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FORCE MAJEURE AND FRUSTRATION—THEIR RELATIONSHIP AND A COMPARATIVE ASSESSMENT

1. INTRODUCTION

The focus of the opening two chapters has been upon *force majeure*, both in a domestic and a civilian context. To an English contract lawyer this emphasis must appear unusual because English lawyers have traditionally been brought up to believe that *force majeure* is a continental doctrine which is alien to the English common law. English contract law, broadly speaking, employs the doctrine of frustration to do the work which would be done on the continent by *force majeure*. While it is true to say that English law recognises no *doctrine* of *force majeure* as such, it is undoubtedly true that *force majeure clauses* have become an increasingly significant component of many commercial contracts and that such clauses have played an important role in cases which have recently been litigated in the English courts. The question which now arises for consideration is why this should be so.

To some extent it is due to the fact that many international standard form contracts, such as the GAFTA and FOSFA forms, employ the language of *force majeure* and provide for English law as the law applicable to the contract or are subject to arbitration in London.[1] Secondly, *force majeure* is a doctrine which is "alive and vibrant" in EU law and the importance of EU law will undoubtedly increase in the future and have a greater impact upon the drafting of commercial contracts.[2] But the rise in the importance of *force majeure* clauses cannot be attributed solely to international and European factors: there must be some domestic agents at work. The principal domestic factor relates to the scope of the doctrine of frustration. Frustration is a doctrine which operates within very narrow confines in English law: it is difficult to persuade a court to invoke the doctrine, its juridical basis is unclear, and the consequences of its invocation remain, despite the intervention of statute, drastic.

In this chapter we shall seek to assess the relationship between *force majeure* clauses and the doctrine of frustration. We shall commence our analysis by asking whether the presence of a *force majeure* clause in a contract is sufficient of itself to exclude (either in whole or in part) the operation of the doctrine of frustration. We shall then turn to a broader consideration of the advantages which can be obtained by the incorporation into a contract of a suitably drafted *force majeure* clause rather than simply invoke the doctrine of frustration when an unforeseen event occurs

1. Some of these cases are discussed in more detail in Chapter 15.
2. See further Chapter 17.

which makes performance of the contract more onerous or which destroys the basis upon which the parties have contracted.

2. THE RELATIONSHIP BETWEEN FORCE MAJEURE AND FRUSTRATION

The principal question which must be considered here is whether the presence of a *force majeure* clause in a contract is sufficient of itself to exclude the operation of the doctrine of frustration. Such an argument was in fact put to Mocatta J. in the case of *Bremer Handelsgesellschaft m.b.H.* v. *Vanden Avenne-Izegem P.V.B.A.*[3] when it was contended that "there was no room for the doctrine of frustration to apply" because of the elaborate *force majeure* clauses included in the contract. Mocatta J. was of the opinion that there was "much to be said for this submission". In principle one can agree and, indeed, one commentator has stated that it "is perhaps time to take up the suggestion of Mocatta J." and conclude that "if two companies draw up a comprehensive contract complete with *force majeure* clause, then the courts should take them at their word and entirely refuse to apply the doctrine of frustration. Parties strong enough to strike equal bargains should be allowed to do so".[4] Although there may be much to be said for this proposition as a matter of principle, it must be conceded that, as a matter of authority, the presence of a *force majeure* clause in a contract does not, of itself, exclude the operation of the doctrine of frustration.[5] Further, this dictum of Mocatta J. provides very weak support for the proposition that a *force majeure* clause should, of itself, exclude the operation of the doctrine of frustration. This is so for a number of reasons. The first is that "very little" was said about this issue in argument and so the dictum is not grounded in an exhaustive consideration of the authorities or the competing arguments. The second is that the argument was not unequivocally accepted; there was simply "much to be said for it". The third is that reliance was placed by Mocatta J. upon the implied term theory of frustration; the argument being that, in the light of the detailed clauses in the contract, there was no room for the implication of a term that the contract had been frustrated. Yet, as we shall see,[6] the implied term theory has been largely abandoned as an explanation for the doctrine of frustration.

3. EXPRESS PROVISION

So the presence of a *force majeure* clause does not of itself exclude the operation of the doctrine of frustration. But a *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 contem-

3. [1977] 1 Lloyd's Rep. 133, at p. 163, *per* Mocatta J.
4. Hedley, "Carriage by Sea—Frustration and Force Majeure" [1990] C.L.J. 209, at p. 211.
5. See, for example, *J. Lauritzen A.S.* v. *Wijsmuller B.V.* (*The Super Servant Two*) [1990] 1 Lloyd's Rep. 1.
6. See pp. 38–39 (below).

plation at the time of entry into the contract. Here the English contract lawyer is on more familiar ground because it is generally accepted that a contract is not frustrated where express provision has been made in the contract for the alleged frustrating event[7] or where the event was foreseen (or was foreseeable) by the parties at the time of entry into the contract.[8] A frustrating event is a supervening, unforeseen event and not an event which has been anticipated in the contract itself.[9]

Although the courts do accept that, supervening illegality apart,[10] express provision for the alleged frustrating event excludes the operation of the doctrine of frustration, they have generally subjected to a narrow interpretation clauses which, it has been alleged, make provision for what would otherwise be a frustrating event.[11] In particular, the mere fact that the contract deals with events of the same general nature as the alleged frustrating event does not mean that the contract deals with every event in that class.

A good example of this restrictive approach is provided by the case of *Metropolitan Water Board* v. *Dick Kerr and Co.*[12] In 1914 contractors agreed to construct a reservoir to be completed within six years. In 1916 the contractors were required by Government Order to stop the work and sell their plant. In these circumstances the contractors claimed that the contract had been frustrated. The Water Board argued that the contract had not been frustrated because express provision had been made in the contract for delay "whatsoever and howsoever occasioned". In the event of "undue delay", they argued, the procedure laid down in the contract was for the contractors to apply to the engineer for an extension of time. The House of Lords rejected the Water Board's argument and held that the contract was frustrated because the delay clause was not intended to apply to such a fundamental change of circumstances. The clause was intended to cover only temporary difficulties; it did not "cover the case in which the interruption is of such a character and duration that it vitally and fundamentally changes the conditions of the contract, and could not possibly have been in the contemplation of the parties to the contract when it was made".[13] Yet, on their ordinary or literal meaning, the words "whatsoever and howsoever occasioned" were apt to cover the delay because they stated that the cause of the delay was irrelevant. On the other hand, the House of Lords regarded it as inherently unlikely that a contractor would promise to complete performance within six years even if it became impossible to do so. The magnitude of the delay was such that the clause could not reasonably have been intended to cover it. On the same reasoning, a clause which makes provision for "strikes" or "wars" may be held not to cover a protracted national strike, such as a general strike,[14] or a war of

7. *Metropolitan Water Board* v. *Dick, Kerr and Co.* [1918] A.C. 119.

8. *Walton Harvey Ltd.* v. *Walker and Homfrays Ltd.* [1931] 1 Ch. 274; cf. *W.J. Tatem Ltd.* v. *Gamboa* [1939] 1 K.B. 132 and *Ocean Tramp Tankers Corporation* v. *V/O Sovfracht (The Eugenia)* [1964] 2 Q.B. 226.

9. *Paal Wilson & Co. A/S* v. *Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* [1983] 1 A.C. 854, at p. 909.

10. *Ertel Bieber & Co.* v. *Rio Tinto Co. Ltd.* [1918] A.C. 260.

11. See generally McElroy and Williams *Impossibility of Performance* pp. 204–218; Benjamin's *Sale of Goods* (4th Edn.) paras. 6-046–6-047 and Treitel *The Law of Contract* (8th Edn.) pp. 795–799.

12. [1918] A.C. 119. See also *Acetylene Co. of G.B.* v. *Canada Carbide Co.* (1922) 8 Ll.L.Rep. 456.

13. *Ibid.*, p. 126, *per* Lord Finlay L.C.

14. *The Penelope* [1928] P. 180, although note the doubts expressed by Lord Brandon in *Pioneer Shipping Ltd.* v. *B.T.P. Tioxide Ltd. (The Nema)* [1982] A.C. 724, at p. 754.

the magnitude of the first or second world wars.[15] The courts insist that provision for the event be "full and complete"[16] and, the greater the magnitude of the event, the less likely it is that it will be encompassed within a general clause or even a clause which covers that event "whatsoever and howsoever occasioned".

