Doctrinal Watershed in the Interpretation of Contractual Impossibility Under the CISG, UNIDROIT Principles and English Law

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SUMMARY

The advents of uniform international commercial laws and model laws have seen serious variations in the applications and interpretations of different doctrines. The doctrine of impossibility of performance of a contract has spawned different routes via the connotations and interpretations various legal systems and regimes of laws have given to it. This article will constructively and critically analyse the doctrines of exemption, force majeure and frustration under the CISG, UNIDROIT Principles and English law respectively in order to lay the foundation for further and better appreciation of these doctrines.

1 INTRODUCTION

This article is a product of comparative law analysis of one of the most famous exemptions to the doctrine of absolute obligation of contract. The doctrines of exemption/*force majeure*/frustration[1] are fluid and complicated; these doctrines have, over the years, served as an avenue through which a party who has committed no breach of contract, can be excused from the performance of the obligations of the contract and or exempted from liability in damages, if there is an unforeseen impediment or event which renders the performance of contractual obligations impossible.

The issues arising from this article are the interplay in the interpretations of the doctrines of exemption/*force majeure*/frustration under the CISG, UNIDROIT Principles, and the English law. These doctrines do not mean the same thing under these legal instruments, there are some obvious points of convergence and divergence that need to be carefully examined. It will be worthwhile therefore to attempt a critical comparison of the subject matter of this article from the standpoint of different legal instruments.[2]

The contribution to knowledge will come by way of developing new perspectives towards interpretations of the relationship mentioned above. The aims of this article are to streamline the positions of the CISG, the UNIDROIT Principles and the English law as regards their relationship with the doctrine of exemption/*force majeure*/*examption* of contracts, and to proffer a better understanding of the working relationship among the three major legal instruments of focus in this article. This article will start with an incisive analysis of the foundational basis for the application of exemption/*force majeure*/frustration. The article will also critically evaluate the doctrine of impossibility from the perspectives of the CISG, UNIDROIT Principles and English law. Also by way of recapitulation, the article will explore further on the doctrine of impossibility which is the common heritage of exemption/*force majeure*/frustration.

2 MOVING FROM *PACT SUNT SERVANDA* TO *CLAUSULA REBUS SIC STANTIBUS*: LEGAL BASIS OF THE DOCTRINES OF EXEMPTION/*FORCE MAJEURE*/FRUSTRATION

2.1 Pact Sunt Servanda

One of the main principles of national and international business law is the general principle of *pacta sunt servanda* which is deeply rooted in the canon law *Codex Iuris Canonici*, the law code of the Catholic Church. *Pacta sunt servenda* is a Latin maxim which simply means that agreements must be respected.[3] This moral code of conduct became the foundation of the law of the merchants. This maxim is one of the most important heritages of the *lex mercatoria*; it is equally the backbone of international law. This maxim is the meeting point of law and morality,[4] and it is very much at the heart of commercial and international relations.[5] The universal nature of the maxim was captured succinctly by Mahmassahi in *LIAMCO v. Libya*[6] when he stated that:

> The principle of the sanctity of contracts … has always constituted an integral part of most legal systems. These include those systems that are based on Roman law, the Napoleonic Code (e.g. art. 1134) and other European civil codes, as well as Anglo-Saxon Common Law and Islamic Jurisprudence 'Sharia.

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[1] Exemption and *force majeure* for the purpose of this article shall be used interchangeably; they refer to a situation where a non-fault, unforeseen, uncontrollable impediment or inhibition occurs to make further performance of a subsisting contract impossible.

[2] A. H. Puelinckx, *Frustration, Hardship*, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, *Unmöglichkeit, Changed Circumstances: A Comparative study in English, French, German and Japanese Law*, 3 J. Int'l Arb. 47 (1986); The writer opines that:

> 'Frustration is not the equivalent of *force majeure* or Unmöglichkeit, nor is *force majeure* Unmöglichkeit; even *force majeure* under Belgian law is not *force majeure* under French law. Although all these concepts belong to the same family, the distinction between them is extremely important in drafting choice of law clauses in international contracts.'

[3] Michael G. Rapsomanikas, *Frustration of Contract in International Trade Law and Comparative Law*, 18 Duq. L. Rev. (1979–1980); the writer opines that:

> 'Roman law, at least, as *jus strictum*, did not recognize the problem of frustration, always abiding by the express terms of the agreement irrespective of how onerous for the debtor the contract could become.'

