the provision of art. 107/3.

Let us now consider the conditions set above.

A. <u>The Exceptionality of the Event</u>.[169]

Article 107/3 of the Alg.c.c, divides events into two categories, those

[169] The law of Italy requires this condition. See El Fazary at p. 305.

Deschenaux in <u>Revue de Droit Suisse</u> at p. 557 says that the character of exceptionality does not add anything to that of unforeseeability. This opinion might be reasonable, but cannot be said that the Algerian legislator distinguishes between:

(1) events which are unforeseeable and exceptional and,

(2) events which are unforeseeable but not exceptional.

Thus, whereas under force majeure he requires the second, under imprevision however, he requires the first?.

which are exceptional (ie not ordinary in their happening), and those which are ordinary. An exceptional event is one which does not frequently happen. An example of this is war, or flood in a region not normally subject to such an event. Regarding this article it is the event which should be exceptional.

When it is said that the exceptionality concerns the event, the problem which arises -says El Fazary- is that, sometimes there is no exceptionality of the event in the case under consideration, and yet the theory of imprevision is applied. Thus in the French case of Canal de Crapone -in which the lower court allowed an increase in the price fixed- the only problem was that the fixed price in 1567 became derisory three centuries later, and there was no exceptional event in that case.

Another illustrating example is the case where (A) and (B) enter into a contract during war time. The price being fixed, it may happen that when the war ceases, that fixed sum becomes very onerous as to be intolerable for the debtor. In this case the debtor can ask for a revision of his contract. The exceptional circumstance in this case is the time in which the contract was concluded (ie the war-time), peace-time (after the war was stopped) being the ordinary circumstance. Therefore the obligation of the debtor becomes onerous not because of an exceptional event (the war) but because of an ordinary event (the peace-time).

Another example is that a hospital contracts with a firm to provide medicines to combat an epidemic. The price fixed is high. It may happen that the epidemic disappears and the obligation of the hospital becomes very onerous. In this case the hospital can surely ask for the application of the theory of imprevision, in order to stabilise the contract. According to El Fazary the application of the doctrine is required because of an ordinary event (ie the disappearance of the epidemic) and not an exceptional one (ie the epidemic itself).

It is for these reasons that he suggests (at p. 307), that the exceptionality should concern the effect of an event and not the event itself. Therefore, in the second example, the event of the war coming to an end has given rise to an exceptional situation which is the onerousness of the obligation. It is also for this reason (ie the problem created by saying that the exceptionality concerns the event itself) that some authors have said that the condition of

unforeseeability of the event (see infra) is sufficient and that there is no need for the condition of exceptionality.[170] Two Algerian authors are also of the same opinion.(See N. Terki, op.cit at p. 17, and Ali Bencheneb, op.cit at p. 88.)

Two remarks should be made regarding what El Fazary says. First, his understanding of the exceptionality of the effects of the event and not of the event itself, is an express contradiction of art.107/3 (and also art. 147/2 Egy.C.C).[171] Secondly, in the examples he gives (see above) the author takes it for granted that where the obligation has become onerous, there should be a revision of the contract. Whereas this is not true; because the onerousness of the obligation is only one of the conditions for the application of the theory of imprevision. There must be the other conditions present. The examples which the author gives, are not cases decided by courts; if they were brought before a court, they could have been decided as if there was no case of imprevision, since the exceptionality of the event was not met, and the fact that the obligation has become onerous, is not sufficient for the application of the theory of imprevision. However, even if it can be said that these examples involve cases of imprevision, the exceptionality might be the ending of the war, had the parties foresee a longer time for its end (ie of the war). The same thing can be said for the example of the hospital. Thus -we may assume that- parties may have contracted on the expectation that the epidemic will continue for at least 6 months, whereas it ended a month after the contract was made. Therefore its end at that time is an exceptional and unforeseeable event.[172] Therefore, imprevision will apply because of an exceptional event and not because of an ordinary one.

What may further be argued in this context is that, there is no exorbitant loss where a debtor agrees to buy a thing at a very high price (say ten times its initial price) and then, because of subsequent events, that

---

170 See for those authors El Fazary at p. 335, and see for the same opinion Abd El Mounem, op.cit at p. 484.

171 See also for the opinion that the exceptionality concerns the event itself, Abd El Mounem F.E., at p. 483, and El Sanhoury, *El Wassit* Vol. 1 at p. 643.

172 El Fazary himself at p. 308, says that the theory of imprevision would apply if the end of those events (war and epidemic) were unforeseeable.

thing is available in the market and can be bought at a very low price. Since the buyer accepted that high price assuming that it would last for a long time (6 months), it cannot be said thereafter that that same price should be considered as an exorbitant loss. However, El Fazary (at p. 377) says that even such a circumstance can be considered as a hardship or an exorbitant loss.

B. The Unforeseeability of the Event.[173]

As in the case of force majeure, the event which renders the performance of the contract onerous must be unforeseeable at the time the contract is concluded.[174] Therefore if that event was foreseen by the debtor, or although not foreseen by him, should have been so, regarding other persons in the same position as his (ie consideration of the unforeseeability *in abstracto*), and yet that debtor entered into that contract without putting any clause for the revision of his contract (or any other clause to the same effect), he is either presumed as having taken the risk of his performance becoming onerous,[175] or that he is at fault in entering that contract. In fact he should have refused to do so. Therefore the theory of imprevision in this case cannot apply.[176]

The unforeseeability of the event is considered *in abstracto*,[177] or what the French law call in relation to a "bon pere de famille" '. The contrast (ie of the debtor) should be made with an ordinary person taken from the same class as the debtor.[178] We have to determine whether an ordinary person could have foreseen the event in question or not. In the case where that person should have foreseen that event, the debtor cannot

---

173 As to the Civil Code of Italy there is no mention of this condition there, but El Fazary says that it is nevertheless required. El Fazary at pp. 328-29.

174 See N. Terki, op.cit at p. 18.

175 See El Fazary, op.cit at p. 330, and see Mazeaud, *Responsabilite...* (1970), at p. 689 para. 1575.

176 See Abd El Mounem, op.cit at p. 484, who holds the same opinion.

177 Anouar Soltane, op.cit at p. 236. The Court of Cassation of Egypt considers this condition *in abstracto*. Id.

178 Ait, op.cit at p. 63, and Stoyanovitch at p. 120. Thus an industrialist and an astronaut and a farmer, all these do not have the same ability to foresee different events. Stoyanovitch id. See also for the required standard of foreseeability, footnote. 57 chapter one, what Bianca says.

claim the application of the theory of imprevision. Thus if the debtor were a businessman, we should look at other businessmen in the same position as his, and determine whether they could have foreseen that event or not. If the answer is yes, then the debtor must have foreseen that event. This means that there will be no case of imprevision, since the event should have been foreseen by the debtor. What has been said above applies also to Swiss law. (See Deschenaux Revue p. 555)

As may be noted we are talking of the unforeseeability of the event. Other authors however, are of the opinion that the unforeseeability should concern the effects of the event. Therefore, if there is for example a war and this has caused an increase in the value of money so as to destabilise the contract, we should look at that increase and determine whether it was foreseen or not, and not the war itself (which is the event). This is because the war itself may be foreseen at the time the contract was concluded, but its effects (ie the increase in the value of money at such a high rate) may be unforeseen.[179]

Although this may be true in some circumstances, it is not a sufficient reason to say that we have to ignore totally the concept of the unforeseeability of the event.[180] Because sometimes a person (a debtor for instance) cannot foresee the effects of an event, unless he has at least an idea about the event which may cause those effects.[181] Thus consider that (A) enters into a contract with (B) who lives in a city 100 KM away from the

[179] See for this opinion A. Bencheneb, op.cit at p. 87, and Ait, op.cit pp. 56 to 58.

[180] See also Stoyanovitch at p. 125 who says that the unforeseeability may concern the event itself or its consequences., and see for the opinion that the unforeseeability concerns the event, Abd El Mounem F.E at p. 484, and El Sanhoury, *El Wassit* Vol. 1 at p. 644. It has been said (supra) that some authors are of the opinion that the condition of unforeseeability is sufficient and there is no need for the condition of exceptionality. Abd El Mounem F.E (at p. 484) is also of the same opinion. It should nevertheless be said that it is very hard to distinguish between an event that is exceptional and one that is unforeseeable. During the preparatory works of the Egyptian Civil Code, when the discussion concerned the conditions of imprevision, an example was given to the effect that the spread of one specie of worm, is not an event which is exceptional since it is foreseeable. This may induce one to say that the conditions of exceptionality and unforeseeability are closely related if not synonymous.

[181] The same opinion is held by Stoyanovitch at p. 125 who says that it is not possible to foresee the effects without knowing their cause.

city of (A). The contract is for the supply of certain goods to (B) and this during a period of three years. Suppose that there is one road only to B's city, and no other way (ie railway or a river or whatever). It may happen that there is an earthquake in the city of (A) (that city has never had an earthquake). That event destroys the road linking the two cities. (A) is therefore obliged to go to other cities which are linked with B's city. He has to travel 300 KM from his city to B's city. In this example, it cannot be said that those effects (ie that there will be an earthquake which will interrupt the traffic by road, and that in such a case he should make about 300 Km in order to get to B's city) were unforeseen whereas the catastrophic event (an earthquake) is not. As can be seen the concept of the unforeseeability of an event is not without value, and should not be ignored, because it may give a guidance as to whether the effects were foreseen or not at the time the contract was concluded.

* Is the Condition of Irresistibility required under the Theory of Imprevision.

