The doctrine of frustration in English law

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I. Overview of the doctrine

In English law, “a contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of the entry into the contract.”[1]

Historically, the concept of frustration has been invoked to mitigate the onerous doctrine of absolute contracts where performance of a contract is prevented by supervening events for which neither party to the contract is responsible and loss allocation is required.

II. The test for frustration

The juristic basis of the doctrine has evolved over number of years. The English courts have over time rejected the notions of “just solution”, “foundation of the contract,” “failure of consideration” and “implied term”, [2] and instead adopted the test of a radical change in the obligation, which is currently regarded by leading commentators as the preferred approach.[3]

That test was first formulated by the House of Lords in Davis Contractors Ltd v Fareham U.D.C.[4] As Lord Radcliffe put it:

“Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would...”
render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do… that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.\(^{[5]}\)

Furthermore, it is not simply a question whether there has been a radical change in the circumstances, but whether there has been a radical change in the obligation or the actual effect of the promises of the parties in the light of the new circumstances, viz. the court will have to establish that the performance was fundamentally different in a commercial sense.

The House of Lords has also accepted the view that the test for frustration is objective,\(^{[6]}\) i.e. it is not a subjective inquiry into the actual or presumed intentions of the parties, as was suggested by the rejected “implied term” test, because the discharge of a contract occurs automatically upon the occurring of the frustration event.

However, the fact that the parties, at the time of contracting, actually foresaw the possibility of the event or new circumstances in question does not necessarily prevent the application of the doctrine of frustration.

III. Key features of the doctrine of frustration

In *J. Lauritzen AS v Wijsmuller BV (The Super Servant Two)*,\(^{[7]}\) Bingham LJ set out the following five propositions which he regarded as the essence of the doctrine:

1. frustration mitigates the rigour of the common law’s insistence on literal performance of absolute promises;
2. the doctrine operates to kill the contract and discharge parties from further liability under it;
3. frustration brings a contract to an end “forthwith, without more
and automatically”;
4. it should not be due to the act or election of the party seeking to rely on it, so that there must be some “outside event or extraneous change in the situation”;
5. a frustrating event must take place without a party’s fault, i.e. it cannot be self-induced.

IV. Legal effects of frustration

The English common law view is that frustration operates not only automatically (i.e. without the choice or election of either party) but also totally. What this means is that the obligations of both parties are wholly discharged in so far as performance of them had not fallen due when the contract was frustrated.

Thus, a court does not have the power at common law to allow the contract to continue and to adjust its terms to the new circumstances. The reason why this approach has not found favour in the English authorities is that it would lead to uncertainty in respect of agreed contract terms and create the undesirable situation of courts having to formulate contract terms for the parties.

Finally, statements referring to a total discharge of contractual obligations are commonly qualified so as to make the point that frustration operates only as a ground of discharge of future obligations, i.e. of those which would have accrued after the date of discharge.

The legal consequences of frustration relating to recovery of payments made are broadly covered by the Law Reform (Frustrated Contracts) Act 1943.

V. Practical illustrations of frustration

The expression “frustration of contract” refers to the general doctrine of discharge by supervening events, irrespective of the type of event which brings about discharge. Over time the English authorities have addressed a number of events that potentially give rise to frustration. The following is a non-exhaustive list of such events:
destruction or unavailability of the subject matter;
- death, illness or incapacity of a person (in personal contracts);
- dissolution or supervening incapacity of corporation;
- frustration of purpose (cancellation of an expected event);
- supervening illegality or change in law (either English or foreign law\[10\]);
- outbreak of war;
- delay sufficiently long to frustrate the parties' commercial adventure;
- method of performance impossible or "radically or fundamentally" different.

On the other hand, the following events have been regarded as insufficient to give rise to the frustration of any underlying contract:\[11\]

- inconvenience, hardship or financial loss;
- delay within the commercial risk undertaken by the parties;
- a difference in expense between the expected and the actual performance;
- abandonment of an exchange rate mechanism;
- de-valorisation;
- inflation.

\[1\] Chitty on Contracts, 29th edition at 23-001.

\[2\] Ibid. at pp. 644-848.

\[3\] Chitty on Contracts, at 23-012 – 23-014.


\[5\] Ibid. at 729.


[8] By contrast, such power can be provided for in civil law systems: cf., for example, Article 451(4) of the Russian Civil Code.