A further example of this restrictive approach to construction is provided by the *The Playa Larga*.[17] The parties entered into a contract for the sale of bagged Cuban raw sugar. The vendors were a Cuban state trading enterprise and the buyers were a Chilean company, whose major shareholder was a Chilean state trading organisation. After the conclusion of the contract but before deliveries had been completed, there was a coup d'état in Chile and the left-wing government of Dr Allende was overthrown by the military. The response of the Cuban government to the coup d'état was to break off diplomatic relations with Chile and to pass a law (Law 1256) which, in substance, froze all property belonging to Chilean official and semi-official agencies and to judicial persons in which the Chilean state had a direct or indirect interest. This law rendered further performance of the contract illegal by Cuban law. The sellers therefore ceased delivery of the sugar and the buyers claimed damages for breach of contract and for conversion of the goods. The sellers responded by arguing that the contract had been frustrated by the passing of Law 1256 which rendered further performance of the contract illegal. The buyers countered that the contract had not been frustrated, because express provision had been made in rule 120 of their contract for a delay in shipment caused by, *inter alia*, "government intervention". The Court of Appeal rejected the buyers' argument and held that the contract had been frustrated. It was held that rule 120 contemplated a "temporary interruption" and that it was not directed at events which struck at the contract as a whole and rendered further performance by either party "unthinkable".[18] A vital factor which persuaded the court to conclude that rule 120 applied to temporary interruptions was that its effect was to make provision for an extension of the shipping period by 30 days and, if, at the end of the 30 days, the sellers were still unable to deliver, then the buyers were given an option to cancel the contract. Such a provision is obviously more apt to cover a temporary difficulty which may be resolved within 30 days rather than a catastrophic event which immediately renders further performance of the contract "unthinkable".

It is, therefore, extremely difficult, if not impossible, to draft a *force majeure* clause which shuts out the doctrine of frustration completely, because even the widest of clauses may be held not to cover a particular catastrophic event and, further, a *force majeure* clause which makes provision for an extension of time may indicate to the court that the scope of the clause is confined to temporary interruptions in performance. On the other hand, it may yet be possible to argue that, at

15. *Pacific Phosphate Co. Ltd.* v. *Empire Transport Co. Ltd.* (1920) 36 T.L.R. 750; *Coppee* v. *Blagden, Waugh & Co.* (1921) 6 Ll.L.Rep. 319; *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32, at pp. 40–41; *Denny Mott & Dickson Ltd.* v. *James B. Fraser & Co. Ltd.* [1944] A.C. 265, at p. 284.

16. *Bank Line Ltd.* v. *Arthur Capel & Co.* [1919] A.C. 435, at p. 455, *per* Lord Sumner, qualifying the judgment of Bailhache J. in *Admiral Shipping Co. Ltd.* v. *Weidner Hopkins Co.* [1916] 1 K.B. 429, at p. 438. Cases can, however, be found in which provision has been sufficiently full and complete, see *Banck* v. *Bromley* (1920) 37 T.L.R. 71 and *In re Comptoir Commercial Anversois and Power, Son & Co.* [1920] 1 K.B. 681.

17. [1983] 2 Lloyd's Rep. 171.

18. *Ibid.*, p. 189.

least 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 should give up their restrictive rules of construction and subject *force majeure* clauses to a more natural construction.

4. WHY DRAFT A FORCE MAJEURE CLAUSE?

If a *force majeure* clause does not of itself exclude the operation of the doctrine of frustration and if, as the law presently stands, it is subjected to a restrictive interpretation, a question arises as to whether any advantage can be obtained by reliance upon a *force majeure* clause. Why not simply invoke the doctrine of frustration whenever an unforeseen event occurs which renders performance more hazardous than was anticipated at the moment of entry into the contract? The answer to that question lies in the fact that the doctrine of frustration in English law operates within very narrow confines and cannot be invoked simply because contractual performance has become more onerous. To appreciate this point we must now turn to a consideration of the doctrine of frustration.

5. FRUSTRATION—A MODERN DEFINITION

Although the doctrine of frustration is of respectable antiquity, it is nevertheless a doctrine the limits of which are difficult to define. But such a task was recently undertaken by Bingham L.J. (as he then was) in *J. Lauritzen A.S.* v. *Wijsmuller B.V.* (*The Super Servant Two*).[19] He outlined five fundamental "propositions" pertaining to the doctrine of frustration which he held were "established by the highest authority" and were "not open to question".[20] But, as we shall see, each of these propositions gives rise to practical difficulties and the question which we must consider is whether these practical difficulties can be eliminated or reduced by the incorporation into a contract of a suitably drafted *force majeure* clause. We shall set out the five propositions and then consider the difficulties to which they give rise.

The first proposition of Bingham L.J. was that the doctrine of frustration had evolved in an effort to "mitigate the rigour of the common law's insistence on literal performance of absolute promises"[21] and that the object of the doctrine was "to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances".[22] The second proposition was that frustration operates

19. [1990] 1 Lloyd's Rep. 1.
20. *Ibid.*, p. 8.
21. Citing *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.* [1926] A.C. 497, at p. 510; *Denny Mott & Dickson Ltd.* v. *James B. Fraser & Co. Ltd.* [1944] A.C. 265, at p. 275; *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corp. Ltd.* [1942] A.C. 154, at p. 171.
22. Citing *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.* [1926] A.C. 497, at p. 510; *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corp. Ltd.* [1942] A.C. 154, at pp. 183, 193; *National Carriers Ltd.* v. *Panalpina (Northern) Ltd.* [1981] A.C. 675, at p. 701.

to "kill the contract and discharge the parties from further liability under it" and that therefore it cannot be "lightly invoked" but must be kept within "very narrow limits and ought not to be extended".[23] His third proposition was that frustration brings a contract to an end "forthwith, without more and automatically".[24] The fourth proposition was that the "essence of frustration is that it should not be due to the act or election of the party seeking to rely on it"[25] and it must be some "outside event or extraneous change of situation".[26] His final proposition was that a frustrating event must take place "without blame or fault on the side of the party seeking to rely on it".[27] We shall now subject these propositions to closer analysis.

(a) The basis of the doctrine of frustration

The first proposition of Bingham L.J. locates the basis of the doctrine of frustration in the need to give effect to the demands of justice by mitigating the commitment of the law to the literal performance of absolute promises. Such a proposition is not without support in the authorities but it must not be forgotten that the juridical basis of frustration has long been a source of debate.[28] Traditionally, it rested upon the implication of a term into the contract to the effect that, in the circumstances which have occurred, the contract should cease to be binding.[29] But this theory has been criticised on the ground that it "is artificial and often fictitious in its operation, since there would seldom be a genuine common intention to terminate the contract upon the occurrence of the particular event in question"[30] and it has been largely abandoned by the judiciary.[31] The theory which commands most judicial acceptance today was set out by Lord Radcliffe in the following terms:

"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

23. Citing *Bank Line Ltd.* v. *Arthur Capel & Co.* [1919] A.C. 435, at p. 459; *Davis Contractors Ltd.* v. *Fareham U.D.C.* [1956] A.C. 696, at pp. 715, 727; *Pioneer Shipping Ltd.* v. *B.T.P. Tioxide Ltd.* (*The Nema*) [1982] A.C. 724, at p. 752.

24. Citing *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.* [1926] A.C. 497, at p. 505; *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.* [1935] A.C. 524, at p. 527; *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corp. Ltd.* [1942] A.C. 154, at pp. 163, 170, 171, 187, 200; *Denny Mott & Dickson Ltd.* v. *James B. Fraser & Co. Ltd.* [1944] A.C. 265, at p. 274.

25. Citing *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.* [1926] A.C. 497, at p. 510; *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.* [1935] A.C. 524, at p. 530; *Denny Mott & Dickson Ltd.* v. *James B. Fraser & Co. Ltd.* [1944] A.C. 265, at p. 274; *Davis Contractors Ltd.* v. *Fareham U.D.C.* [1956] A.C. 696, at p. 729.

26. Citing *Paal Wilson & Co. A/S* v. *Partenreederei Hannah Blumenthal* (*The Hannah Blumenthal*) [1983] 1 A.C. 854, at p. 909.

27. Citing *Bank Line Ltd.* v. *Arthur Capel & Co.* [1919] A.C. 435, at p. 452; *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corp. Ltd.* [1942] A.C. 154, at p. 171; *Davis Contractors Ltd.* v. *Fareham U.D.C.* [1956] A.C. 696, at p. 729; *The Hannah Blumenthal* [1983] 1 A.C. 854, at pp. 882, 909.

28. See generally McNair, "Frustration of Contract by War" (1940) 56 L.Q.R. 173; Treitel, *The Law of Contract* (8th Edn.) pp. 818–823; *Chitty on Contracts* (27th Edn.) paras. 23-005–23-013.

29. *F.A. Tamplin S.S. Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.* [1916] 2 A.C. 397, at pp. 403–404, *per* Lord Loreburn.

30. *Chitty on Contracts* (27th Edn.) para. 23-007.

