FRUSTRATION AND EXCUSED NON-PERFORMANCE

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I. Introduction

When a frustrating event occurs, both parties are discharged by law from the contract. Supervening illegality apart,[1] a frustrating event occurs when a contract becomes impossible to perform because the subject matter of the contract has been destroyed or otherwise rendered unavailable;[2] or because a delay brought about by the event so gravely affects the adventure as to amount to a frustrating delay;[3] or because the contract as a result of the event becomes so fundamentally altered in its commercial character as not to be the contract agreed by the parties.[4] The word "frustration" is derived from the second of these cases, where it exists or rather existed conjunctively with a frustrating breach of contract,[5] but now has acquired general currency so as to apply to all instances listed in this paragraph.

As might be expected, the topic of frustration surfaces at uneven intervals in the wake of events with major disruptive commercial consequences. Even here, the doctrine is frequently displaced by contractual provision in the form of force majeure and related clauses. Force majeure clauses deal with a range of adverse events that, whilst they may occur unexpectedly in the particular instance, yet sufficiently form part of the common commercial experience to be provided for in contracts. Wars break out from time to time, as do riots, strikes, export embargoes, epidemics and so on. The widespread use of such clauses does not mean that we can dispense with the law concerning frustration. Standard form language may not have been updated, and certain types of event may not have been foreseen and thus not embraced by a force majeure clause.

The doctrine of frustration in English law is a blunt instrument, drastic in its effects but rarely employed to effect a termination of the contract. Where it arises, both parties are excused from further performance. Yet, apart from cases where force majeure clauses come into play, there are further instances of contractual disruption falling short of frustration where, though the contract is not terminated, one of the parties is excused more or less from further performance. Where such excuse arises, the ensuing non-performance or incomplete performance will often in turn excuse the other party. Thus the supervening event at one remove also excuses the latter party's non-performance. The purpose of this article is to explore the subject of excused non-performance, in the broader sense as including both frustration and these other instances of excused non-performance. Its principal aim

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[1] Supervening illegality raises issues of its own and is not dealt with in this article.
[2] Sale of Goods Act 1979 s.7; *Taylor v Caldwell* (1863) 3 B. & S. 826; 122 E.R. 309.
[3] This may involve a prospective assessment of future facts. See *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] A.C. 724 at 752; [1981] 2 All E.R. 1030 at 1047 (Lord Roskill: "all the evidence of what has occurred and what is likely thereafter to occur").
[4] This third species was authoritatively explained by Lord Radcliffe in *Davis v Fareham Urban District Council* [1956] A.C. 696 at 729; [1956] 2 All E.R. 145 at 160: "[F]rustration 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."
[5] See *Jackson v Union Marine Insurance Co. Ltd* (1874) L.R. 10 C.P. 125.

is to show that certain attributes of the doctrine of frustration in English law impede our understanding of the broader category of contractual excuse. To begin with, three features of the current law are examined: first, the notion that liability for breach of contract is strict; secondly, the accepted view that frustration, when it arises, automatically brings the contract to an end; and thirdly, the basis on which the law intervenes to discharge contracts affected by frustrating events. Afterwards, there will be an examination of six instances of excused non-performance standing outside frustration. These concern instances of temporary and partial impossibility. Finally, there will be a recommendation about the direction the law should take in the future.

II. No-fault Liability

Where performance of the contract is based on the fault standard, the doctrine of frustration will rarely be invoked to excuse non-performance or sub-standard performance. The promisor's response to the supervening event, if consonant with due care, dispenses with any need to bring the doctrine of frustration into play. In one sense, the promisor's non-performance is excused but in another the promisor, not guaranteeing an outcome, has done all that was required by the contract. It is where performance is strict that the doctrine of frustration may be needed to excuse non-performance. The expression "strict liability", as we shall see, does not express accurately the general (or presumptive) standard of performance of contractual obligations. In so far as frustration comes into play in aid of the performing party in cases where liability may loosely be described as strict, it draws attention to a subset of strict liability that we may refer to as absolute liability. In private law, where liability is strict, the absence of personal fault is no defence. If absolute liability were however the rule, there could be no excuse at all for non-performance, with the possible exception of supervening illegality.

The question whether liability for breach of contract should be based on fault or a stricter standard has not attracted at common law the attention that the distinction between fault-based and strict liability has received in the civil law.[6] As will be seen below, there is much to be said for Kötz's view that "the Common Law basically regards the contract as a guaranteed promise"[7] and hence bases liability on an absolute standard. For our immediate purposes of comparison, strict and absolute liability at common law may be taken together under the banner of strict liability. In the civil law, a distinction is drawn between non-performance and the attribution of blame for non-performance.[8] At its most basic, therefore, a buyer of goods suffering from a latent defect will be entitled in a redhibitory action to unwind the contract and recover the price if it has been paid,[9] but will recover damages only if the seller knew of the defect.[10] There may be numerous exceptions to the fault principle and, as in German law, fault may be the subject of a rebuttable presumption.[11] This basic stance naturally makes civil law systems more receptive than the common law to relief in the face of

[6] For a general comparison of civil law and common law on the issue of fault and breach of contract, see H. Kötz, *European Contract Law* 2nd edn (Oxford: Oxford University Press, 2017), 244-254; G. Treitel, *Remedies for Breach of Contract* (Oxford: Oxford University Press, 1988), Ch II.

[7] H. Kötz, *European Contract Law* 2nd edn (Oxford: Oxford University Press 2017), 252.

[8] H. Kötz, *European Contract Law* 2nd edn (Oxford: Oxford University Press 2017), 244. Treitel expresses the difference between civil law and common law in the matter of fault as lying in its relevance to breach of duty, for a common lawyer, and in its relevance to "what a common lawyer would call remedies", for a civil lawyer: *Remedies for Breach of Contract* (1988), Ch II para.8.

[9] Or claim a price reduction.

[10] French Code civil, see arts 1644-1645. More generally, BGB §280.

[11] For a discussion of the complex position, see R. Zimmermann, *The New German Law of Obligations* (Oxford: Oxford University Press 2005), pp.50-51.

circumstances gathered under the broad head of force majeure.[12] As a defence to liability in damages, force majeure is not a barrier to the unwinding of the contract.[13]

At common law, there is no received device for determining whether a contractual obligation is strict or fault-based that corresponds to the analytical distinction between obligations de moyens and obligations de résultat in French law.[14] Obviously, a contractual obligation is as strict as express provision makes it. But beyond such instances, the strictness or not of a contractual obligation is absorbed in English law almost as a matter of osmosis rather than of conscious thought. The text books do not address the distinction as a free-standing matter. It is well recognised, however, that whereas the duty of an employee or of a professional to supply services is fault-based,[15] various other duties, such as the duty of a seller to supply goods,[16] or of a voyage charterer to supply a cargo,[17] or of a buyer to pay the price,[18] or a borrower to repay a loan, are not qualified by the fault standard, and this is without question. It has long been the case, again, that the seller of goods is liable for unfit or unsatisfactory goods even if the non-conformity of the goods is due to a third party manufacturer or producer and no amount of care and attention on the part of the seller could have brought the non-conformity to light.[19]

The distinction between absolute and strict liability in English law, mentioned above, now requires elaboration. One may be excused from a strict liability to perform in circumstances where an absolute liability would allow no excuse. In this area, the defining features of English law start with the landmark case of *Paradine v Jane*,[20] where a tenant was driven from the property by the forces of Prince Rupert for almost the whole of the three-year lease term. Had the tenant wished to be excused from paying the rent, due at quarterly intervals, then he should have provided for it by his contract. The lessee was bound as a result of "the duty or charge [he laid] upon himself"[21] and was obliged to pay as much as a lessee would be obliged to pay for the repair of a house if he undertook to repair it as a result of a tempest or the actions of the King's enemies. *Paradine v Jane*, an action in debt, marks a doctrine of absolute rather than strict liability for breach of contract. It has been explained as based on the nature of a duty owed by someone undertaking absolutely to do a certain thing that is "not naturally impossible",[22] but this begs the question whether there was an absolute undertaking. The lessee, it might be added, was not prevented by Prince Rupert and his forces from paying the rent and may not have been required as a term of the tenancy to occupy the land even though there may well have been obligations to maintain and reinstate the property.

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[12] For general relief in French law in the event of force majeure, see Code civil art.1231-1. For the definition of force majeure, see art.1218.

[13] Similarly, preserving termination rights, are art.79(5) of the UN Convention on Contracts for the International Sale of Goods and art.7.1.7(4) of the Unidroit Principles of International Commercial Contracts.

[14] H. Kötz, *European Contract Law* 2nd edn (Oxford: Oxford University Press 2017), at pp.248-249 notes that the Code civil, even after its recent revision, does not formally recognise this distinction, which is based on the work of Demogue, though it is recognised in the case law.

[15] See Supply of Goods and Services Act 1982, s.10.

[16] *Lewis Emmanuel & Son Ltd v Sammut* [1959] 2 Lloyd's Rep. 629; *Jacobs Marcus & Co v Crédit Lyonnais* (1884) 12 Q.B.D. 589.

[17] *Barker v Hodgson* (1814) 3 M. & S. 267; 105 E.R. 612.

