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Effect of Supervening Events on the Performance of Contractual Obligations

Concept of Frustration and *Force Majeure* in Time Charterparties

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Submission deadline: 11/01/2013

Number of words: 15.246 (max. 18.000)

10/28/2013

Table of Contents

1 Introduction

Conclusion of an agreement is sometimes followed by unforeseen events occurring without fault of either party. The occurrence of such events may interfere in the performance or prevent the performance of the contractual obligations. This brings uncertainty as to the legal effect of such change of circumstances on rights and obligations of the parties and may even result in discharge of the contract in question.[1]

In order to identify legal consequences of such extraordinary events, terms of the contract must be analyzed in the first place.[2] Often, commercial parties reasonably contemplate such change of circumstances at the time of the contracting and even envisage legal consequences for these events. This is often achieved through the contractual risk allocation clauses.[3]

Risk allocation clauses are particularly important in maritime shipping. One of the characteristic features of the shipping business is that there are many external risks that may endanger the ships, their cargoes and cause delays and interruptions in the service of the ships.[4] As a result, there is a need and tendency of allocating risks through various mecha-

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1 Michael Furmston, *Cheshire, Fifoot and Furmston's Law of Contract*, sixteenth (Oxford university press, 2012), 714.

2 Ewan McKendrick, *Contract Law: Text, Cases, and Materials*, 2nd ed (Oxford [England] ; New York: Oxford University Press, 2005), 878–880.

3 Thomas Edward Scrutton, *Scrutton on Charterparties and Bills of Lading*, 22nd ed (London: Sweet & Maxwell Thomson Reuters, 2011), para. 1–089.

4 Thor Falkanger, *Scandinavian Maritime Law: The Norwegian Perspective*, 3d ed (Oslo, Norway: Universitetsforlaget, 2011), para. 1–2.

nisms such as statutory rules allowing limitation of liability, insurance, general average and most importantly contractual clauses.[5]

It is often argued in the legal literature that it is impossible to draft fully self-regulatory contract, which is completely isolated from the governing law.[6] Thus, parties cannot merely rely on the wording of the contract, as the effect of the contractual provisions will largely depend on the governing law of the agreement. Governing law plays an important role in interpreting the contractual terms and determining their legal affect as well as regulating issues not covered by the agreement.[7] Therefore, apart from contractual arrangements, the legal effect of the supervening events on contractual obligations largely depends on the law governing such obligations. The interesting point of observation is how the rules of governing law, on the one hand, and the contractual risk allocation clauses, on the other hand, interact and can influence the final outcome.

If the event occurs rendering the obligations under the charterparty radically different from what was originally undertaken by the contracting parties, common law doctrine of frustration may discharge the contract.[8] However, application of the doctrine of frustration employs extensive analysis of the facts of the case and terms of the contract.[9] Charterparty risk allocation clauses may envisage number of supervening events and regulate consequences

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5 Ibid.

6 *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (Cambridge ; New York: Cambridge University Press, 2011), 116–117.

7 Guiditta Cordero Moss, *Lectures on International Commercial Law*, Publication Series of the Institute of Private Law, University of Oslo 162 (CEPMLP Internet Journal, 2003), 31–51; Marcel Fontaine, *Drafting International Contracts: An Analysis of Contract Clauses* (Ardsley, N.Y: Transnational Publishers, 2006), 439–451.

8 Davis Contractors Ltd v Fareham Urban District Council (House of Lords 1956); *Time Charters*, 6th ed, Lloyd's Shipping Law Library (London: Informa, 2008), para. 26.4.

9 Edwinton Commercial Corporation and Global Tradeways Ltd v Tsavliris Russ (Worldwide Salvage and Towage) Ltd "Sea Angel," 2 Lloyd's Rep 517 (English Court of Appeal 2007).

of their occurrence. If this is the case, then the application of the doctrine might be prevented due to contractual regulation.

In light of the above, it can be concluded that, both the contractual provisions and governing law is to be taken into consideration to determine whether the supervening events in question can result in total discharge of obligations under the charterparty or merely suspend or otherwise modify them.

1.1 Research Question and its Practical Relevance

This thesis aims to determine whether and under what circumstances can supervening events, occurring subsequent to concluding the time charterparty, result in the discharge of the contract by frustration.

Scholarly writings as well as case law demonstrate, that mere fact that supervening events occur without the fault of the parties affecting or preventing performance of the contract is not sufficient to bring doctrine of frustration into operation. Change in circumstances has to be radical.[10]

Although, doctrine of frustration is quite antique, limits of this doctrine are difficult to define.[11] It has been often criticized for being artificial and even that it "*may have caused more problems than it was intended to solve*."[12]

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10 G. H Treitel, *Frustration and Force Majeure* (London: Sweet & Maxwell, 2004), para. 1–003; Davis Contractors Ltd v Fareham Urban District Council (House of Lords 1956); National Carriers Ltd v Panalpina (Northern) Ltd (House of Lords 1981).

11 Ewan McKendrick, *Force Majeure and Frustration of Contract* (London; New York: Lloyd's of London Press, 1995), 35; Marel Katsivela, "Contraacts: Force Majeure Concept or Force Majeure Clauses?" (2007), 109.

Based on the above, it can be concluded that uncertainty is inherent feature of the doctrine of frustration,[13] this hinders commercial certainty and predictability,[14] which is so crucial for the parties involved in the shipping business. Therefore, it is important to outline the elements of the doctrine, identify when is it invoked by the courts and what consequences does it have for the parties to the agreement. Also, whether and how the parties can avoid such consequences if they decide to do so.

Parties often contract out possible causes of frustration by incorporating *force majeure* and or similar risk allocation clauses.[15] Therefore, thesis will also assess the effect of the contractual *force majeure* clauses and in particular, interrelation of these clauses with the frustration doctrine. It will be demonstrated that sufficiently drafted *force majeure* clause can avoid application of the doctrine of frustration. However, considering the factual circumstances of the case, courts may nevertheless consider that despite the all embracing wording of the *force majeure* clause, the event occurred might not be of a dimension for which parties reasonably intended to assume the risk for.[16]

Force majeure as a concept in the common law exists only to the extent that the parties incorporate it into a contract.[17]Therefore, it will be demonstrated that wording of the clause and its interpretation will determine the legal effect of such clause.[18]

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12 Fengming Liu, "The Doctrine of Frustration: An Overview of English Law" 19, no. 2 (April 2, 1988): 285–286.

13 McKendrick, *Force Majeure and Frustration of Contract*, 38–39.

14 Scottish Navigation Co. Ltd. v W. A. Souter & Co. (King's Bench division 1917); Bank Line v Arthur Capel & Co (Court of Appeals 1919).

15 Bremer Handelsgesellschaft m.b.H v. J. H. Rayner & Co. LTD., 2 Lloyd's Rep. 73 (Queen's Bench Division (Commercial Court) 1978).

16 Metropolitan Water Board v Dick Kerr and Co Ltd (House of Lords 1918).

17 Treitel, *Frustration and Force Majeure*, para. 12–021; McKendrick, *Force Majeure and Frustration of Contract*, 3–5.

Shipping business is largely international and maritime law is correspondingly an area of law that has developed in an international setting.[19] Anglo-American law has played an important role in the development of the standard charterparty forms,[20] therefore English law is an important consideration when certain issues are dealt with under the charterparty, even when the contract is not governed by the English law.[21] The ruling of the Norwegian Supreme Court in *Sunvitor*[22] serves as a good example for the above. In the said case, the Norwegian Supreme Court decided that English law could be used as background law also when Norwegian law was applicable to a contract. In a later case, *Arica*[23] arbitrators attested to the same.

Swedish Supreme court in cases NJA 1954 s. 574 and NJA 1971 s. 474[24] further confirms that even if English law does not apply to the charterparty, the construction of the relevant clause might take into consideration the understanding of such clauses in English law, which has particular relevance in respect of charter parties.

The above demonstrates relevance of the English law for the charterparties, understanding of which is important even in case the contract is subjected to civil governing law.

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18 Marel Katsivela, "Contracts: Force Majeure Concept or Force Majeure Clauses?," 110; Great Elephant Corp v Trafigura Beheer BV, the "CRUDESKY," Lloyds' Law Reposrter (2013).

19 Falkanger, *Scandinavian Maritime Law*, para. 1.2; Proshanto K Mukherjee, Mark Brownrigg, and Bruce Farthing, *Farthing on International Shipping* (Berlin; London: Springer, 2013), 1.

20 Falkanger, *Scandinavian Maritime Law*, 366.

21 Ibid.

22 ND 1974.103.NH "Sunvictor"

23 ND 1983.309.NV «Arica"

24 Juergen Basedow, *The Hamburg Lectures on Maritime Affairs, 2009 & 2010*, 1st ed, Hamburg Studies on Maritime Affairs 6888 (New York: Springer, 2012), 44.

Considering the importance of English law, present research will be limited to the frustration of time charterparties and assessment of the legal affect of the *force majeure* clauses under English law. However, several examples will be provided from other civil jurisdictions for illustrative purposes only, to ensure better understanding of relevant legal concepts within the scope of the present research.

The reason of limiting the scope of the study to time charterparties is determined by the number of reasons. Shipping cases dealing with the delay, interruption of charter service or destruction of the ship have substantially contributed to the development of the doctrine of frustration.[25] Time charter is a service contract "*under which the ship's capacity is made available to a time charterer for a specified period*."[26] The charterer is free to employ the vessel for his own purposes within the permitted contractual limits.[27] One of the characteristics of the time charterparties is that they are concluded for a fixed period of time rather than for a particular voyage, thus parties do not contemplate definite adventure in the time charterparty. Therefore, it is difficult to define whether the supervening event is of such a nature as to frustrate commercial purpose of the contract and destroy the "common object" of the parties.[28]

1.2 Methodology and Legal Sources

This thesis is based on the analytical research method and aims to critically evaluate the relevant legal issue within the identified scope. The aim of the paper is to outline main

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25 Liu, "The Doctrine of Frustration: An Overview of English Law," 264.

26 Thor Falkanger, *Scandinavian Maritime Law: The Norwegian Perspective*, 3d ed (Oslo, Norway: Universitetsforlaget, 2011), 417.

27 John Furness Wilson, *Carriage of Goods by Sea*, 7th ed (New York: Pearson/Longman, 2010), para. 1.1.

28 *Cheshire, Fifoot and Furmston's Law of Contract*, 722; Bank Line v Arthur Capel & Co (Court of Appeals 1919); Hirji Mulji v Cheong Yue Steamship Co (Court of Appeals 1926); FA Tamplin Steamship Co, Ltd v Anglo-Mexican Petroleum Products Co, Ltd (House of Lords 1916).

shortcomings of the doctrine of frustration by analyzing selected aspects of the problem and to assess whether the available solutions are sufficient to eliminate the shortcomings.