The majority of Arab authors are of the opinion that for the theory of imprevision to apply the condition of irresistibility should be required.[182] However, two Algerian authors do not discuss this condition at all.[183]

This condition is that either the event or its consequence, were inevitable, but at the same time, did not put the party in an impossibility to perform his contract. Thus for example, if the Canal through which the debtor intended to carry the goods sold was closed, although that event (the closing) was inevitable since the debtor could not prevent it, it did not

[182] See Mohamed Abd Arrahim Anbar, op.cit at p. 249, and Anouar Soltane, op.cit at p. 235, and Abd El Mounem, op.cit at pp. 484-85, and *El Wassit* Vol. 1 at p. 644, and Ait, op.cit at p. 76, and El Fazary, op.cit at p. 346, who says that there is a unanimity between Arab authors about the requirement of this condition, and that even the Arab jurisdictions apply it. He then gave an example of a decision of the Court of Cassation of Egypt in a case decided in 1964. In that case that court decided that in order that the theory of imprevision can be applied, the delay in performing the contract should not be due to the fault of the debtor. Id at p. 347. As may be seen, what that court declared, concerns the condition of non imputability of the non performance to the debtor and not the irresistibility of the event.

[183] These are N. Terki, op.cit at pp. 17 et seq, and A.Bencheneb, op.cit at pp. 87 et seq.

make his performance of the contract impossible. This is because he could use other routes which would make his performance more onerous.

El Fazary, is amongst the authors who require this condition. Another example is of a debtor who undertook to supply goods by using roads. But it happens that a flood has interrupted the traffic by roads. In this case there could be no imprevision; since that debtor could use the railway or the carriage by sea or by river. As is seen in this example, although that event was irresistible (or insurmountable) it did not put the debtor into an impossibility of performance, since he has other possibilities to perform his contract, he should use them and cannot claim imprevision. What is noticeable in the Civil Code of Egypt as well as all the other Arab Codes which adopted the theory of imprevision, is that there is no disposition regarding the condition of irresistibility.[184]

What should be borne in mind is that the condition of irresistibility in respect to this theory should not be treated as the one required under force majeure. We have seen for example that under French law the condition of irresistibility is synonymous to the one of impossibility. Under imprevision the condition of irresistibility should mean that there was no other way by which the debtor could perform his contract without incurring big losses by the fact that his obligation has become very onerous. He should also have done what was possible in order that the event in question did not affect the contract he made, ie by rendering it more onerous. (See Stoyanovitch p. 128, and Louis Fyot p. 81 footnote. 3). The condition of irresistibility -understood in this way not as in French law- is therefore, required.

C. The Generality of the Event.[185]

This condition is provided for in art. 107/3 Alg.C.C, and it is also provided for in art. 147 Egy.C.C,[186] and other Arab Civil Codes.[187] It is

[184] See El Fazary, op.cit at p. 346. This condition is not mentioned in the Civil Code of Italy. Id It is not mentioned also in the discussion of authors considering Swiss and German laws.

[185] This condition is not required under the Italian Civil Code. See El Fazary at p. 312.

[186] See *El Wassit* Vol. 1 at p. 643.

[187] See El Fazary, op.cit at p. 309.

also required under Swiss law.[188]

It means that the event should have a general character and not only concern the debtor himself.[189] Examples of such events are war, earthquake, flooding and economic crises.... This does not mean however, that that event should affect the whole population of a country. It is sufficient therefore if it affects an important part of it or a certain region in that country[190], or a great number of a special profession such as the industrialists of a region or its farmers. Having said that, we should exclude events related only to the debtor such as his death or illness or bankruptcy or the destruction of his harvest (recolte agricole).(Abd El Mounem, op.cit at p. 484, and N. Terki, op.cit at p. 20)

It is worth noting that, during the preparatory works of the Egyptian Civil Code and when discussing art. 147 (which is exactly the same as art. 107/3 Alg.C.C), the condition of "general" did not appear at first. But it was suggested there, that such a condition should be added in order to restrict the cases in which the theory of imprevision can be invoked. This means that it is not just any event which entitles the debtor to claim the application of the theory of imprevision. This condition will therefore give greater force to the *pacta sunt servanda* principle, or to the sanctity of contracts.[191] This condition puts another difference between the concept of force majeure, in which the condition of generality is not required since a personal event such as the death or the illness of the debtor may exonerate him, and the theory of imprevision.[192]

---

[188] See H. Deschenaux, "La revision des Contrats en Droit Suisse" (1948) 30 Journal of Comparative Legislation 3rd S. parts 3 & 4. 55, at pp. 59-60

[189] See Abd El Mounem, op.cit at p. 484, and Stoyanovitch at p. 114, an example is the coronation cases ie the death of Edward affected many persons. Id.

[190] Ait, op.cit at p. 52.

[191] See *El Wassit* Vol. 1 at p. 630.

[192] Ait, op.cit at p. 54, and Stoyanovitch at p. 114. It is to be noted that El Fazary is of the opinion that this condition (ie of generality) should not be required. He qualifies it as unjust, because the debtor will be refused any adaptation of his contract merely because the event which rendered his performance more onerous is not general, and this although he suffers an exorbitant loss. He suggests that the other conditions are sufficient. Islamic law -he says- does not require the generality of the event. Id at pp. 315-16.

D. The Performance Should Become Onerous.[193]

Art. 107/3 of the Alg.C.C, states that: "the execution of the contractual obligation, without becoming impossible, must become excessively burdensome and thereby threaten the debtor with an exorbitant loss...". As may be seen, it is this condition which clearly differentiates force majeure from imprevision. This is because in the former the performance becomes impossible whereas in the latter it becomes onerous only.

In order to understand this condition, three questions should be studied. These are, the definition of the concept of "the performance becoming onerous", the "criterion used to decide whether there is an onerous performance or not", and "when the onerousness should be considered?.".

1. Definition of the Onerousness of the Contractual Obligation.

It can be said that this condition means that there should be an economic (or financial) destabilisation of the contract. This in other words means that the debtor finds great difficulty in performing his contract, and that difficulty would cause him a great loss regarding the contract he made.[194]

Under Swiss law this theory would also be applied when the performance has become valueless for the party who is now claiming the application of the theory of imprevision, such as in the case where there is a depreciation in the value of money (e.g. the price stipulated in the contract), and this in addition to the cases where the performance of the contract has become onerous. In order that the modification of the contract can be admitted because of the destabilisation, the contract should be an executory one when the destabilising event happens. This means that if the contract has already been performed, no question of imprevision is raised.[195]

---

193 This is also required under the Italian Civil Code. See El Fazary at pp. 360 et seq.

194 El Fazary, op.cit at p. 366, and Stoyanovitch at pp. 138-39, Thus 50 KG of coffee in 1913 costed 60 frs whereas in 1920 it costed 393 frs. For a list of this type of examples see id at p. 139. The condition of " exorbitant loss " was in fact required in the writings of two Italian authors in the 17th century who are Mantica and Luca. See Stoyanovitch at p. 221 footnote. 1.

2. The Criterion of Onerousness.

It is to be noted that the majority of Arab authors are of the opinion that the onerousness of an obligation should be considered objectively and not subjectively.[196] That is to say the judge should look at the contract itself to determine whether there is a real exorbitant loss threatening the debtor or not. Therefore he does not have to take into account what the debtor may possess in his patrimony to see whether he has suffered that loss. Thus for example if a state company has concluded a contract, but because of an event, the performance of the contract has become onerous as to threaten that company with an exorbitant loss. In this case that company (which can be considered as the state) can ask for the application of the theory of imprevision, even if the loss in the contract is minor regarding the state's (ie the state company) budget.(El Fazary at p. 368.)

The Court of Cassation of Egypt declared in one case in 1962 that the loss should be determined in relation to the contract itself. This opinion is also adopted by the jurisprudence in Sudan and Iraq. In one case (in Sudan) it was decided that an increase of the price of one type of goods from £70 to £94 (ie of £24) cannot constitute a threat of loss for the debtor.[197] One court in Egypt also decided that a decrease in the value of a piece of land from £100 to £70, cannot cause the obligation to become onerous as to threaten the debtor with a big loss.

Thus the Arab jurisprudence is using the objective criterion in deciding whether there is a loss or not.(El Fazary pp. 369-70.)

What is important here is that, it is not any loss which entitles the contractor whose performance has become onerous to claim the application of imprevision. This is because each party to a contract is supposed and he himself expects to bear a certain loss. It is therefore the loss which exceeds that risk limit which should give him the right to revision. This would mean that there must be an abnormal loss exceeding what was expected at the time the contract was concluded.[198]

---

[195] See Deschenaux, J.C.L. p. 60. This is therefore different from the French administrative law supra (ie the doctrine of imprevision).

[196] El Fazary at p. 367, and Abd El Mounem, op.cit at p. 85, see also generally Mohamed Hassanine, *El Wadjiz* (1983).

[197] El Fazary at p. 369.

3. When is the Condition of the Performance becoming Onerous to be Considered.

El Fazary says that authors and Arab jurisprudence are unanimous in the view that no question of imprevision (and therefore of the performance becoming onerous) can arise after the contract has been totally performed.[199] Therefore the debtor whose performance has become onerous is entitled to claim the application of this theory while he is performing his contract. In this situation the judge can readapt his contract. This is also the position of the Court of Cassation of Egypt.(El Fazary p. 375)

However, that author rightly says that there is no reason why the debtor cannot be entitled to claim the application of this theory after the conclusion of the contract and before the performance of his contract, if he knows that this performance would be onerous and would threaten him with a big loss.

The 'Conseil d'Etat' of France awards an indemnity of imprevision, even after the performance of the contract has finished, whereas this - following what El Fazary says- this solution is not applied by Arab jurisdictions and not accepted by Arab authors. El Fazary rightly observes that the solution of the "Conseil d'Etat" should be followed by Arab jurisdictions. Thus if a debtor has suffered a big loss in performing his contract but has nevertheless performed it, he should be entitled to ask for the application of the theory of imprevision, and that loss should be divided between him and his creditor.(See El Fazary at pp. 375-76.)