[18] *Trans Trust SPRL v Danubian Trading Co. Ltd* [1952] 2 Q.B. 29; [1952] 1 All E.R. 970.

[19] *Bigge v Parkinson* (1862) 7 H. & N. 955; 158 E.R. 758; *Randall v Newson* (1877) 2 Q.B.D. 102; *Frost v Aylesbury Dairy Co. Ltd* [1905] 1 K.B. 608.

[20] (1647) Aleyn 26; 82 E.R. 897.

[21] As opposed to a duty or charge imposed by law. See also *Atkinson v Ritchie* (1808) 10 East 530 at 533; 103 E.R. 877.

[22] *Jacobs Marcus & Co v Crédit Lyonnais* (1884) 12 Q.B.D. 589 at 603.

Although *Hall v Wright*[23] was a breach of promise action, and so an atypical contract case,[24] it reveals the long shadow cast by *Paradine v Jane*. The defendant declined to fulfil his marriage engagement owing to the onset of a pulmonary illness that caused bleeding. His defence was that the engagement to marry was subject to an implied condition excusing him from performance if he became incapacitated. The defence was narrowly successful in the Court of Queen's Bench but this decision was reversed in the Court of Exchequer Chamber.[25] The majority were not persuaded by the sufficiency of the groom's defence, that he lacked the capacity for sexual intercourse or even to endure the strains of a marriage ceremony. One reason was that impotence was the only impediment to marriage recognised by the canon law;[26] a second reason was that marriage gave women an opportunity for advancement in life;[27] a third reason was that the defence did not sufficiently explain why the defendant could not go through with the marriage ceremony or perform the physical duties of marriage;[28] a fourth reason was that performance of the engagement was still required even at the expense of the plaintiff's life since the cause of prudence would be served by breaking the contract and paying damages.[29] This fourth reason in particular demonstrates the shadow cast by *Paradine v Jane* and the continuing force of absolute liability. Baron Martin noted pointedly that specific performance of such an engagement would not be permitted,[30] which throws us back on the old truism that, while a primary obligation may be impossible to perform, its secondary complement, to pay damages for non-performance, will not be.[31] The common law's resistance to specific performance and its inclination towards absolute liability in contract therefore go hand in hand.

Hall v Wright is the high water mark of absolute liability.[32] In his dissenting judgment, Pollock C.B. invokes implied conditions to excuse the author who becomes insane and the painter who becomes "paralytic" from their undertakings to execute works in the future, as well as the person who dies before he can accomplish an act that only he can do. In these cases, the author, the painter and the executor of the deceased are excused by an implied condition.[33] A few years later, this implied condition was further developed in *Taylor v Caldwell*,[34] where the owner of a concert hall and pleasure gardens, renting it for performances on four nights, was excused from liability for the hirer's wasted advertising and other preparatory costs when the hall burnt down. The starting point for the court was that, in the case of a "positive and absolute" contract to do a thing, the intrusion of an unexpected

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[23] (1858) E. B. & E. 765; 120 E.R. 688.

[24] "It seems unreasonable to deal with [the contract to marry] as with a contract for sale of goods or other business transaction, though, no doubt, the same principle governs both": Bramwell B. at (1858) E. B. & E. 765 at 774.

[25] By a majority of 4 (Martin B, Williams J., Crowder J. and Willes J.) to 3 (Watson B., Bramwell B. and Pollock C.B.).

[26] Willes J. at (1858) E. B. & E. 765 at 785.

[27] Willes J .at (1858) E. B. & E. 765 at 786.

[28] Crowder J. at (1858) E. B. & E. 765 at 787.

[29] Crowder J. at (1858) E. B. & E. 765 at 787. See also Martin B. at 788 and Williams J. at 791 (who also notes at 793 that the marriage was broken off without any reason being given).

[30] At (1858) E. B. & E. 765 at 788.

[31] *Thornborow v Whitacre* (1705) 2 Ld Raym. 64; 92 E.R. 270. Hence, Lord Atkinson in *Horlock v Beal* [1916] 1 A.C. 486 at 506: "[I]f the contract of the parties be…positive and absolute, they are bound by it, however impossible the performance of it may become."

[32] See earlier *Barker v Hodgson* (1814) 3 M. & S. 267; 105 E.R. 612, where a charterer was unable to load a cargo at Gibraltar when pestilence broke out ashore. It was an action in covenant and, according to Lord Ellenborough C.J. at 270: "Is not the freighter the adventurer, who chalks out the voyage, and is to furnish at all events the subject matter out of which freight is to accrue?"

[33] See supporting statements of the court in *Taylor v Caldwell* (1863) 3 B. & S. 826 at 835-836.

[34] (1863) 3 B. & S. 826.

burden or even impossibility would be no defence to an action for non-performance. The owner's obligation to provide the concert hall, however, was held not to be positive and absolute because there was an implied condition that the hall remain in existence. In the words of the court: "[I]t appears that the parties must from the beginning have known that [the contract] could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done". [35] One might equally turn the thing on its head and say that the existence of this implied condition meant that the contract was not positive and absolute.

A non-promissory term of this sort would be implied only in the limited circumstances associated with implied terms, whether these are implied in law or implied in fact as terms that go without saying or that are required as a matter of business necessity.[36] Precisely when such a condition will be implied cannot be laid down with certainty, but what is clear is this. Force majeure of itself is no excuse. A seller who failed to ship a quantity of esparto from a named or other safe or convenient Algerian port, when this could not be done owing to civil insurrection, was liable for breach of contract in *Jacobs Marcus & Co. v Crédit Lyonnais*.[37] Particular incidents of force majeure are so commonly the subject of express contractual provision that the omission of such a clause points to liability for failure to perform notwithstanding the event. The stringency of liability encourages the widespread use of force majeure clauses, and the absence of a force majeure clause in a given instance suggests an allocation of risk that should not be upset by excusing non-performance. The current law amounts to a standing invitation to contracting parties to consider the risks and draft their contracts with those particular risks in mind. If a particular event is foreseeable, yet the parties have not expressly provided for it, the rule of absolute liability stretching back to *Paradine v Jane* will not be displaced except in very limited circumstances.[38] That same rule of absolute liability lies where the event is one that the promisor has brought upon itself (self-induced frustration)[39] or might with the aid of reasonable foresight have avoided.[40]

None of this quite explains why the burning down of the concert hall in *Taylor v Caldwell* excuses further performance when the duty to deliver goods rendered impossible by force majeure does not. Contractual drafting is available for both events and the reasons for excluding absolute liability appear to be equally strong in both instances. Where time is of the essence of the contract, impossibility includes the impossibility of delivering on the due date or within the agreed delivery period. In *Jacobs Marcus & Co. v Crédit Lyonnais*, to revert to the language of *Taylor v Caldwell*, the parties must have known from the beginning that the contract could not be fulfilled if an insurrection of sufficient violence prevented the shipment of the goods in accordance with the contract. Nor can a convincing distinction be drawn between an obligation to deliver or provide a specific thing and an obligation concerning a generic thing, so long as the degree of impossibility (and not difficulty) is the same in both cases, which will be a rare event. An incantation of genus numquam perit does not foreclose discussion. It is arguably possible for a contract for the sale of unascertained goods to be discharged

[35] (1863) 3 B. & S. 826 at 833.
[36] See, e.g., *Banck v Adam Bromley & Son* (1920) 5 Ll. L. Rep. 124 at 126. Implied terms are discussed further below.
[37] (1884) 12 Q.B.D. 589. The defence was that the goods could not be transported to the agreed place for quality inspection.
[38] See below.
[39] *Imperial Smelting Corp. Ltd v Joseph Constantine Steamship Line Ltd* [1942] A.C. 154; (1941) 70 Ll. L. Rep. 1.
[40] *Ocean Tramp Tankers Corp. v V/O Sovracht (The Eugenia)* [1964] 2 Q.B. 226; [1964] 1 All E.R. 161.

for frustration, though such is likely to arise only in the case of goods to be supplied from a particular source, or goods in an identified bulk, or something closely analogous to these cases.[41]

The distinction between cases where the excusing condition is implied and cases where it is not would seem to lie between events that directly affect the physical subject matter of the contract and events that do not. In the words of the court in *Taylor v Caldwell*: "The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."[42] This distinction between different events of impossibility presents a visible line but does not command acceptance for its intrinsic rationality.