31. *Davis Contractors Ltd.* v. *Fareham U.D.C.* [1956] A.C. 696, at p. 728; *National Carriers Ltd.* v. *Panalpina (Northern) Ltd.* [1981] A.C. 675, at p. 687 and *Pioneer Shipping Ltd.* v. *B.T.P. Tioxide Ltd.* (*The Nema*) [1982] A.C. 724, at pp. 751–752.

was undertaken by the contract. *Non haec in foedera veni.* It was not this that I promised to do."[32]

This theory is not based overtly upon the need to do what is "reasonable and fair" in the changed circumstances but rather it focuses upon the construction of the contract and asks whether the contract which the parties made is "on its true construction, wide enough to apply to the new situation; if not, then it is at an end".[33] The difficulties associated with the "just solution" theory advocated by Bingham L.J. are essentially two-fold. The first is that the theory does not "mean that the courts can do what they think just whenever a change of circumstances causes hardship to one party".[34] Secondly, the House of Lords has rejected the proposition that a court has the power at common law to qualify the absolute, literal terms of a promise in order to do what is just and reasonable.[35] Nevertheless, it must be conceded that the just solution theory does have some support in the authorities.

This debate surrounding the theoretical basis of the doctrine probably does not have many important practical consequences but it does make it very difficult to predict when the courts will invoke the doctrine because, if we are not sure of the basis of the doctrine, we are unlikely to be able to predict with any degree of certainty the circumstances in which the courts will invoke it. Uncertainty is therefore inherent in the doctrine of frustration. This uncertainty can, however, be eliminated to a large extent by the incorporation into a contract 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. Of course, difficulties of interpretation may still arise, but at least the parties can limit the enquiry of the court and focus its attention upon the construction of the particular clause at issue rather than upon the vaguer notion of what is "reasonable and fair" in the changed circumstances.

(b) Contexts and contortions—an excursus

Before considering the second of Bingham L.J.'s propositions, it is suggested that some profit can be gained from noting the rather unusual contexts in which frustration has been invoked in recent cases and the resultant contortions in which the courts have had to engage in order to apply orthodox doctrines to unusual fact situations. Two fact situations illustrate this process. The first line of cases concerned agreements to arbitrate which had "gone to sleep" and one party later attempted to revive the arbitration. The essential problem which gave rise to this particular group of cases was that, until the enactment of section 13A of the Arbitration Act 1950 (as inserted by section 102 of the Courts and Legal Services Act 1990), neither the courts nor arbitrators in England had the power to dismiss an arbitration for want of prosecution.[36] In the absence of such a power, the courts were asked to

32. [1956] A.C. 696, at p. 729.
33. *Ibid.*, p. 721, *per* Lord Reid.
34. Treitel, *The Law of Contract* (8th Edn.), pp. 819–820.
35. *British Movietonews Ltd.* v. *London and District Cinemas Ltd.* [1952] A.C. 166, rejecting the radical approach advocated by Lord Denning in the Court of Appeal ([1951] 1 K.B. 190, at p. 202).
36. *Bremer Vulkan Schiffbau und Maschinenfabrik* v. *South India Shipping Corporation* [1981] A.C. 909 and see generally on these cases Mustill and Boyd, *Commercial Arbitration* (2nd Edn.), pp. 503–517.

employ any common law doctrines which appeared even remotely suitable (and some which were manifestly unsuitable) to enable them to reach a commercially just solution, namely that the agreement to arbitrate had been abandoned. Frustration was one of the contractual doctrines[37] which was dredged up in an effort to reach such a solution. But the invocation of frustration foundered on the rule that a frustrating event must be an "outside event or extraneous change of situation".[38] In these cases the delay was caused by the parties themselves and so could not be said to be due to an "outside event" or "extraneous change of situation". The doctrine of frustration probably emerged unscathed from these cases, but it is suggested that there are two principal dangers revealed by this line of authority and their employment of established common law doctrines such as frustration. The first is that they disguise what the courts are really trying to do, namely dismiss an action for want of prosecution.[39] The second is that they may distort well-established principles of the common law.[40]

The second group of cases, which illustrates the second of these dangers more graphically, concerns an employee who is absent from work for a long period of time, for example because of sickness[41] or imprisonment,[42] and in consequence is "dismissed" by his employer. The employee argues that he has been unfairly dismissed. The employer counters that he has not been dismissed because his contract of employment was frustrated by his long absence from work. Now it is important to appreciate why employers have invoked this argument. It is an attempt to evade the clutches of the employment protection legislation, particularly the unfair dismissal legislation, because such legislation applies only to a *dismissal* by the employer; it has no application to frustrated contracts which are terminated, not by the action of the employer, but by *operation of law*. Employees have sought to meet this argument on two principal grounds. The first is to argue that the contract has not been frustrated. The Employment Appeal Tribunal (EAT) has, on

37. Others were repudiatory breach and an agreement to abandon, the agreement being inferred from the silence of both parties.

38. *Paal Wilson & Co. A/S* v. *Partenreederei Hannah Blumenthal* (*The Hannah Blumenthal*) [1983] 1 A.C. 854, see further below pp. 50–52.

39. The problem should not arise in future cases because, as has already been noted, Parliament was eventually persuaded to intervene in the form of s.13A of the Arbitration Act 1950 which gives to an arbitrator, in the absence of a provision to the contrary in the arbitration agreement, the power to make an award dismissing any claim in a dispute referred to him if it appears to him that there has been an inordinate and inexcusable delay on the part of the claimant in pursuing the claim and that the delay will either give rise to a substantial risk that it is not possible to have a fair resolution of the issues in that claim or that it has caused, or is likely to cause or to have caused, serious prejudice to the respondent. The section came into force on 1 January 1992. The House of Lords has held that, in deciding whether or not there has been an inordinate and inexcusable delay, a court may have regard to delay which occurred before the coming into force of the section (*L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd.* [1994] 1 A.C. 486).

40. Although frustration emerged relatively unscathed, this was not the case with the rules of offer and acceptance. For example in *Cie. Française d'Importation et de Distribution S.A.* v. *Deutsche Continental Handelsgesellschaft* [1985] 2 Lloyd's Rep. 592, at p. 599, Bingham J. stated that the proposition that an agreement to abandon an arbitration can be made by silence on both sides does "some violence . . . to familiar rules of contract such as the requirement that acceptance of an offer should be communicated to the offeror unless the requirement of communication is expressly or impliedly waived".

41. See generally *Notcutt* v. *Universal Equipment Co. (London) Ltd.* [1986] 3 All E.R. 582 and the discussion therein of the leading cases.

42. See generally *F.C. Shepherd & Co. Ltd.* v. *Jerrom* [1987] Q.B. 301 and the discussion therein of the leading cases.

occasions, been sympathetic to this argument, aware that the consequence of allowing such a plea to succeed is to enable employers to defeat the aim of the legislation, which is to subject such terminations of the employment relationship to a test of fairness.[43] As Lord Wedderburn has remarked, we can see here the EAT "struggling to free itself of rigid common law doctrines in order to produce what it judges to be a just solution between an individual employee and the employer".[44] But the Court of Appeal, while suggesting that a cautious approach is appropriate, has refused to conclude that frustration has no application to contracts of employment which can be terminated by the employer upon the giving of relatively short notice.[45] The conclusion that an employment contract can, in principle, be frustrated has led to a second argument, particularly in cases where the cause of the absence from work is the imprisonment of the employee. Employees in such cases have argued that the contract is not frustrated because the frustration was "self-induced". It must be conceded that a deliberate act is generally treated by the courts as self-induced frustration[46] but the courts have refused to accede to this argument in this context. This refusal is difficult to reconcile with general principle, but a number of justifications have been offered in its support. The first is the rather specious one that the cause of the employee's absence from work is not his criminal act but the "outside event" of the court sending him to prison.[47] The second is that in these cases it is not the party who has not performed the deliberate act who is invoking self-induced frustration, which is the usual case, it is the party who is responsible for the act who is invoking it.[48] The third and related justification is that the consequence of allowing the plea of self-induced frustration to succeed is to benefit the party putting forward the argument (the employee) by enabling him to bring his claim within the scope of the employment protection legislation when he would not otherwise be able to do so.[49] Finally, Balcombe L.J. has suggested that the doctrine of self-induced frustration may be inappropriate in this context and he indicated that he was prepared to countenance a degree of inconsistency in this respect between employment contracts and other commercial contracts.[50] There is much to be said for this latter approach, treating these cases as *sui generis*, either by excluding frustration and self-induced frustration completely or, as has been done by the EAT, applying them with a strong dose of industrial good sense. But enough

43. See in particular *Harman* v. *Flexible Lamps Ltd.* [1980] I.R.L.R. 418, disapproved in this respect by the Court of Appeal in *Notcutt* v. *Universal Equipment Co. (London) Ltd.* [1986] 3 All E.R. 582, at p. 586.