The primary legal source for conducting the research was the case law, which was analyzed within the scope of the legal problem. The thesis relies upon a body of case law establishing rules of general application in English law of contracts as well as rulings of English courts particularly concerned with frustration of time charterparties.

Thesis also relies on scholarly writings as a secondary source, relevant for acquiring background information about the topic, as well as for identifying the legal controversies on the research question.

1.3 Structure

This thesis comprises of four parts. The first part presents the short introduction of the research question and its practical relevance. Also scope and aim of the research, methodology of research study and legal sources used.

Second part presents the analysis of the legal basis of the English doctrine of frustration. Namely, this part covers nature, effect and elements of the doctrine, as well as legal aspects of its operation.

The third part deals with the *force majeure* clauses, their nature, effect and interrelation with the frustration doctrine. This chapter also presents comparative analysis of the two concepts – *force majeure* and frustration.

The last chapter summarizes the findings and presents concluding remarks on the research question.

2 Doctrine of Frustration

Present chapter analyses the doctrine of frustration. Namely, the essence of the doctrine, it's legal effect and the conditions to be fulfilled for invoking the doctrine will be discussed. Factors excluding application of the doctrine will also be addressed. The aim of this chapter is to identify controversies about the legal bases of the doctrine, as well as demonstrate complexity of its application.

2.1 Nature and Effect of the Doctrine

When extraordinary events occur, without the default of either of the parties, subsequent to the formation of the charterparty and these events radically and significantly alter the nature of the contractual rights and obligations of the parties,[29] the contract may be automatically brought to an end by operation of the doctrine of frustration.[30] Alteration has to be such as to "*destroy the identity of the charter service or to make it, as a matter of business, a totally different thing.*"[31]

Operation and effects of the doctrine does not depend on the action, inaction or will of the parties to continue the contract.[32] As stated above, it brings the contract automatically to an end notwithstanding the fact that parties might continue to perform their contractual

29 Treitel, *Frustration and Force Majeure*, para. 1–001; Scrutton, *Scrutton on Charterparties and Bills of Lading*, para. 1–089; Davis Contractors Ltd v Fareham Urban District Council (House of Lords 1956); National Carriers Ltd v Panalpina (Northern) Ltd (House of Lords 1981).

30 Liu, "The Doctrine of Frustration: An Overview of English Law," 271.

31 *Time Charters*, para. 26.4.

32 Hirji Mulji v Cheong Yue Steamship Co (Court of Appeals 1926).

obligations. With respect to time charterparty for instance, if considered as frustrated, the time charterparty will be discharged even if the charterer continues to pay hire for the ship.[33] In *Hirji Mulji v Cheong Yue Steamship Co.,*[34] Privy Council considered the time charterparty frustrated by the requisitioning of the ship, irrespective of the fact that the parties have agreed (subsequent to the requisition) that the charterer would take the ship after her release.

If frustrated, the contract is not void *ab initio,* but only from the moment of frustration.[35] Parties are released from their obligations that are due after the frustrating event, however they still remain responsible for those obligations, which arose before such event.[36]

Prior to introducing the doctrine of frustration under English law, the rule of absolute contracts, as laid down in *Paradine v Jane*[37] by the Court of King's Bench was applied. According to this rule, when the party binds himself by contract "absolutely to do a thing", he cannot escape liability.[38] However, case law gradually mitigated the effects of this harsh rule,[39] giving effect to the demands of the justice.[40] The *Taylor v Cardwell*[41] is generally

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33 Bank Line v Arthur Capel & Co (Court of Appeals 1919).

34 Hirji Mulji v Cheong Yue Steamship Co (Court of Appeals 1926).

35 *Cheshire, Fifoot and Furmston's Law of Contract*, 731; Liu, "The Doctrine of Frustration: An Overview of English Law," 262; Treitel, *Frustration and Force Majeure*, para. 15–002.

36 McKendrick, *Contract Law*, 902–921; Hirji Mulji v Cheong Yue Steamship Co (Court of Appeals 1926); Chandler v Webster (Court of Appeals 1904).

37 Paradine v Jane (King's Bench division 1647).

38 *Cheshire, Fifoot and Furmston's Law of Contract*, 714; Treitel, *Frustration and Force Majeure*, para. 2–001; McKendrick, *Contract Law*, 868.Liu, "The Doctrine of Frustration: An Overview of English Law," 263.

39 Taylor v Caldwell (Court of Appeal 1863); Paul Krell v CS Henry (King's Bench 1903).

40 McKendrick, *Contract Law*, 867–868; Lauritzen A.S. v Wijsmuller B.V. (THE "SUPER SERVANT TWO"), 1 Lloyd's Rep 148 (House of Lords 1989); *Time Charters*, para. 26–5.

41 Taylor v Caldwell (Court of Appeal 1863).

considered to have established the modern doctrine of discharge by supervening events, doctrine of frustration.[42]

As a matter of general feature of this doctrine, it must be noted, that mere hardship or inconvenience would not be sufficient to justify discharge by frustration,[43] "*[t]here must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.*"[44] Legal scholars confirm that, courts would not apply the doctrine of frustration unless they conclude that to hold the parties bound, in the light of the altered circumstances, would change the fundamental nature of the contract.[45]

Doctrine of frustration is not a remedy for the consequences of bad commercial bargains,[46] it operates within a very narrow limits and is not easily to be invoked.[47] Parties have to find themselves committed to radically different obligations from that they originally contemplated for.[48]

When referring to radically different obligations, it shall be noted that heavier financial burden will not be considered to substantially alter parties' contractual obligations.[49] As it was held in *Occidental v. Skibs A/S Avanti:* "*The fact that [...] ships were chartered during a boom period when rates were high, which was then followed by a period of depression*

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42 Treitel, *Frustration and Force Majeure*, para. 2–001; 2–022–2–038.

43 *Cheshire, Fifoot and Furmston's Law of Contract*, 716.

44 Davis Contractors Ltd v Fareham Urban District Council (House of Lords 1956).

45 *Time Charters*, para. 26.49; Tsakiroglou & Co. Ltd. v. Noblee and Thorl GmbH (House of Lords 1962); Ocean Tramp Tankers Corporation v V/O Sovfracht ,The Eugenia (Court of Appeal 1964).

46 Treitel, *Frustration and Force Majeure*, 2–036; Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (House of Lords 1982).

47 McKendrick, *Contract Law*, 867-878; Treitel, *Frustration and Force Majeure*, para. 2–037.

48 *Cheshire, Fifoot and Furmston's Law of Contract*, 715.

49 *Time Charters*, para. 26.48.

during the currency of the charters, is a normal phenomenon of the fluctuations to which the tanker market is ordinarily subject from time to time."[50] Hence, context of commercial relationship is relevant when identifying whether the change in circumstances can be considered radical as opposed to more onerous and burdensome.

The economic consequences of the frustration is that "losses lie where they fall."[51] Advance payments if already paid, shall not be reimbursed.[52] This was attested in *Lloyd Royal* v. *Stathatos,* [53] where the Court of Appeal rejected the charterers' claim for the return of hire paid in advance. This approach was deviated from in *Fibrosa* v. *Fairbairn.*[54] The House of Lords allowed reimbursement of the advance payment to the extent of the full absence of the consideration. Nevertheless, this is considered to be a very rare case in practice.[55]

The consequences of the doctrine, has been modified by the Law Reform (Frustrated Contracts) Act 1943 (the "Act").[56] The Act only regulates subsequent rights of the parties to the frustrated contract.[57] A right of recovery of already paid or payable hire falls within the scope of the Act. Notably, the Act applies to time charter parties while voyage charterparties as well as bills of lading are expressly excluded from the scope of its application. Details of this regulation will not be further discussed in the paper, as the Act deals with the subsequent rights of the parties, while the thesis is focused on the circumstances in which the contract can be deemed frustrated. Therefore, allocation of losses following the frustration of the contract falls well beyond the scope of this study.

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50 Occidental v. Skibs A/S Avanti, 1 Lloyd's Rep 293 (Queen's Bench 1976).

51 Davis Contractors Ltd v Fareham Urban District Council (House of Lords 1956).

52 *Time Charters*, para. 26.59.

53 Lloyd Royal Belge SA v Stathatos, 30 Great Britain Times Law Reports 70 (1917).

54 Fibrosa Spolka v Fairbairn (Court of Appeals 1943).

55 *Time Charters*, para. 15.1.

56 McKendrick, *Contract Law*, 904–906; *Time Charters*, para. 26.60 –26.62 .

57 *Cheshire, Fifoot and Furmston's Law of Contract*, 735–742; *Time Charters*, para. 26.60–26.62.

2.2 Operation of the Doctrine

It is not possible to predefine or classify specific circumstances to which the doctrine of frustration will apply.[58]

As often noted in the legal literature, application of the doctrine of frustration is the question of fact and law. For instance, the question whether delay in general or particular delay is capable of frustrating the contract is a matter of law, but the question whether, actually experienced delay is of sufficient length to cause frustration is a matter of fact.[59] Notably, it is sometimes hard to make such distinction between the issues of fact and that of the law.[60]

In *Edwinton Commercial Corporation v Tsavliris Russ*[61] the Court of Appeal held that application of the doctrine requires "multi-factorial" approach and the factors that need to be considered are terms of the contract, their context, matrix of facts, parties reasonable expectations and especially their knowledge, assumptions and contemplations regarding the particular risk.

Therefore, application of the doctrine often constitutes a difficult task for the courts and arbitrators. One of the decisive elements when applying the doctrine is the test of "radically different" obligations. This test implies that "*there has to be [...] a break in identity be-*

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58 *Cheshire, Fifoot and Furmston's Law of Contract*, 719.

59 *Time Charters*, para. 26.11; National Carriers Ltd v Panalpina (Northern) Ltd (House of Lords 1981); Universal Cargo Carriers Corp. v Citati, 1 Lloyd's Rep 174 (Queen's Bench 1957).

60 Treitel, *Frustration and Force Majeure*, para. 16–002.

61 Edwinton Commercial Corporation and Global Tradeways Ltd v Tsavliris Russ (Worldwide Salvage and Towage) Ltd "Sea Angel," 2 Lloyd's Rep 517 (English Court of Appeal 2007).

tween the contract as provided for and contemplated and its performance in the new circumstances."[62]

Thus, complex analysis of facts and terms of the contract is required when applying the doctrine, which justifies the above suggestion that no predefined test can exist to identify when the doctrine will operate.