III. Automatic Discharge

It has authoritatively been stated that frustration discharges both parties automatically from a contract with prospective effect. So, according to Lord Sumner in *Hirji Mulji v Cheong Yue Steamship Co. Ltd*,[43] when "certain events frustrate the commercial adventure contemplated by the parties…such a frustration brings the contract to an end forthwith, without more and automatically". For this to occur, the event must go to the "common object" of the parties and not merely to the "individual advantage" of one of them.[44] The authorities drawn on by Lord Sumner are not consistently clear as to frustration operating only automatically.[45] Furthermore, they seem almost to assume that neither party would have an interest in the continuance of the contract. Therefore, in *F.A. Tamplin Steamship Co. Ltd v Anglo Mexican Petroleum Co. Ltd*, Earl Loreburn hypothesises that the parties would have said "it is all over between us" had they contemplated the event that did occur.[46] At the root of this attitude lies the assumption that frustration can only ever operate in extreme circumstances, so that neither party would have any practical interest in affirming the contract in order to extract whatever performance might be salvaged. If frustration comes into play only in extreme circumstances where neither party has a practical interest in the continuance of the contract, it does suggest the absence of a need for automatic frustration.[47]

Despite criticism of Lord Sumner's doctrine of automatic discharge,[48] and even though *Hirji Mulji* was a decision of the Privy Council and hence not binding law in England, automatic discharge was

[41] *Sanschagrin v Echo Flour Mills Co* [1922] 3 W.W.R. 694.
[42] (1863) 3 B. & S. 826 at 839.
[43] [1926] A.C. 497 at 505.
[44] [1926] A.C. 497 at 507.
[45] In *Jackson v Union Marine Insurance Co. Ltd* (1874) L.R. 10 C.P. 125 at 144, Bramwell J., delivering the judgment of the majority, appears to countenance automatic discharge when saying that the failure of the vessel to arrive in time for loading the cargo released both parties. His words, however, given the parties' common interest in a timely voyage, are best understood as meaning that either party might elect to terminate the contract in the events that happened.
[46] [1916] 2 A.C. 397 at 404.
[47] See below for the discussion of the law Reform (Frustrated Contracts) Act 1943.
[48] J. McElroy (ed. G. Williams), *Impossibility of Performance* (Cambridge: Cambridge University Press, 1941), pp.221 et seq, noting also at pp.97-98 that it would prevent the treatment of the contract in *Krell v Henry* [1903] 2 K.B. 740 as voidable at the behest of the hirer of the room, a more satisfactory outcome than dissolution of the contract.

approved in dicta in a flurry of leading cases in the 1940s[49] and must now be taken to be settled law.[50] Automatic frustration means that a frustrating event cannot be waived by either party.[51] Although mutual waiver will also be impossible, the parties' conduct may give rise to a new contract on different terms.

Since automatic frustration now occupies the field, it has effaced a distinction made by McElroy, who observed that one party's impossibility in the matter of performance does not necessarily entail a corresponding impossibility on the part of the other.[52] If a seller bearing the risk of loss is unable to deliver and pass the property in specific goods, this does not mean that it is impossible for the buyer to pay the price. Whereas the seller may be excused by impossibility, the buyer is excused because the consideration for its payment or promise to pay has failed. The apparent rejection of this approach[53] means that we have a doctrine of frustrated contracts and not of frustrated obligations. We also observe a divide between cases of true frustration and cases, of the sort to be considered below, where one party's non-performance is excused without the contract itself being discharged. If the McElroy approach were the law, it would preclude any universal rule of automatic discharge, since automatic discharge depends upon both parties being discharged for the same reason. Whereas the foundering of a vessel on its way to the load port prevents both the shipowner from tendering the vessel and the voyage charterer from loading a cargo, the same cannot be said where the primary duty of one of the parties is to make a payment for a performance that the other is now disabled from providing.

Besides removing choice as to the continuance of the contract from the parties, automatic frustration also dispenses with any need for one party to inform the other of the fact of discharge or even of the event that produces the discharge.[54] Standard force majeure clauses, however, will commonly impose just such a duty.[55] The event itself might well in a given instance be a notorious fact but the automatic discharge itself, more particularly one party's view that such discharge has occurred, might well be a different matter. Since discharge occurs with prospective effect, it may be possible to imply a term surviving the discharge that such communication take place, just as exclusion clauses, confidentiality clauses and non-compete clauses survive the termination of a contract for breach regardless of which

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[49] *Imperial Smelting Corp. Ltd v Joseph Constantine Steamship Line Ltd* [1942] A.C. 154; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32; (1942) 73 Ll. L. Rep. 45; *Denny Mott and Dickson Ltd v James B. Fraser and Co. Ltd* [1944] A.C. 625; 1944 S.C. (H.L.) 35.

[50] For a more recent assertion of the automatic, non-elective character of frustration, see *J .Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1 at 9. See also E. McKendrick, "Frustration: Automatic Discharge of Both Parties?", in A. Dyson, J. Goudkamp and F. Wilmot-Smith (eds), *Defences in Contract* (Oxford: Hart Publishing 2019).

[51] *BP Exploration Co. (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783, 809-810.

[52] J. McElroy (ed. G. Williams), *Impossibility of Performance* (Cambridge: Cambridge University Press 1941), pp.99-100.

[53] G. Treitel, *Frustration and Force Majeure* 3rd edn (London: Sweet & Maxwell 2014), paras 2-042 to 2-044, citing *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675 at 687 (Lord Hailsham L.C.), whose words however are equivocal) and 702 (Lord Wilberforce, who however states that failure of consideration "may be a feature of some cases of frustration, [but] it is plainly inadequate as an exhaustive explanation").

[54] The law concerning termination for breach does not unequivocally call for notice of termination; the line drawn in such cases between matters of fact and of law is far from satisfactory. Termination may be effective even if the injured party's decision to terminate is evident to the guilty party only through silence or inactivity: *Vitol SA v Norelf Ltd* [1996] A.C. 800; [1996] 3 All E.R. 193. See generally, E. Peel (ed.), *Treitel: The Law of Contract* 15th edn (London: Sweet & Maxwell 2020), paras 18-012 to 18-013.

[55] e.g., GAFTA 100 cl.20: "…Sellers shall have served a notice on Buyers within 7 consecutive days of the occurrence or not later than 21 consecutive days before commencement of the shipment period, whichever is later…".

party it was whose conduct led to the termination. Automatic frustration also gives rise to uncertainty, particularly in the case of frustrating delay in that an arbitrary decision may have to be taken as to when the effluxion of time produces an effect sufficiently serious to merit contractual discharge, when in cases of termination for breach a notice by the affected party provides a sharper point of reference.[56]

Whereas automatic discharge has now taken firm root in frustration cases, it has not for discharge for breach. When the doctrine of fundamental breach held sway in the control of exemption clauses, the Court of Appeal in *Harbutt's "Plasticine" Ltd v Wayne Pump and Tank Co. Ltd*[57] held that the fundamental breach of contract that occurred in that case automatically brought the contract to an end. Following the installation of equipment in a factory, there occurred a catastrophic fire, but the breach, consisting of negligence in the installation of the equipment, was not discovered until some years after the fire. The fire was held to be a frustrating event automatically bringing the contract to an end, since the plaintiff could not be said to have a practical choice between affirming and terminating the contract.[58] This step was taken to deny the application, after termination of the contract, of a clause excluding liability. Subsequently, in *Photo Production Ltd v Securicor Transport Ltd*,[59] the House of Lords made it clear that clauses excluding liability survived contractual termination. In addition, the termination of a contract for breach, where available, depended upon whether the injured party elected to terminate.[60] *Harbutt's "Plasticine"*, so far as it supported a rule that exclusion and similar clauses could not survive the termination of the contract, was therefore overruled. The notion that a fundamental breach might lead automatically to termination, at least in some cases, was not explicitly disapproved but is inconsistent with the repeated general statements in the case concerning the promisee's election to affirm or terminate a contract in the event of a discharging breach.

In different circumstances, however, the capacity of an event to be at the same time a frustrating event and a breach of contract was resurrected without mention of *Harbutt's "Plasticine"* or of *Photo Production* in *MSC Mediterranean Shipping Co. Ltd v Cottonex Anstalt*.[61] In that case, a shipper of goods was unable to return containers as required by the contract of carriage. In the containers was a consignment of cotton for which the shipper was to be paid under the terms of a documentary credit. There was a fall in the cotton market and the consignee obtained an injunction to prevent the Bangladeshi issuing bank from making payment, but payment respecting goods under four bills of lading was made nevertheless by the London confirming bank. "[N]either the consignee nor the shipper, nor anyone else for that matter" was interested in the goods and the Bangladeshi customs authorities would not surrender the containers without a court order. Meanwhile, the shipper remained liable as the original party under the four bills of lading for demurrage payments for late redelivery (at varying dates) of the containers and the demurrage rate was mounting on a daily basis. The carrier claimed that demurrage carried on running at all times under a continuing breach of

[56] The notice may be given when it is clear that delay in breach of contract has gone to the root of the contract, when the point of no-return may indeed have been reached some time previously. See E. McKendrick, "Frustration: Automatic Discharge of Both Parties?", above at p.156, noting remaining difficulties.
[57] [1970] 1 Q.B. 447; [1970] 1 All E.R. 225.
[58] See Lord Denning M.R. at [1970] 1 Q.B. 447 at 466 ([1970] 1 All E.R. 225 at 234); Widgery J. at 472 ([1970] 1 All E.R. 225 at 240); and Cross J. at 475 ([1970] 1 All E.R. 225 at 242).
[59] [1980] A.C. 827; [1980] 1 All E.R. 556.
[60] See Lord Wilberforce at [1980] A.C. 827 at 847, with whose speech Lords Keith and Scarman concurred, and Lord Diplock (especially) at 847 and 849-850.
[61] [2016] EWCA Civ 789; [2016] 2 Lloyd's Rep. 494. The elective character of discharge for breach was however recognised in general terms at [29].

contract, so that the shipper was liable to payment of a sum in excess of the value of the containers.[62] The decision of the Court of Appeal, however, was that, by the date the commercial purpose of the contract had been frustrated, the carrier could no longer look to payment under the demurrage clause.[63] This meant that the contract was frustrated automatically notwithstanding the continuing breach of contract. The court concluded that discharge occurred on the date the carrier offered to sell the containers to the shipper, who rejected the offer. The making of the offer gave a convenient date for marking a frustrating delay.