[4] Dietrich Maskow, *Hardship and* Force Majeure, 40 Am. J. Comp. L. 657, 658 (1992). The principle of *pacta sunt servanda* reflects natural justice and economic requirements because it binds a person to their promises and protects the interests of the other party. Since effective economic activity is not possible without reliable promises, the importance of this principle has to be emphasized.

[5] In the *Sapphire v. National Iranian Oil Company award*, Arbitral Award 15 Mar. 1963, I.L.R., 1967, 136, 181; the arbitrators expressly stated: 'It is a fundamental principle of law, which is constantly being proclaimed by international courts, that contractual undertakings must be respected. The rule *pacta sunt servanda* is the basis of every contractual relationship.'

[6] (12 Apr. 1977) Y B. Comm. Arb (1981) 89 at 101.

Contract of sale of goods relationships, come with various challenges and risks; prices may suddenly increase, inflation may rise, and performance may become more onerous, but in all these, parties are still expected to perform the agreement they entered into. A sales contract, for instance, guarantees the buyer that the purchased goods will be at his disposal at a given date (or at least that he will obtain compensation if the supplier fails to deliver them at that date); it guarantees the supplier payment of the specified amount at the agreed date.

It has also been held that the principle of *pacta sunt servanda* implies that the contract is the law of the parties,[7] agreed to by them for the regulation of their legal relationship, and generates not only the obligation of each party to a contract to fulfil its promises, but also the obligation to perform them in good faith, to compensate for the damage caused to the other party by their non-fulfilment and to not terminate the contract unilaterally except as provided for in the contract.[8]

2.2 *Clausula Rebus Sic Stantibus*

There are exceptions or limits to the principle of *pacta sunt servanda* in the forms of the peremptory norms of general international law, called *jus cogens* (compelling law) and the *rebus sic stantibus* (things thus standing) principle. The legal principle *clausula rebus sic stantibus*, as part of customary international law, also allows for treaty obligations to be unfulfilled due to a compelling change in circumstances. This explains the principle that unexpected events can affect the performance of the contract. A contract will only guarantee performances when it does not yield to the pressure of unforeseen developments.[9]

The exempting principle of *rebus sic santibus*, was already recognized by ancient Roman law.[10] According to the Code of the Roman Emperor Justinian, a party to a contract is not liable for impossible performances. Thomas Aquinas used Aristotle's theory of human responsibility to explain the conclusions of the Canonists. He writes that choice was an act of will, and one could only choose what was possible. A promise to do the impossible was not binding.[11] All promises were subject to a condition[12] and impossibility can be an exempting condition by which a promise could be broken. This principle (*rebus sic santibus*) tries to find a balance between the obligation to perform a signed contract and the discharge of a party from performance in cases of unexpected and impossible events.

While the various national law systems deal with the principle of *rebus sic stantibus*, this principle can also be found in the international law domain.[13] Unexpected or unforeseen events are much more frequent in international business than in national contracts. It is part of the nature of international contracts that they are concluded and executed in less stable political, economic, and juridical surroundings than national contracts. Joseph Perillo writes while analysing the doctrine of *pacta sunt servanda* that:

> [T]raditional doctrines in both the systems of common law and civil law have solidly supported the doctrine of *pacta sunt servanda* – agreements must be kept though the heavens fall. The major exceptions in civil and common law systems are the doctrines of impossibility of performance, sometimes denominated '*force majeure*', and frustration of the venture. In many legal systems the traditional doctrine continues to receive solid support and relief for hardship is limited to these two doctrines, either performance is made impossible by *force majeure* and the contract disappears[14]

The above legal analysis points to the fact that the doctrines of exemption/*force majeure*/frustration are exceptions to the doctrine of absolute contract. An obligation to perform can be exempted when an unforeseen event happened after or before the conclusion of the contract to effectively discharge the contract, but the privilege accorded by this doctrine should not be applied loosely in order to defeat the positive binding nature of contractual promises.[15]

3 Distinctions in the applications of exemption/*force majeure*/frustration

3.1 *Under the CISG*

The United Nations Convention on Contracts for the International Sale of Goods (CISG) garners the most attention

[7] Wouter Den Haerynck, *Drafting Hardship Clauses in International Contracts*, in *Structuring International Contracts* 231–232 (Dennis Campbell ed., Kluwer Law International 1996); the writer was of the view that: 'for instance, in France, the principle *pacta sunt servanda* (as incorporated in Art. 1134 of the French Civil Code) prevails over the principle *rebus sic stantibus*. If the contract does not contain any provision regarding events of changing circumstances, then, the performance of the contract will be enforced without any changes to the contract'.