2.3 Common Causes of Frustration

Having said that the threshold for invoking the doctrine is rather high, this assertion has to be further confirmed by addressing relevant causes of frustration. Therefore, present section will illustrate how the courts, faced with the respective cause of frustration, actually have applied the doctrine in practice.

One can only provide for the non-exhaustive list of the circumstances that can bring the doctrine into operation.[63] Such circumstances can be frustration of purpose,[64] supervening illegality or change in law,[65] death, illness or incapacity of a person.[66] However, most complex and controversial causes of frustration, particularly relevant for time charterparties are: impossibility, delay and interruption.[67] Practical difficulty with these causes of frustration is that their duration and effects can hardly be predictable and therefore factual

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62 Ibid.

63 Liu, "The Doctrine of Frustration: An Overview of English Law," 267.

64 Paul Krell v CS Henry (King's Bench 1903); Herne Bay Steamboat Co v Hutton (Court of Appeal 1903).

65 Treitel, *Frustration and Force Majeure*, para. 8.001–8.055.

66 Joseph Chitty, *Chitty on Contracts*, 29th ed, The Common Law Library (London: Sweet & Maxwell, 2004), para. 23–020–23–055.

67 *Cheshire, Fifoot and Furmston's Law of Contract*, 721; Metropolitan Water Board v Dick Kerr and Co Ltd (House of Lords 1918).

and legal assessment of these causes is more complex.[68] Therefore, following sections will address the impossibility, delay and interruption as the causes of frustration.

2.3.1 Impossibility

Supervening impossibility of performance may discharge the obligations of the parties if it is sufficiently serious to cause this effect. Same applies to the partial or temporary impossibility.[69] Since there is no such concept as partial or temporary frustration, the contract is either frustrated or remains in force.[70] However, this does not necessarily apply in case when the charterparty can be separated in distinct and severable voyages.[71] Separable contract can be described as one, dealing with: "*[...] wholly distinct, separate, and severable adventures between which there was no interdependence in the sense that the carrying out of any one of them was made to depend in any way upon the carrying out or abandonment of any of the others*".[72] In the *Dominion Coal* v. *Roberts,*[73] *which* concerned seven-year time charter with an option to extend to ten years, contract was considered to be indivisible and it was held that the requisition of the ship for the first three years either frustrated the whole charter or none of it.

Destruction of the subject matter of the contract is the most obvious situation when performance becomes impossible and the contract is discharged.[74] Furthermore, contract may be discharged where the subject matter of the contract becomes unavailable for the purpose of performance, when it is no longer at the disposal of the parties.[75]

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68 McKendrick, *Force Majeure and Frustration of Contract*, 123–138.

69 Treitel, *Frustration and Force Majeure*, para. 3–001, 3–002, 3–003.

70 Ibid., Paul Krell v CS Henry (King's Bench 1903).

71 *Time Charters*, para. 26.12.

72 BTP Tioxide Ltd v Pioneer Shipping Ltd, The Nema, 2 Lloyd's Rep 339 (Court of Appeals 1982).

73 Dominio Coal Company, Ltd. v. Roberts and others, 4 Lloyd's Rep 434 (1920).

74 Taylor v Caldwell (Court of Appeal 1863).

75 Treitel, *Frustration and Force Majeure*, 4–002.

Thus, identification of the subject matter of the charterparty is necessary. Ship is regarded to be the subject-matter of the agreement for time and voyage charters, as these contracts are the type of service contracts to be performed by use of the specified ship.[76]

Therefore, given that the ship is the subject matter of the time charter contract, impossibility would arise and time charter will be frustrated by the actual total loss of the chartered ship, or if the ship is "*so badly damaged that she has effectively been destroyed as a commercial ship or rendered unfit for the charter with no prospect of being made again fit.*"[77]

Where the loss of the chartered ship is the cause of frustration of the charter, any clause permitting the substitution of another ship will not prevent frustration, unless parties incorporate clear provision allowing substitution after the loss of the ship.[78] In *Niarchos (London), Ltd. v. Shell Tankers, Ltd*.[79]*,* the seven-year time charter incorporated a clause giving her owners the right to substitute chartered ship with the larger one. During the charter service the ship ran aground and became a total loss. Court held that as the time charter had been frustrated by the total loss of the ship and her owners no longer had a right to make a substitution

A charterparty may also be frustrated when the ship is detained and hence becomes unavailable for the performance of the contract.[80] This is illustrated by the number of cases

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76 Ibid., 4–004.

77 Blane Steamships v. Minister of Transport, 2 Lloyd's Rep 155 (Court of Appeals 1951); *Time Charters*, para. 26.14 .

78 *Time Charters*, para. 26.15.

79 Niarchos (London), Ltd. v. Shell Tankers, Ltd., 2 Lloyd's Rep 496 (Queen's Bench 1961).

80 Treitel, *Frustration and Force Majeure*, para. 4–003.

initiated as a result of the Gulf War between Iran and Iraq.[81] In these cases, the prolonged detention of ships, which had been time-chartered had the effect of discharging the contracts.

2.3.2 Delay and Interruption

Number of cases have addressed the question whether the contract has been frustrated by the delay and interruption. However the results reached are not particularly clear and consistent. The courts analyze various factors to establish that the delay is of the dimension to frustrate the contracts. These elements will be discussed in the sections immediately following below.

2.3.2.1 Delay as a Cause of Frustration

In order for a delay to frustrate a contract its effect must be radical.[82] As it was suggested in *Tatem v. Gamboa:* "*if the foundation of the contract goes [...] by reason of such long interruption or delay that the performance is really in effect that of a different contract, [...] contact is regarded as frustrated.*"[83]

Length and effect of the delay was ground for frustration in *Lloyd Royal Belge SA v Stathatos.*[84] The case concerned a time charter for "one round trip Gibraltar to the States" which entitled the charterers to cancel the contract if the ship was not delivered by December 10.

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81 Kodros Shipping Corporation v. Empresa Cubana De Fletes (The Evia), Lloyd's Rep. 334 (Court of Appeal 1982).; Kissavos Shipping Co. S.A v. Empressa Cubana De Fletes (THE "AGATHON"), Lloyd's Rep. 211 (Court of Appeal 1982).; International Sea Tankers Inc v. Hemisphere Shipping Co. Ltd. (The "Wenjiang" (No. 2)), 1 Lloyd's Rep. 400 (Queen's Bench Division (Commercial Court) 1982).; Vinava Shipping Co. Ltd. v. Finelvet A.G., Lloyd's Rep 503 (QBD 1982).

82 *Time Charters*, para. 26.17 .

83 Tatem ltd v Gamboa, 61 Lloyd's Rep 149 (King's Bench Division 1938).

84 Lloyd Royal Belge SA v Stathatos, 30 Great Britain Times Law Reports 70 (1917).

The ship was detained by the Admiralty on December 2, and not released till the following February 10. The charterparty was held to be discharged, as there had been "*such interruption of the common object of the parties as to amount to frustration of the common adventure.*"[85]

The delay as a cause of frustration was also discussed in a pivotal case of *Bank Line Ltd v Arthur Capel & C.*[86] The vessel was time chartered for one year on a charterparty made on February 16, 1915. The charter period was to run from the time when the ship was placed at the charterer's disposal, which was contemplated to happen on April of 1915. The ship was not delivered within the contractually agreed time and was subsequently requisitioned by the government in May 1915. She was not released until September 1915. The House of Lords held that the contract had been frustrated by the requisition as the postponement of the commencement date of the charter was thought to last for an indefinite period.

This decision is criticized for the following reasons: delay did not seem to interfere with the use of the ship but on the contrary, charterer was the one who was seeking to enforce the contract. The shipowner's real motive for arguing frustration seems to have been increased freight rates on the market. Therefore, shipowner in fact profited from the discharge, which is why this ruling is often criticized as being improper application of the doctrine of discharge.[87]

There are however certain special factors in the case, which indicate that the shipowner would have been prejudiced, had the contract remained in force. Most important factor concerns the length of the requisition. It was uncertain how long the detention would last. Time of the commencement of the charterparty was to run from the time at which the ship was placed at the disposal of the charterer. At the time of the requisition the ship had not

85 Treitel, *Frustration and Force Majeure*, 5–040.

86 Bank Line v Arthur Capel & Co (Court of Appeals 1919).

87 Treitel, *Frustration and Force Majeure*, para. 5.046-5.047.

yet been placed at his disposal. Hence, had the contract remained in force, it would have restricted shipowner's freedom to dispose of the ship for an indefinite time.[88]

The above case has to be compared with *Modern Transport Co Ltd v Duneric Steamship Co*,[89] where a ship, which had been chartered for 12 months, was placed at the charterer's disposal and was then requisitioned for five and a half months. It was held that the contract remained in force. The crucial fact distinguishing this case from the *Bank Line* case is that, when the requisition took effect, there was no doubt as to the time at which the period of 12 months specified in the charterparty would expire. Hence, there was no such uncertainty, which was likely to cause prejudice to the shipowner.[90] Another special factor (although not decisive) in the *Bank Line Ltd v Arthur Capel & C.*, which was considered by the court, is that in June 1915 both parties regarded the contract as at an end and shipowners seem to have acted in reliance on this shared view. Thus, the final result in the *Bank Line Ltd v Arthur Capel & C* case can be justified by reference to special factors listed above.[91]

In certain cases however, the courts did not consider that particular delay was sufficient to have frustrating effect, especially in cases where the result of the delay has been no more than extra expense for the owners or the charterers.[92]

Good example would be the case *Ocean Tramp Tankers* v. *Sovfracht,*[93] where the ship was time chartered for a trip from Genoa to India via the Black Sea. Before the terms of the charter were fixed the parties, who were aware of the danger of the Suez Canal being

88 Ibid.

89 Modern Transport Co Ltd v Duneric Steamship Co (King's Bench Division 1917).

90 *Treitel, Frustration and Force Majeure*, 5–047.

91 Ibid.

92 *Time Charters*, para. 26.19 ; Edwinton Commercial Corporation and Global Tradeways Ltd v Tsavliris Russ (Worldwide Salvage and Towage) Ltd "Sea Angel," 2 Lloyd's Rep 517 (English Court of Appeal 2007).