As the automatic discharge of the contract in *MSC Mediterranean Shipping* demonstrates, the case of frustration caused by prolonged delay shares a kinship with discharge for breach caused by frustrating delay. *Jackson v Union Marine Insurance Co. Ltd*[64] laid the foundation for non-breach frustrating delay and was drawn on heavily by the Court of Appeal in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*,[65] a case of frustrating delay arising from a breach of contract. The difference between breach and non-breach in a given case may turn upon the presence in the contract of an exception clause, like the excepted perils clause in *Jackson*, which protected the shipowner from liability when the chartered vessel ran aground. It is not easy to see why, in the case of delay at least, there should be automatic discharge in one case (non-breach) but elective discharge, apart from the unusual case of *MSC Mediterranean Shipping*, in the other (breach).[66] Admittedly, the doctrine of frustration goes beyond instances of frustrating delay, but even so the question has to be asked why frustration, when it arises, operates automatically in all cases.

One response is to note that the Law Reform (Frustrated Contracts) Act 1943 allocates a just sum to the party that has provided a valuable benefit once the parties are discharged from further performance of the contract because it has "become impossible of performance or otherwise frustrated".[67] The Act does not define frustration but is applicable only upon contractual discharge.[68] If the party in receipt of a valuable benefit were able by affirming the contract to absolve itself of the duty to pay for that benefit, the purpose of the legislation would be stultified.[69] Thus the 1943 Act, though it does not define what amounts to a frustrating event, nevertheless is predicated upon the contract being automatically frustrated by the event. Otherwise one of the parties might be able to avoid paying for a valuable benefit by keeping the contract open indefinitely for further performance.

Apart from the 1943 Act, the case for automatic frustration appears to hinge on the futility of further performance and to presuppose therefore the application of frustration only in extreme circumstances. There are, nevertheless, numerous cases of impossibility of performance that do not necessarily strike at the root of the contract sufficiently to call into play the doctrine of frustration and that do not call for treatment as instances of breach of contract founded on the non-performance of a strict duty. These cases, orphaned by the rule of automatic frustration with its focus on the discharge

[62] Replacement carriers were available for $3,262 at all material times in the discharge port, Chittagong.

[63] Discussion is confined to this point. Other issues raised were mitigation, penalty clauses, good faith and the principle of debt recovery in *White & Carter (Councils) Ltd v McGregor* [1962] A.C. 413.

[64] (1874) L.R. 10 C.P. 125.

[65] [1962] 2 Q.B. 26; [1962] 1 All E.R. 474.

[66] "[I]f [the shipowner's] stipulations, owing to excepted perils, are not performed, there is no cause of action, but there is the same release of the charterer": Bramwell J. at (1874) L.R. 10 C.P. 125 at 143.

[67] Section 1(3).

[68] Section 1(1): "Where a contract governed by English law has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of this section shall…have effect in relation thereto."

[69] But liability might arise alternatively to pay a quantum meruit sum.

of contracts rather than obligations, may be referred to as instances of excused non-performance[70] and concern temporary or partial impossibility. A rule of automatic discharge in the event of frustration consigns these cases to a sort of no-man's land. Were it not for the automatic effect of frustration, these cases could instead be seen as part of a continuum with contracts being affected in various ways by impossibility of performance.

The approach of Article 79 of the UN Convention on the International Sale of Goods 1980 is more elegant and persuasive. In exempting the non-performing party from liability in damages once the standard for exemption has been met,[71] Article 79 leaves to one side the fate of the contract as a whole. Contractual avoidance (termination) is governed by the fundamental breach rule in Article 25. Misleadingly named, the rule applies when non-performance, whether in breach of contract or excused under Article 79, is of a sufficient degree of severity.[72] Furthermore, the notion of automatic discharge in English law creates a circle: a contract is automatically discharged when it is frustrated, and it is frustrated when automatic discharge is the only practical response to the event. The question is how such cases of excused non-performance, discussed below, are to be accommodated despite the shadow cast by automatic frustration.

IV. Basis of Frustration

In *Bell v Lever Bros. Ltd*,[73] Lord Atkin, when expressing his "alternative mode" of explaining the common law doctrine of common mistake,[74] connected mistake to frustration. There was, he said, an implied condition of the efficacy of a contract that a "fundamental reason" for making the contract was true at the contract date, so that the contract was not different in kind from the one the parties supposed they were entering into. This condition was implied in accordance with the test of business efficacy, so that the law did not intervene merely to make the contract "more businesslike or more just".[75] In stating the position for mistake, Lord Atkin was clear that the position was the same for "future facts",[76] the case of frustration.

The modern law of frustration is conventionally dated from *Taylor v Caldwell*,[77] where it was explained as based upon an implied condition. This implied condition has been recognised as releasing the parties both where the subject matter of the contract has perished[78] and where there has been a frustrating delay.[79] As noted above, one explanation of this implied term is that it is based on business necessity.[80] Viewed as such, it is a term implied in fact, so that the treatment of the event in question as a frustrating event would, in Lord Hoffmann's treatment of such terms, necessarily be regarded as

[70] This expression and variants of it are used on a number of occasions in G. Treitel, *Frustration and Force Majeure* 3rd edn (London: Sweet & Maxwell 2015).
[71] This article does not go into the question whether the standard for relief (impracticability) is or is not sufficiently demanding.
[72] The more apt expression "fundamental non-performance" is used in the Unidroit Principles of International Commercial Contracts, art.7.3.1.
[73] [1932] A.C. 161.
[74] Alternative to the view that a contract impaired by a common mistake of sufficient gravity is void by operation of law.
[75] [1932] A.C. 161 at 226.
[76] [1932] A.C. 161 at 225.
[77] (1863) 3 B. & S. 826.
[78] The position in *Taylor v Caldwell* itself.
[79] *Jackson v Union Marine Insurance Co Ltd* (1874) L.R. 10 C.P. 125.
[80] *Banck v Adam Bromley & Son* (1920) 5 Ll. L. Rep. 124.

a matter of contractual construction.[81] If the term, however, were one implied in law, then construction could not truly form the basis of the implied condition. Construction would nevertheless remain of relevance. Supervening illegality apart, the terms of a contract may allocate the risk of adverse events to one of the parties so as to prevent the frustration of the contract. It is probably more likely that, when a contract is construed, there will be an implied allocation of the risk of an otherwise frustrating event, rather than an implied excuse for non-performance given to a party for what would otherwise not be a frustrating event.[82]

Now, the line between terms implied in fact and terms implied in law is often difficult to draw. Business efficacy is usually seen as concerned with terms implied in fact, but the line between what the parties must have had in mind, and what the judge believes they would as fair and reasonable parties have had in mind if they had considered the matter, is as elusive as the line between the most business-like interpretation and the most reasonable interpretation of a contract bearing more than one possible meaning.[83] In this connection, it is as well to recall that the House of Lords, when dealing with "an uncontemplated turn of events" in *British Movietone News Ltd v London and District Cinemas Ltd*,[84] repudiated the view of Denning L.J. in the court below that the court might substitute "a just and reasonable solution" for what the contract stipulated. Stopping short of this repudiated approach, a term drawing on what the parties as reasonable parties would have agreed to, had they given consideration to the matter at the outset of the contract, indeterminately straddles the line that separates terms implied in fact and terms implied in law.[85] Just such an ambiguous case is that of *Taylor v Caldwell*[86] itself. In addition to saying that the condition was "implied by English law",[87] which expression might not quite have had the same connotation then that it has today, Blackburn J. said in words not far removed from the "officious bystander" test for terms implied in fact*: "*For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition."[88] Yet, even if contracting parties might at the contract date have some intention that provision should later be made for a frustrating event, any common intention to that effect would often fail the test of precision for a term to be included in the contract.[89] Furthermore, as Lord Radcliffe once said: "There is something of a logical difficulty in seeing how even the parties could impliedly have provided for something which ex hypothesi they neither expected nor foresaw."[90] They might not if questioned at the contract date about the supervening event both

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[81] *Attorney General Belize v Belize Telecommunication Ltd* [2009] UKPC 10; [2009] 1 W.L.R. 1988 at [21] (the question is whether "an implied term would spell out in express terms what the instrument…would reasonably be understood to mean"). But see *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] A.C. 742 at [25] (Lord Neuberger: "construing the words used and implying additional words are different processes governed by different rules").

[82] Express provision, as with excepted perils clauses, is a case apart.

[83] See *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 W.L.R. 2900.

[84] [1952] A.C. 166; [1951] 2 All E.R. 617, reversing [1951] 1 K.B. 190.