* What Happens When the Debtor is Compensated for his Loss by Other Means than the Revision of his Contract.

An example may illustrate this situation. (A) sells 100 tons of certain goods to (B). (A) has also concluded a contract with (C) for the carriage

[198] See to this effect N. Terki, op.cit at p. 21, and Stoyanovitch at p. 141. What is abnormal risk is left to the judge since its determination depends on the facts of each case (ie the period in which the contract was concluded, its nature etc). Id at p. 148. As regards Swiss law see for the condition of onerousness, Deschenaux, J.C.L., at p. 62. Under Swiss law if this condition is met, as well as the other ones, then the contract may either be terminated or adjusted.

[199] El Fazary at p. 374. Swiss law is to the same effect see supra.

of those goods in his boat. The government has issued an order to seize all the boats. (A) has therefore to use the railway to transport the goods. This would make his performance more onerous as to threaten him with a big loss. The government has also awarded a compensation to (A) because of the loss due to the carriage by the railway. The question is whether (A) can ask for a revision of his contract because of the loss he suffered, although he got that compensation.

Both the Civil Code of Tunisia and Iraq (which adopted the theory of imprevision) do not apply this theory when the person whose performance has become onerous has received a compensation from an insurance company.[200] The Court of Cassation of Egypt also does not apply this theory when the person whose performance has become onerous has received compensation, because of that onerousness in the performance of his contract.(El Fazary p. 379.)

Although this solution seems to be equitable as well as acceptable, it should be applied when the person (debtor or creditor) whose performance has become onerous, has received the compensation in relation to the contract he made. Whereas if the compensation was awarded to him because of a separate contract and not related to the one which has become onerous, in this case this solution should not apply. This is because, as has already been said, the onerousness of the obligation is considered objectively, that is to say, without taking into account the patrimony of the debtor (whether he is rich or not) whose performance has become onerous. In the example already given, if the compensation received was because of a different contract (if we suppose it to be so), in this case it should be considered as part of his patrimony and has no relation to the loss suffered in the other contract for which he claims the application of the theory of imprevision.

It should be noted that it is the party who claims the application of the theory of imprevision, who has to prove that there is an event which has rendered the performance of his contract onerous,[201] and to prove all the other conditions as set above.(See El Fazary pp. 397 to 402.)

---

200 El Fazary at pp. 377-78.

201 See N. Terki, op.cit at p. 21.

E. The Non Imputability of the Event to the Debtor.

This is -as has already been said- an obvious condition, therefore it is not expressed in art. 107/3 Alg.C.C.[202] What can be said about this condition is that the event which has rendered the performance of the contract onerous, must not be due to the fault of the party who claims the application of imprevision. More generally, he must not be involved -in any way- in the supervening of that event, otherwise he will be refused the revision of his contract.

Thus if the performance of a contract is delayed because of the fault of the debtor and then an event supervenes and renders, as a consequence, the performance of the debtor's obligation more onerous, in this case the debtor cannot claim the application of the theory. Because if he had performed the contract in time that event would not have affected the contract he concluded.[203] But it should be noted that the fault of the party which prevents him from claiming the application of imprevision, must have some influence on the destabilisation. (Cf with French law in cases of force majeure (supra), where it was said that the fault of the debtor should have some influence.)

III. The Effects of Imprevision.

In what follows we shall study the process of revising or readapting the contract. Art.107/3 Alg.C.C, states that where the conditions of imprevision are met, "the judge may, according to the circumstances and after considering the parties' interests, 'reduce' in a reasonable manner, the obligation which has become excessive. Any agreement to the contrary is null and void.".

Three questions should be studied in order to understand this provision: Firstly, the power of the judge regarding a case of imprevision. Secondly, the process of readjusting the destabilised contract and thirdly, the contractual provisions as to the effect of imprevision.

---

202 It is neither expressed in the other Arab laws, nor in the Italian Civil Code. See El Fazary, op.cit at p. 318.

203 El Fazary at p. 321, an see Ait, op.cit at p. 74. See also to the same effect for Swiss law Deschenaux, J.C.L. p. 60, and Revue p. 561.

A. The Power of the Judge regarding a case of Imprevision.

Article 107/3 states that the judge "**may...**". Does this mean that the judge has the power to refuse any revision even if the conditions of imprevision were met ?. Strictly speaking, this article allows such an interpretation. However, it has rightly been noted[204] that it would be incomprehensible to say that the judge has a total discretion in accepting or rejecting the application of the theory of imprevision although its conditions are met, and disposing at the same time that any stipulation contrary to art. 107/3 Alg.C.C. is void. From this it should be concluded that the judge possesses a power to appreciate whether the conditions of imprevision are met or not, but has no power to refuse the revision if they are met.

B. The Process of Readjusting the Destabilised Contract.

The French version of art. 107/3 uses the word "reduce", whereas the Arabic version uses the word "render". Therefore , following the former version, the judge can only reduce the obligation which has become onerous. This would mean that if the hardship caused to one party can only be lessened by increasing the obligation of the other party, or by suspending the whole contract, such a solution would be dismissed. This logical interpretation would certainly be contrary to the foundation of the theory of imprevision, which is to resolve equitably the situation which has arisen.

However, as it is known, the Arabic version is the official one, and the Arabic word used there has a general meaning. That is to say, it means to readapt or to readjust the contract. Therefore the judge has a total discretion as to the manner by which he can lessen the hardship caused to one of the parties to the contract. This would mean that he may reduce the obligation of the party whose performance has become onerous, or increase the reciprocal obligation (ie of the other party), or suspend the contract.[205]

---

204 See A. Bencheneb, op.cit at p. 89, and N. Terki, op.cit at pp. 22-23.

205 See N. Terki, op.cit at p. 24, and A. Bencheneb, op.cit at p. 89, and Anouar Soltane, op.cit at p. 236, and *El Wassit* Vol. 1 op.cit at p. 646. During the preparatory works of the Egyptian Civil Code, the word "reduce" was also used in the article concerning imprevision (which is the same as art. 107/3 Alg.C.C), but since the

Under **Swiss law** it is open to the contracting parties to claim the termination or the revision of their contract when the conditions of imprevision are met. However, the one who claims the application of the theory of imprevision must do all that is possible in order to minimise the effects of that supervening event. This is considered as an application of the principle of good faith. (Deschenaux J.C.L. p. 60) The revision may take the form of increasing an obligation (see art. 373/2 C.O) or reducing it.(See to this effect Association H. Capitant p. 570) The law itself has provided for the termination of contracts in certain circumstances (e.g. arts. 269 & 373 C. O), and the jurisprudence has extended this right of termination to other contracts. (Deschenaux J.C.L. p. 64) Where there is a termination of the contract the party for whom the termination was decided, has to pay a compensation to the other one. This is because that party has to bear a part of the loss resulting from the destabilisation of the contract.(See Association H. Capitant p. 570, and Deschenaux Revue.. p. 607)

It is worth noting that the revision is only possible when the parties have agreed to maintain their contract. (See Deschenaux J.C.L. p. 65, and Association H. Capitant p. 568, and M. Fontaine p. 45) Therefore if such an agreement is not reached then the judge can terminate the contract. (Association H. Capitant p. 570)

German law is not substantially different in the means of adjusting a destabilised contract. But it should be noted that the legislator intervened in 1939, and again after the Second World War in 1952, issuing certain regulations providing for adjustment of contracts entered into prior to June 21st 1948. By those regulations contracts may be terminated or adapted through "judicial decree".[206] Generally speaking -and this in comparison with Anglo-American law- when the contract can no longer be performed according to its initial terms (and this as to honour the *pacta sunt servanda* principle), then its termination can be pleaded by the suffering party.[207] In such a case although there is a termination of the contract, we

real meaning intended was the readaptation rather than the reduction only, that word was replaced by the word "render" as in art. 107/3 Alg.C.C, which means in general readjusting. See to this effect *El Wassit* Vol. 1 op.cit at p. 646.

206 See Joachim pp. 99-100, and Rodiere p. 133, and see for these legislations Peter Hay at pp. 366 et seq.

207 The termination has a retroactive effect. That is to say each party has to return

are nevertheless concerned with a change in circumstances (and not impossibility). This termination can be decided when, because of the change of circumstances, the contract has become insignificant. But if the contract still has some utility for <u>both parties</u>, then the contract should be adjusted.[208] What should be also noted is that the adjustment made by the judge concerns extra-contractual risks only (or extra-contractual hardship) and not those which are normally borne by parties.[209]

Adjustment (ie the revision) of the contract is also provided by the application of the principle of good faith as formulated in art. 242 B.G.B. [210]

The adjustment of a contract may take several forms. It may for example be in the form of a <u>delay</u> in the performance of the contract, or a <u>reduction</u> in the performance of one party, or an <u>increase</u> in the obligation of the other contracting party.[211] In one case for example, which concerns a lease of a property, a lessee intended to use it for construction. A subsequent regulation prohibited construction on that leased property. The lessee asked for a reduction of the rent. It was decided by the court - although the lessor stressed the fact that the lessee gave up his plan of construction on the leased property- that the lessee was to be granted that reduction of the rent; since to enforce the contract without reduction would violate the principle of good faith as expressed in art. 242 B.G.B.[212]

In addition to the above mentioned means of adjusting contracts, another way of adjustment may take the form of <u>sharing</u> either the loss or

---

what he received from the other. If that return is impossible, then compensation is provided. Sometimes that retroactive effect goes back to the time of conclusion of the contract. In others it goes back to the time when it is decided that there has been a lapse in the basis of the contract, and this when applying the doctrine of <u>Geschaftsgrundlage</u>. See J. Cohn p. 21.