93 Ocean Tramp Tankers Corporation v V/O Sovfracht ,The Eugenia (Court of Appeal 1964).

closed, included the printed War Clause in the charterparty. The ship entered the Canal and was trapped there. It was held by the Court of Appeal that the charterers were in breach of the War Clause in allowing the ship to enter the Canal, thus they could not rely on self-induced frustration. The fact that the ship would, if not trapped, have had to proceed around the Cape to India did not frustrate the charter because the cargo was not perishable and the prolongation (138 days from delivery to redelivery against 108 days) was not so significant to make the voyage around the Cape radically different. Most importantly, the only real difference was that the voyage became considerably more expensive and this was not a ground for regarding the contract as frustrated.[94]

2.3.2.2 Strike and War as Interruption

Strikes in general are of uncertain duration and they will not usually frustrate a charter.[95] Nevertheless, there is nothing to prevent a strike having this effect in appropriate circumstances.[96] Decisive factor for frustrating the charterparty is the effect that strike will have on the performance of the contract: "*It is not the nature of the cause of delay which matters so much as the effect of that cause upon the performance of the obligations which the parties have assumed one towards the other.*"[97]

Whether the outbreak of war (apart from cases of illegality) would cause frustration would depend upon its effects on the charter.[98] Wars vary greatly in their intensity and geographic

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94 *Time Charters*, para. 26.19.

95 Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (House of Lords 1982); Reardon Smith Line, Ltd. v. Ministry of Agriculture, Fisheries and Food, 1 Lloyd's Rep 385 (Court of Appeal 1961).

96 *Time Charters*, para. 26.40; John Furness Wilson, *Carriage of Goods by Sea*, 5th ed (Harlow, England ; New York: Pearson/Longman, 2004), 40.; McKendrick, *Force Majeure and Frustration of Contract*, 88–91, 123-138

97 Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (House of Lords 1982).

98 Akties. Nord-Ostero Rederiet v. E. A. Casper, Edgar & CO., LTD., 14 Lloyd's Rep. 203 (House of Lords 1923).

scope. Some may be expected to have a devastating effect on a particular charter while others might affect it slightly or not at all.[99]

As it is stated in *Finelvet AG v. Vinava Shipping Co Ltd,*[100] declaration of war does not prevent the performance of a contract. It is the acts done in furtherance of the war, which may prevent performance, depending on the individual circumstances of the case.

Good demonstration of this statement is *Kodros Shipping Corporation v. Empresa Cubana De Fletes*[101] where the ship was time chartered for 18 months and was due to be redelivered on May 20, 1981. On September 22, 1980 war broke out between Iraq and Iran and hostilities in the area of the Shatt-al-Arab prevented the sailing of the ship. However, the Court of Appeal held that charter was frustrated not on the date when the war broke out, but on 4 October, when it became obvious that the ship would be affected by the war.

2.3.2.3 Proportionality Test

If the delay lasts, or is likely to last, for so long that no part of the agreed performance can be rendered, the contract will be discharged.[102] In Gulf War cases, were time-chartered ships were detained for long-periods, contracts were frustrated and consequently charterers ceased to be liable for hire as soon as it became clear that the detention would extend beyond the period of the charterparties.[103] Herewith, when the delay appears at first to be like-

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99 *Time Charters*, para. 26.43; Cheshire, Fifoot and Furmston's Law of Contract, 721-722.

100 Finelvet AG -v- Vinava Shipping Co Ltd ("The Chrysalis"), 1 Lloyd's Rep 503 (1983).

101 Kodros Shipping Corporation v. Empresa Cubana De Fletes (The Evia), Lloyd's Rep. 334 (Court of Appeal 1982).

102 Treitel, *Frustration and Force Majeure*, 5–049.

103 Kodros Shipping Corporation v. Empresa Cubana De Fletes (The Evia), Lloyd's Rep. 334 (Court of Appeal 1982); Vinava Shipping Co. Ltd. v. Finelvet A.G., Lloyd's Rep 503 (QBD 1982).

ly to be of short duration the contract will be frustrated if, and as soon as, it appears that the delay will be extraordinarily lengthy.[104]

In cases when some performance of the contract is still possible, the test used by the courts is proportionality test, which assesses the relation between the unexpired balance of the charter period at the time of the alleged frustration to the whole contract.[105] As it was noted in *Anglo-Northern* v. *Jones:* "*[t]he main consideration is the probable length of the total deprivation of use of the vessel as compared with the unexpired portion of the charterparty."*

The same test was applied in *FA Tamplin Steamship Co, Ltd v Anglo-Mexican Petroleum Products Co. Ltd.*[106] A tanker was chartered for five years and when the charterparty still had nearly three years to run, the ship was requisitioned during the First World War. Ship's owners claimed that the contract was frustrated. In the view of the majority, the proportion of the part, which might have been performed, was sufficiently large as compared to the original contract. There would be several months during which this ship would be available for commercial purposes before expiration of the charterparty. Although the period of the requisition was indefinite, there was a sufficient chance for the ship to be available for further service under the charter before its expiry.[107] Therefore, the charterparty was not considered to be frustrated.

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104 *Time Charters*, para. 26.47; International Sea Tankers Inc. v. Hemisphere Shipping Co. Ltd. (The "Wenjiang" (No. 2)), 1 Lloyd's Rep. 400 (Queen's Bench Division (Commercial Court) 1982).

105 *Time Charters*, para. 26.26, 26.30; Port Line Ltd. v. Ben Line Steamers, 1 Lloyd's Rep. 290 (Queen's Bench 1958); Heilgers v. Cambrian Steam Navigation, 34 Times Law Reports 72 (Court of Appeals 1917); National Carriers Ltd v Panalpina (Northern) Ltd (House of Lords 1981).

106 FA Tamplin Steamship Co, Ltd v Anglo-Mexican Petroleum Products Co, Ltd (House of Lords 1916).

107 *Time Charters*, para. 26.28.

The decision of the House of Lords in *FA Tamplin Steamship Co, Ltd v Anglo-Mexican Petroleum Products Co, Ltd.* should, however, be treated considering special circumstances of that case. Important factor of this case is that it was the owners who claimed that the contract was discharged. Had their claim succeeded, they would have gained a windfall profit: compensation paid by the Government, which exceeded the hire payable under the charterparty. Thus, it can be concluded that if the admiralty compensation had been lower than the hire and the charterers had refused to continue with the charter the decision of the House of Lords might have been different.[108] The ruling in *FA Tamplin Steamship Co, Ltd v Anglo-Mexican Petroleum Products Co, Ltd* was upheld by Court of Appeal in *Modern Transport Co Ltd v Duneric SS Co,*[109] where the case concerned the time charter for 12 months. The court held that the requisition was for less than half the period of the time charter and this was not sufficient to bring the charterparty to an end.

2.3.2.4 Assessment of the Extent of Interruption

The length and effect of the interruption must be assessed at the time when it occurs.[110] In *Anglo-Northern v. Jones*[111] the rule was established as follows: "*the parties must have the right to claim that the charterparty is terminated by frustration as soon as the event upon which the claim is based happens. The question will then be what estimate would a reasonable man of business take of the probable length of the withdrawal of the vessel from service […] and it will be immaterial whether his anticipation is justified or falsified by the event.*"

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108 *Time Charters*, para. 26.29.

109 Modern Transport Co Ltd v Duneric Steamship Co (King's Bench Division 1917).

110 Treitel, *Frustration and Force Majeure*, para. 9–008–9–009; Denny, Mott & Dickson Ltd v James B Fraser & Co Ltd (House of Lords 1944).; National Carriers Ltd v Panalpina (Northern) Ltd (House of Lords 1981).

111 Anglo-Northern Trading Co. v. Emlyn Jones (King's Bench 1917).

In *Court Line* v. *Dant & Russell,*[112] ship was trapped due to the War between Japan and China and it was expected that she would be prevented from sailing down river indefinitely, which consequently did not prove to be correct. Notwithstanding this fact, the charter was considered to be frustrated.

Likewise, in *BTP Tioxide Ltd v Pioneer Shipping Ltd*,[113]Court of Appeals dismissed as irrelevant the fact that the strike unexpectedly ended only nine days after the arbitrator had decided that it had frustrated the charter.

Thus, regarding the assessment of the delay and interruption it can be concluded that the cause of frustration is the delay/interruption, rather than the event causing such delay/interruption and therefore, frustration has to be judged in the light of expectations assessed retrospectively rather than objectively in the light of the information available at the time of trial.[114]

2.4 Factors Excluding Frustration

Having discussed the concept and common causes of the doctrine, it is important to outline that parties cannot always rely on the doctrine of frustration when occurring supervening events satisfy the "test of radically different". Therefore, following sections will address the cases when the parties are excluded to invoke the doctrine of frustration.

112 Court Line Ltd. v. Dant & Russell , INC., 64 Lloyd's Rep 212 (King's Bench Division 1939).

113 BTP Tioxide Ltd v Pioneer Shipping Ltd, The Nema, 2 Lloyd's Rep 339 (Court of Appeals 1982).

114 McKendrick, *Force Majeure and Frustration of Contract*, 123–138.

2.4.1 Self-induced Frustration

The essence of the frustration is that it shall not be the result of an omission of a positive act, subject to certain limitations.[115] It should not be due to the deliberate act or election of the party seeking to rely on it.[116]

Omission will frustrate the contract only when there is duty to act, which does not extend beyond what is reasonable, as demonstrated by the case below.

In the *Bank Line* case,[117] the shipowners could have secured the early release of the ship, which had been requisitioned if they had offered to provide a substitute vessel to the respective authorities, but the House of Lords held that they were under no duty to take such step. As it can be inferred from the decision, the reason why no such duty existed is that the efforts required from the shipowners, for securing early release of the ship were unreasonable.

Frustration might be considered to be self-induced where it is due to the "act" or "election" of the party claiming the discharge. This might be the case for instance, when party enters into number of contracts and is prevented to perform one or some of them.[118] It is suggested in the legal literature, that the element of "election" is not present when it is the law that determines which contract is to be discharged, as opposed to the party itself.[119]

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115 Treitel, *Frustration and Force Majeure*, 14–016.

116 *Chitty on Contracts*, 23–059; *Time Charters*, para. 26.55; Maritime National Fish v Ocean Trawlers (Court of Appeals 1935).

117 Bank Line v Arthur Capel & Co (Court of Appeals 1919).

118 Hugh G Beale, Joseph Chitty, and Anthony Gordon Guest, *Chitty on Contracts. 1, 1,* (London: Sweet & Maxwell, 2012), para. 23.062.