[8] ICC Award No 5485 (1987) Y B. Comm. Arb (1989) 156 at 168.

[9] Van Houtte Hans, *Changed Circumstances and* Pacta Sunt Servanda, in *Transnational Rules in International Commercial Arbitration* ICC Publ. No 480, 4, 105 (Gaillard ed., 1993) .

[10] James Gordley, *Impossibility and Changed and Unforeseen Circumstances*, 52 Am. J. Comp. L. 513–530 (Summer 2004); the author quoted a famous Roman text which contained the maxim, 'there is no obligation to the impossible'; Corpus IurisCivilis Dig. 50.17.185 (533) (*Celsuslibro octavo digestorum*).

[11] Thomas Aquinas, *Summa theologiae* I-II q. 13 a. 5 ad 1.

[12] Baldus de Ubaldis, *Commentaria Corpus iuriscivilis* to Dig. (1597) 12.4.8.

[13] The 1969 Vienna Convention on the Law of Treaties, Art. 62, states:

> A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (1) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (2) the effect of the change is radically to transform the extent of the obligations still to be performed under the treaty.

[14] Joseph Perillo, Force Majeure *and Hardship under the UNIDROIT Principles of International Commercial Contract*, Universidad Panamericana 111–113 (1998).

[15] I.C.C. award No. 1512 (1971), YB. Comm. Arb., 1976, 128, 129; the Arbitrator held while declining to apply *rebus sic santibus* principle to the above matter thus:

> 'The principle "*Rebus sic stantibus*" is universally considered as being of strict and narrow interpretation, as a dangerous exception to the principle of sanctity of contracts. Whatever opinion or interpretation lawyers of different countries may have about the "concept" of changed circumstances as an excuse for non-performance, they will doubtless agree on the necessity to limit the application of the so-called "doctrine *rebus sic stantibus*" (sometimes referred to as "frustration", "*force majeure*", "Imprévision", and the like) to cases where compelling reasons justify it, having regard not only to the fundamental character of the changes, but also to the particular type of the contract involved, to the requirements of fairness and equity and to all circumstances of the case.'

in this article; this is a treaty law enacted in 1980 under the auspices of UNCITRAL,[16] and saddled with the sole function of governing the international sale of goods.[17] Since the inception of the CISG, it has generated a lot of excitement, a plethora of cases have been conclusively decided based on its applications, different hierarchies of courts and tribunals have had something to say about the provisions of this Convention, and it has created a field day for the academics and practitioners who never ceased to critically and analytically develop the jurisprudence of the Convention. All these have contributed immensely in making the CISG one of the most tested and applied uniform Conventions of the twenty-first century. However, there are some pitfalls that have taken the shine out of this illustrious Convention. The incongruous draughtsmanship exhibited under Article 79 of this Convention has ultimately succeeded in creating more disaffection than any other articles of this Convention.[18]

Article 79 of the CISG provides that:

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

'Exemption' as used under Article 79 CISG has its own peculiar meaning different from the traditional *force majeure* or frustration doctrines;[19] this is in order to avoid pitching the tent of this provision under any legal system.[20] Basically, exemption as used under the CISG is a rule of damages which shielded a party from paying damages if non-performance was caused by an impediment which was beyond the control and foreseeability of the party and which consequences the party cannot overcome or take into account at the time of the conclusion of the contract.[21] Generally, Article 79 deals with what has often been known in the national sales law under the label of *force majeure*, impossibility, frustration, impracticability, or hardship.[22]

Under the doctrine of exemption, the contract is not automatically discharged as sundry remedies except liability in damages can conveniently apply,[23] this is unlike the doctrine of frustration in English law where the automatic discharge of the contract applies, and this has been a major difference between the two doctrines.[24] In fact, Treitel argues that 'the effect of an impediment under Art. 79 of the CISG resembles those of an excuse for non-performance in English law rather than those for frustration'.[25] The fact that Article 79 CISG also permits the situation of temporary frustration further sets it apart from the doctrine of frustration under English law.[26]