208 P. V. Ommeslaghe p. 5.

209 <u>Id</u> p. 26 (this is similar to French administrative law (ie the doctrine of imprevision "la charge extra-contractuelle").

210 See Lesguillons pp. 530-31, and Joachim pp. 108-09. It should be noted that the revision of contracts is not provided for by legislation. It is therefore the jurisprudence and the doctrine which have developed these concepts. See Rodiere p. 124.

211 See Lesguillons p. 532, and Peter Hay at p. 364.

212 See Lesguillons <u>id</u>, and Joachim p. 109.

the profit resulting from the contract, and this between the contracting parties.

In one case (A) sold a house to (B). (A) had paid mortgages in inflated currency. Because of subsequent revalorization laws, (A) had to make further payments to the mortgagees. In this case the basis of the contract viz "that the mortgages had been paid off" had lapsed. The Supreme Court decided that (A) has a claim against (B) by which the latter should contribute to the further payments. If (B) refuses, (A) can claim the rescission of the contract of sale.[213] Other examples where there might be a relief, are a change in legislation, and frustration of the purpose of the contract.(See Horn N, p. 19.)

However, it should be remembered that the intervention of courts is limited, since they must not alter the purpose of the contract or radically change the content of the contract.[214] Other exceptions are that there could be no release for the concerned party, in the case of a change of circumstances, where the contract is a speculative one, or that the risk was foreseeable to the party and he could have protected himself by a special clause.[215]

Considering Algerian law the following examples will illustrate how the different means of adjustment may be used in case of a destabilised contract.

1. The Process of Reducing an Obligation.

Consider that a seller promises to deliver 3 tons of sugar to a buyer. Because of a war, the import of sugar is stopped, and therefore its price within the seller's country (supposing that both the seller and the buyer live in the same country), has sharply increased as to threaten the seller with an exorbitant loss. In this case the judge may reduce the quantity which the seller promised. But what should be taken into account are the

[213] See J. Cohn p. 22 [for the case only].

[214] See Joachim p. 109.

[215] See Rodiere p. 131, and P. V. Ommeslaghe p. 22, see also Norbert H. at p. 19 Cf Texas where it is said that whereas French law and the United States laws base their solution (in the field of impossibility of performance) on unforeseeability, German law bases its theory on good faith.

circumstances of the case as well as the interests of both parties.[216] Having reduced that quantity to a certain limit, the debtor has to deliver that new quantity and cannot refuse such adjustment.(See *El Wassit* Vol. 1 p. 648)

2. The Process of Increasing an Obligation.

The judge may also increase the obligation of the other party whose performance has not become onerous. Thus (A) promises to deliver - during a period of three years - a certain quantity of rice to (B), at 20 pence per kg. It happens that because of an event of imprevision, the price increases to £4 per kg. The judge may in this case increase the price as initially fixed. However, in increasing that obligation the loss expected to be borne by the seller should be taken into account, that is to say, the loss which has been called 'the normal loss'. This is because it is the aim of the theory of imprevision to divide the loss between the two parties to the contract and not to put it on one party alone.[217] This is also the case under Swiss law (See Association H. Capitant p. 570) and German law (see supra).

In the example given, if the seller expects an increase of £1, this should be borne by him alone, because it is a 'normal loss', expected by any contractor. Whereas the remainder ie £3 (4-3) is considered as 'abnormal increases'. This latter loss would be divided between the two parties. For example the buyer would pay not the 20 pence as initially fixed, but 20p + £1.50 = £1.75 per kg.[218] It is up to the judge to decide how this abnormal increase will be divided, since no article of the Civil Code, imposes on him a certain way of division[219] or allocation of the loss. However, it has been said that the judge cannot impose upon the creditor this new

216 See Abd El Mounem Faradj, op.cit at p. 487.

217 See Stoyanovitch at p. 183. This would differentiate the concept of force majeure from the one of imprevision. That is under force majeure the contract is generally terminated, and it is therefore the debtor -in a synallagmatic contract- of the performance which has become impossible, who bears the risk of force majeure. In a unilateral contract, it is the creditor who bears that loss. However, under the theory of imprevision, the loss is borne by the two parties. See Abd El Mounem, op.cit at p. 486.

218 See to this effect Abd El Mounem, op.cit at p. 487.

219 See Ait, op.cit at p. 96, and N. Terki, op.cit at p. 26.

price.(See *El Wassit* Vol. 1 p. 647.)

3. The Process of Suspending the Contract.

Sometimes the readaptation of the contract is achieved by suspending the destabilised contract. This is so when the effects of Imprevision are temporary only. The utility of the contract after this suspension should also be taken into account, that is, whether it is always useful to perform the contract after the suspension.[220] Thus a contractor promises to build a plant and deliver it in 2 years time, but the price of materials of construction increases temporarily. In this case the contractor will suffer a hardship in performing his contract. Therefore the judge may, regarding the temporary character of the increase in prices, suspend the contract until the event which caused that increase ceases, and then the contract should have its normal effects. But the delivery of the plant will naturally be delayed.(See *El Wassit* Vol. 1 pp. 646-47)

The revision of the contract concerns the period in which the event happens and destabilises the contract. Therefore, if that event is over and the prices become normal as they were, the contract should be performed as it was initially concluded. This means without applying -in the normal period- the revision made by the judge, since the revision concerns the period of destabilisation only, and this is now over.(*El Wassit* Vol. 1 p. 648.)

Having seen the three possible means of readjusting a destabilised contract, the question which might be asked is whether the judge , in the context of readjusting the contract can terminate it when there is no way of such a readjustment, or that the destabilisation of the contract is permanent. We have seen that Swiss and German laws consider the termination of the contract as another mean for the adjustment of the destabilised contract.

However, considering Egyptian law, most of its doctrine is of the opinion that the judge cannot terminate the contract, because the aim of imprevision is to divide the loss between the parties, whereas the

[220] Stoyanovitch at p. 181. There appear to be nothing which prevents the judge from applying the two means of adjustment of a contract (viz reducing one obligation and increasing the other) at the same time. See to this opinion Abd El Mounem F. E at p. 488.

termination of the contract would put the whole loss on the creditor.[221] Another argument is that the Egyptian article concerning imprevision, does not give such a power to the judge. Therefore, there should be an express article which gives him that right.[222] Even the Egyptian jurisprudence rejects the idea of terminating a contract because of imprevision.(See Ait p. 115.)

The same arguments set above applies to Algerian law. However, some authors are of the opinion that the termination of the contract, should be allowed under Algerian law.[223] One author gives as an argument art. 561/3 Alg.C.C.[224] That article is a special application of the theory of imprevision, concerning contracts called "contrats d'entreprise" (ie contracts of hire of work and skill), by which a person promises to do work for another in return for a certain remuneration. It may happen that the foundation upon which the remuneration in that contract was determined, disappears by an unforeseeable, exceptional and general event. In this case, the judge may either increase the remuneration of the worker (entrepreneur) or terminate the contract.[225] The better solution might be that the creditor should be allowed -if he so wishes- to claim the termination of the contract instead of any adjustment.

After having stated the conditions under which a party can claim the revision of his contract, article 107/3 Alg.C.C provides that :"....Any agreement to the contrary is null and void.". As may clearly be seen any contractual stipulation, limiting or totally barring a party from using his right for the application of the theory of imprevision, is void. Any clause which is less rigorous than the stipulation of that article should also be considered as void.[226]

The logical question which can be asked, is the reason for making that

---

221 *El Wassit* Vol. 1, p. 648, and see Ait, op.cit at p. 114.

222 See Ait id. An example is article 658/4 Egy.C.C, which gives the judge the right to terminate the contract (this article concerns imprevision.).

223 See N.Terki, op.cit at pp. 27 et seq.

224 Which is the same as art. 658/4 Egy.C.C, see *El Wassit* Vol. 1 op.cit at p. 651 footnote. 1, and similar to art. 373/2 of the Swiss C.O.

225 For other examples see also Mohamed Hassanine, *El Wadjiz* op.cit .

226 The majority of Arab laws make the provision concerning imprevision imperative, and any clause to the contrary is void. See El Fazary, op.cit at p. 275.

article imperative in character. Some authors have argued that by this disposition, the legislator tries to protect the weaker party from the other contracting party who may be in a strong contractual position, and therefore forces him to accept to renounce his right of claiming the application of the theory of imprevision.[227] Following this opinion, the clauses which may be void are those made at the time the contract is concluded. Therefore when the event causing the destabilisation of the contract happens, it is open to the parties at that time to provide for the non application of the theory of imprevision.[228] This is because -as it is argued- at that time the party who is in the stronger contractual position, cannot influence the will of the weaker party.

However, this argument does not seem to be convincing.[229] This is because it is not certain whether the will of the weaker party will not be influenced, such as in the case where he is obliged to keep the contractual relationship with the party who is in the stronger position.

The other problem raised by this article, is that whereas it is imperative and any provision to the contrary is void, we find that the legislator has allowed such clauses in the case of force majeure. That is to say, the debtor can -by a contractual clause- bear the risk of being in an impossibility to perform his contract. It is obvious that a case of force majeure is more important than the one of imprevision, since there the performance is impossible, whereas under imprevision, it is onerous only. Therefore the imperative provision should be made for the case of force majeure rather than that of imprevision.[230] Some authors have tried to explain the difference, but it should be said, they are not convincing. The legislator should have allowed such clauses under imprevision in order to harmonise the articles governing force majeure and those governing imprevision, since no clear reason seems to justify the difference in effect.(See to this effect El Fazary pp. 282-83.)