[85] See e.g. Earl Loreburn in *F.A. Tamplin Steamship Co. Ltd v Anglo Mexican Petroleum Co. Ltd* [1916] 2 A.C. 397 at 403-404 where, in his reference to "a foundation on which the parties contracted", it is far from clear what type of implied term he has in mind.

[86] (1863) 3 B. & S. 826.

[87] (1863) 3 B. & S. 826 at 835.

[88] (1863) 3 B & S 826, 834.

[89] *Luxor Estates (Eastborne) Ltd v Cooper* [1941] A.C. 108 at 117; *BP Refinery (Westenport) Pty Ltd v Shire of Hastings* (1977) 180 C.L.R. 266 at 283 ("capable of clear expression").

[90] *Davis Contractors v Fareham Urban District Council* [1956] A.C. 696. See *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch); [2019] L. & T.R. 14 at [31] for Marcus Smith J.'s assessment of Rix L.J.'s judgment in *Edwinton Commercial Corp. v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547; [2007] 2 Lloyd's Rep. 517, where "the parties' knowledge, expectations,

have accepted discharge of the contract instead of an adjustment of its terms[91] or the outcome mandated by the Law Reform (Frustrated Contracts) Act 1943, even if they might have been in agreement that the contract should be adjusted in one way or another but without agreeing on the way.

The perceived deficiencies of the implied term approach to frustration have encouraged in more recent times the view that a contract is discharged when its foundation has been destroyed by supervening events.[92] This has been said to depend upon "an objective rule of the law of contract" discovered by inquiring into, not what the parties would have said in response to a hypothetical inquiry at the contract date,[93] but instead into what as "fair and reasonable men" they would "presumably" have agreed upon.[94] Hence, the court is dispensed from any need to search for any particular outcome, whether it be complete or partial discharge, automatic or elective discharge, intended by the parties. This does not mean that the intention of the parties is irrelevant for, even here, the parties might say following upon the events that happened: "It was not this that I promised to do."[95] This approach is not as such inconsistent with implied conditions when it comes to the outcome of a case, for a condition need only be a technique for concluding that in certain events a contract loses its binding force, as was the case with Lord Atkin's treatment of common mistake in *Bell v Lever Bros*. *Ltd*.[96] Intention will always be relevant in so far as the contract does not support any common intention of the parties for obligations to remain in force despite the most extraordinary and disruptive events, so as to be absolute in character.

However we put the test for intervention in a contract, it remains intractably difficult to justify where we place the line separating cases of frustration and cases of absolute obligation. The seller of specific goods on whom the risk still rests is excused when they perish without any fault on his part, and the painter commissioned to paint a portrait is excused if struck by blindness. But the shipper of goods from a specific port is not excused if insurrection prevents shipment from that port during the shipment period even were the shipper to say: "It was not this that I promised to do". And if we were to say that the shipper could have protected itself by means of a force majeure clause to escape the stringency of an absolute obligation, might we not say the same about the seller of specific goods and the portrait painter?

V. Temporary and Partial Impossibility

The common law doctrine of frustration, limited in its invocation and drastic in its application, excludes from its application the means of dealing with instances of temporary and partial impossibility. In particular, there is no means of rewriting the contract.[97] Lord Haldane's words in *Tamplin* are

assumptions and contemplations, in particular as to risk, as at the time of the contract", listed in the judgment of Rix L.J. at [111], are explained as going beyond the matters that might normally be taken into account when interpreting a contract. Even when not sufficiently connected to the making of this particular contract to be taken as evidence of intention, these matters are far from divorced from the intentions of the parties.

[91] See E. Peel (ed.), *Treitel: The Law of Contract* 15th edn (London: Sweet & Maxwell 2020), citing Lord Wright in *Denny Mott & Dickson v James B Fraser & Co Ltd* [1944] A.C. 265 at 275.

[92] See G. McMeel, "The Juridical Basis of Frustration Revisited" [2020] L.M.C.L.Q. 297.

[93] *Davis v Fareham Urban District Council* [1956] A.C. 696.

[94] *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] A.C. 497; [1926] 1 W.W.R. 917.

[95] *Davis v Fareham Urban District Council* [1956] A.C. 696.

[96] [1932] A.C. 161.

[97] The contract may make implied provision. See *Minnevitch v Café de Paris (Londres) Ltd* [1936] 1 All E.R. 884, where a band leader hired on "no play, no pay" terms was denied remuneration for two days when a café closed on the death of the reigning monarch.

pertinent: "[T]he Courts cannot take any course which would in reality impose new and different terms on the parties."[98] One target of these words is any attempt to improve the contract terms for one of the parties so as to take account of the hardship that would otherwise be suffered by one of them. An attempt approximating to a plea for hardship relief of this sort came in *Davis Contractors Ltd v Fareham Urban District Council*,[99] where a builder unsuccessfully sought the discharge of the contract in order to benefit from a higher rate of remuneration that would arise out of a restitutionary, quantum meruit calculation of the builder's work. But Lord Haldane's words go further than this in that they are equally applicable to the shrinking, as it were, of a contract. If, therefore, to take the case of an entire contract, some diminished performance were possible, it would necessarily entail the scaling down of the performance owed by both parties, and not just the performance of the party that is not affected by the frustrating event. Problems of this nature are diminished in practical terms where a contract is severable and the supervening event is partial in its effect, though they may still arise in respect of one or more severable parts of the contract. Issues of this nature are best resolved by contractual provision, as long as there is such provision.

Even where the liability of the promisor is not fault-based, there may be instances where the promisor is or should be excused for non-performance, even though the overall weight of the event is not sufficient to give rise to frustration of the contract. These instances of excused non-performance present acute difficulties. The resolution of some of these problem cases can, as stated above, be either achieved or minimised by severability in some instances, but there remains a body of contracts where this is not possible. In order to gauge more fully the range of impossibility of performance, beyond the core of frustration with its total and automatic discharge of contracts, a useful exercise is to consider a number of hypothetical cases, some of which are quite closely related to existing case law. Six hypothetical cases are considered below.

> *Case 1: A portion only of the concert hall in* Taylor v Caldwell *is damaged by fire, reducing the attractiveness of the venue but making it possible for the planned concerts to go ahead with reduced capacity. Is the hirer bound to proceed and, if so, must the full agreed fee be paid? Does this depend upon whether the owner is liable in damages for the reduced amenity?*[100]

This is an entire contract. Let us begin with the question whether the owner is liable for the reduced amenity when the event falls short of the catastrophe that occurred in *Taylor v Caldwell*. Assuming that the owner is in no way responsible for the fire, having taken care to engage competent staff to supervise the hall and any work being carried out in it, the owner should be no more liable in this case than he would be if the hall were totally destroyed.

If the owner were to insist that the hirer proceed with the hire of the hall in these circumstances, the overall effect of the fire on the holding of concerts and on ancillary attractions is likely to be determinative of the question whether the contract will remain on foot. Assume first that the owner was in breach of contract. Apart from any question of damages, the hirer would be entitled on familiar principle to terminate the contract, either if the breach were of a promissory condition, or if it were of an innominate term and went to the root of the contract, depriving the hirer of substantially the whole of the contracted-for benefit. Despite the earlier confluence of frustrating delay and frustrating breach, in general terms the availability of discharge for frustration is likely to be significantly narrower than the availability of discharge for a breach going to the root of the contract. This is so even though

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[98] [1916] 2 A.C. 397 at 407.

[99] [1956] A.C. 696.

[100] In *Taylor v Caldwell* (1863) 3 B. & S. 826 itself, the hire charge for the concert hall and gardens was expressed in severable terms as £100 for each of the four days.

the test for a discharging breach is a stringent one; discharge for breach does not come already constrained by the rule of absolute liability.

Take now the owner who is not in breach of contract. As a matter of principle, the hirer should be free to terminate the contract if, had there been a breach, the hirer could have terminated for breach. Diplock L.J. in *Hongkong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd*, when referring to promissory conditions, thought that the breaking up of the condition into its component parts – namely, the promise (warranty) and the event (condition) – was in modern times unnecessary,[101] but a reconnection of the separate elements provides the key to resolving our problem case. Termination in non-breach cases could be achieved by means of an implied non-promissory condition if the non-performance goes to the root of the contract, but if the standard of performance is subject to an express promissory condition in the contract, the same outcome could be achieved by stripping the promissory element out of the condition.

Rather more difficult is the case where non-performance or substandard performance would not, if there were a breach, give rise to termination rights. Assuming again that the owner is excused from liability and assuming that the contract has not imposed the risk of the fire on the hirer, does this mean that the hirer is bound to pay the hire in full without any recourse against the owner of the concert hall?[102] English law lacks the machinery to impose and calculate a reduced hire for the concert hall. This is a significant failing that, in the absence of contractual provision or a reversion to absolute liability, may be soluble only by means of correcting legislation. The likelihood that the parties will negotiate a reduced rate is not a satisfactory answer.