44. *The Worker and the Law* (3rd Edn.), p. 145, relying upon cases such as *Converfoam Ltd.* v. *Bell* [1981] I.R.L.R. 195; *Chakki* v. *United Yeast Co. Ltd.* [1982] 2 All E.R. 446 and the decision of the EAT (subsequently reversed by the Court of Appeal) in *F.C. Shepherd & Co. Ltd.* v. *Jerrom* [1985] I.C.R. 552.

45. *Notcutt* v. *Universal Equipment Co. (London) Ltd.* [1986] 3 All E.R. 582.

46. See below pp. 46–52.

47. *Hare* v. *Murphy Bros. Ltd.* [1974] 3 All E.R. 940, at p. 942 (Lord Denning) and *F.C. Shepherd & Co. Ltd.* v. *Jerrom* [1987] Q.B. 301, at p. 334 (Balcombe L.J.).

48. *F.C. Shepherd & Co. Ltd.* v. *Jerrom* [1987] Q.B. 301, 318–319, 326, *per* Lawton L.J. and Mustill L.J. As Lord Mustill has remarked extra-judicially ("Anticipatory Breach of Contract: The Common Law at Work", *Butterworth Lectures 1989–1990*, p. 3), the case produced an "absurd state of affairs, in which the ordinary world was turned upside down, with the party who would normally have been denying his fault in fact asserting it".

49. *Ibid.*, *per* Lawton L.J. and Mustill L.J.

50. *Ibid.*, p. 335.

has been said to make the point that these cases must be treated with great caution and they must not be allowed to distort the principles of the doctrine of frustration, both in relation to the circumstances in which frustration can be invoked and in relation to the scope of self-induced frustration. As we have seen, the juridical basis of the doctrine of frustration is already shrouded in uncertainty and that uncertainty can only be compounded by attempting to accommodate the contortions of the courts in these cases within a general theory of the basis and the limits of the doctrine of frustration. These cases are best regarded as being *sui generis*.

(c) A doctrine with "very narrow limits"

The second proposition of Bingham L.J. is worthy of note because it makes the point that it is no easy task to persuade a court that a contract has been frustrated. Indeed, at one point in time, supervening events were not regarded as an excuse for non-performance because the parties could have provided for such eventualities in their contract. In short, once a party had assumed an obligation he was bound to make it good.[51] Even this rule was not, in all probability, an absolute one: "there remained some scope for the development of a defence of supervening impossibility through Act of God and this was allowed where death, the most dramatic Act of God, intervened".[52] However, beginning with *Taylor* v. *Caldwell*,[53] through cases such as *Jackson* v. *Union Marine Insurance Co. Ltd.*[54] to the "coronation cases",[55] the courts began to adopt a more relaxed approach, being rather more willing to discharge a contract on the ground of frustration.

But today, as the judgment of Bingham L.J. reveals, the pendulum has swung back towards a more restrictive approach. This restrictive approach was classically illustrated by the decision of the House of Lords in *Davis Contractors Ltd.* v. *Fareham U.D.C.*[56] The plaintiff contractors agreed to build 78 houses for the defendants for £94,000. The work was scheduled to last for eight months but, owing to shortages of skilled labour, it took 22 months to complete and cost £115,000. The plaintiffs, in an attempt to recover a sum of money in excess of the contract price, argued that the contract had been frustrated and that they were therefore entitled to claim a sum greater than the contract price on a *quantum meruit*. The plaintiffs' argument was rejected. Lord Radcliffe stated that it was 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."[57] The restrictive attitude of the modern courts was well summed up by Lord Roskill when he said that the doctrine of frustration was "not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent bargains".[58]

51. *Paradine* v. *Jane* (1647) Aleyn 26.
52. Simpson, "Innovation in Nineteenth Century Contract Law" (1975) 91 L.Q.R. 247, at p. 270, citing *Williams* v. *Hide* (1624) Palmer 548; Jones W. 179.
53. (1863) 3 B. & S. 826.
54. (1874) L.R. 10 C.P. 125.
55. See, for example, *Krell* v. *Henry* [1903] 2 K.B. 740 and *Chandler* v. *Webster* [1904] 1 K.B. 493.
56. [1956] A.C. 696.
57. *Ibid.*, p. 729.
58. *Pioneer Shipping Ltd.* v. *B.T.P. Tioxide Ltd.* (*The Nema*) [1982] A.C. 724, at p. 752. This desire to avoid disturbing the normal consequences of imprudent bargains has been particularly evident in

Davis Contractors may be said to be the paradigm example of an "imprudent bargain": the unexpected rise in prices undoubtedly caused hardship to the plaintiffs but it did not result in a radical change in the nature of the obligation assumed and so the contract was not frustrated. Similarly, the closing of the Suez Canal, although making the performance of contracts for the carriage of goods by sea more onerous, did not frustrate such contracts because there was not a sufficiently fundamental change in the nature of the obligation assumed.[59]

In principle, there is much to be said for this restrictive stance.[60] This is so for two principal reasons. The first is that contractual obligations are generally strict,[61] and so it is for a contracting party to qualify the obligation which he has assumed in whatever way he deems necessary. The second is that the one thing which we do know about the future is that it is uncertain; war may suddenly break out, prices may suddenly increase, inflation may rise, labour disputes may break out, etc. Contracting parties are expected to foresee and provide against many such possibilities when entering into a contract and they cannot invoke the doctrine of frustration simply because the going gets rough or because performance has become more onerous than they had anticipated at the time of entry into the contract. When considering the narrowness of the doctrine of frustration it must not be forgotten that the parties have at their disposal a wide range of clauses and techniques to deal with unforeseen events, such as *force majeure* clauses, exception clauses, hardship clauses, intervener clauses[62] and price escalation clauses.

On the other hand, it can be argued that such a narrow doctrine of frustration increases the transaction costs of the parties by compelling them to spend time negotiating and drafting an appropriate *force majeure* clause or price variation clause. But the narrowness of the doctrine of frustration has the advantage that it avoids the uncertainty which would be caused by giving to the courts a general power to review "onerous" contract terms or contracts which have turned out to be more "onerous" as a result of a change in circumstances, and parties are at least given the opportunity to tailor the clause to their own particular needs.

The advantage of a *force majeure* clause is, therefore, that it offers to the parties, should they wish to avail themselves of it, the opportunity to escape from the narrowness of the doctrine of frustration by including within their *force majeure* clause an event which would not, at common law, be sufficient to frustrate the contract. For example, we have noted that the closure of the Suez Canal was held not to constitute a frustrating event, but it is common for *force majeure* clauses to list the "closure of the Suez Canal" as an event which gives to the parties an option to ter-

cases such as *Amalgamated Investment & Property Co. Ltd.* v. *John Walker & Sons Ltd.* [1977] 1 W.L.R. 164 where it has been alleged that the purpose of the contract was frustrated.

59. *Tsakiroglou & Co. Ltd.* v. *Noblee & Thorl G.m.b.H.* [1962] A.C. 93; *Ocean Tramp Tankers Corporation* v. *V/O Sovfracht* (*The Eugenia*) [1964] 2 Q.B. 226. A similar conclusion was reached by the courts in the United States: see, for example, *Transatlantic Financing* v. *U.S.* 363 F. 2d. 312 (1966), discussed in more detail at p. 317 (Digwa-Singh).

60. But for a more liberal view of the role and the scope of frustration and analogous doctrines see Chapters 10 (McInnis) and 12 (Rogers). In the latter chapter it is argued that estoppel is the preferable doctrine to invoke in many of these cases.

61. See Treitel, *Remedies for Breach of Contract: A Comparative Account*, Chapter 2, and Holmes, *The Common Law* pp. 298–300, discussed further at pp. 4 above.

62. On which see generally Schmitthoff, "Hardship and Intervener Clauses" [1980] J.B.L. 82.

minate the contract.[63] Similarly, we have noted that an unexpected rise in prices has been held not to constitute a frustrating event, but again it is common to include within a list of *force majeure* events "abnormal increases in prices and wages". The flexibility given to contracting parties to define their own "*force majeure* events" is a significant advantage over the doctrine of frustration.