Articles 79 and 80 of the CISG are listed under the 'exemption' category and they all work in tandem, though Article 80 is wider in its applications. Article 80 provides that 'A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.' This provision (Article 80) is provided under section IV, (Exemptions) part of the Convention (CISG). It has been argued that 'Article 80 has the seductive charm of a self-evident statement',[27] thus any party whose actions or omissions prevented the other party from performing the contract shall not be allowed to rely on the latter party's failure to perform.[28] Although

[16] The United Nations Commission on International Trade Law (UNCITRAL) has been recognized as the core legal body of the United Nations system in the field of international trade law, its aim is to modernize and harmonize the rules on international business.

[17] Michael J. Dennis, *Modernizing and Harmonizing International Contract Law: The CISG and the UNIDROIT Principles Continue to Provide the Best Way Forward*, 19(1) Unif. L. Rev. 114 (2014).

[18] John Honnold stated that 'in spite of strenuous efforts of legislators and scholars we face the likelihood that Art. 79 may be the Convention's least successful part of the half-century of work towards international uniformity'; John O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* 472–495 (3d ed., Kluwer Law International 1999).

[19] JelenaVilus, *Provisions Common to the Obligations of the Seller and the Buyer*' in *International Sale of Goods: Dubrovnik Lectures* Ch. 7, 239–264 (Petar Sarcevic & Paul Volken eds, Oceana 1986), he writes that: 'in this field, as in many others, the notions of common law and civil law differ. As a result, the international drafters wanted to create a new concept by amalgamating different ideas which, of course, have its positive and negative aspects'.

[20] Denis Tallon, *Art. 79*, in *Bianca-Bonell Commentary on the International Sales Law* 572–595 (Giuffrè: Milan 1987); the author argues that:

'Thus Art. 79 was elaborated on a variegated background. Significantly, however, the Convention avoided reference to the domestic theories recapitulated above. It developed a system of its own, which in fact results from a slow maturation process that started with ULIS. This autonomy, illustrated by the lack of reference to accepted wording and concepts of domestic laws (*force majeure*, frustration, impracticability), renders the interpretation of Art. 79 extremely difficult because one cannot resort to these laws as a guide.'

See also Yesim M. Atamer, *Art 79*, in *UN Convention on Contracts for the International Sale of Goods (CISG)* 1056 (Stefan Kröll et al. eds, Hart Publishing 2011).

[21] *Ibid*.

[22] Ingeborg Schwenzer et al., *International Sales Law* 583 (2d ed., Hart Publishing 2012).

[23] Rodrigo Uribe, *Change of Circumstances in International Instruments of Contract Law: The Approach of the CISG, the PICC, the PECL, and the DCFR*, 15(2) VJ 233–266 (2011).

[24] Atamer, *supra* n. 20, at 1069, para. 40.

[25] Geunter Treitel, *Frustration and Force Majeure* 536, para. 15–039 (Sweet & Maxwell 1994).

[26] *Ibid.; see also* Mattew Parker & Ewan McKendrick, *Drafting* Force Majeure *Clause*, I.C.C.L.R.

[27] Honnold, *supra* n. 18, at 496, para. 436.

[28] This is regarded as a rule of exemption under the international contract on sale of goods. It is a rule that tries to strike a balance between the breaches of the parties which resulted in a two-way cause of failure of

Article 79 CISG is one of the most challenging and important CISG provisions, the CISG tried to strike a balance between the demands of both civil and common law systems, the result is therefore a Convention whose uniform mantra as enshrined in Article 7 of the Convention has been seriously undermined by the sheer multiplicity of interpretations different national jurisdictions can give to the provision of Article 79. It has been noticed by Schlechtriem, while analysing uniform law provisions like Article 79 that:

> Such laws provide at first only verbal uniformity, and there is always a great danger of, in the application and/or interpretation of a uniform law, practitioners and legal writers paying only lip service to the uniform law, reading and applying it in a manner in keeping with their domestic law.[29]