A further problem concerns the hirer who has paid in advance and who, whilst receiving sub-standard performance, is not able to show a total failure of consideration in an action to recover a portion of the price. A similar problem arises where specific goods, for which a buyer not on risk has already paid in full before delivery, perish in part.[103] It has been argued that in such cases a claim for partial recovery will be allowed.[104] The case relied upon for this, however, whilst admitting part recovery in the case of a sale of goods, refused to admit a claim for the recovery of an apprenticeship fee on the premature demise of the master part way into the apprenticeship.[105] If a claim for recovery in part after payment were maintainable, it should be anticipated in the position of the hirer of the hall seeking to reduce the hire prior to payment.

> *Case 2: The contents of a particular warehouse are sold in their entirety, with the risk remaining on the seller until delivery. Prior to delivery, the warehouse is damaged by fire and a substantial part of the contents lost. Is the seller bound to supply the remaining goods and the buyer bound to accept them? If a portion of the contract goods has been delivered but the price not yet paid, may the seller demand payment and, if so, how much? And does the answer to this question depend upon whether the buyer has consumed the delivered goods? May the buyer insist on returning all the delivered goods or so many goods as have not yet been consumed?*

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[101] [1962] 2 Q.B. 26 at 71.

[102] The problem here is noted in G. Treitel, *Frustration and Force Majeure* 3rd edn (London: Sweet & Maxwell 2015) at 5-008 to 5-009, who states that BGB §§275 and 326 would scale down performance of the contract on both sides.

[103] A problem identified by Atiyah. See now C. Twigg-Flesner, R. Canavan and H. MacQueen, *Atiyah and Adams' Sale of Goods* 13th edn (Harlow: Pearson 2016), p.292.

[104] E. Peel (ed.), *Treitel; The Law of Contract* 15th edn (London: Sweet & Maxwell 2020), para.22-011.

[105] *Whincup v Hughes* (1871) L.R. 6 C.P. 78 at 81.

First of all, if the risk of loss has been transferred to the buyer, this will disable the buyer from pleading frustration in the event of destruction of the goods in whole or in part.[106] The above case bears some resemblance to *Howell v Coupland*[107] and *H.R. & S. Sainsbury Ltd v Street*,[108] both of which involve the forward sale of agricultural produce to be grown on identified land, therefore dealing with an uncertain future yield. In *Howell*, the defendant contracted to sell 200 tons of potatoes to be grown on a designated piece of land, large enough in normal times to grow more than the contract quantity. Owing to a blight affecting the crop, the defendant could deliver only about 80 tons and was sued by the plaintiff for damages for non-delivery of the remaining 120 tons. Treating the case as one akin to a contract for the sale of specific goods,[109] the court concluded that the defendant was excused by a condition in the contract that the goods come into existence and remain in existence up to the point of delivery. No opinion was expressed about whether the seller had been bound to deliver the 80 tons that were grown,[110] or whether the buyer had been bound to accept them when delivered.

The question of the seller's duty to make part delivery arose in *H.R. & S. Sainsbury Ltd v Street*, where the defendant contracted to sell "about 275 tons" of feed barley to be grown on his land at a stated price per ton. The harvest was poor and the yield of 140 tons was sold to a third party instead of being offered to the plaintiffs. The defendants contended that an implied condition of the contract released him from delivering any of the agreed contract goods if the yield on his farm, through no fault of his own, failed to achieve the agreed tonnage. So stated, the defendant's condition would have liberated him whether the yield was 50 tons or 250 tons. Judgment was given for the plaintiffs since the defendant's condition was too unreasonable to be implied, unlike the reasonable condition that he should not be liable in damages for the shortfall.[111] Given the likely effect of poor harvesting conditions on the market price of the crop, it is unsurprising that the plaintiffs should have wanted the 140 tons but nothing in the case indicates that they should have been bound to accept that quantity if tendered by the defendant. There is a certain even-handedness in both parties being bound in respect of the lesser quantity but the literal wording of section 30(1) of the Sale of Goods Act is an obstacle to that conclusion. It frees the buyer from having to accept a lesser quantity than the agreed contractual amount without reference to the cause of the short delivery, whether excused or not.[112] The result is

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[106] M.G. Bridge, *The Sale of Goods* 4th edn (Oxford: Oxford University Press 2019), para.4.05. See also *Rugg v Minett* (1809) 11 East 210; 103 E.R. 985, where some goods were at the seller's risk and some at the buyer's.

[107] (1876) 1 Q.B.D. 258, affirming (1874) L.R. 9 Q.B. 462.

[108] [1972] 1 W.L.R. 834.

[109] And hence akin to the contract to hire the defendant's hall in *Taylor v Caldwell* (1863) 3 B. & S. 826 and a contract to sell, install and maintain machinery on the defendant's premises in *Appleby v Myers* (1867) L.R. 2 C.P. 651. "It was not an absolute contract of delivery under all circumstances, but a contract to deliver so many potatoes, of a particular kind, grown on a specific place, if deliverable from that place:": (1876) 1 Q.B.D. 258 at 261 (Lord Coleridge C.J.) .

[110] Blackburn J. comes nearest to this question in the court below at (1874) L.R. 9 Q.B. 462 at 466: "[T]herefore there was an implied term in the contract that each party should be free if the crop perished." But he probably had in mind the whole crop grown on the land. The seller would, if bound to deliver, not have been able to claim the price in full under this entire contract: *Cutter v Powell* (1796) 6 Term Rep. 320; 101 E.R. 573; *Appleby v Myers* (above).

[111] Although the case was not governed by s.7 of the Sale of Goods Act, not enacted at the time of *Howell v Coupland* (1876) 1 Q.B.D. 258, the court would have been prepared to excuse the defendant under s.5(2) of the Act (which hardly seems in point) or under an implied contractual condition.

[112] The case law on which s.30(1) appears to have been based (see Chalmers, *The Sale of Goods Act 1893* 4th edn (London: William Clowes & Sons 1899), p.67 consists of breach of contract cases and in addition is more concerned with the buyer's liability under an entire contract to pay for such goods as in fact were delivered and accepted. See e.g. *Oxendale v Wetherell* (1829) 9 B. & C. 386; 109 E.R. 143.

to convert a contact for the sale of goods, whose performance is reduced in part by supervening circumstances, into a call option in favour of the buyer.

> *Case 3: A seller of goods to be carried by sea and delivered at destination is required by the contract to have them carried via the Suez Canal. The canal is closed for an indefinite period owing to hostilities. Is the seller bound now to have the goods carried via the Cape of Good Hope?*[113] *Is the buyer bound to accept carriage via the Cape?*

The closure of the Suez Canal in 1956 rendered it financially more onerous in *Tsakiroglou & Co. Ltd v Noblee Thorl GmbH* for a CIF Hamburg seller to have the goods carried via the Cape of Good Hope. Although both parties had contemplated a shorter voyage (and therefore less expensive for the sellers)[114] via the Suez Canal, the closure of the Canal was not enough to have the contract discharged for frustration. For our present purpose, the point of interest in the case is the following statement of Lord Simonds: "[I]t does not automatically follow that, because one term of a contract, for example, that the goods shall be carried by a particular route, becomes impossible of performance, the whole contract is thereby abrogated."[115] Lord Guest, on the assumption there was an implied duty to ship by the usual or customary route, would not accept that the closure of this route would lead to the frustration of the contract since shipment via the Cape of Good Hope did not make the contract a "radically different" thing. There were two different tests for a breach of contract and for a frustrating event.[116] Lord Guest's example of the implied term can accommodate a duty to ship via the Cape in the circumstances of the closure of the Canal because the usual or customary route in the assumed term implies the continuing availability of the Canal. This is not the case with an express provision calling for shipment via the Canal. Is Lord Simonds right, and may either party insist on shipment via the Cape?

In the case supplied by Lord Simonds, the outcome would be straightforward if the sellers were in breach of contract in shipping via the Cape of Good Hope. The buyers would be able to exercise the normal remedies available for breach, namely, damages and in some instances termination. They could also, if they were so inclined, waive the breach. If the closure of the Canal, whilst insufficient to amount to a frustrating event, yet amounts to a defence to an action for failing to ship via the Canal, there is despite Lord Simonds's words no good reason to attach to the sellers' defence a requirement that they ship instead via the Cape. It is the very existence of such a defence that is the problem here. To fall back on *Jacobs Marcus & Co v Crédit Lyonnais*,[117] if the failure to ship is regarded as the breach of an absolute duty, then the sellers are in breach despite the closure of the Canal. Further, if the logic of absolute delivery obligations still holds force, there seems no reason why the House of Lords in *Tsakiroglou* should have dealt with the dispute in terms of the sellers' failure to establish a frustration of the adventure. It would have been enough for their lordships to assert the absolute character of the sellers' duty to ship and leave it at that. The absolute character of the duty would be indifferent to any distinction between a simple duty to ship on board a vessel bound for Hamburg, and a duty to ship on a Hamburg-bound vessel proceeding via the Suez Canal.

Supposing there were a defence to liability under a contract not frustrated, could the buyers insist on the sellers performing by shipping instead via the Cape? Neither party may impose upon the other a

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[113] Suggested by *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93; [1961] 2 All E.R. 179.
[114] Because the freight element is embedded in the price, the CIF seller assumes the risk in forward selling of a rise or fall in freight rates later to be negotiated with the carrier.
[115] [1962] A.C. 93 at 112.
[116] [1962] A.C. 93 at 131.
[117] (1884) 12 Q.B.D. 589.

change of terms. If an FOB buyer may not require, instead of shipment on board, delivery on shore, even where this is supposedly for the advantage of the seller, then the buyers on this hypothesis would not be able to bend the sellers to their will.[118] Likewise, the sellers could not insist if the buyers were unwilling to accept a different delivery term.