(d) The consequences of frustration

The third proposition of Bingham L.J. draws attention to the drastic consequences of a finding that a contract has been frustrated. The contract is immediately and automatically brought to an end, irrespective of the wishes of the parties. A court does not have the power at common law to allow the contract to continue and to adapt its terms to the changed circumstances or to substitute new terms more suitable for the changed situation than the terms contained in the original contract. This is claimed to be a significant weakness given the increasing importance of long-term, relational contracts where it is alleged that the existence of such a power would be extremely valuable.[64] Although the harshness of the common law rules relating to the consequences of frustration has been mitigated to an extent by the enactment of the Law Reform (Frustrated Contracts) Act 1943, we shall see[65] that the Act suffers from a number of deficiencies and is unlikely to meet the needs of contracting parties. In contrast, a *force majeure* clause can make its own provision for the consequences of the occurrence of a *force majeure* event; for example, provision can be made for the availability of extensions of time, the suspension or variation of the contract or even the termination of the contract. The remedial rigidity of the general law contrasts unfavourably with the flexibility which can be obtained by the drafting of an appropriate *force majeure* clause.

A further difficulty is created by the proposition that frustration operates *automatically*, that is to say, irrespective of the wishes of the parties.[66] In the first place it creates difficulties where it is alleged that the contract has been frustrated by delay.[67] Secondly, it appears to "make it impossible for the parties to negotiate after the event"[68] because, even if the parties subsequently seek to negotiate their way out of the situation, one party can always undermine that negotiating process by arguing that the contract was frustrated and that, in determining whether the contract was frustrated, his conduct in entering into the negotiating process is irrel-

63. Of course, difficulties of construction may still arise. See generally on the drafting of such clauses Chapters 4 (Furmston) and 5 (Berg). See also Cartoon, "Drafting an Acceptable *Force Majeure* Clause" [1978] J.B.L. 230.

64. Relational contracts are generally beyond the scope of this book. For a useful discussion of this issue see Bell, "The Effect of Changes in Circumstances on Long-term Contracts" in Harris and Tallon (eds.), *Contract Law Today: Anglo-French Comparisons* and Macneil, "Contracts: Adjustment of Long-term Economic Relations under Classical, Neoclassical and Relational Contract Law" (1978) 72 Northwestern Univ. L. Rev. 854. The claim that long-term contracts require separate regulation is challenged by McKendrick, "The Regulation of Long-Term Contracts in English Law" in Beatson and Friedmann (eds.), *Good Faith and Fault in Contract Law* (Oxford, 1995).

65. Discussed further in Chapter 11.

66. See, for criticism, McElroy and Williams, *Impossibility of Performance* pp. 221–231; Goldberg, "Is Frustration Invariably Automatic" (1972) 88 L.Q.R. 464 and Stannard, "Frustrating Delay" (1983) 46 M.L.R. 738, esp. pp. 744–747.

67. This point is discussed further in Chapter 6.

68. Stannard, *op. cit.*, note 66, p. 746.

evant because frustration operates automatically, irrespective of the conduct of the parties after the occurrence of the frustrating event.[69]

Thirdly, the proposition that frustration operates automatically is difficult to reconcile with the troublesome case of *Howell* v. *Coupland*.[70] There the parties entered into a contract for the sale by the defendant to the plaintiff of "200 tons of regent potatoes grown on land belonging to the defendant in Whaplode". The defendant's crop failed because of the potato blight and he was only able to deliver 80 tons of potatoes. The plaintiff sued in respect of the non-delivery of the other 120 tons. It was held that the contract was for the delivery of a portion of a specified crop and that there was implied into the contract a condition which excused the defendant from the consequences of the non-performance of his obligation to deliver the 120 tons in the events which happened. An interesting question which was not raised on the facts of *Howell* was whether the defendant remained under an obligation to deliver the 80 tons of potatoes. That question was subsequently answered in the affirmative by MacKenna J. in the factually similar case of *H.R. and S. Sainsbury Ltd.* v. *Street*.[71] Such a conclusion is clearly inconsistent with the automatic nature of frustration because the obligation to deliver the portion of the crop which is destroyed is discharged but the obligation to deliver the crop which has grown remains enforceable. This inconsistency has led some commentators to assert that *Howell* is not a frustration case but an example of the courts determining the rights of the parties "by the express or (more usually) implied terms of their bargain".[72] But this reasoning is difficult to support because it does not tell us *why* the courts see fit to imply terms into a contract in certain, largely undefined situations. The suggestion that *Howell* has nothing to do with frustration is also difficult to reconcile with the judgment of Blackburn J. in the case itself because he found support for his judgment in *Taylor* v. *Caldwell*,[73] a leading frustration case, thereby suggesting that he was of the opinion that *Howell* was truly a frustration case. Further, given that frustration was at the time *Howell* was decided thought to be based upon the implication of a term into the contract, the use of the same technique in *Howell* also suggests that it is properly regarded as a frustration case. If this is so, it suggests that the rule that frustration operates automatically is in need of reconsideration. The rule could, however, be saved by explaining *Howell* as a case of partial "frustration": the obligation to deliver the 120 tons was frustrated

69. *Hirji Mulji* v. *Cheong Yue S.S. Co.* [1926] A.C. 497; cf. *The Super Servant Two* [1990] 1 Lloyd's Rep. 1 (the facts of which are discussed in greater detail at pp. 46–50) where Bingham L.J. held that the defendants' argument that the contract was frustrated was fatally flawed because they argued that the contract was frustrated, not when their barge which had been allocated to perform the contract with the plaintiffs sank, but when they communicated to the plaintiffs their decision that they could not perform the contract with the other barge. The argument that the operation of the doctrine was dependent upon the decision of the defendants, Bingham L.J. held to be inconsistent with authority. If this was the argument of the defendants, then it would appear to have been misconceived because the frustrating event, if there was one, was the sinking of the barge and so the date of frustration should have been that date, not the date of their communication with the plaintiffs. The subsequent conduct of the defendants, it could then have been argued, was irrelevant because the contract was frustrated automatically.

70. (1874) L.R. 9 Q.B. 462; affd. (1876) 1 Q.B.D. 258. See also the discussion at pp. 258–259 (Diamond).

71. [1972] 1 W.L.R. 834, although it should be noted that, in such a case, the plaintiff is under no obligation to accept the 80 tons, see Sale of Goods Act 1979, s.30(1).

72. Greig and Davis, *The Law of Contract*, p. 1308.

73. (1863) 3 B. & S. 826.

automatically, but the obligation to deliver the 80 tons remained enforceable. This is a plausible explanation of the case but it suffers from the difficulty that English law does not appear to recognise the existence of a doctrine of partial frustration.[74] Barry Nicholas has already pointed out the "discomfort in which English law finds itself when faced with partial impossibility",[75] which discomfort is caused in large part by the fact that the consequences of frustration are directed towards the contract as a whole and not to the particular obligation which has been affected by the unforeseen event. Yet cases can be found in which the courts have excused a party from the consequences of the non-performance of a particular obligation without holding that the contract was frustrated.[76] In so far as these cases are sometimes classified as cases of "partial frustration", it is suggested that such classification is misleading because it suggests that the contract as a whole has been terminated when, in fact, it is only a particular obligation which has not been performed as a result of the supervening event. What is required is for English law to recognise a separate doctrine under which a contracting party can be excused from the non-performance of a particular obligation (where the non-performance has been caused by a supervening event) without the contract as a whole being discharged. But that task must await another day. Here enough has been said to demonstrate the difficulties which surround the "automatic" nature of frustration, which difficulties can be largely avoided by reliance upon a carefully drafted *force majeure* clause which clearly sets out the consequences of the occurrence of a *force majeure* event.

(e) Self-induced frustration

The fourth and fifth propositions of Bingham L.J. relate to the scope of the doctrine of self-induced frustration. English law has never set out with any clarity the limits of this doctrine,[77] and the fourth proposition of Bingham L.J. was critical on the facts of *Super Servant Two*, to which we must now turn.

The defendants agreed to transport the plaintiffs' oil rig, using, at their option, either *Super Servant One* or *Super Servant Two* (both of which were self-propelling,

74. *Kawasaki Steel Corp.* v. *Sardoil S.P.A.* (*The Zuiho Maru*) [1977] 2 Lloyd's Rep. 552, 555, where Kerr J. stated that a plea of partial frustration "will not do", although he stated on the same page that *Howell* was a case in which the contract was not frustrated in its entirety, thereby suggesting that *Howell* might be classified as a case of partial frustration.

75. See p. 30 above.

76. See, for example, *H.R. & S. Sainsbury Ltd.* v. *Street* [1972] 1 W.L.R. 834; *Cricklewood Property and Development Trust Ltd.* v. *Leighton Investment Trust Ltd.* [1945] A.C. 221, 233–234; *Libyan Arab Foreign Bank* v. *Bankers Trust Co.* [1989] Q.B. 728, 772; *John Lewis Properties plc* v. *Viscount Chelsea* [1993] 2 E.G.L.R. 77, 82.