However, although the imperative character of article 107/3 Alg.C.C may be justified when there is a clause which *prevents* a party from

227 See *El Wassit* Vol. 1 op.cit at p. 649 footnote. 2.

228 *El Wassit* Vol. 1 footnote. 2 page. 650.

229 See El Fazary, op.cit at p. 285.

230 See El Fazary, op.cit at pp. 281-82.

claiming the application of the theory of imprevision, or *limits* this right, it is less justifiable when the parties themselves provide for a process of revision of their contract by which the destabilised contract would be equitably readjusted. Such provisions may in fact guide the judge in finding the best way of readjusting equitably the contract.[231] Therefore the legislator should have limited the prohibition to the clauses which either limit or prevent a party from claiming the application of the provision of article 107/3, and not to those which envisage a process of readaptation which might be more advantageous to both parties and especially to the weaker party.

From what has been discussed in this chapter, it can be seen that many laws (German, Swiss, U.S.A, Italy, Algeria and the other Arab laws) do not follow the rigid rule to the effect that unless there is case of absolute impossibility no release can be provided for the contractor who finds it difficult if not ruinous to perform his contract. This rigid rule is also adopted by English law but it is possible to say that courts can adopt a more flexible position towards problems of excessive onerousness when the case is one which satisfies the common test as explained above. The French legislator started with the same rigid rule but instead of conferring to judges the power to modify contracts detsabilised by supervening events, he preferred temporary legislative intervention in cases of economic destabilisation of private contracts. The reason behind such a position is - as has already been said- the reluctance to trust judges in their appreciation of cases of hardship. It is hard to comprehend why the judges are trusted when dealing with cases of force majeure (ie a total release of debtors) and not in cases concerning an increase or a decrease -in term of cost- of the obligation of one of the parties to the contract.

---

[231] See to this effect N. Terki, op.cit at p. 11, see also M. Fontaine (1976) 2 Int'l.T.L & P., at p. 10

General Conclusion.

In the study regarding the English doctrine of frustration, it has been seen that early English law starts with a harsh rule to the effect that impossibility of performance cannot discharge the debtor from his contractual obligation. The position of French and Algerian laws is totally different in this aspect. "A l'impossible nut n'est tenu" was the prevailing principle. However, as has been remarked, English courts departed from that principle and admitted the release of the debtor in cases of impossibility. English law continues in its development while French law maintains the aforementioned principle. It has been pointed out that under English law the release of a debtor is even extended to cases of possibility (e.g. the Coronation cases). The common test developed by courts to the effect that "if the performance of the contract is to be enforced it would be a performance of a radically different contract from the one undertaken" can also be used and is in fact used for cases other than those of impossibility. French law requires an impossibility of performance in order that a debtor can be discharged from his obligation. This position is continually emphasised by the Court of Cassation. Its arguments are -as has been said- not very convincing; since nothing really prevents it from adopting a more flexible position such as the adoption of the theory of imprevision. As regards English law, from a probable interpretation of the speeches of the judges, it can be said that the onerousness of an obligation might be considered as a frustrating event. Certain countries such as Algeria, Egypt, Swiss, Germany and even U.S.A, considered that, to require an impossibility of performance in order to release a debtor from his obligation was too narrow, and adopted frankly the theory of imprevision. The adoption of this theory can not constitute a threat to the sanctity of contracts. An example is the widespread use of "Hardship clauses" in international contracts. It is in fact the principle *pacta sunt servanda* which causes injustice in certain circumstances.

The doctrine of force majeure as admitted in French law is very narrow if compared with the English and the Scottish doctrine of frustration.[232] But comparing the latter doctrine with that of Algeria,

Egypt or Swiss laws, it can be said, that frustration is more limited in extent than in the above laws.

Looking back to the comparison made during this study between English, Scottish, French and Algerian laws on the subject of impossibility of performance it is clear that the required conditions (such as non-imputability, unforeseeability) of frustration or force majeure are similar. It was also seen that the legal solutions in cases like Taylor V. Caldwell, Appleby and Howell can similarly be reached under French and Algerian laws. Concerning the cases involving a delay in the performance (e.g. requisition, seizure, temporary impossibility, mobilisation..), under English and Scottish laws the length of the delay is very important in order that a contract can be held frustrated. Under French and Algerian laws on the other hand the delay itself has no relation to the question of exoneration from liability. Consideration is given to the length of the delay when opting either for the suspension or the termination of the contract. It has also been seen that both English and French courts construe the clauses concerning force majeure and frustration in a strict manner. Where the effects of force majeure or frustration are not regulated by the parties then both laws provide special rules to govern these effects. Generally speaking the debtor is discharged from further performance and can recover what he paid for if the payment was made for a future performance which did not materialise.

In the course of this work we have given, as far as possible, our opinion on certain questions without purporting that they are the only and the certainly right deductions. Constantinesco says (at pp. 264-65) that a comparative study of the doctrine of impossibility, frustration, force majeure and imprevision will be of great benefit. We hope that our study is one step further in such a task.

[232] See Constantinesco, p. 488.

BIBLIOGRAPHY

LIST OF PERIODICALS.

- Alphonse M. Squillante & Fellice M. Congalton, "Force Majeure" (1975) 80 Commercial Law Journal.4.
- Amin S. H, "The Theory of Changed Circumstances in International Trade" (1982) Lloyd's Maritime & Commercial Law Quarterly.577.
- Andre Besson, "Cas Fortuit et Force Majeure dans les Accidents d'Automobiles" (1931) Revue Generale des Assurances Terrestres.272.
- Andrew J. Bateson, "The Duty to Cooperate"(1960) Journal of Business Law.187.
- Anna Kamarul (et al), "The 1980 U.N. Convention on Contracts for the International Sale of Goods" in. Meeting On International Trade Law, 7th, Australian Academy of Science, Canaberra, 1980. 7th International Trade Law Seminar, Canaberra 1980.204.
- Arnold D. McNair, "War-Time Impossibility of Performance of Contract" (1919) 35 Law Quarterly Review.84.
- Arnold D. McNair, "Frustration of Contract by War" (1940) 56 Law Quarterly Review.173.
- Arnold D. McNair, "The Law Reform (Frustrated Contracts) Act 1943" (1944) 60 Law Quarterly Review.160.
- Baker J. H, "Frustration and Unjust Enrichment" (1979) Cambridge Law Journal.266.
- Barry Nicholas, "Force Majeure and Frustration" (1979) 27 American Journal of Comparative Law. 231.
- Barry Nicholas, "The Vienna Convention on International Sales Law" (1989) 105 Law Quarterly Review.201.
- Basil Eckersley, "International Sale of Goods- Licences and Export Prohibitions" (1975) Lloyd's Maritime & Commercial Law Quarterly.265.
- Bruno Oppetit, "L'Adaptation des Contrats Internationaux aux Changements de Circonstances: La Clause de 'Hardship'" (1974) 101 Journal du Droit International.794.
- Christine Mogridge, "Frustration, Employment Contracts And Statutory Rights" (1982) 132.2 New Law Journal.795.
- Claude Fabien et Ejan Mackaay, "Le Droit Civil aux Prises avec l'Inflation" (1983) 28 Mc Gill Law Journal.284.
- Clive Parry, "The Trading With The Enemy Act and the Definition of an Enemy" (1940-41) 4 Modern Law Review.161.
- Cohn E. J, "Frustration of Contract in German Law" (1946) 28 3rd.S. Parts 3 & 4 Journal of Comparative Legislation & International Law.15.
- Colin Manchester, "Frustration or Dismissal?" (1978) 128.2 New Law Journal.674.
- 'Comments' "Commercial Frustration : A Comparative Study" (1967) 3 Texas International Law Forum.275.
- Corbin A. L, "Frustration of Contract in the United States of America" (1947) 29

3rd.S. Parts 3 & 4 Journal of Comparative Legislation & International Law.1.
- Dalhuisen H. J, "Changed Circumstances and the Role of the Judiciary" (1975) 'T Exempel Dwinght. Opstellen aangeboten aan Prof mr. I. Kisch. Zwolle.49.
- David Green, "Force Majeure Clauses and International Sale of Goods-Comparative Guidelines for the Common Lawyer" (1980) 8 Australian Law Review.369.
- De Cruz S. P, "A Comparative Survey of the Doctrine of Frustration" (1982) 2 Legal Issues of European Integration.51.
- Denson Smith J, "Impossibility of Performance as an Excuse in French Law: The Doctrine of Force Majeure" (1936) 45 Yale Law Journal.452.
- Edward Veitch, 'Comments' (1976) 54 Canadian Bar Review.161 .
- Feltham J. D, "Uniform Laws on International Sales Act 1967" (1967) 30 Modern Law Review.670.
- Fengming Liu "The Doctrine of Frustration: An Overview of English Law" (1988) 19 Journal of Maritime Law & Commerce.261.
- Francis Rose, "Restitution After Frustration" (1981) 131.2 New Law Journal.955.
- François Chabas, "Force Majeure" (1978) 4 Encyclopedie Dalloz.Repertoir de Droit Civil.
- Frederic C. Woodward, "Impossibility of Performance as an Excuse for Breach of Contract" (1901) 1 Columbia Law Review.529.
- Georges Berlioz, "Le Code Civil algerien de 1975 et les Contrats Internationaux" (1978) 4 International Trade Law & Practice.81.
- Georges Durry, cases and comment (1966) n: 27 Revue Trimestrielle de Droit Civil. 823.
- Georges Durry, cases and comment (1968) n: 25 Revue Trimestrielle de Droit Civil. 733.
- Georges Durry, cases and comment (1976) n: 21 Revue Trimestrielle de Droit Civil.151.
- Georges Pequignot, "Requisition" (1959) 2 Encyclopedie Dalloz.Repertoir de Droit Public et Administratif.765.
- Gerard Cornu, cases and comment (1981) n:4 Revue Trimestrielle de Droit Civil.171.
- Glanville L. Williams, "The End of Chandler V. Webster" (1942-43) 6 Modern Law Review .46.
- Glanville L. Williams, "The Law Reform (Frustrated Contracts) Act 1943" (1943-44) 7 Modern Law Review.66.
- Grunfeld C, "Traditionalism Ascendant" (1952) 15 Modern Law Review.85.
- Hamson C. J, case and comment (1960) Cambridge Law Journal.10.
- Hans Smit, "Frustration of Contract: A Comparative Attempt at Consolidation" (1958) 58 Columbia Law Review.287.
- Harold J. Berman "Non-Performance and Force Majeure in International Trade Contracts" In. International Association of Legal Science Conference in Helsinki 1960. Some Problems of Non-Performance and Force Majeure in International Contracts of Sale. Helsinki 1961. n: 2 (1961).31.
- Harold J. Berman, "Excuse for Nonperformance in the light of Contract Practices in