119 Treitel, *Frustration and Force Majeure*, 14–022; Maritime National Fish v Ocean Trawlers (Court of Appeals 1935).

The leading case on the self-induced frustration is *Lauritzen A.S. v Wijsmuller B.V (The Super Servant Two).*[120] The respondents had to transport oil-drilling rig from Japan to Rotterdam, using one of their two ships Super Servant One or Super Servant Two. Respondents selected Super Servant Two to perform the voyage. However the selected ship sunk while performing another contact. Respondents claimed frustration due to the destruction of the ship. In the view of the Court of Appeal, as the defendants had a choice to select the ship for performing the voyage, alleged frustrating event was caused by their own act – the choice to perform voyage with Super Servant Two and not by a supervening event. Therefore they could not rely on the frustration doctrine. The Court of Appeal held that it was irrelevant that the defendants could no allocate Super Servant One to perform all of concluded contracts as "*it is within the promisor's own control how many contracts he enters into and the risk should be his.*"[121]

This ruling has been described as a harsh decision.[122] Two practical steps could have been taken to avoid such result: had the contract indicated that it should have been performed with Super Servant Two, the sinking of that vessel, without negligence on the part of the defendants, would have entitled the defendants to seek relief under the doctrine of frustration. Thus, the element of "election" would have been excluded. The second step could have been to insert respectively drafted *force majeure* clause into the contract and allocate the risks accordingly. This case obviates importance of precise contractual regulation, as well as importance of *force majeure* clauses in the commercial contracts.[123] *Force majeure* clauses and its legal effect will be discussed in details in Chapter 3 of this thesis.

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120 Lauritzen A.S. v Wijsmuller B.V, (The Super Servant Two), 1 Lloyds Rep 1 (Court of Appeal 1990).

121 Ibid.

122 McKendrick, *Contract Law*, 884.

123 Ibid., 894; Great Elephant Corp v Trafigura Beheer BV, the "CRUDESKY," Lloyds' Law Reposrter (2013).

Similarly, in *Maritime National Fish v Ocean Trawlers*[124] charterers of a trawler, which could be used only with an otter trawl, claimed to be discharged on the ground that the license needed for the use has not been granted. The licensing requirement was in force at the time of contracting, however due to the change of government policy charterers obtained only three out of five licenses. Frustration was considered to be self-induced since it was due to the election of the defendant not to nominate the chartered vessel for the license.

Frustration will be considered as self-induced, when event, which makes performance of the contract impossible was caused by the party's breach of the charter.[125] In *Monarch Steamship v. Karlshamns Oljefabriker,*[126] frustration was self-induced due to the owner's breach of the seaworthiness obligation. In *Ocean Tramp Tankers Corporation v V/O Sovfracht*[127] for instance, charterers could not rely on the trapping of the ship in the Suez Canal as the cause of frustrating the charter because they were in breach of the War Clause by sending the ship in the canal.

2.4.2 Foreseen and Foreseeable Events

Frustrating event must be neither foreseen, nor foreseeable by the parties. In order to identify whether foreseeability will exclude the doctrine of frustration, the following three factors have to be considered: degree of foreseeability, extent of foreseeability and whether it was the intention of the parties or one of the parties to assume the risk of its occurrence.[128] For inferring such risk-assumption it is necessary to demonstrate, that not only the super-

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124 Maritime National Fish v Ocean Trawlers (Court of Appeals 1935).

125 *Time Charters*, para. 26.52; Beale, Chitty, and Guest, *Chitty on Contracts. 1, 1,*, para. 24–048.

126 Monarch Steamship Co Ltd -v- Karlshamns Oljefabriker (House of Lords 1949).

127 Ocean Tramp Tankers Corporation v V/O Sovfracht ,The Eugenia (Court of Appeal 1964).

128 Treitel, *Frustration and Force Majeure*, 13–012.

vening event as such, but also its consequences or effects on the contract were foreseeable.[129]

In *W J Tatem Ltd v Gamboa,*[130] a charterparty was frustrated due to the detention of the ship. This outcome was determined by the fact that it was not foreseeable that the ship would be detained not only for the period of the charter, but also for a long period thereafter, making the extent of the detention unforeseeable.

If the parties foresaw the event but made only partial provision for it, than it will be considered that they did not assume the risk for the event. This is the reason why in the *Bank Line v Arthur Capel & Co*[131] a charterparty was frustrated by the requisition of the ship even though the parties had foreseen that event and had actually made provision for it in the contract.

Foreseeability is another factor that excludes application of the doctrine. The event shall not be within the contemplation of the parties at the time of entry into the contract.[132] The difficulty in this case is to identify what is and what is not foreseeable at the moment of the contracting.[133] Certain events are foreseeable in the sense that one can be aware that they may take place, however the degree of certainty that this event will occur and affect the particular agreement must be assessed in relation to each particular case and will be the question of evaluation by the courts.[134]

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129 Ibid., 13–013.

130 W J Tatem Ltd v Gamboa (King's Bench 1939).

131 Bank Line v Arthur Capel & Co (Court of Appeals 1919).

132 McKendrick, *Force Majeure and Frustration of Contract*, 35.

133 McKendrick, *Contract Law*, 867.

134 *Ibid.*, 880.

And lastly, when foreseeability is alleged, it is important to consider the "*nature of the service involved and the nature and extent of the consequences of the intervening events.*"[135] In *Edwinton Commercial Corporation and Global Tradeways Ltd v Tsavliris Russ,*[136] one of the decisive factors against the charterers' claim of frustration was that the ship had been chartered for salvage services and this carried with it the risk that had materialized, namely that the port authorities might have detained the chartered ship for obtaining security in respect of claims relating to the initial casualty.[137]

2.4.3 Express Provision for the Frustrating Event

If parties expressly provide for the frustrating event in the contract, the question is whether the occurred event is more fundamental than that contemplated by the parties.[138] Thus, the issue of interpretation arises to identify whether the clause is complete and is of all-embracing character.[139]

In *Pacific Phosphate Company, Ltd. v. Empire Transport Company, Ltd.*,[140] a contract was made in 1913 according to which ship owners undertook to provide charterers with certain vessels in each of the years 1914 to 1918. The parties agreed that if war broke out shipments might at the option of either party be suspended until the end of hostilities. After the start of the World War I, court held that the contract was discharged, as the suspension clause was not intended by the parties to cover war of such catastrophic nature as in fact

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135 *Time Charters*, para. 26.16.

136 Edwinton Commercial Corporation and Global Tradeways Ltd v Tsavliris Russ (Worldwide Salvage and Towage) Ltd "Sea Angel," 2 Lloyd's Rep 517 (English Court of Appeal 2007).

137 *Time Charters*, para. 26.19.

138 *Cheshire, Fifoot and Furmston's Law of Contract*, 725.

139 Ibid.; *Time Charters*, para. 26.34; Bank Line v Arthur Capel & Co (Court of Appeals 1919).

140 Pacific Phosphate Company Ltd. v. Empire Transport Company Ltd., 4 Lloyd's Rep 189 (King's Bench Division 1920).

occurred.[141] Consequently, the fact that the event may have been contemplated by the parties or even anticipated at the time the contract was entered into will not exclude the application of the doctrine, unless the parties have made complete provision for it to fully cover the different circumstances, which have arisen.[142]

Based on the above, it can be concluded, that when parties allege the contract to be frustrated as a result of the impossibility, delay or interruption, or any other cause, provisions of the charterparty shall be examined in their context whether they are sufficiently wide to deal with the new development. If they are not, and in practice few will be sufficiently wide to cover the situation so radical as to cause frustration - then they will not prevent frustration.[143] This principle is established in *Fibrosa Spolka v Fairbairn,*[144] by the Court of Appeals and implies that: when supervening events render the performance of a contract impossible, and there is no undertaking by the parties to bear risk for such event, contract will be frustrated notwithstanding the fact that the parties may have expressly provided for the clause dealing with the interruption.

Such express provisions, dealing with the frustrating event can be drafted in the form of a *force majeure* clause. Legal effect of such clauses, as well as their interrelation with the doctrine of frustration will be analyzed in Chapter 3 of this study.

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141 Select Commodities Ltd v Valdo SA (Queen's Bench Division 2007).

142 *Time Charters*, para. 26.31, 26.32; Pacific Phosphate Company, Ltd. v. Empire Transport Company Ltd, 4 Lloyd's Rep 189 (King's Bench Division 1920).

143 *Time Charters*, para. 26.36.

144 Fibrosa Spolka v Fairbairn (Court of Appeals 1943).

2.5 Conclusion

As demonstrated above, the doctrine of frustration is not tailored to satisfy the needs of commercial parties in modern world for the following two main reasons: firstly, the threshold for invoking the doctrine of frustration is rather high; and secondly, the legal effect of the application of the doctrine are drastic in terms that it brings the contract automatically to an end, irrespective of the wishes of the parties.[145]

With respect to the high threshold for establishing the frustration of the contract, it must be noted that this approach reflects the importance of commercial certainty and predictability in English law.[146] Courts have adopted a restrictive approach to the operation of the doctrine in order to avoid it becoming an escape route for a party who has entered into a bad bargain.[147]

The, limits of the doctrine can be summarized as immediately follows below:[148]

Doctrine does not apply where the event was foreseen or foreseeable. Frustration may not be invoked where express provision has been made in the contract for the event that is alleged to have frustrated the contract. Contracting party cannot claim frustration of the contract where the alleged frustrating event was caused by his own conduct, act or omission, rather than a supervening event. The cases regarding the delay and self-induced frustration

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145 Treitel, *Frustration and Force Majeure*, 55-70; Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (House of Lords 1982).

146 Scottish Navigation Co. Ltd. v W. A. Souter & Co. (King's Bench division 1917); Bank Line v Arthur Capel & Co (Court of Appeals 1919).

147 Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (House of Lords 1982).

148 McKendrick, *Contract Law*, 867.

require multi-factorial assessment by the courts, their outcome largely depends on the particular circumstances of the case, causing uncertainty and inconsistency.[149]

As to the legal consequences of frustration, in case of occurrence of unforeseen events, the parties would often prefer to have their obligations under the contract suspended or modified to adjust to the changed circumstances, rather than treat the contract as discharged altogether. Doctrine of frustration is thus rather inflexible in this respect.

Having analyzed the harshness and impracticability of the doctrine of frustration under English law, it needs to be further assessed whether there are any mechanisms available for the parties to the contract to avoid application of the doctrine and if so, what is interrelation between these mechanisms and the doctrine of frustration.

149 Liu, "The Doctrine of Frustration: An Overview of English Law," 285–286.

3 Contractual Provisions for Supervening Events

The starting point for determining whether the contract has been frustrated must be the terms of the contract itself.[150] This is because, firstly, it is necessary to ascertain the extent of the contractual obligations in order to decide whether performance in the changed circumstances is radically different from the obligations initially assumed; and secondly, it must be ascertained whether the contract makes provision for the events, which have occurred.[151] If the contract does make the provision for that event, then it is the contract that will regulate the impact of the event on the contractual obligations of the parties. In other words, party will be able to rely on contractual remedy as opposed to claiming discharge under the common law.