77. An attempt was, however, made by Hobhouse J. at first instance in *The Super Servant Two* [1989] 1 Lloyd's Rep. 148, at pp. 154–156 (noted by McKendrick [1989] L.M.C.L.Q. 3) to define self-induced frustration as a "label" which has been used to describe "those situations where one party has been held by the courts not to be entitled to treat himself as discharged from his contractual obligations". On this analysis, frustration was self-induced where the alleged frustrating event was caused by a breach or an anticipatory breach of contract by the party claiming that the contract had been frustrated, where an act of the party claiming that the contract has been frustrated broke the chain of causation between the alleged frustrating event and the event which made performance of the contract impossible, and where the alleged frustrating event was not a supervening event, by which he meant "something altogether outside the control of the parties". See also the discussion by Swanton "The Concept of Self-induced Frustration" (1990) 2 J.C.L. 206.

semi-submersible barges especially designed for the transportation of rigs). Prior to the time for performance of the contract, the defendants made an internal decision, which they admitted was not irrevocable, to allocate *Super Servant Two* to the performance of the contract with the plaintiffs. They allocated *Super Servant One* to the performance of other concluded contracts. After the conclusion of the contract, but before the time fixed for performance, *Super Servant Two* sank while transporting another rig in the Zaire River. The plaintiffs' rig could not be transported by *Super Servant One* because of its allocation to the performance of other concluded contracts.[78] At this point the parties entered into "without prejudice negotiations" and it was agreed that the defendants should transport the rig by another, more expensive, method. In these circumstances the plaintiffs sued to recover the losses which they had incurred as a result of this more expensive method of transportation, alleging that the defendants were in breach of contract in failing to transport the rig in the agreed manner. The defendants denied liability on two principal grounds. The first was that the sinking of *Super Servant Two* frustrated the contract between the parties. The second was that the sinking of *Super Servant Two* entitled them to cancel the contract under clause 17 of the contract, which was a *force majeure* clause. Here we shall focus our attention upon the frustration point.

The plaintiffs argued that this was not a case of frustration because the cause of the loss was not the sinking of *Super Servant Two* but the decision of the defendants not to use *Super Servant One* in the performance of the contract with the plaintiffs. In this respect the plaintiffs placed heavy reliance upon the decision of the Privy Council in *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.*[79] There the defendants chartered a ship from the plaintiffs but the vessel could only be used for its intended purpose if it was fitted with an otter trawl. An otter trawl could only be used under licence and, although the defendants applied for licences for each of the five vessels which they operated, they were allocated only three. They elected to apply the licences to the trawlers which they owned directly or indirectly rather than to the vessel chartered from the plaintiffs. The plaintiffs sued for the hire due under the charter. The defendants denied that they were liable to pay the hire because they maintained that the charterparty had been frustrated because it was impossible to use the trawler for its stated purpose without a licence. The Privy Council held that the failure of the defendants to obtain a licence did not have the effect of frustrating the contract between the parties; it was a case of self-induced frustration and the defendants were in breach of contract.

The scope of the case has, however, always been a source of some controversy. On the one hand, it could be argued that the crucial factor which led the Privy Council to conclude that it was a case of self-induced frustration was that the defendants elected to allocate the licences to trawlers which they owned directly or indirectly rather than to the trawler chartered from the plaintiffs.[80] On the other hand, it could be argued that the mere fact that the defendants had a choice as to

78. After the loss of *Super Servant Two* the defendants did use *Super Servant One* to carry one of the cargoes which had been scheduled for *Super Servant Two* but otherwise no other alteration was made to their internal scheduling.

79. [1935] A.C. 524.

80. The fact that the defendants had an interest in the trawlers to which they allocated the licences is not clear from the judgment of Lord Wright in the Privy Council but it does emerge from the judgments in the Canadian courts, see [1934] 1 D.L.R. 621, at p. 623 and [1934] 4 D.L.R. 288, at p. 299.

the distribution of the licences was sufficient to turn it into a case of self-induced frustration.

The latter interpretation was the one which was adopted in *Super Servant Two*, both at first instance and in the Court of Appeal. Support for such an interpretation can be found in the judgment of Lord Wright in *Maritime National* when he said that it was "immaterial"[81] to speculate why the defendants had allocated the licences to the three particular trawlers. Applying this analysis to the facts of *Super Servant Two*, it was held that the mere fact that the defendants had a choice as to the allocation of *Super Servant One* meant that this was a case of self-induced frustration because the alleged frustrating event was due to the act or election of the party seeking to invoke the doctrine.

Such a conclusion leaves a seller or supplier of goods in an impossible position where his source of supply partially fails because of an unforeseen event. Indeed, in many ways it would be preferable if the source of supply failed completely because then at least the seller could invoke frustration as an excuse for non-performance. There are, however, a number of possible escape routes for a party, such as the defendants in *Super Servant Two*, whose source of supply partially fails for some unforeseen reason.

The first is to eliminate the choice on the part of the defendants. Thus, Bingham L.J. stated that, had the contract been to perform the contract by the use of *Super Servant Two*, then he felt "sure"[82] that the contract would have been frustrated on the sinking of *Super Servant Two*. Such a stipulation would have brought about a complete rather than a partial failure of supply but only at the cost of giving to the defendants less flexibility in the allocation of their barges.

The second is to argue that *Super Servant Two* was, in fact, wrongly decided. A number of arguments can be put forward in support of this proposition.[83] In the first place it can be argued that it provides an odd contrast with *Howell* v. *Coupland*[84] because, there too there was a partial failure of supply, yet the seller was discharged from his obligation to supply the 120 tons of potatoes. Of course, *Super Servant Two* is factually distinguishable because in *Howell* the defendant had entered into a contract with one buyer whereas in *Super Servant Two* the defendants had entered into a number of different contracts with different parties. But this factor hardly seems to be material.

The second argument is that there is some, albeit slight, authority for the proposition that, in the event of a partial failure of supply, a seller who cannot satisfy all his contractual obligations can seek to share the partial supply among his contractors without being in breach of contract. Suppose, for example, that a potato farmer reasonably believes that his land will yield 500 tons of potatoes and so he agrees to sell 100 tons to each of five different purchasers. But his crop partially fails and the land yields only 200 tons. What is the legal position of the farmer? There are, theoretically, a number of possible solutions. The first view is that all

81. [1935] A.C. 524, at p. 530.
82. [1990] 1 Lloyd's Rep. 1, at p. 9.
83. See also the criticisms levelled against the decision by Treitel, *The Law of Contract* (8th Edn.) pp. 805–806.
84. (1874) L.R. 9 Q.B. 462; affd. (1876) 1 Q.B.D. 258, discussed above at note 70 and associated text.

five contracts are frustrated. But the courts are unlikely to accept such an extreme argument.[85] The second view, and the one apparently taken by the Court of Appeal in *Super Servant Two*,[86] is that none of the contracts are frustrated, so that the farmer is in breach of any contract which he fails to perform fully.[87] But such a solution does seem harsh on the farmer, because there is no obvious reason why he should be released from the consequences of non-performance when the failure is total but not when it is partial or why he should be released when he has only one buyer but not when he has many buyers. A third view is that the farmer has a free choice as to which of the five contracts are to be performed and that the rest are discharged on the ground of frustration. But it is suggested that the courts are unlikely to give to the farmer a free hand in the distribution of the scarce supplies and so may require a particular method of division. The fourth view is that a particular method of distribution will be required and, in so far as any of the farmer's contractual obligations remain unperformed, they are discharged on the ground of frustration. But what method of distribution would the law require? One method would be pro rata division,[88] another would be the satisfaction in full of the contracts which happen to be concluded first in time,[89] yet another would be the satisfaction in full of contracts according to their delivery dates.[90] A wider view is that the farmer should simply be required to act reasonably in the distribution of scarce resources.[91] The latter solution has been adopted in America in the Uniform Commercial Code[92] and there were some signs in recent cases that English law was moving slowly in a similar direction.[93]

But such a development was brought to an abrupt halt in *Super Servant Two* because the cases which appeared to support such a movement were explained as cases which turned upon the construction of a *force majeure* clause.[94] Thus, Hobhouse J. expressly stated that if a promisor wished protection in the event of a partial failure of his supplies "he must bargain for the inclusion of a suitable *force majeure* clause in the contract".[95] It is, however, of some interest to note that a

85. Although on one reading the judgments of the House of Lords in *Tennants (Lancashire) Ltd.* v. *C.S. Wilson & Co. Ltd.* [1917] A.C. 495 are capable of supporting such an argument.

86. Although it should be noted that the full range of options was not available to the Court of Appeal because *Super Servant One* was not physically divisible and so she had to be allocated to the performance of certain selected contracts.

87. See also *Hong Guan & Co. Ltd.* v. *R. Jumabhoy & Sons Ltd.* [1960] A.C. 684, at pp. 701–702 and *Pancommerce S.A.* v. *Veecheema B.V.* [1982] 1 Lloyd's Rep. 645, at p. 651, although note the valuable discussion of the former case by Hudson, "Prorating in the English Law of Frustrated Contracts" (1968) 31 M.L.R. 535, at pp. 539–541.