International Trade" (1963) 63.2 Columbia Law Review.1413.
- Henri Deschenaux, "La Revision des Contrats par le Juge" (1942) Revue de Droit Suisse.509.
- Henri Deschenaux, "La Revision des Contrats en Droit Suisse" (1948) 30 3rd.S.Parts.3 & 4 Journal of Comparative Law & International Law.55.
- Henri & Leon Mazeaud, cases and comment (1950) n:18 Revue Trimestrielle de Droit Civil .501.
- Henri Lesguillons, "Frustration, Force Majeure, Imprevision, Wegfall der Geschaftsgrundlage" (1979) 5 International Trade Law & Practice.507.
- Jacques Mestre, cases and comment (1986) n:4 Revue Trimestrielle de Droit Civil.345.
- Jean-Louis Devolve "The French Law of 'Imprevision' in International Contracts" (1981) 2 International Contract Law & Finance Review.3.
- Jean Pierre Plantard, "Un Nouveau Droit Uniforme de la Vente Internationale: La Convention des Nations Unies du 11 Avril 1980" (1988) 115 Journal du Droit International.311.
- Jean Virole, "Incidence des Mesures d'Embargo sur les Contrats Internationaux" (1981) 7 International Trade Law & Practice.311.
- Jeffrey Price, "The Doctrine of Frustration and Leases" (1989) 10 Journal of Legal History.90.
- Joachim Meinecke, "Frustration in the West German Law of Contract" (1978) 13 Irish Jur. N. S.83.
- John J. Gorman, "Commercial Hardship and the Discharge of Contractual Obligations under American and British Law" (1980) 13 Vanderbilt Journal of Transnational Law.107.
- John M. Hall, "The Effect of War on Contracts" (1918) 18 Columbia Law Review.325.
- John N. S. Kirkham, "Force Majeure - Does It Really Work ?" (1984) 30 Rocky Moutain Mineral Law Institute.6.1.
- Joseph D. Becker, "The Rolimpex Exit from International Contract Responsibility" (1978) 10 New York University Journal of International Law & Politics.447.
- Kahn P, "Force Majeure et Contrats Internationaux de Longue Duree" Friedman Collection .181.
- Keith Gibson, "The Effect of Imprisonment on Contract of Employment" (1982) 126 Solicitors' Journal.651.
- Kenneth C. Sutton, "The Draft Convention on the International Sale of Goods. Part.1." (1976) 4 Australian Business Law Review.269.
- Knut Rodhe, "Adjustment of Contracts on Account of Changed Conditions" (1959) 3 Scandinavian Studies In Law.151.
- Lausanne Colloquium "The 1980 Vienna Convention On The International Sale Of Goods" Lausanne Colloquium Of Novembre 19-20, 1984. Publications De L'Institut Suisse De Droit Compare. (Schulthess Polygraphischer Verlag Zurich 1985. (Reprint 1987)).
- Leo M. Drachsler, "Frustration of Contracts: Comparative Law Aspects of Remedies

in cases of Supervening Illegality" (1957) 3 New York Law Forum (Now called N.Y.Law Schl.Law.Rev) .50.
- Leon E. Trakman, "Frustrated Contracts and Legal Fictions" (1983) 46 Modern Law Review .39.
- Lihazur Rahman Khan, "Frustration Legislative or Administrative Intervention" (1982) 6 Cochin University Law Review.91.
- Lord Cooper, "Frustration of Contract in Scots Law" (1946) 28 3rd.S. Parts 3 & 4 Journal of Comparative Legislation & International Law.1.
- Mann F. A, "Trading with the Enemy" (1943-44) 7 Modern Law Review.159.
- Marcel Fontaine, "Les Clauses de Hardship. Amenagement Conventionnel de l'Imprevision dans les Contrats Internationaux a Long Terme" (1976) 2 International Trade Law & Practice.7.
- Marc Vericel, "La Consideration de la Personne dans les Contrats Civils" (1982) 4 Travaux Juridiques de l'Universite de Saint-Etienne.185.
- Martin Hunley, "Supervening Impossibility as a Discharge of an Obligation" (1946-47) 21 Tulane Law Review.603.
- Martin L. Ziontz, "A New Uniform Law for the International Sale of Goods: Is it Compatible with American Interests?" (1980) 2 North Western Journal of International Law & Business.129.
- McElroy R. G, & Glanville Williams, "The Coronation Cases I" (1940-41) 4 Modern Law Review.241.
- Michael D. Aubrey, "Frustration Reconsidered- Some Comparative Aspects" (1963) 12 International & Comparative Law Quarterly.1165.
- Michael G. Rapsomanikis, "Frustration of Contract in International Trade Law and Comparative Law" (1980) 18 Duquesne Law Review.551.
- Michael Joachim Bonell, "La Nouvelle Convention des Nations-Unies sur les Contrats de Vente Internationale de Marchandises" (1981) 7 International Trade Law & Practice.7.
- Mouralis J. L, "Imprevision" (1978) 4 Encyclopedie Dalloz.Repertoir de Droit Civil.
- Muna Ndulo, "The Vienna Sales Convention 1980 and the Hague Uniform Laws on International sale of Goods 1964: A Comparative Analysis" (1989) 38 Part.1 International & Comparative Law Quarterly.1.
- Neville Maryan Green, "Force Majeure in International Construction Contracts" (1985) 13 International Business Lawyer (U.K).505.
- Norbert Horn, "Change in Circumstances And the Revision of Contracts in Some European Law and in International Law" (1985) 3 Studies In Transnational Economic Law (Netherlands).15-29.
- Nour-Eddine Terki, "L'Imprevision et le Contrat International dans le Code Civil Algerien" (1982) 8 International Trade Law & Practice.9.
- Ole Lando, "Renegotiation and Revision of International Contracts An Issue in the North-South Dialogue" (1980) 23 German Yearbook of International Law.37.
- Paul B. Fairest, "Self-Induced Frustration-The Implied Term Theory Burried" (1964) Cambridge Law Journal.186.

- Peter Hay, "Frustration and its Solution in German Law" (1961) 10 American Journal of Comparative Law. 345 .
- Pierre Van Ommeslaghe, "Les Clauses de Force Majeure et d'Imprevision (Hardship) dans les Contrats internationaux" (1980) 57 Revue de Droit International et de Droit Compare.7.
- Pierre Wigny M, "Responsabilite Contractuelle et Force Majeure" (1935) Revue Trimestrielle de Droit Civil.19.
- Puelinckx A. H, "Frustration, Hardship, Force Majeure, Imprevision, Wegfall der Geschaftsgrundlage, Unmoglichkeit, Changed Circumstances. A Comparative Study in English, French, German and Japanese Law" (1986) 3 Journal of International Arbitration .47.
- Ramdane Zerguine, "Le Code Civil et l'Adaptation Judiciare du Contrat" (1982) 19 Revue Algerienne des Sciences Juridiques Economiques et Politiques.291.
- R.E.M "notes" (1948) 64 Law Quarterly Review.179.
- Richard E. Speidel, "Excusable Nonperformance in Sales Contracts: Some Thoughts about Risk Management" (1980) 32 South Carolina Law Review.241.
- Richard W. Duesenberg, "Contractual Impracticability : Courts begin to Shape §.2-615" (1977) 32 Business Lawyer.1089.
- Ross Anderson, "Frustration Of Contract In The High Court" (1948-50) 1 Annual Law Review (University Of Western Australia).50.
- Saul Litvinoff, "Force Majeure, Failure of Cause and Theorie de l'Imprevision : Louisiana Law And Beyond" (1985) 46 Louisiana Law Review. 1.
- Schmitthoff C M, "Frustration and Suez" (1958) Journal of Business Law.409.
- Schmitthoff C. M, "Conflicting Decisions on Suez Frustration" (1959) Journal of Business Law .58.
- Schmitthoff C. M, "The End of Suez" (1961) Journal of Business Law.184.
- Schmitthoff C. M, "Frustration of International Contracts of Sale in English and Comparative Law" In. Some Problems of Nonperformance and Force Majeure in International Contracts of Sale (Helsinki Conference.1961).127.
- Schmitthoff C. M, (1964) Journal of Business Law.53.
- Sen G. M, "Doctrine of Frustration in the Law of Contract" (1972) Journal of the Indian Law Institute Special Issue.132.
- Stephan Tromans "Frustration - the Tenant's Release" (1981) Cambridge Law Journal.217.
- Sturge L.J, "The Doctrine of Implied Condition" (1925) 41 Law Quarterly Review.170.
- Thornely J. W. A, "Seller's Liability for Partial Failure of Crop to be grown on Specified Land" (1973) Cambridge Law Journal.15.
- Travaux de l'Association Henrie Capitant pour la Culture Juridique Française. Vol. 83 "Les Effets de la Depreciation Monetaire sur les Rapports Juridiques Contractuels" (Journees d'Istambul) Faculte de Droit d'Istambul. 1973.
- Travaux de La Semaine Internationale de Droit. Paris.1937 "La Revision des Contrats par le juge".
- Wade H.W. R, "The Principle of Impossibility in Contract" (1940) 56 Law Quarterly

Review .519.
- Wasserman G, "Impossibility of Performance in the Civil Law of Quebec" (1952) 12 Revue du Barreau de la Province du Quebec.366.
- William W. McBryde, "Frustration of Contract" (1980) Juridical Review .1.