Problems of temporary and partial impossibility are not confined to the performance of strict obligations. Hence:

> *Case 4: A singer is engaged for a lump sum fee under an entire contract to give a series of concerts, recitals and master classes. Owing to illness, the singer is not available for the whole series of events.*[119] *May either party withdraw from the contract? If some performance is rendered, what is the singer's recoverable fee?*

It is established law that, except for the unlikely event of the contract making a stricter provision, the singer is not strictly or absolutely liable to be available for concerts.[120] Illness and difficulties of transport would therefore constitute a defence. In *Poussard v Spiers*,[121] Madame Poussard was unavailable for rehearsals and the opening night to perform the leading female role in Lecoq's *Les Prés St Gervais*. The question before the court was whether the management might engage an alternative singer for the whole run of the opera. Since no alternative was available on a short-term, uncertain basis, Madame Poussard's non-attendance for the opening night and early performances went to "the root of the matter"[122] and the defendants were consequently "discharged".[123] The court, in steering a course between the functions of trial judge and jury, concluded that the availability of Madame Poussard was a "condition precedent". As such, it was evidently of the non-promissory kind.[124] Nothing in the report suggests that the contract was frustrated. Had the defendants been able to find a temporary substitute and call on Madame Poussard on her recovery from illness, she would evidently have been contractually bound to provide her services.

How far may we apply the approach in *Poussard v Spiers* to the above case? Our hypothetical case is different in that the singer's engagement is for a multiplicity of tasks and not for a single run of a show or opera. The first question concerns when the singer fell ill. If this occurs at the outset, then, taking the measure of future availability for some of the engagements, a test of a quantitative character will determine whether the unavailability goes to the "root of the matter". In applying such a test, account should also be taken of the possibility of rescheduling the events for which the singer is currently unavailable. Further into the performance schedule, the same approach should be adopted to the varying facts. The character of the contract as an entire one means that it is not simply a matter of lopping off some of the branches and allowing the surviving parts of the contract to go ahead. Moreover, the lump sum fee gives rise to a difficulty in evaluating the performance that the singer has

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[118] *Wackerbarth v Masson* (1812) 3 Camp. 270; 170 E.R. 1378; *Maine Spinning Co. v Sutcliffe & Co.* (1918) 87 L.J.K.B. 382.

[119] Suggested by *Poussard v Spiers* (1876) 1 Q.B.D. 410.

[120] Or to risk life and limb to turn up for contractual duties in general. The cases generally concern an action by the employee for unfair dismissal rather than an action by the employer: see e.g. *Ottoman Bank v Chakarian* [1930] A.C. 277; [1930] 2 W.W.R. 82.

[121] (1876) 1 Q.B.D. 410.

[122] Mme Poussard's illness prevented her from performing on the opening night and the following three nights, but a substitute was hired for the whole of the run as from the opening night.

[123] Blackburn J's judgment combines the language of both important terms and serious consequences.

[124] See also *Bettini v Gye* (1876) 1 Q.B.D. 183 at 187, suggesting that a singer delayed in attending rehearsals because of illness might have had an "excuse" preventing his being liable in damages.

rendered and is capable of rendering. This is soluble on a quantum meruit basis by reference to the contract sum.

Although frustration was not the course adopted by the court in *Poussard v Spiers*, it should be asked whether it has a role to play in those cases where, either at the outset of or in the course of the engagement, the singer's illness renders it impossible for any further performances. The rule of automatic discharge would cause no mischief in such a case and, moreover, there is the language of the Law Reform (Frustrated Contracts) Act 1943 to impose upon the management a duty to pay for any valuable benefit already rendered.[125] It is precisely where some further performance after the singer's recovery is possible that frustration should be avoided.

> *Case 5: A medical specialist, engaged by contract to perform an operation, is owing to illness unable to conduct the operation on the due date and it is unclear when the specialist will become available. May the patient insist on having the operation carried out by the specialist whenever the specialist becomes available? May the specialist insist on performing the operation at a later date when available to perform?*

Though materially quite different, cases dealing with charterparties provide a useful starting point. In *F.A. Tamplin Steamship Co. Ltd v Anglo Mexican Petroleum Co. Ltd*,[126] a vessel chartered for five years was requisitioned in wartime when the charterparty had three years left to run. At the time of the requisition, it was not known how long the vessel would be withdrawn from service or how long the war would last. At a point in the requisition period, when some 19 months remained of the charterparty period, the question before the court was whether the charterparty had been determined or suspended as a result of the requisition, taking account of the substantial refitting of the vessel in the course of the requisition. The underlying reason for the dispute, not as such before the House of Lords for decision, concerned whether it was the owners or the charterers who were entitled to "compensation" for the requisition in the form of the higher charter rate paid by the government. By a bare majority, the court held that the charterparty had not been discharged or suspended.[127] One reason was that any term to be implied in the contract permitting discharge would contradict the terms of the contract;[128] another reason was that the interruption to the charterparty was not sufficient for a term to be implied in favour of discharge.[129] The decision of the Court of Appeal that the contract was neither discharged nor suspended was therefore confirmed. The dissenting minority viewed the interruption to the charterparty to be of such uncertain duration and so destructive of the foundation of the contract as to bring about the avoidance of the contract;[130] and as going to the root of the consideration bargained for so as to put an end to the charterparty.[131]

An interesting though undeveloped aspect of the case concerns suspension as a halfway house between continuance and discharge. This calls for an understanding of suspension. Would it mean simply stopping the clock, or would it mean that the owners were temporarily released from providing the vessel and the charterers from paying hire while the clock continued to run? If it were the former, any sums payable by the government ought in principle to be payable to the owners, and if the latter,

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[125] Section 1(3).
[126] [1916] 2 A.C. 397.
[127] Thus affirming the judgment of the Court of Appeal at [1916] 1 K.B. 485, which in turn had affirmed the judgment of Atkin J. at [1915] 3 K.B. 668.
[128] Lord Parker (with whom Lord Buckmaster L.C. concurred) at [1916] 2 A.C. 397 at 427-428.
[129] Earl Loreburn at [1916] 2 A.C. 397 at 405-406.
[130] Lord Haldane at [1916] 2 A.C. 397 at 411.
[131] Lord Atkinson at [1916] 2 A.C. 397 at 421-422.

such sums should go to the charterers.[132] The answer to this question, which is essentially one of construction, depends upon whether the contract is for the use of the vessel within a stated period of five years, running in this case from December 1913 to December 1918, or is for the use of a vessel for a period of time, broken or unbroken, that in its totality amounted to five years. The former is the more likely construction for a contract of this sort. If the contract were instead for a number of described voyages that, in their totality, would normally take five years to carry out, then the latter construction would be appropriate.[133] A time-limited contract to provide personal services is most likely to conform to the former construction.

Horlock v Beal[134] concerned a claim brought on behalf of a seaman for wages, the seaman having signed articles for a period not to exceed two years. The vessel had been interned along with its crew in an enemy port on the outbreak of war and, as of the time of the decision, the war was of uncertain duration. A majority of the House of Lords ruled that the seaman was not entitled to his wages, with Lord Shaw, Lord Atkinson and Lord Wrenbury running this disqualification from the date war was declared. Earl Loreburn would have dated the disqualification from the later removal of the crew from the vessel and their internment on shore as prisoners of war.[135] The issue before the court was whether the seaman was entitled to his wages and he was held not to be in view of the fate of the contract: it "ceased to be binding";[136] there was "a dissolution of the relation of master and servant";[137] the "contract was "put an end to" and "determined";[138] and the contract was "ended" and "neither party…any longer bound".[139] The outcome of the case has nevertheless been explained as turning upon the doctrine of failure of consideration[140] but the above language of their lordships weighs heavily against that interpretation. Failure of consideration would explain why the employer was not bound to pay but not why the seaman was released from the contract.

Had the interruption to the contract been of an actual or foreseeably shorter duration, then the contract should have remained subsisting[141] unless, which would be most unusual, time were of the essence. Whether in such circumstances the seaman should be entitled to his wages despite an inability to work the vessel would turn upon the construction of the contract. In the absence of limiting language, the seaman's willingness to hold himself out for orders from his employer should suffice to justify payment of wages. For the purpose of the above hypothetical case, a more significant point is that the performance of a personal service contract or charterparty contract (voyage or time) can be held in suspense as a result of supervening circumstances until a point is reached when it is discharged for frustration. It may be difficult, if the contract is not immediately frustrated, to determine when the point is reached for frustration to be declared.

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[132] Owing to the conclusion at all stages in the case after arbitration that the contract was neither suspended nor terminated, the case throws no light on what suspension might mean.

[133] For timed individual voyages, a result akin to the mutual abandonment that takes place in certain breach cases, eg *Pearl Mill Co. Ltd v Ivy Tannery Co. Ltd* [1919] 1 K.B. 78, might be appropriate.