A common law jurisdiction will always strictly interpret Article 79 towards common law strict frustration rules, where any impediment short of impossibility will rarely be entertained; on the other hand, a civil law country, like Germany under its wider *Wegfall der Geschäftsgrundlage* doctrine,[30] will be tempted to lump in together the doctrine of hardship and frustration under Article 79, thereby relaxing the rules to accommodate impracticable circumstances. This is because the doctrine of hardship is well developed under the civil law and its absence under the CISG will leave a civil law practitioner with no choice but to interpret Article 79 accordingly.[31]

It can be argued that Article 79 of the CISG is more suited to be categorized as one of the items under Article 4 CISG (provision ousting from the jurisdiction of the CISG questions of validity of a contract).[32] It should be an exclusive matter under which the national laws would exercise jurisdiction.[33] This argument is based on the fact that Article 79 is susceptible to homeward interpretations[34] and any doctrine which has the capacity to extinguish obligations between parties in a contract should be better left under the national law sphere.[35] This is because the yardstick through which obligations can be excused and the severity of elements that can ground this form of discharge vary from jurisdictions to jurisdictions. There are always the temptations to adapt the law to reflect a particular national law's purpose in such circumstances. However, it can also be argued that since exemption takes effect after or before the conclusion of a contract, it has no place on the validity items; the contract is not vitiated *ab initio*, but only exempted liability in damages due to an uncontrollable impediment which the parties are not liable for.

Another major problem bedevilling the doctrine of exemption, under the CISG, according to Jacob S. Ziegel is 'the conceptual differences in approach to exemption among the major legal systems, because of lack of unanimity about the solutions to the policy issues, and also of the unsettled state of the law even within a given system'.[36] For instance, Article 79 of the CISG and Article 7.1.7 of the UNIDROIT Principles do not ostensibly provide for the doctrine of frustration of purpose, whereas this is an integral and equitable face of the doctrine of frustration under English common law.[37]

3.2 Under the UNIDROIT Principles

The UNIDROIT Principles use the term *force majeure*, and this does not exactly resemble the French traditional *force majeure* doctrine, though it bears striking similarities; the UNIDROIT Principles *force majeure* can also be differentiated from the popular *force majeure* clauses seen under commercial contracts which have gained popularity in the international

obligations to perform a contract. Honnold made the rhetoric remark that Art. 80 not only governs problems of exemption from liability but may have unwittingly modified all the remedial provisions of the CISG. *See* Honnold, *supra* n. 18, at 496–500; *see also Medicine's Case*, Russia (26 Jan. 2006) Arbitration proceeding 53/2005 Cite as: http://cisgw3.law.pace.edu/cases/060126r1.html accessed on 30 Nov. 2016; it was held that 'a delay by a buyer in sending a request for the procurement of some vital documents which would have aided completion of the contractual obligations is enough to bring Art. 80 of the CISG when apportioning damages from the breach that follows'.

[29] Peter Schlechtriem, *Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations*, (2005), http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem12.html (accessed 7 Apr. 2017); also cited as Peter Schlechtriem, *Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations*, 10 Juridica Int'l 27–34 (2005).

[30] The German concept of impossibility is entirely different. It only excludes the general claim for specific performance notwithstanding fault and foreseeability on the part of the debtor. The question whether the debtor has to pay damages is a matter of fault. *See* Richard Backhaus, *The Limits of the Duty to Perform in the Principles of European Contract Law*, 8.1 Electronic J. Comp. L. (2004) http://www.ejcl.org/81/art81-2.html (accessed 15 Nov. 2016).

[31] Apparently, under the common law, just like the CISG, there is no developed distinction between frustration and hardship; hardship can be grouped under impracticability of performance. Normally, a contract under the common law and even the CISG cannot be held to have been frustrated for a mere impracticality of performance unless it is such that goes to the root of the contract and radically changes it as opposed to what was contracted earlier.

[32] This is because 'When defining "impediment," most jurisdictions started by determining if and how their national doctrines for exemption fit within the CISG's concept of "impediment"'. *See* Brandon Nagy, *Unreliable Excuses: How Do Differing Persuasive Interpretations of CISG Art. 79 Affect Its Goal of Harmony?* 26(2) N.Y. Int'l L. Rev. (Mar. 2013).

[33] This suggestion may not be true, Todd Weitzmann writes that 'validity defence can generally be distinguished from an excuse defence on the basis that validity is concerned with the balance between the parties in the formation process while excuse is concerned with the problems arising when an unforeseen development subsequent to the date of the contract renders performance either impossible or difficult'. *See* Todd Weitzmann, *Validity and Excuse in the U.N. Sales Convention*, 16 J. L. & Com. 265–290 (1997).