LIST OF BOOKS

BOOKS WRITTEN IN ARABIC.

- Abbas Helmi, *Maritime Law* (Algiers, O.P.U. 1983).
- Abd El Mounem Faradj Essadah, *Contract Theory in the Laws of Arab Countries (Egyptian, Libanese Syrian, Iraquian, Libyan, Koweitian, Soudanese* (Beirut. 1974).
- Abd Essatar Etelili, *The Conditions of Liability of Airline Carriers and the Causes of Exoneration* (Algiers, S.N.E.D. 1976).
- Ali Ali Souleiman, *Studies of the Civil Liability in the Algerian Civil Law* (Algiers, O.P.U. 1984).
- Ahmed Salama, *The Theory of Obligation*
- Anouar Soltane, *The Sources of Obligation.Treatise of the General Theory of Obligation.A Comparative Study of Egyptian and Lebanese Laws* (1983).
- El Sanhoury A, *El Wassit* (Beirut. 1952) Vol. 1 .
- El Sanhoury A, *El Wassit* (Beirut. 1952) Vol. 2 .
- El Sanhoury A, *El Wassit* (Beirut. 1952) Vol. 3 .
- El Sanhoury A, *El Wassit* (Beirut. 1952) Vol. 4 .
- El Sanhoury A, *El Wassit* (Beirut. 1952) Vol. 5 .
- El Sanhoury A, *El Wassit* (Beirut. 1952) Vol. 6 part. 1.
- El Sanhoury A, *El Wassit* (Beirut. 1952) Vol. 7 part. 1.
- El Sanhoury A, *El Moudjez.The General Theory of Obliagtions* (Beirut).
- Hamdi El Ghenimi, *Studies of the Algerian Maritime Law* (Algiers, O.P.U. 1983).
- Houcine Amer & Abd Arrahim Amer, *The Delictual and Contractual Liability* (2 nd ed., 1979).
- Ibrahim Zaki Akhnoukh, *The Algerian Law of Employment* (2. nd ed., Algiers, O.P.U . 1988).
- Mahmoud Djamel Eddine Zaki, *The General Theory of Obligation* (Cairo. 1978).
- Mohamed Abd Arrahim Anbar, *Encyclopedia of Legal Principles in Egypt and in the Arab Countries* Vol. 10 (Cairo. 1977).
- Mohamed Hassanine, *The Contract of Sale in the Algerian Civil Law* (Algiers, O.P.U. 1983).
- Mohamed Hassanine, *El Wadjiz.The Theory of Obligation. The Sources of Obligations and their Effects in the Algerian Civil Law* (Algiers, S.N.E.D. 1983).
- Mouhye-Eddine Ismail Alam Eddine, *The General Theory of Obligation.*
- Rached Rached, *Studies of the Algerian Law of Employment* (Algiers, O.P.U. 1985).

BOOKS WRITTEN IN ENGLISH.

- Andreas F. Lowenfeld, *International Economic Law.* Vol. 1 *International Private Trade* (2nd ed., New York. 1981).
- Anson's, *Law of Contract* (25th ed., Oxford, Clarendon Press. 1979).
- Atiyah P. S, *The Sale of Goods* (5th ed., Pitman Publishing. 1975).
- Atiyah P. S, *The Sale of Goods* (7th ed., Pitman Publishing. 1985).
- Atiyah P. S, *An Introduction to the Law of Contract* (3rd ed., Oxford, Clarendon Press. 1981).
- Atiyah P. S, *Essays on Contract* (Oxford, Clarendon Press. 1986).
- Barry Nicholas, *The French Law of Contract* (London, Butterworths. 1982).
- Beale H. G. & Bishop W. D. & Furmston M. P, *Contracts. Cases and Materials* (London, Butterworths. 1985).
- Benjamin's *Sale of Goods* (1st ed., London. Sweet & Maxwell. 1974).
- Benjamin's Sale of Goods (3rd ed., London. Sweet & Maxwell. 1987).
- Bianca C. M. & Bonell M. J. (et al), *Commentary On The International Sales Law. The 1980 Vienna Sales Convention* (Giuffre. Milan. 1987).
- Chalmer's, *Sale of Goods Act 1979 Including the Factors Acts 1889 & 1890* (16th ed., London, Butterworths. 1971)
- Chalmer's, *Sale of Goods Act 1979 Including the Factors Acts 1889 & 1890* (18th ed., London, Butterworths. 1981).
- Cheshire Fifoot & Furmustons, *Law of Contract* (11th ed., London, Butterworths. 1986).
- Chitty, *On Contracts* Vol. 1. *General Principles* (London, Sweet & Maxwell. 1968).
- Chitty, *On Contracts* Vol. 1. *General Principles* (24th ed., London, Sweet & Maxwell. 1977).
- Chitty, *On Contracts* Vol. 1 . *General Principles* (25th ed., London, Sweet & Maxwell. 1983).
- Chitty, *On Contracts* Vol. 2. *Specific Contracts* (25th ed., London, Sweet & Maxwell. 1983).
- Cohn E. J, *Manual of German Law* vol. 1. *General Introduction. Civil Law* (2nd ed., London, Oceana Publication, Inc. 1968).
- David M. Walker, Vol 1. *Principles of Scottish Private Law* (2nd ed. Oxford, Clarendon Press. 1975).
- David M. Walker, Vol 2. *Principles of Scottish Private Law* (3rd ed., Oxford, Clarendon Press. 1983).
- David M. Walker, *The Law of Contracts and Related Obligations in Scotland* (London. Butterworths. 1979)
- Dessemontet F. & Ansay T, *Introduction to Swiss Law* (Kluwer Law And Taxation Publishers. 1983).
- Dix & Crump, *On Contracts of Employment* (6th ed. D W. Crump. London, Butterworths. 1980).
- Dobson A. P, *Sale of Goods and Consumer Credit* (London, Sweet & Maxwell. 1975).

- Dobson A. P, *Sale of Goods and Consumer Credit* (3rd ed., London, Sweet & Maxwell. 1984).
- Donald Keating, *Law and Practice of Building Contracts including Architects & Surveyors* (London. Sweet & Maxwell. 1955).
- Ernest J. Shuster, *The Principles of German Civil Law* (London, Oxford at the Clarendon Press. 1907).
- Evans David Lloyd, *The law of Landlord and Tenant* (2nd ed., London. 1985).
- Glanville L. Williams, *The Law Reform (Frustrated Contracts) Act 1943* (London. 1944).
- Gloag W. M , Introduction to the Law of Scotland (9th ed., Edinburgh.W. Green & Son.Ltd. 1987).
- Graveson R. H., Cohn E. J., Diana Graveson, *The Uniform Laws on International Sales Act.1967. A Commentary* (London, Butterworths. 1968).
- Greig D. W, *Sale of Goods* (London, Butterworths. 1974).
- Hudson's, *Building & Engineering Contracts. Including the Duties and Liabilities of Architects, Engineers and Surveyors* (10th ed., I. N. Ducan Walace. 1970).
- John Tillotson, *Contract Law in Perspective* (London, Butterworths. 1981).
- John Tillotson, *Contract Law in Perspective* (2nd ed., London, Butterworths. 1985).
- John H. Crabb, *The French Civil Code* (as amended to July 1, 1976) (Fred.B.Rothman & Co., New Jersey, 1977 (2nd printing. 1985).
- Konrad Zweigert & Hein Kotz *An Introduction to Comparative Law* Vol. 2 *The Institutions of Private Law.* Translated from the German by Tony Weir (2nd ed., Clarendon Press. Oxford. 1987).
- MacLeod J. K, *Sale and Hire Purchase* (London, Butterworths. 1971).
- Roy Glanville Mc Elroy & Glanville L. Williams, *Impossibility of Performance. A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration* (Cambridge, At The University Press. 1941).
- Rudolf Gottschalk, *Impossibility of Performance in Contract. With a Supplement for the years 1938-1944* (London, Stevens & Sons Ltd. 1945).
- Schmitthoff C. M, *The Sale of Goods Including the Hire-Purchase Act.1965 and Other enactments* (2nd ed., London, Stevens & Sons Ltd. 1966).
- Schmitthoff C. M. & David A. G. Sarre, *Mercantile Law* (14th ed., London, Stevens & Sons. 1984).
- Schmitthoff C. M, *Export Trade The Law and Practice of International Trade* (8th ed., London, Stevens & Sons. 1986).
- Treitel G. H, *The Law of Contract* (5th ed., London, Stevens & Sons. 1979).
- Treitel G. H, *The Law of Contract* (6th ed., London, Stevens & Sons. 1983).
- Treitel G. H, *The Law of Contract* (7th ed., London, Stevens & Sons. 1987).
- William W. McBryde, *The Law of Contract in Scotland* (Edinburgh.W. Green & Son.Ltd. 1987)

BOOKS WRITTEN IN FRENCH.