As already indicated above, the effect of the doctrine of frustration is radical. It automatically brings the contract to an end. Parties however, might want to avoid such drastic consequence of the doctrine, or on the contrary, want to be excused from performing their contractual obligations in the situations when they cannot rely on the frustration doctrine.[152] Therefore, they may provide express provisions in the contract either for the specific obstacles to performance or for such obstacles in general in *force majeure* clauses and define the effects of the supervening events on their rights and obligations.[153]

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150 McKendrick, *Contract Law*, 867.

151 Ibid., 868, 902.Scrutton, *Scrutton on Charterparties and Bills of Lading*, para. 1–089.

152 Treitel, *Frustration and Force Majeure*, para. 2–037; 2–038.

153 Ibid., Bremer Handelsgesellschaft m.b.H v. J. H. Rayner & Co. LTD., 2 Lloyd's Rep. 73 (Queen's Bench Division (Commercial Court) 1978).

This chapter firstly defines the concept of *force majeure.* Secondly, the effect of the *force majeure* clauses on the contractual rights and obligations of the parties and interrelation of such clauses with the frustration doctrine is analyzed in details.

3.1 Concept of *Force Majeure*

The concept of *force majeure* is alien to common law, however it is an established doctrine in civil law jurisdictions (Italy, France, Norway, Germany)[154]and can be defined as follows:

"*Force majeure occurs when the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it impossible. I promised to do this but I cannot due to some irresistible unforeseeable and uncontrollable event*."[155]

Thus, in civil law jurisdictions *force majeure* constitutes an excuse of performance even in the absence of an express contractual provision.[156] As for the f*orce majeure* clause, it seeks to anticipate eventualities that might arise after the contract is concluded and settle the allocation of risks beforehand in an agreed, rather than imposed manner. The scope of the contractual force *majeure clause* can be broader than that provided in the relevant statute. For that reason, force *majeure* clauses are common elements of commercial contracts both in civil law and common law jurisdictions.[157]

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154 Treitel, *Frustration and Force Majeure*, para. 12–021.

155 A.H Puelinckx, "Frustration, Hardship, Force Majeure, Imprévision, Wegfall Der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances" 3, no. 2 (1986)

156 Marel Katsivela, "Contracts: Force Majeure Concept or Force Majeure Clauses?," 102.

157 McKendrick, *Force Majeure and Frustration of Contract*, 3–5.

3.1.1 *Force Majeure* in French Law

Force majeure as a concept exists in the common law only to the extent that is incorporated into a contract by the parties. The doctrine has French origin and plays a central part in the structure of contractual liability in French law.[158] It sets limit to the strict liability and is applied by the courts, if the event is a) irresistible, b) unforeseeable, and c) external to the debtor, and d) makes performance impossible and not merely more onerous or difficult.[159]

As it can be seen from the above, to invoke a defence of *force majeure* the debtor (promisor) must show that performance has been made impossible and not merely more onerous. In this respect *force majeure* corresponds with the English law doctrine of frustration.[160] Where the French law differs, however is in the rule that physical or legal impossibility alone is sufficient to apply this defence by French courts. Thus, it is not relevant whether the event substantially and radically alters parties' contractual rights and obligations.[161]

Another factor that shall be outlined is that civil judge, faced with the issue of qualifying an event as a *force majeure* event, may resort to the "statutory" definition of the *force majeure* event, thus the elements for its qualification will be provided by the background law.[162]

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158 *Contract Law*, Casebooks on the Common Law of Europe (Oxford [England] ; Portland, Or: Hart Pub, 2002), 592–594; Puelincks, "Frustration, Hardship, Force Majeure, Imprévision, Wegfall Der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances," 51–52.

159 Marel Katsivela, "Contraacts: Force Majeure Concept or Force Majeure Clauses?," 103; McKendrick, *Force Majeure and Frustration of Contract*, 21.

160 Davis Contractors Ltd v Fareham Urban District Council (House of Lords 1956).

161 McKendrick, *Force Majeure and Frustration of Contract*, 21; Treitel, *Frustration and Force Majeure*, para. 12–021.

162 Tomas Chevallier- Boutell, "Use of Force Majeure as a Risk Allocation Mechanism in the Context of International Project Finance" (April 21, 2010): 6.

3.1.2 *Force Majeure* in English Law

It was through the doctrine of frustration, that common law developed its own remedy to deal with events that affect the basic economics of the contracts. Although, there is no general doctrine of *force majeure* in English law, parties often incorporate *force majeure* clauses in their contracts, thus English courts have to deal with these clauses and interpret them accordingly.[163]

Therefore, questions that need to be analyzed are: the effect of the force *majeure clauses* on the obligations of the parties, relation of this clause to the frustration doctrine, the legal nature of the *force majeure* clauses, how the *force majeure* clauses are construed by the courts.

For identifying the effect of the *force majeure* clauses in particular on the charterparties, the courts have to assess whether the occurred events or event falls within the scope of the said clause.[164]This largely depends on the wording of the clause and its interpretation by the courts. Therefore, brief overview regarding the construction of time charterparty terms will be provided.

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163 McKendrick, *Force Majeure and Frustration of Contract*, 7; A.H Puelincks, "Frustration, Hardship, Force Majeure, Imprévision, Wegfall Der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances" 3, no. 2 (1986): 51.

164 Treitel, *Frustration and Force Majeure*, para. 12–018.

3.2 Construing Terms in Time Charterparties

3.2.1 Effect of the Contractual Clauses

As already noted earlier, it is not possible for the parties to draft fully self-regulatory contract, which is completely isolated from the governing law.[165] For instance, many of the *force majeure* clauses describe supervening events as events beyond the control of the parties that may not be foreseen or reasonably overcome. This definition has to be interpreted in accordance with the applicable law, namely questions such as what is deemed to be beyond the control of one party, whether it is sufficient to prove that a party has been diligent and has acted in good faith, etc. Thus, two clauses with exactly the same wording might have different legal effects due to their interpretation.[166]

Furthermore, legal consequences of *force majeure* vary from a judicial adjustment for the altered circumstances to termination of the contract or suspension of the contractual obligations.[167] Civil law judge will check and apply the statutory effects of the force *majeure* event if parties omit such regulation in the clause. Common law judge, on the other hand will rely on the wording of the clause and apply principles of contact interpretation to identify the effects of the event.

Considering all above, if parties include the *force majeure* clause in the charterparty and subject it to the English law, coordination of such clause with the canons of interpretation of the governing law is necessary.[168]

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165 *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, 116–117.

166 Ibid., 52.

167 Fontaine, *Drafting International Contracts*, 439–451; THEO RAUH, "Legal Consequences of Force Majeure Under German, Swiss, English and United States' Law" 25:1 (1996): 152.

168 *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, 116–117.

3.2.2 Canons of Interpretation

Having demonstrated the relevance of the governing law on the effect of the contractual clauses and in particular *force majeure* clauses, canons of interpretation relevant for time charterparties shall be addressed below.

Although, standard charterparty forms are extensively used in the maritime industry, the parties usually amend these standard contracts throughout the negotiation.[169] In case of conflict between the standard charterparty clauses and privately negotiated provisions, there is a presumption favoring the latter,[170] as they are considered to more accurately reflect the presumed intention of the parties.[171]

As it is argued in the legal literature, judges are inclined to the literal interpretation of charterparty terms. Nevertheless, most cannons of interpretation shall be considered relevant for interpreting charterparties.[172]

One of the most important canons of interpretation relevant for the scope of the present study is *ejusdem generis* rule. This cannon of construction, "*limits the literal wide meaning of general words if they are following particular words and phrases having common characteristic.*" For instance in case *Andre & Cie v Orient Shipping Rotterdam BV*[173] while determining what constituted off-hire event, it was held that expression "any other cause" must be construed *ejusdem generis* with the preceding list of incidents named in the clause

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169 D. R Thomas, *Legal Issues Relating to Time Charterparties* (London: Informa, 2008), 26.; John Furness Wilson, *Carriage of Goods by Sea*, 7th ed (New York: Pearson/Longman, 2010), para. 1–1.

170 Thomas, *Legal Issues Relating to Time Charterparties*, 26–27.

171 Homburg Houtimport v Agrosin Private Ltd and Ors (The "Starsin") (Court of Appeals 2001);

172 *Chitty on Contracts. First Supplement, First Supplement,* (London: Sweet and Maxwell, 2004); HIH Casualty and General Insurance Ltd v Chase Manhattan Bank (House of Lords 2001).

173 Andre & Cie v Orient Shipping Rotterdam BV (The "Laconian Confidence") (QBD 1996).

and entirely external cause like the interference of authorities, did not exempt charterer from paying hire. Furthermore, the same approach was followed in case *Stag Line v. Foscolo Mango.*[174] However, parties are free to exclude application of *ejusdem generis* rule in their agreement.[175]

This might be particularly important for construing *force majeure* clauses. *Force majeure* clauses often include general, non-specified events such as "*any other similar cause beyond the reasonable control of either party*".[176] This type of general language is quite common in charter parties and "*often invites for litigation or arbitration*".[177] This can be avoided by specifying the events covered by the *force majeure* clause.

Nevertheless, even if the relevant contractual clause is drafted in rather detailed manner, literal construction of such clause will have certain interpretative limits. House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society* introduced the basic principle that interpretation of commercial contract must reflect commercial common sense. Main aspect of this principle can be summarized as follows: if the contract as construed by applying "*ordinary language and rules of syntax*" would lead to unreasonable result, the assumption must be made that the parties cannot have intended it, thus one have to use commercially sensible construction.[178] Good illustration of this principle is also the case *Metropolitan Water Board v Dick Kerr and Co Ltd,*[179]which will be discussed in more details below.

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174 Stag Line v Foscolo Mango (1932).

175 Sidermar SpA ti. Apollo Corporation (1978).

176 SUPPLYTIME 2005, Clause 32

177 Society of Maritime Arbitrators, INC, "The Arbitrator" 42 (July 2011): 4.

178 Investors Compensation Scheme Ltd v West Bromwich Building Society (House of Lords 1998).

179 Thomas, *Legal Issues Relating to Time Charterparties*, 26; Metropolitan Water Board v Dick Kerr and Co Ltd (House of Lords 1918).