[34] Harry Flechtner, *Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods*, 19 Pace Int'l L. Rev. 29–51 (2007).

[35] Anja Carlsen, *Can the Rules of Hardship Be Applied as a Validity Defense* (1998) http://www.jus.uio.no/pace/can_upicc_hardship_provisions_be_applied_when_cisg_is_governing_law.anja_carlsen/_4.en.html (accessed 3 Nov. 2014); the author writes that: 'The purpose of Article 4 (a) is mainly to protect domestic public policy concerns and this purpose can generally be achieved by the decisive-test approach because of the number of instances in which the CISG does not purport to provide solutions to subjects with important domestic policy concerns' (accessed 21 Apr. 2017).

[36] Jacob S. Ziegel, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods* (1981) http://www.cisg.law.pace.edu/cisg/text/ziegel79.html (accessed 10 Jan. 2017).

[37] J. D. Feltham, *The U.N. Convention on Contracts for the International Sale of Goods*, J. Bus. L. 346, 359 (1981).

commercial law practice.[38] The UNIDROIT Principles of International Commercial Contracts is a legal document drawn up by UNIDROIT first in 1994 which aims at the harmonization of the international commercial contract.[39] This legal instrument comprises of tested and well-documented *lex mercatoria*,[40] it is not a positive enactment but enjoys the flexibility of its adoption or application being subject to the choice of the contractual parties. Article 7.1.7 of the UNIDROIT Principles provides that:

> (1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
>
> (2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.
>
> (3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.
>
> (4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

The provision of the UNIDROIT Principles on *force majeure* is similar to the CISG, though there are some noticeable differences. It has been debateable whether or not it can be a gap filling instrument intended to help in the interpretations of the provisions of the CISG. This research will expose the shortfalls of this legal instrument and will posit that it is a bad imitation of the CISG which failed to add something new to the solutions of frustrated contracts.[41]

The French Civil Code provisions, especially Article 1148, are similar to the *force majeure* under Article 7.1.7 of the UNIDROIT Principles. Under both provisions, liability for damages is excluded in a circumstance where an impediment makes the performance of the contract impossible. *Force majeure* in the French civil law context plays a central role in both contractual and delictual liability, it sets a limit to strict liability and it is characterized by irresistibility, unforeseeability, externality and impossibility.[42]

According to French jurisprudence, which stemmed from Articles 1147[43] and 1148[44] of the Civil Code, termination of contracts is possible in cases of *force majeure* (the terms casfortuit and cause étrangère are used interchangeably). It will be safe to say that Article 79 of the CISG, Article 7.1.7 of the UNIDROIT Principles and Article 1148 of the French Civil Code are similar in their exclusion of damages over matters concerning contractual impossibility. It has been held in the *Électricité de France* case[45] that though the company pleaded *force majeure* as justifying particular interruptions of electric supply by violent storms, such plea only brought exemption from damages and did not affect the continuity of the contract as the French concept of *force majeure* recognizes partial frustration.[46]

Another distinguishing aspect of the UNIDROIT Principles is that it deals with *force majeure* in the chapter on non-performance whereas commercial hardship is dealt with in the chapter on performance. The logic of this division is that; if performance is impossible, it will not be performed; whether the non-performance is excused or will be the basis for a money judgment for damages or restitution is a question dealt with under non-performance.[47] If performance is burdensome, the consequences of the burden are dealt with as an aspect of performance.[48] *Force majeure* under Article 7.1.7 UNIDROIT Principles refers only to impediments which make performance impossible and not those only making it onerous,[49] as the UNIDROIT Principles have a separate provision for hardship.[50]

It is also the case that *force majeure* under the UNIDROIT Principles does not affect the validity of the contract, this is a major point of departure from the French law doctrine of *force majeure* which provides that if the performance of the obligation in a contract is wholly and permanently impossible, then the contract is void and it is only the court that can order its restitution or recession, but in practice the court has wider powers to deal with the consequences of a *force majeure* situation.[51]

[38] Aditi Patanjali, *A Comparative Study and Analysis of the Doctrine of Frustration Under the CISG, UNIDROIT Principles and UCC*, 23(5) I.C.C.L.R 174–187 (2012).