- Alain Benabent, *Droit Civil. Les Obligations* (Montchrestien. 1987).
- Alex Weill, *Droit Civil. Les Obligations* (Dalloz. 1971).
- Alex Weill & François Terre, *Droit Civil. Les Obligations* (2eme ed., Dalloz. 1975).
- Alex Weill & François Terre, *Droit Civil. Les Obligations* (4eme ed. Dalloz. 1986).
- Ali Bencheneb, *Theorie Generale du Contrat* (2eme ed., Alger, O.P.U. 1982).
- Andre De Laubadere, *Traite de Droit Administratif* (6eme ed., Paris, L.G.D.J. 1973).
- Andre De Laubadere & Franck Moderne & Pierre Devolve, *Traite des Contrats Administratifs* (2eme ed., Paris, L.G.D.J. 1984).
- Antoine Vialard, *Droit Civil Algerien. La Responsabilite Civile Delictuelle* (2eme ed., Alger, O.P.U. 1986).
- Ahmed Lourdjane, *Le Droit Civil Algerien* (Paris, Edition L'Harmattan. 1985).
- Boris Starck, *Droit Civil.* 1 *Responsabilite Delictuelle* (2eme ed., Paris, Librairie Technique. 1985).
- Brun A. & Galland H, *Droit du Travail* (Sirey. 1958).
- Camerlynck G. H & Gerard Lyon-Caen, *Precis de Droit du Travail* (6eme ed., Librairie Dalloz. 1973).
- Camerlynck G. H & Gerard Lyon-Caen, *Droit du Travail* (11eme ed., 1982).
- Christian Larroumet, *Droit Civil. Les Obligations* 1ere Partie. Tome 3. (Ed Economica. 1986).
- Gabriel Marty & Pierre Raynaud, *Droit Civil* Tome 2. 1er Vol. *Les Obligations* (Sirey. 1962).
- Georges Vedel, *Droit Administratif* (3eme ed., Paris, P.U.F. 1964).
- Georges Vedel & Pierre Devolve, *Droit Administratif* (10eme ed., P.U.F. 1988).
- Guy Fraikin, *Traite de la Responsabilite du Transporteur Maritime* (Paris, L.G.D.J. 1957)
- Guy Raymond & Pierre Billard, *Droit Civil. Concours des Fonctions Publiques* (Paris, Librairie Technique. 1986).
- Henri De Page, *Traite Elementaire de Droit Civil Belge* Tome 2. (3eme ed., Bruxelles. 1964).
- Henri Lalou, *Traite Pratique de la Responsabilite Civile* (5eme ed., Paris, Librarie Dalloz. 1955).
- Henri et Leon Mazeaud & Jean Mazeaud, *Leçons de Droit Civil* Tome. 3. Vol. 2. *Principaux Contrats* (3eme ed., Editions Montchrestien. 1968)
- Henri et Leon Mazeaud & Jean Mazeaud, *Traite Theorique et Pratique de la Responsabilite Civile Delictuelle et Contractuelle* Tome 2. (6eme ed., Paris, Editions Montchrestien. 1970).
- Henri et Leon Mazeaud & Jean Mazeaud, *Leçons de Droit Civil* Tome.2. 1er Vol. *Obligations Theorie Generale* (5eme ed., Paris, Editions Montchrestien. 1973).
- Henri et Leon Mazeaud & Jean Mazeaud et François Chabas, *Leçons de Droit Civil* Tome.2.
  1er Vol. *Obligations Theorie Generale* (7eme ed., Paris, Editions Montchrestien.

1985).
- Henri Mazeaud & François Chabas, *Exercises Pratiques de Droit Civil* Tome 2 *Obligations. Droit reels Principaux* (Editions Montchrestien. 1986).
- Jacques Flour et Jean-Luc Aubert, *Droit Civil. Les Obligations* Vol 2. *Sources: Le Fait Juridique* (Armand Colin. 1981).
- Jean Carbonnier, *Droit Civil. 4/ Les Obligations* (6eme ed., P.U.F. 1969).
- Jean Carbonnier, *Droit Civil. 4/ Les Obligations* (9eme ed., P.U.F. 1976).
- Jean Carbonnier, *Droit Civil. 4/ Les Obligations* (11eme ed., P.U.F. 1982).
- Jean François Lachaume, *Droit Administratif* (4eme ed. Collection Themis. P.U.F. 1987).
- Leontin-Jean Constantinesco, *Inexecution et Faute Contractuelle en Droit Compare (Droit Français, Allemand, Anglais)* (Bruxelles, W. Kohlhammer Verlay. Stuttgart/Librairie Encyclopedique. 1960).
- Loic Cadiet, *Le Droit Contemporain des Contrats. Bilan et Perspectives* (Paris, Ed. Economica. 1987).
- Marcel Planiol & Georges Ripert, *Traite Pratique de Droit Civil Français* Tome 6. *Obligations* 1ere Partie. (2eme ed., Paris, L.G.D.J. 1952).
- Maurice Tancelin, *Des Obligations. Contrat et Responsabilite* (4eme ed., Montreal, Wilson & Lafleur Ltee. 1988).
- Michel de Juglart, *Cours de Droit Civil avec Plans et Devoirs de Questions Pratiques* Tome 1. 2eme Vol. *Biens-Obligations* (10eme ed., Paris, Edition Montchrestien. 1982).
- Michel Le Galcher-Barron, *Droit Civil. Les Obligations* (3eme ed., Francis Lefebvre. 1979).
- Michel Rousset, Driss Basri, Ahmed Belhadj, Jean Caragnon, *Droit Administratif Marocain* (4eme ed., Rabat, Imprimerie Royale. 1984).
- Nour Eddine Terki, *Les Obligations.Responsabilite Civile et Regime General* (Alger, O.P.U. 1982).
- Philippe Malaurie & Laurent Aynes, *Cours de Droit Civil. Les Obligations* (Ed. Cujas. 1985).
- Philippe Malinvaud, *Les Mecanismes Juridiques des Relations Economiques Droit des Obligations* (4eme ed., Paris, Librairies Techniques).
- Pierre Dupont Delestraint, *Droit Civil. Les Obligations* (10eme ed., Dalloz. 1986).
- Pierre Ghiho, *Cours de Droit Civil* Vol 4. *Les Obligations* (2eme ed., Edition L'Hermes. 1983).
- Rene Rodiere & Denis Tallon, *Les Modifications du Contrat au Cours de son Execution en raison de Circonstances Nouvelles* (Paris, Ed. Pedone. 1986).
- Veronique Ranouil, *L'Autonomie de la Volonte: Naissance et Evolution d'un Concept* (Paris, P.U.F. 1980).
- Waline M, *Droit Administratif* (9eme ed., Edition Sirey. 1963).
- Yvaine Buffelau-Lanore, *Droit Civil* (3eme ed., Masson. 1986).

LIST OF THESES

- Ait Ouali Ahmed, *La Theorie de l'Imprevision en Droit Algerien* (Oran. 1982).

- Andre Louveau, *Theorie de l'Imprevision en Droit Civil et en Droit Administratif* (Rennes. 1920).
- Benslimane H. M. L, *De la Theorie de l'Autonomie de la Volonte et de ses Effets dans le Droit Contractuel Algerien* (Oran. 1983).
- Charles Besson, *La Force Obligatoire du Contrat et les Changements dans les Circonstances* (Universite de Lausane. 1955).
- Constantin Stoyanovitch, *De l'Intervention du Juge dans le Contrat en cas de Survenance de Circonstances Imprevues. Theorie de l'Imprevision* (Aix Marseille. 1941).
- Corneliu-Mihail Popescu, *Essai d'une Theorie de l'Imprevision en Droit Français et Compare* (Paris, L.G.D.J. 1937).
- Cornesse Fernando, *Quelques Aspects Contemporains de la Theorie de l'Imprevision* (Lyon. 1946).
- Edouard Bourgoin, *Essai sur la Distinction du Cas Fortuit et de la Force Majeure* (Lyon. 1902).
- Emmanuel Gounot, *Le Principe de l'Autonomie de la Volonte en Droit Prive. Contribution a l'Etude Critique de l'Individualisme Juridique* (Dijon. 1912).
- Gerard Thery, *De la Notion d'Exteriorite dans la Force Majeure et dans la Responsabilite* (Lille. 1948).
- Hamed Zaki, *L'Imprevision en droit Anglais Etude de Droit Anglais* (Paris. 1930).
- Hassbou El Fazary, *The Effects of Changed Circumstances on Contractual Obligations in Comparative Law. An Analytical Study of the Theory of Changed Circumstances in Comparative Law and in Islamic Law* (in arabic) (Alexandria. 1979).
- Jean Auverny-Bennetot, *La Theorie de l'imprevision. Droit Prive. Droit Administratif. Droit Ouvrier* (Paris. 1938).
- Jean Foulon, *Le Caractere Provisoire de la Notion d'Imprevision* (Paris. 1938).
- Jean Quesnel, *De Quelques Applications de la Notion de Force Majeure en Temps de Guerre 1930-40* (Caen. 1945).
- Jean Radouant, *Du Cas Fortuit et de la Force Majeure* (Paris. 1920).
- Leon Marie, *Du Cas Fortuit et de la Force Majeure* (Caen. 1896).
- Leon Marre, *Essai sur les Notions de Cas Fortuit et de Force Majeure. Etude Critique de quelques Opinions Nouvelles* (Paris. 1910).
- Louis Fyot, *Essai d'une Justification Nouvelle de la Theorie de l'Imprevision a l'egard des Contrats Portant sur des Objets Autres qu'une Somme d'Argent* (Dijon. 1921).
- Rene Fiatte, *Les Effets de la Force Majeure dans les Contrats* (Paris. 1932).