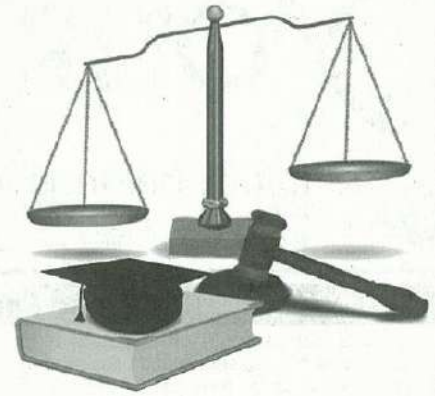




Guest Column

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Frustration Of Contracts

Frustration is a common law doctrine which means that if a contract is rendered impossible due to the fault of neither party and it may be impossible therein to perform the contract as the nature of the contract changes radically. The remedy of invoking frustration is available even when it is not expressly referred to in a contract. However, caution has to be exercised in that it is not used merely as a tool by a party seeking to terminate the contract or due to the party's inability to complete the contract. Frustration automatically brings to an end the contract at the time of the frustrating act. A charter party is said to be frustrated when the performance of the charter becomes impossible due to an external event that is not within the control of either party and beyond the scope of the contract or the commercial purpose of the charter becomes impossible to attain. To invoke the doctrine of frustration effectively, the event giving rise to the claim must be unexpected and unforeseeable, the risk of the event must not be provided for whether by the language of the charter party or custom and the performance of the contract must be impossible, or commercially impracticable. In short, it would defeat the sole commercial purpose of the contract. In order to determine whether frustration can be invoked will totally depend on a wide range of factors and the courts may interpret it in a narrow sense.

Whilst common law dictated the absolute performance of the contract, over the years the law has evolved and has gained wider meaning and flexibility. In *Taylor vs Caldwell* (1863), Blackburn J explained that the rule of absolute liability only applied to definite contracts and not if there was an express or implied condition underlying the contract. The continued existence of the Music Hall in Surrey Gardens was the implied condition that was absolutely necessary for the contract to be fulfilled. That the music hall was burned down due to a fire was not the fault of either party. Therefore, it was impossible for the performance of the contract and held that both parties were excused from their obligations under their contract.

In the 'Sea Angel' [2007] EWCA Civ 547, the issues raised included (1) Did the detention of the Sea Angel in Karachi mean a frustration of the contract (2) Were the

Defendants/Plaintiffs to bear the risk of delay due to detention by governmental authorities? The brief facts of the case: The *Tasman Spirit*, a tanker loaded with crude oil grounded in the approaches of the port of Karachi. The vessel thereafter broke into two leading to major pollution. The owners of the vessel entered into a salvage contract with Tsavlis. Tsavlis in turn entered into sub-contracts with a number of craft including the *Sea Angel*. The *Sea Angel* was to be used for lighterage operations and was hired for a period of 20 days. However, the vessel could not be returned within the contractual period as the port authorities in Karachi had refused to issue it with the certificate showing that it did not own any port fees for months. Tsavlis did not pay any hire for the *Sea Angel* after the contracted period. The court ruled in favour of the Claimants. Tsavlis went in appeal. The appeal was dismissed as there was performance of the contract, the effect of the detention on the performance of the charter was purely a question of financial consequences which would either way fall on one party or the other and Tsavlis had an obligation to pay hire until redelivery.

Practically speaking, claiming that a contract is frustrated is very difficult to maintain. The burden of proof will lie upon the party that makes the allegation and wishes to rely on frustration. The said party must ascertain that there is no clause in the charter party that specifically excludes the doctrine of frustration from operating and that it is a complete provision. In this case, the party will be able to claim frustration if the contract is rendered radically different. As a rule, there does not seem to be any general principles to determine frustration but it is dependent upon the individual facts. It is mostly seen that the Courts do interpret commercial contracts in the light of commercial considerations. If there is a delay in the performance of a contract, then the Courts would have to look at how prolonged is the delay and whether it is so prolonged as to defeat the commercial object itself leading to frustration. Any party wanting to invoke frustration must first carefully determine the circumstances and their ability to prove frustration. If reliance is placed wrongfully the aggrieved party are well within their rights to claim for damages for repudiatory breach and termination of contract.