88. *Bremer Handelsgesellschaft m.b.H.* v. *C. Mackprang Jr.* [1979] 1 Lloyd's Rep. 221, at p. 224.

89. *Intertradex S.A.* v. *Lesieur Torteaux S.A.R.L.* [1978] 2 Lloyd's Rep. 509.

90. A view apparently held by Lord Finlay in his dissenting speech in *Tennants (Lancashire) Ltd.* v. *C.S. Wilson & Co. Ltd.* [1917] A.C. 495, at p. 508.

91. *Continental Grain Export Cpn.* v. *S.T.M. Grain Ltd.* [1979] 2 Lloyd's Rep. 460, at p. 473 and *Bremer Handelsgesellschaft m.b.H.* v. *Continental Grain Co.* [1983] 1 Lloyd's Rep. 269, at p. 292.

92. Section 2–615, discussed further in Chapter 16.

93. See the analysis of the relevant cases in Treitel, *The Law of Contract* (8th Edn.), pp. 774–776, *Benjamin's Sale of Goods* (4th Edn.), paras. 6-043 and 18-181; Hudson *op. cit.*, note 87 and Hudson "Prorating and Frustration" (1979) 123 S.J. 137.

94. The cases which were distinguished on this ground were *Intertradex S.A.* v. *Lesieur Torteaux S.A.R.L.* [1978] 2 Lloyd's Rep. 509; *Bremer Handelsgesellschaft m.b.H.* v. *C. Mackprang Jr.* [1979] 1 Lloyd's Rep. 221 and *Bremer Handelsgesellschaft m.b.H.* v. *Continental Grain Co.* [1983] 1 Lloyd's Rep. 269.

95. [1989] 1 Lloyd's Rep. 148.

similar position to that adopted by the Court of Appeal and Hobhouse J. in *Super Servant Two* was once adopted by the courts in America but that gradually they were persuaded to permit prorating even in the case where there was no *force majeure* clause or exception clause in the contract.[96] Thus *Super Servant Two* may yet be open for further examination.

But, at least for the moment, the third and safest method of protection for a seller faced with a partial failure of supplies, and the one actually adopted by the defendants in *Super Servant Two*, is to incorporate into the contract a suitably drafted *force majeure* clause. However, even when such a clause has been incorporated into the contract, it should not be assumed that it will necessarily achieve its purpose. The courts will probably still insist that the seller act reasonably in allocating his available supplies.[97] Thus, the protection afforded by an appropriately drafted *force majeure* clause may be limited, but it is better than having no protection at all because the "frustration" is held to be "self-induced".

(f) Frustration and fault

The final proposition of Bingham L.J. relates to the relationship between frustration and fault. This is a vexed issue and it also arose on the facts of *Super Servant Two*. The plaintiffs argued that it was a case of self-induced frustration because they alleged that the cause of the sinking of *Super Servant Two* was the negligence of the defendants or their employees. It is not entirely clear whether a contract can be frustrated when the alleged frustrating event has been brought about by the negligence or fault of one of the contracting parties.[98] Some have argued that, generally, negligence should exclude frustration,[99] while others have maintained that the presence of fault should not necessarily exclude frustration.[100] The point has never been conclusively resolved.[101] The defendants in *Super Servant Two* argued that it was only when they had acted deliberately or were in breach of a duty of care owed to the plaintiff that they would be precluded from relying upon the doctrine of frustration.[102] But this view was rejected[103] on the ground that it would "confine the law in a legalistic strait-jacket"[104] and obscure the real issue, which was whether "the frustrating event relied upon is truly an outside event or extraneous change of

96. See Hudson, *op. cit.*, note 87, p. 536.

97. See, for example, *Intertradex S.A.* v. *Lesieur Torteaux S.A.R.L.* [1978] 2 Lloyd's Rep. 509; *Continental Grain Export Corp.* v. *S.T.M. Grain Ltd.* [1979] 2 Lloyd's Rep. 460 and *Bremer Handelsgesellschaft m.b.H.* v. *Continental Grain Co.* [1983] 1 Lloyd's Rep. 269, as explained by the Court of Appeal and Hobhouse J. in *Super Servant Two*.

98. The principal authority is the decision of the House of Lords in *Joseph Constantine Steamship Ltd.* v. *Imperial Smelting Corporation Ltd.* [1942] A.C. 154 but even here there are only *obiter dicta* on point.

99. Treitel, *The Law of Contract* (8th Edn.), p. 804.

100. Viscount Simon in *Joseph Constantine S.S. Co.* v. *Imperial Smelting Corporation Ltd.* [1942] A.C. 154, at p. 166.

101. See the rather equivocal remarks of Lord Brandon in *The Hannah Blumenthal* [1983] 1 A.C. 854, at p. 909.

102. Relying upon *Joseph Constantine Steamship Ltd.* v. *Imperial Smelting Corporation Ltd.* [1942] A.C. 154, at p. 166 (Viscount Simon), 195 (Lord Wright) and 202 (Lord Porter), and *Cheall* v. *A.P.E.X.* [1983] 2 A.C. 180, at pp. 188–189.

103. Relying upon the judgment of Griffiths L.J. in *The Hannah Blumenthal* [1983] 1 A.C. 854, at p. 882.

104. [1990] 1 Lloyd's Rep. 1, at p. 10.

situation or whether it is an event which the party seeking to rely on it had the means and opportunity to prevent but nevertheless caused or permitted to come about". The same point was made at first instance by Hobhouse J. when he held that the sinking of *Super Servant Two* was not an event which was outside the control of the defendants; it was an event which was within their control and it did not cease to be within their control simply because they had unreasonably failed to exercise control.[105] The adoption of such an approach is likely to lead to the conclusion that most if not all cases involving negligence on the part of the party claiming that the contract has been frustrated will be treated as cases of self-induced frustration because the alleged frustrating event will be within his reasonable control.

Once again, contracting parties can seek to escape this consequence by drafting a *force majeure* clause which extends to damage caused by the fault of the party relying upon the clause. But such a proposition is a controversial one. On one view, a clause which purports to apply to events within the control of the party relying upon it is not a *force majeure* clause at all.[106] On this argument such a clause is an exception clause, not a *force majeure* clause. But this view was not shared by Bingham L.J. in *Super Servant Two* because he maintained that clause 17, which it was alleged covered the sinking of *Super Servant Two* even when the sinking was caused by the negligence of the defendants or their employees, was a *force majeure* clause, not an exception clause. On the other hand, Bingham L.J. held that the "broad approach" adopted by the Privy Council in *Canada Steamship* v. *R.*,[107] to the construction of exclusion clauses which purported to exclude liability for negligence was also applicable to the interpretation of a *force majeure* clause. Unfortunately, the rules of interpretation enunciated in *Canada Steamship* have been heavily criticised for their artificiality[108] and Donaldson L.J. (as he then was) has warned against treating the rules "as if they were the words of a codifying and, still worse an amending, statute".[109] The extension of these artificial rules to *force majeure* clauses is, therefore, not an approach which can be welcomed, especially when there have been signs, albeit rather limited, of judicial unwillingness to apply the *Canada Steamship* rules to some clauses which have the effect of enabling one contracting party to exclude liability for his own negligence.[110] At a time when a more relaxed and natural approach has been evident in the interpretation of limitation[111]

105. [1989] 1 Lloyd's Rep. 148, at p. 158, although Hobhouse J. conceded that the position would have been otherwise if the contract had contained an exclusion clause which exempted the defendants from liability for their negligence.

106. See pp. 16–17 above.

107. [1952] A.C. 192.

108. See, for example, Palmer, "Negligence and Exclusion Clauses Again" [1983] L.M.C.L.Q. 557.

109. *The Raphael* [1982] 2 Lloyd's Rep. 42, at p. 45.

110. See, for example, *Scottish Special Housing Association* v. *Wimpey Construction U.K. Ltd.* [1986] 2 All E.R. 957, where no mention was made of the *Canada Steamship* rules. Indeed, the Full Supreme Court of Victoria in *Schenker & Co. (Aust) Pty. Ltd.* v. *Malpas Equipment and Services Pty. Ltd.* [1990] V.R. 834, 846 held that the strained approach to construction adopted in *Canada Steamship* was inconsistent with the more natural and ordinary approach to construction adopted by the High Court of Australia in *Darlington Futures Ltd.* v. *Delco Australia Pty. Ltd.* (1986) 161 C.L.R. 500. But such an approach has not yet been adopted in England and the Court of Appeal has recently followed and applied the *Canada Steamship* rules (*EE Caledonia Ltd.* v. *Orbit Valve Co. plc.* [1994] 2 Lloyd's Rep. 239).