Based on the above, it can be concluded that charterparties must be construed in a commercially sensible manner. Thus, courts will interpret the literal meaning of the words in light of the commercial purpose of the contract, policy behind this being desired uniformity in charterparty interpretation[180] and efficient functioning of the shipping market.[181]

3.3 *Force Majeure* Clauses

Force majeure clauses vary from simply drafted clauses to the clauses of rather complex structure. Furthermore, apart from the classic *force majeure* clauses operating only when performance is prevented, more developed ones may apply if performance becomes onerous or even uneconomic. In this case, rather than merely excluding liability, such clause provides for an extension of the time for performance and other adjustments to a party's contractual obligations.[182]

The flexibility of such clauses implies an answer to the question of why parties nevertheless incorporate a *force majeure* clause in their contract when the English law recognizes frustration as a defence against the claims for non-performance of contractual obligations. Frustration, apart from being relatively uncertain concept, has the very severe effect of bringing the contract automatically to an end. Upon occurrence of a frustrating event, both parties are relieved from liability for failure to perform future obligations arising under the contract.[183] A suitably drafted force *majeure clause*, on the other hand,

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180 Mannai Investment Company Limited (Appelants) v. Eagle Star Life Assurance Company Limited (House of Lords 1997).

181 Breadner and others v Granville-Grossman and others (High Court of Justice 2001).

182 Fontaine, *Drafting International Contracts*, 401–439; Richard Christou, *Boilerplate: Practical Clauses* (London: Sweet & Maxwell, 2010), 170–177. Marel Katsivela, "Contracts: Force Majeure Concept or Force Majeure Clauses?," 101–112.; McKendrick, *Force Majeure and Frustration of Contract*, 9,38,39.

183 Treitel, *Frustration and Force Majeure*, 807–818.

may consider the outcome which is more favorable for the both parties, with the possibility of extensions of time being granted to the promisor, suspension or alteration of the contract in certain events, return of sums already paid and, as a last resort, termination of the contract.[184]

Moreover, the *force majeure* clause can also relieve a party from liability should his performance of the contract be prevented by an event beyond his control which does not, however, frustrate the contract. The case of particular importance demonstrating practical significance of *force majeure* clauses is the Court of Appeal case *Lauritzen A.S. v Wijsmuller B.V, Super Servant Two,*[185] as already discussed above in this study. As mentioned above, the respondents had to transport oil-drilling rig using one of their two ships Super Servant One or Super Servant Two. They selected Super Servant Two to perform the voyage. However, the selected ship sunk while performing another contract. In the view of the Court of Appeal, alleged frustrating event was caused by their own act – the choice to perform voyage with Super Servant Two. Therefore the charterers were precluded from relying on the frustration doctrine.

Reasoning of the court in this case also addresses the issue whether the defendants where entitled to rely on the cancellation clause and terminate the charterparty. Proper definition of the scope of the clause required interpreting it in the context of the whole contract. Court of Appeal concluded that notwithstanding that the cancellation right was exercisable in wide range of circumstances, it did exclude liability for negligence. Thus, defendants would be able to rely on the cancellation clause only if non-performance was not due to their negligence. Present case demonstrates that the courts are unlikely to conclude, in the absence of very clear words, that a *force majeure* clause will encompass events caused by

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184 Ibid; Lauritzen A.S. v Wijsmuller B.V, (The Super Servant Two), 1 Lloyds Rep 1 (Court of Appeal 1990).

185 Ibid.

the negligence of the party relying upon the clause.[186] The House of Lords in *Alghussein Establishment v. Eton College* have further confirmed this view.[187] Therefore, although parties were precluded to rely on the doctrine of frustration in *Auritzen A.S. v. Wijsmuller B.V.*, they would be able to rely on the *force majeure* clause to avoid the contractual liability if the loss of the Super Servant Two occurred without the negligence of the defendants.[188]

In many ways the narrowness of the doctrine of frustration can be explained on the basis that it is up to the parties to protect their legal position by suitably drafted *force majeure* clause.[189] Yet, it is this flexibility which makes it difficult to define meaning and effects of the *force majeure* clause and there is also a risk that too widely drawn *force majeure* clause may be deprived of its legal effect as it might be held void for uncertainty.[190]

3.3.1 Nature of the *Force Majeure* Clauses

The question whether the *force majeure* clause is type of the exclusion clause is important because interpretation of the force majeure clause depends on this matter.[191] Namely, the issue of interest is whether the strict rules of construction applicable to exclusion clauses shall apply.[192] The strict rules of interpretation imply that if it is not possible to choose between two or more meanings that the contractual language could convey, then, as a principle of last resort, the meaning restricting most the scope of the exclusion of liability

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186 McKendrick, *Contract Law*, 880.

187 Alghussein Establishment v Eton College (House of Lords 1991).

188 McKendrick, *Contract Law*, 884–894.

189 McKendrick, *Contract Law*, 902.

190 Ibid., *Force Majeure and Frustration of Contract*, 10; British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressing Ltd (Queen's Bench Division 1953).

191 Treitel, *Frustration and Force Majeure*, para. 12–018.

192 Fairclough Dodd & Jones Ltd v. J.H. Vantol Lt, 1 Lloyd's Rep 546 (Queen's Bench Division 1955).

under the clause is to be adopted.[193] This view is confirmed by reasoning of Lord Diplock in *Photo Production* v. *Securicor.*[194]

Judicial approach favors the view that exclusion clauses act as a defence to a breach.[195] As for the *force majeure* clauses, they are considered to define the obligation assumed, rather than excuse or limit the consequences of breach. Thus, *force majeure* clause operates to "prevent what otherwise might be a breach from being a breach."[196] Although there is uniform view in the legal literature about the nature of the clause, there is no uniform judicial opinion about interpretation method of the *force majeure* clauses, in some cases narrow construction of the clause may be favored.[197]

To sum up, *force majeure* clauses are not exclusion clauses. Exclusion clauses limit the extent of the obligation assumed by the party. Whereas, in case of *force majeure* clause, non-performance is not a breach only because no performance was due in the circumstances stipulated by the said clause.[198] There is no uniform approach regarding interpretation of the *force majeure* clause.

3.3.2 Operation of the *Force Majeure* Clauses

Operation of the *force majeure* clause depends on two factors. Firstly, the wording of the clause and its interpretation is of a particular importance to find whether the event occurred falls within the scope of the clause. Secondly, the requirement of causation has to be satisfied.

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193 *Time Charters*, para. 27.2; Ailsa Craig Fishing v Malvern Fishing (House of lords 1983).

194 Photo Production Ltd v Securicor Transport Ltd, 1 Lloyd's Rep 545 (House of Lords 1980).

195 Treitel, *Frustration and Force Majeure*, para. 12–018.

196 Fairclough Dodd & Jones Ltd v. J.H. Vantol Lt, 1 Lloyd's Rep 546 (Queen's Bench Division 1955).

197 Treitel, *Frustration and Force Majeure*, 12–023;12-024.

198 McKendrick, *Force Majeure and Frustration of Contract*, 14–17.

The issue of interpretation of the clause and its interrelation with the governing law has been already discussed above. The following section, will address certain elements that parties to the contract are advised to take into consideration while drafting the *force majeure* clauses. These elements to be contained in the well-drafted *force majeure* clause have been enlisted in legal doctrine as follows: the definitions of the event, list of specific events, obligations as to reporting and the effect of the event. [199]

Furthermore, when referring to the "acts of authority" which are often included in the *force majeure* clause, these acts are advised to cover specific acts (or non-acts) of a non-legislative nature, such as withdrawal of the license or the grant of a license but on terms difficult or costly to comply with.[200]

If parties are willing to effectively invoke the *force majeure* defence in cases of the strike, it is suggested that the clause shall also cover consequences of the strike. Consideration behind this suggestion is that *force majeure* situation may end the moment the strike is settled, whereas the disruption caused by the strike may still prevent a party from resuming work under the contract.[201]

If event occurs which clearly falls within the wording of the clause, the party invoking the clause must demonstrate that the event envisaged by the *force majeure* clause was the cause of delay in performing of the contract.[202] If non-performance is attributable to two

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199 Fontaine, *Drafting International Contracts*, 403–439; McKendrick, *Force Majeure and Frustration of Contract*, 58–60.

200 Ibid., 85.

201 Ibid., 90.

202 Raiffeisen Hauptgenossenschaft v Louis Dreyfus v. Louis Dreyfus & Co. Ltd, 1 Lloyd's Rep 345 (Queen's Bench Division 1981).

events, of which only one falls within the *force majeure* clause, it will be sufficient to demonstrate that the event was the dominant and proximate cause of non-performance.[203]

3.3.3 Circumstances Existing at the Date of the Contract

Unlike frustration, *Force majeure* can still be relied upon even when the event preventing performance operated at the date of the contract.[204] Perhaps *Navrom v. Callistis Ship Management S.A.*,[205] although concerning the voyage charterparties, is a good illustration of this approach. The court allowed the parties to invoke the *force majeure* defence due to the congestion in the port, notwithstanding the fact that the congestion had been in existence when the charter was entered into.

As indicated above, according to the French law, one of the necessary elements of *force majeure* is that event must not be reasonably foreseeable for the relevant party. *Force majeure* has more general meaning in English law not necessarily conveying the French element of foreseeability of the doctrine. Suggestion is made that it is more a question of causation: whether the occurrence of a particular peril, which could have been foreseen, can really be said to have caused one party's failure to perform.[206]

3.4 Comparative Assessment of *Force Majeure* and Frustration

As already discussed above, frustration is a doctrine, which operates within very narrow confines under English law. Its judicial base is unclear and the consequences of its

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203 McKendrick, *Force Majeure and Frustration of Contract*, 71; Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd (Court of Appeals 1918).

204 McKendrick, *Force Majeure and Frustration of Contract*, 78.

205 Navrom v. Callistsis Ship Management S.A. (The "Radauti"), Lloyd's L. Rep 276 (Queen's Bench Division (Commercial Court) 1987).

206 McKendrick, *Force Majeure and Frustration of Contract*, 78.

invocation are harsh. To eliminate the harshness of this doctrine and for the sack of predictability and legal certainty, commercial parties are inclined to use contractual risk allocation clauses, such as *force majeure* clause. Although English law does not recognize a notion of *force majeure,* as such, *force majeure* clauses have become increasingly significant component of many commercial contracts and still remain the issue of assessment by English courts.[207]

Many standard form contracts, including charterparties may incorporate *force majeure* clause and subject the agreement to English law. Therefore, assessment of the relationship between *force majeure* clauses and the English law doctrine of frustration is important. Namely, it has to be identified whether the presence of a *force majeure* accords with the doctrine of frustration and whether such clause in a contract can supplement the operation of the doctrine of frustration. Furthermore, it is also important to identify what advantages the incorporation of suitably drafted *force majeure* clause can bring, as opposed to invoking the doctrine of frustration.