[39] Aldo Mascareño & Elina Mereminskaya, *The Making of World Society Through Private Commercial Law: The Case of the UNIDROIT Principles*, 18 (4) Unif. L. Rev. 447 (2013).

[40] Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts: Towards a New* lexmercatoria?, 2 I.B.L.J, 145–187 (1997).

[41] Alejandro M. Garro, *Comparison Between Provisions of the CISG Regarding Exemption of Liability for Damages (Art. 79) and the Counterpart Provisions of the UNIDROIT Principles (Art. 7.1.7)* (2005), http://cisgw3.law.pace.edu/cisg/principles/uni79.html (accessed 24 Mar. 2017).

[42] Barry Nicholas, Force Majeure *in French Law*, in *Force Majeure and Frustration of Contract* Ch. 2, 21 (Ewan McKendricked ed., 2d ed., Lloyd's of London Press Ltd 1995) .

[43] Art. 1147 of French Civil Code provides thus:

> The debtor is condemned, where appropriate, to the payment of damages, whether for non-performance of the obligation or for delay in its performance, whenever he does not show that the failure to perform derives from an extraneous cause which cannot be imputed to him, even though there is no bad faith on his part.

[44] Art. 1148 of the French Civil Code provides that:

> There is no place for any damages when, as a result of a *force majeure* or an accident, the debtor has been prevented from conveying or doing that to which he was obliged or has done what was forbidden to him.

[45] Barry Nicholas, *Force Majeure in French Law*, in *Force Majeure and Frustration of Contract* Ch. 2, 26 (Ewan McKendrick ed., 2d ed. Routledge 1995).

[46] Mestre (1991) Rev. trim, de droit civ. 659. 34.

[47] The UNIDROIT Principles clearly tilts towards French doctrine of *force majeure*, and it does seem that Art. 7.1.7 will only apply in a situation of absolute impossibility of performance. This explains why there is a provision for hardship that deals with a situation where performance of the contract is merely onerous.

[48] Perillo, *supra* n. 14.

[49] Nicholas, *supra* n. 45, at 25; *see also* Patanjali, *supra* n. 39 where the author argues that:

> 'The Convention is limited to those impediments that result in impossibility of performance but not impracticability, frustration or imprévision.'

[50] Michael J. Bonell, *Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts*, 40 Am. J. Comp. L. 617, 618–619 (1992).

[51] Nicholas, *supra* n. 45; He writes that 'French law shares with other civil law systems the principle which the common law doesn't accept that, an obligation to do the impossible is void.'

While it has been debated hotly whether or not the remedy of specific performance can apply under Article 79 CISG, no such question is raised under Article 7.1.7 UNIDROIT Principles, because it clearly enumerated that the applicable remedies include termination of the contract or to withhold performance or request interest on money due. The omission of specific performance under this list sends a signal that the UNIDROIT Principles do not consider it an applicable remedy under the *force majeure* provision.[52]

Furthermore, *force majeure* clauses do not represent the doctrine of *force majeure* as provided under Article 7.1.7, the *force majeure* clauses are boilerplate or standard form provisions, which cover natural disasters or other 'Acts of God', war or the failure of third parties (such as suppliers and subcontractors), to perform their obligations to the contracting party.[53] It is important to remember that *force majeure* clauses are intended to excuse a party only if the failure to perform could not be avoided by the exercise of due care by that party.[54]

The question whether or not a *force majeure* clause will excuse damages is subject to the parties' drafting choice. For instance, under English common law, there is no readily recognized concept of *force majeure*, but such clauses dealing with *force majeure* may differ substantially and everything will turn on the precise words adopted in the contract.[55] However, Article 7.1.7 of the UNIDROIT Principles crafted provisions that are wider in scope than the CISG, English common law, and even the civil law aspect of the provisions and practice of frustration or *force majeure*. It has been observed that Article 7.1.7 of the UNIDROIT Principles includes the ground covered in common law systems by doctrines of frustration and impossibility of performance, and in civil law systems by doctrines such as *force majeure*, but it is identical to none of them.[56]