[134] [1916] 1 A.C. 486.

[135] Lord Parmoor dissented and would have ordered wages to continue to be paid.

[136] Lord Wrenbury at [1916] 1 A.C. 486 at 528.

[137] Lord Shaw at [1916] 1 A.C. 486 at 514.

[138] Lord Atkinson at [1916] 1 A.C. 486 at 505. Lord Atkinson also discussed at some length the case law on seamen's wages.

[139] Earl Loreburn at [1916] 1 A.C. 486 at 494.

[140] Since the owners did not receive the service for which they had contracted: J. McElroy (ed. G. Williams), *Impossibility of Performance* (Cambridge: Cambridge University Press 1941), p.152.

[141] See *Geipel v Smith* (1872) L.R. 7 Q.B. 404 where a voyage charterparty could not be performed within a reasonable time as a result of the outbreak of the Franco-Prussian War.

The wisdom of hindsight may provide a certainty that was not present at the time a decision had to be made.[142] In *Morgan v Manser*,[143] the defendant comedian[144] in February 1938 engaged the plaintiff for ten years as his personal manager but was called up for military service in June 1940 before being demobilised in February 1946. The question was whether he was still engaged to his personal manager for the balance of the ten-year period so as not to be able to engage a replacement manager in that period. The court's conclusion was that the call-up was of such a fundamental character, given the circumstances of the time, as to frustrate the contract as of the date of the call-up.[145] This was despite the plaintiff and defendant continuing personal dealings during the course of the war, as the defendant undertook military entertainment duties. This was not to be regarded as a mere suspension of the contract but, rather, the maintenance of a personal relationship with a view to a possible renewal of the contract after the war. That said, and the parties not having acted inconsistently with the continuance of the management contract, there seems no obvious reason why the remaining two years or so of the contract should not have been played out. The defendant had agreed terms for ten years and there is nothing in the report of the case telling us that the final two years of the engagement had been rendered fundamentally different as a result of the call-up.[146] The defendant had no good reason to walk away from the contract in 1940; he had no career alternative to military service. If anyone had a reason, it would have been the manager but there is nothing in the case to indicate any desire on his part to sever the engagement.

Turning now to the specialist physician, the illness of uncertain duration lacks the ominous aspect of a major war. Unlike the case of the seaman in *Horlock v Beal*,[147] who would naturally want the contract to continue in the absence of any better alternative, here either party, depending upon personal circumstances, might want to keep the contract on foot or conversely might want to have it discharged. The surgeon is excused from performance as long as the illness persists, leaving the patient free to keep the contract on foot, and the surgeon to insist on its being kept on foot, until there occurs a frustrating delay to be measured by the patient's needs and condition.

> *Case 6: A seller is bound to deliver goods within a stipulated period, say, the month of July, with full freedom to choose the delivery date. The seller makes preparations for a late July shipment but on June 30 the government in the country of export announces that, as from July 10, all exports of goods of the contract type will be embargoed. Is the seller bound to deliver by July 10 and, if so, how strict is that obligation?*[148]

This case is slightly different from the others in that it concerns not so much an exemption as a dilution of liability. A seller's duty to deliver, as seen above, is an absolute duty except to the extent that it is excused by a condition to be implied if the subject matter of the contract, or the bulk or place from which it is to be supplied, has perished. To these instances should be added a case akin to perishing, where governmental action in the country of export makes performance impossible. This case should not be too expansively defined for it arises only where the contract calls for the goods to be

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[142] A similar difficulty arises in *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789; [2016] 2 Lloyd's Rep. 494.

[143] [1948] 1 K.B. 184; [1947] 2 All E.R. 666.

[144] His stage name was Charlie Chester.

[145] "[W]hen the defendant was called up, …the fate of this country, as we all remember, hung on a thread, [and] anyone…called up was likely to be in military service for a very considerable time": at 192.

[146] cf. *Metropolitan Water Board v Dick Kerr & Co. Ltd* [1918] A.C. 119 (where the obligor's future burdens were more uncertain).

[147] [1916] 1 A.C. 486.

[148] Suggested by *Ross T. Smyth & Co. (Liverpool) Ltd v W.N. Lindsay (Leith) Ltd* [1953] 1 W.L.R. 1280.

transported from the relevant country in performance of the contract, and not merely to be the product of that country capable of being maintained in store elsewhere.[149]

Suppose that a contract, as is common for the sale of commodities, calls for delivery within a stated period, the choice of date lying with the seller. Normally, any actual or governmental intervention restricting or preventing export will be dealt with by an express provision in the contract. If this is not so, then we are faced with the type of problem dealt with by Devlin J. in *Ross T. Smyth & Co. (Liverpool) Ltd v W.N. Lindsay (Leith) Ltd.*[150] This case concerned a contract on CIF Glasgow terms for the sale of Sicilian horsebeans to be shipped October and/or November, the choice of date lying with the seller. On October 20, the Italian Government announced by regulation that a system of specific export licences would come into effect as from November 1. It proved impossible for the seller to obtain a licence to ship the goods once the regulation came into effect in November. Devlin J.'s starting point was that the contract gave the seller 61 options corresponding to each day in the shipment period "and if he is prevented by law from shipping for 30 or 21 of those days his rights are so far reduced, but it does not excuse him from shipping in the remaining period".[151] This left for consideration the critical period between October 20 and November 1 and the nature of the seller's obligation in that period. According to Devlin J., the sellers had an obligation to ship in this period. He would have been prepared to accept a plea that, even by exercising due diligence, they were unable to procure a shipment. There was, however, no finding of fact on which such a plea could have been based.[152] In a similar vein, referring to a conjectural case of shipment in September or October, he had observed in an earlier case that impossibility in September did not free the sellers from an obligation to exercise "best endeavours" to ship in October.[153] A governmental announcement of a forthcoming ban on export would be an a fortiori case for due diligence or best endeavours.

This approach sits awkwardly alongside an absolute duty to deliver. It is a type of excused non-performance except that the excuse goes to the standard of obligation. As much as we may accept that a seller who has bargained for a wide margin of shipment has substantially been deprived of a contractual entitlement by force of events, should there be a reduction in the standard of obligation if Devlin J.'s 61-day obligation were reduced to 60 days? If the duty remained absolute, would we say the same for a reduction in the available time to one or two days? And if we are to migrate from absolute duty to best endeavours or due diligence, at what point do we cross the bar? If ever the outcome of a case turned upon this issue, it is likely that due diligence or best endeavours would uncover a shipment, always provided that the seller were prepared to pay a high enough price. A steep price rise would not amount to impossibility for the seller.[154]

VI. Summary

It is submitted that automatic frustration of the contract serves no practical purpose. In separating frustration with its automatic effect from other cases of excused non-performance, English law compromises an understanding of the greater whole. Once a disabling event occurs, the focus should be on the obligation or obligations to be performed and not upon the contract taken as a whole. If the

[149] *Blackburn Bobbin Co. Ltd v T.W. Allen & Sons Ltd* [1918] 2 K.B. 467.
[150] [1953] 1 W.L.R. 1280.
[151] [1953] 1 W.L.R. 1280 at 1283.
[152] [1953] 1 W.L.R. 1280 at 1284.
[153] *Charles H. Windschuegl Ltd v Alexander Pickering & Co Ltd* (1950) 84 Ll. L. Rep. 89 at 94. See also *Tradax Export SA v André & Cie SA* [1976] 1 Lloyd's Rep. 416 at 424 ("due diligence"); *Continental Grain Export Corp v STM Grain Ltd* [1979] 2 Lloyd's Rep. 460 at 474-475 ("due diligence").
[154] *Brauer and Co. (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All E.R. 497.

event is serious enough and the risk of it has not been allocated, then the non-performing party should be excused from liability, whether completely, temporarily or partially. The party to whom performance is owed, for its part, will to a greater or lesser extent be able to offset that non-performance against its own contractual obligation to perform, invoking where necessary the failure of consideration principle. The rule of excusing individual non-performance is the way that the UN Convention on the International Sale of Goods and the Unidroit Principles of International Commercial Contracts deal with supervening events, so too Article 2 of the Uniform Commercial Code. Article 2-615[155] provides that delayed delivery, partial delivery and non-delivery of the goods are not be treated as a breach of the seller's duty to deliver if rendered "impracticable" as a result of "the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made".[156] There is no reference to the position of a buyer faced with a seller's failure to perform and certainly no reference to the fate of the contract as a whole. The answer to these questions has to be found in general contract law outside Article 2. There is now no easy path in English law to removing the barrier that separates automatic frustration from other cases of excused non-performance, given the entrenched acceptance of automatic frustration and the language of the Law Reform (Frustrated Contracts) Act 1943, focusing as the latter does on discharge of the whole contract prior to the application of the statutory scheme of reimbursement. But the modern law of unjust enrichment is surely equal to the task of shadowing and surpassing the Act if benefits are retained under a contract in indefinite suspense.[157]

[155] The heading is "Excuse by Failure of Presupposed Conditions".

[156] Similar language is to be found in §261 of the Restatement 2d of Contracts.

[157] cf. *Cutter v Powell* (1795) 6 Term Rep. 320; 101 E.R. 573.