The presence of the *force majeure* clause in a contract does not, of itself, exclude the operation of the doctrine of frustration.[208] The important issue here is whether provision was made for an event causing the performance to be radically different from that undertaken by the contract.[209] As it is stated in *Davis Contractors Ltd v. Fareham Urban District Council: "[t]he question is whether the contract […] is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end*."[210]

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207 *Ibid.*, 33; Great Elephant Corp v Trafigura Beheer BV, the "CRUDESKY," Lloyds' Law Reposrter (2013).

208 Lauritzen A.S. v B.V, (The Super Servant Two), 1 Lloyds Rep 1 (Court of Appeal 1990).

209 McKendrick, *Force Majeure and Frustration of Contract*, 118.

210 Davis Contractors Ltd v Fareham Urban District Council (House of Lords 1956).

With the same token, in *Fibrosa Spolka v Fairbairn,*[211] Court of Appeals established the rule, that when supervening events render the performance of a contract impossible, and there is no undertaking by the parties to bear risk for such event, contract will be frustrated, notwithstanding the fact that the parties may have expressly provided for the clause dealing with the event.

Force majeure clause may be relied upon as evidence that the parties have made express provision for the alleged frustrating event or at least that the event was one which was within their reasonable contemplation at the time of entry into the contract. Contract is not frustrated where express provision has been made in the contract for the alleged frustrating event,[212] or where the event was foreseen or was foreseeable by the parties at the time of entry into the contract.[213] Frustrating event is a supervening, unforeseen event and not an event, which has been anticipated in the contract itself.[214] Therefore, the relevant party will be able to resort to the remedies for the breach of the contract and not bear the consequences of the frustration.

It is suggested in the legal literature, that greater the magnitude of the event, the less likely it is that it will be encompassed within a general clause.[215] *In Metropolitan Water Board v Dick Kerr and Co Ltd*,[216] contractors where required to stop the construction works due to the order of the Government. House of Lord took the view that magnitude of the delay took it outside the scope of the quite broad exemption clause (which entitled contractor for extension of the time in case of the undue delay in the performance), notwithstanding the

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211 Fibrosa Spolka v Fairbairn (Court of Appeals 1943).

212 Treitel, *Frustration and Force Majeure*, para. 12–001–12–004; Metropolitan Water Board v Dick Kerr and Co Ltd (House of Lords 1918).

213 McKendrick, *Contract Law*, 880.

214 McKendrick, *Force Majeure and Frustration of Contract*, 35.

215 *Ibid.*, 33–38.

216 Metropolitan Water Board v Dick Kerr and Co Ltd (House of Lords 1918).

use of the words "whatsoever and howsoever occasioned" and stated that contract was frustrated. On the same reasoning, a force majeure clause which includes in the list of force majeure events "strikes", as a matter of interpretation, not to cover a national strike or general strike.

It is therefore extremely difficult if not impossible to draft a *force majeure* clause, which shuts out the doctrine of frustration completely. This is because even the widest of clauses may be held not to cover a particular catastrophic event. Furthermore, there might be some considerations when dealing with the scope of the clause, such as: *force majeure* clause, which provides extension of time as its legal effect may indicate to the court that the scope of the clause is confined to temporary interruptions in performance.[217]

On the other hand, it may be possible to argue that, where the parties are of equal bargaining power, the courts should be more prepared to conclude that a clause which expressly covers "delays whatsoever and howsoever" occasioned, covers even a delay caused by the most catastrophic of events. In other words, the courts might give up their restrictive rules of construction and subject *force majeure* clauses to a more natural construction when dealing with parties having equal bargaining power.[218]

Although doctrine of frustration is of respective antiquity, it is nevertheless a doctrine the limits of which are difficult to define. Judicial basis of frustration has long been a source of debate and it has been criticized in theory for being artificial, harsh and inflexible.[219] Thus, it is unlikely to predict with any degree of certainty the circumstances in which the courts will invoke it. Uncertainty is therefore inherent to the doctrine of frustration. This uncertainty can, however be eliminated to a large extent by the incorporation into a contract

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217 McKendrick, *Force Majeure and Frustration of Contract*, 33–38.

218 Ibid.,McKendrick, *Contract Law*, 878–880; Treitel, *Frustration and Force Majeure*, para. 12–023–12–024.

219 Liu, "The Doctrine of Frustration: An Overview of English Law," 262.

of a suitably drafted *force majeure* clause. The clause can specify the circumstances in which it is to operate and the role of the court is then reduced to the interpretation of the clause.[220]

Force majeure clause offers the parties opportunity to escape from the narrowness of the doctrine by including in the clause the event, which would not at common law be sufficient to frustrate the agreement.[221]

Frustration operates automatically, irrespective of the wishes of the parties. It also makes it impossible for the parties to negotiate after the event. Automatic nature of the doctrine can be avoided by carefully drafted *force majeure* clause, which clearly sets out the consequences of the occurrence of a *force majeure* event.[222]

220 McKendrick, Force Majeure and Frustration of Contract 38–39.

221 McKendrick, *Force Majeure and Frustration of Contract*, 63.

222 Ibid., 44–46.

4 Concluding Remarks

The doctrine of frustration evolved to mitigate the rule on literal performance of absolute promises. The doctrine is "*an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change of circumstances […]*."[223] The foregoing study demonstrated that, while trying to give effect to the demands of the justice, the courts have adopted a restrictive approach to the operation of the doctrine by keeping it within very narrow limits with rather high threshold for invoking it.

While discussing the causes of frustration, this study showed that none of the causes would be sufficient to constitute frustration unless changed circumstances "*go to the root of the contract*."[224] Delay and interruption in the charter service, strike and war, impossibility of performance - all of these events have to frustrate common venture of the charterer and the shipowner. Heavier financial burden, onerousness of the obligations will not be sufficient to affect "basic economics" of the contract.

Such restrictive approach to the doctrine is due to various considerations under English law. Commercial certainty and predictability is the basic principle of the English law of contract.[225] English approach is that the doctrine ought not to be an escape route from

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223 Edwinton Commercial Corporation and Global Tradeways Ltd v Tsavliris Russ (Worldwide Salvage and Towage) Ltd "Sea Angel," 2 Lloyd's Rep 517 (English Court of Appeal 2007).

224 Liu, "The Doctrine of Frustration: An Overview of English Law," 282.

225 Scottish Navigation Co. Ltd. v W. A. Souter & Co. (King's Bench division 1917); Bank Line v Arthur Capel & Co (Court of Appeals 1919).

"*normal consequences of imprudent commercial bargains*."[226] Parties have to bear the risks if they do not protect their interests through contractual regulation.[227]

Another consideration is radical effect of the doctrine, which is why courts refrain from easily invoking it. Frustration immediately and automatically brings a contract and the obligations of the parties to an end. The fact that the parties may have treated the contract as continuing after a frustrating event will not prevent the operation of the doctrine.[228] Parties, especially those involved in long commercial relations, would often prefer to adjust the contract to the changed circumstances, therefore doctrine of frustration is rather impractical in terms of adjustment to particular commercial needs of the parties.

Present analyses also demonstrated that the main problem of the doctrine has been its application in actual cases and for this reason the doctrine has been subject of considerable confusion and uncertainty.[229] There is no uniform standard applicable to the cases of frustration, whether or not a particular event is capable of causing frustration of the contract is the question to be determined based upon the facts of the case and contractual regulation between the parties. Thus, assessment of the facts of the case "*often [...] will be a question of degree [...] and [..] where questions of degree are involved, opinions may and often legitimately […] differ.*"[230] What complicates the matter more, for instance in cases of delays and interruptions, length and effect of these events must be assessed at the time when they occur, which requires certain degree of speculation by the courts.

It is uncertain whether a specific event will lead to frustrating the contract. Uncertainty and inflexibility in application of the doctrine, as well as its radical affects on the contract

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226 Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (House of Lords 1982).

227 Comptoir Commercial Anversois v Power, Son & Co. (King's Bench 1920).

228 *Time Charters*, para. 26.6; Hirji Mulji v Cheong Yue Steamship Co (Court of Appeals 1926).

229 Liu, "The Doctrine of Frustration: An Overview of English Law," 262.

230 Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (House of Lords 1982).

hinders commercial certainty and predictability, which is particularly crucial for the parties involved in shipping. By incorporating *force majeure* clauses, parties have the ability to deal with the anticipated changed circumstances in the way that is acceptable to their commercial needs.[231] Firstly, parties can avoid the operation of the doctrine by incorporating *force majeure* clause, which fully embraces the potential frustrating event. Secondly, parties might be willing to bring their contractual relations to an end in certain circumstances, which by itself may not be sufficient to bring the doctrine of frustration into operation. All the above can be achieved by respectively drafted *force majeure* clause, which is a valuable mechanism to allocate risks between the counterparties.

The thesis also discussed the importance of the well-drafted risk allocation clauses. The study showed that while drafting the *force majeure* clauses, parties must take due consideration of the limitations and interpretations to which *force majeure* clauses are subject under the law governing the transaction. A failure properly to account for such matters in the contract could result in the affected party being solely reliant on the limited relief available under the common law doctrine of frustration.[232]

Parties are free to decide what events they want to be considered to be force majeure events within their contractual relationship. Most importantly, the freedom of contract may go as far as to include in the spectrum of *force majeure* event even negligent acts of the parties or impracticability of performance, including increased financial burden. Thus, wording of the clause will define application, effect and scope of force majeure. Given that the parties agree on the legal consequences of *force majeure* events beforehand, such risk allocation clauses maximize the protection of contracting parties and minimize the likelihood of unintended consequences.[233]

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231 Ibid.

232 Chevallier- Boutell, "Use of Force Majeure as a Risk Allocation Mechanism in the Context of International Project Finance," 15–16.

233 Ibid., 113.

Importance of the well-drafted *force majeure* clause is evidenced by the fact that International Chamber of Commerce issued ICC Force Majeure Clause 2003, to facilitate the drafting process for the commercial parties and help them to take unforeseeable circumstances into account.[234] It is noteworthy, that SUPPLYTIME 2005 force majeure clause has been amended to make it more consistent with the structure and provisions of the ICC Force Majeure Clause 2003.

In light of the above, when subjecting their contract to English law, parties must always be mindful of the legal consequences an applicable law may bring in their contractual relationship. Given the need for predictability in any commercial dealing, and in particular in shipping industry, parties can and should eliminate undesired and unexpected results of application of harsh doctrinal rules by respective contractual arrangements. By means of fully utilizing freedom of contracts, commercial parties can achieve considerable degree of legal certainty as to the consequences of unforeseen events on their legal relationship through properly designed risk allocation clauses.

234 "BIMCO Explanatory Note on SUPPLYTIME 2005"

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