111. *Ailsa Craig Fishing Co. Ltd.* v. *Malvern Fishing Co. Ltd.* [1983] 1 W.L.R. 964; *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.* [1983] 2 A.C. 803.

and exclusion clauses,[112] it seems rather unfortunate that Bingham L.J. has seen fit to extend the scope of the artificial *Canada Steamship* rules to *force majeure* clauses.

Apart from this point about the application of the *Canada Steamship* rules of construction to *force majeure* clauses, there is some force in the argument that a *force majeure* clause, by definition, must apply only to events which were beyond the control of the parties. There must, therefore, be some doubt as to whether a *force majeure* clause, properly so called, can ever apply to events which were within the control of the party invoking the clause. But, even if it can so apply, a number of difficulties lie ahead of a party who seeks to draft a *force majeure* clause which covers his own negligence, particularly in the form of the *Canada Steamship* rules of construction and, possibly, even the controls contained in the Unfair Contract Terms Act 1977.[113]

6. CONCLUSION

The theme of this chapter may be said to be, broadly speaking, one of "self-help": that is to say, since the doctrine of frustration operates within narrow confines, considerable advantages can be obtained by the incorporation into a contract of a suitably drafted *force majeure* clause. It may be objected that such an approach adds to the transaction costs of the parties and that a better way of dealing with this issue is to subject the doctrine of frustration to re-examination, with the aim of giving to the courts more extensive powers to re-write contracts which have become more onerous as a result of the occurrence of an unforeseen event. But the latter solution would be costly in terms of the uncertainty which would ensue and it is by no means clear that this uncertainty can be eliminated by enacting specific solutions, because the solutions which will be acceptable to contracting parties are unlikely to be capable of precise identification as they are largely context-dependent.

The proposition that we should not reform the doctrine of frustration is, of course, a contestable one, but it is undeniably true that frustration presently operates within very narrow confines. In the absence of imminent reform two options are available to us. We can either bemoan the present state of the law or we can begin to advise contracting parties as to how they can draft clauses which are suitable to their needs. The latter approach may be acceptable to the party who is legally advised or who can afford legal advice, but what of the contracting party who has not been advised to incorporate a *force majeure* clause into his contract but who finds that his contractual obligations have, as the result of an unforeseen event, become more onerous? As we have seen,[114] he is unlikely to succeed with an argument that the contract has been frustrated. So what can he do?

One obvious step is to give serious consideration to incorporating a *force majeure* clause into his future contracts. But what about his existing contracts? One step

112. See, for example, the speech of Lord Diplock in *Photo Production Ltd.* v. *Securicor Transport Ltd.* [1980] A.C. 827; and, more generally, the decision of the High Court of Australia in *Darlington Futures Ltd.* v. *Delco Australia Pty. Ltd.* (1986) 161 C.L.R. 500.

113. The possible application of the Act to *force majeure* clauses is considered at p. 11 and p. 264.

114. Above, pp. 42–44.

which he can take is to seek to renegotiate the contract in an effort to recover some of the unexpected cost from the other party to the contract. If the other party is willing to pay and does pay, obviously no problem arises. But what if the other party refuses to enter into such negotiations or promises to pay but later refuses? A significant obstacle in the way of a party seeking to renegotiate in such circumstances was the rule that performance of an existing contractual duty owed to the promisor is not good consideration for a fresh promise given in return.[115] But the importance of this hurdle appears to have been radically reduced by the recent decision of the Court of Appeal in *Williams* v. *Roffey Bros. & Nicholls (Contractors) Ltd.*[116] The defendants, who had entered into a contract to renovate a block of flats, subcontracted the carpentry work to the plaintiff for a price of £20,000. During the course of the work the plaintiff ran into financial difficulties, partly because he discovered that he had fixed the price too low. It was in the defendants' interests to ensure that the work was completed on time because, if it was not, they would be liable to pay compensation under a "penalty clause" contained in the main contract. So the defendants arranged a meeting with the plaintiff, at which it was agreed that they would pay the plaintiff an extra £10,300, at the rate of £575 per flat on completion, to ensure that the work was completed on time. The plaintiff sued the defendants to recover some of the additional promised sum, but the defendants argued, *inter alia*, that there was no consideration to support their promise to pay. This argument was rejected by the Court of Appeal. Adopting a pragmatic approach the court held that the defendants had in fact obtained a benefit as a result of the plaintiff's promise to complete the work on time, in that it enabled them to avoid liability under the main contract.

For present purposes our interest lies in whether, prior to the re-negotiations, the plaintiff could have argued that the contract was frustrated. The answer is clear that he could not. And, as Adams and Brownsword have pointed out, this conclusion may render it

> "necessary to review the application of the frustration principle, which . . . firmly sets its face against assisting a contractor to re-negotiate an underpriced contract, despite the underpricing arising through circumstances beyond the control of the parties. Yet, in *Williams* v. *Roffey*, the court bends over backwards to indemnify a contractor against the effects of underpricing in circumstances where the underpricing is entirely within his control."[117]

This does appear at first sight to be rather anomalous but the point can, in fact, be met on two grounds. The first is that *Williams* v. *Roffey* can be reconciled with cases such as *Davis* v. *Fareham U.D.C.*[118] on the ground that the courts in all of these cases were simply concerned to uphold the bargain which the parties had concluded. In *Davis* the original agreement was never consensually varied and the court held the parties to their original agreement. But in *Williams* the parties did reach a new agreement and the effect of the decision of the Court of Appeal was to uphold the validity of the later agreement. The second point of distinction is that it

115. *Stilk* v. *Myrick* (1809) 2 Camp. 317 and 6 Esp. 129.

116. [1991] 1 Q.B. 1.

117. "Contract, Consideration and the Critical Path" (1990) 53 M.L.R. 536, at p. 541 (footnotes omitted).

118. [1956] A.C. 696, discussed in more detail at p. 42 above. *Davis* is, in fact, the case which is relied upon by Adams and Brownsword to draw a contrast with *Williams* v. *Roffey Bros*.

is possible to maintain that the "changed or unforeseen circumstances which would constitute a sufficient basis for an exception to the pre-existing duty rule need not be of the same degree required for actual discharge by impossibility"[119]; it suffices that the changed circumstances created a "reasonable and honest belief that the original duty is discharged".

If *Williams* v. *Roffey* is correct, it would appear that economic duress is now the principal control device which places limits upon the conduct of the parties during the renegotiation of a contract. Renegotiations would thus be liable to be set aside where the party whose performance had become more onerous had employed an "illegitimate"[120] threat which was a (significant[121]) cause[122] of the other party agreeing to the new terms. The difficulty with this formulation of duress, when applied to the facts of *Williams* v. *Roffey*, is that, if the contract was not frustrated (which it was not), there was an illegitimate threat (a breach of contract) which surely was a (not "the") cause of the defendants' agreeing to the new terms.[123] The prerequisites for a successful duress claim would, therefore, appear to have been satisfied, but the Court of Appeal nevertheless concluded that, on the facts, there had been no economic duress. This is rather difficult to explain (and the explanation lies beyond the scope of our present discussion) but it does illustrate, once again, that the courts are willing, within limits, to allow contracting parties to engage in "self-help" in circumstances where it could not be argued that the contract had been frustrated, whether the self-help be in the form of permitting them to draft wider *force majeure* clauses or in upholding the renegotiation of a contract after the occurrence of an unforeseen event. But whether *Williams* v. *Roffey* will, as Adams and Brownsword suggest, result in a "review" of the doctrine of frustration, is a question which only time will answer.[124]

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119. Brody, "Performance of a Pre-existing Contractual Duty as Consideration: The Actual Criteria for the Efficacy of an Agreement Altering Contractual Obligation" (1975) 52 Denver L.J. 433, at p. 461, citing *Michaud* v. *McGregor* 61 Minn. 198, 63 N.W. 479 (1895).

120. *Universe Tankships of Monrovia* v. *International Transport Workers' Federation* (*The Universe Sentinel*) [1983] 1 A.C. 366.

121. *Dimskal Shipping Co. S.A.* v. *International Transport Workers Federation* [1992] 2 A.C. 152, 165H.

122. *Barton* v. *Armstrong* [1976] A.C. 104.

123. See Birks, "The Travails of Duress" [1990] L.M.C.L.Q. 342. Although it would have been harder to show that the threat was a *significant* cause of the new agreement being concluded. See fn. 121 above.

124. Some of the material in this chapter is based on a case-note which was originally published in *Lloyd's Maritime and Commercial Law Quarterly* in 1990. I am grateful to the editor, Professor Francis Rose, for giving permission to draw upon this material.