Critical and comparative analysis of Article 79 of the CISG and its counterpart Article 7.1.7 of the UNIDROIT Principles will show that aside from minor differences in syntax, the most noticeable difference is the absence of a counterpart to Article 79(2) of the CISG in the UNIDROIT Principles.[57] Article 79(2) of the CISG provides that a third person's failure to perform can constitute grounds for exemption in some instances, but this is absent under Article 7.1.7 of the UNIDROIT Principles.[58]

The above omission reflects the gap between the assumed function that this paragraph was to take in the mind of its drafters and the misunderstandings and complexities inherent in the distinction of excuses based on the failure of a third person to perform. One can also notice the difference in phraseology between the last paragraphs included in both instruments. Article 79(5) of the CISG is moulded in terms of limiting the exemption to liability for damages though leaving open the application of termination and other similar remedies, whereas Article 7.1.7(4) of the UNIDROIT Principles approves the application of the remedy of termination, withholding performance or requesting interest on money due and leaving open the application of other remedies.

Both Articles 79(4) of the CISG and 7.1.7 (3) of the UNIDROIT Principles refer to the availability of damages in a situation where a party who fails to perform any of his obligations in a contract due to an impediment, fails to give the victim party notice of the impediment within a reasonable time after the party who fails to perform knew or ought to have known of the impediment; this is totally unavailable under the common law doctrine of frustration.[59]

3.3 Under English Law

The English common law doctrine of frustration has strong ties with the doctrine of exemption and *force majeure* discussed above, but unfortunately they are not the same, both in principles and in consequences. It has been put forward that the common law system does not know the concept of impediment or hardship, but rather adopted the general approach of classifying 'frustration' as circumstances, be they specific events or general events which have affected the contract in such a way so as to make it radically different from that which was originally concluded. Bugden and Lamont-Black are of the opinion that for there to be frustration, there must be a supervening and subsequent event, where the event is of an original nature; it may in an appropriate case serve to vitiate the contract *ab initio* under the doctrine of mutual mistake.[60]

Under the common law, a contract may be discharged on the ground of frustration when something occurs after the

[52] Maskow, *supra* n. 4; *see also* Art. 106 (4) of the Common European Sales Law excluded specific performance. It provides that: 'If the seller's non-performance is excused, the buyer may resort to any of the remedies referred to in paragraph 1 except requiring performance and damages.'

[53] Jennifer M. Bund, Force majeure *Clauses: Drafting Advice for the CISG Practitioner*, 17 J. L. & Com. 381–413 (1998); the writer opines that: 'By including a *force majeure* clause, parties can delineate the types of "extraordinary circumstances" that will excuse performance, thereby increasing predictability.'

[54] Patanjali, *supra* n. 38.

[55] Aubrey Diamond in Force majeure *and Frustration* 262 (Ewan MCkendrick ed., 2d ed., Lloyd's of London Press Ltd 1995); Ewan Mckendrick added at p. 34 while stressing the relationship between frustration and *force majeure* that 'Frustration can apply when there is an existing *force majeure* clause because *force majeure* clause is simply an evidence that parties have made express provision for the alleged frustrating event and thus reasonably contemplate the occurrence of those events, but under English law, frustration is purely a supervening, unforeseeable event and not like the event of *force majeure* that have been contemplated and provided for.'

[56] UNIDROIT Principles of International Commercial Law (2004), at 206.

[57] Nagy, *supra* n. 32. He writes that 'The main message of art. 79(2) is that the "seller bears the risk that third-party suppliers or subcontractors on which the seller depends may breach their own contract with the seller, so that the seller will not be excused when failure to perform was caused by its supplier's default".'

[58] Scott D. Slater, *Overcome by Hardship: The Inapplicability of the UNIDROIT Principles' Hardship Provisions to CISG*, 12 Fla. J. Int'l L. 231–262 (1998).

[59] Although adjudication can be an anchored base on the doctrine of good faith if similar circumstances occurred under common law frustration. It also does appear that Art. 7.4.1 of the UNIDROIT Principles which excluded damages when non-performance is excused under the UNIDROIT Principles is in support of the similar provision of Art. 79 (5) of the CISG but there is no similar provision under the Sales of Goods Act of 1979, other than the provision under s. 7 which will render any sale that falls within the provision avoided.

[60] Paul M. Bugden & Simone Lamont-Black, *Goods in Transit* 648, para. 25–027 (Sweet & Maxwell 2013); *see also* Ingeborg Schwenzer et al., *Global Sales and Contract Law* 652, para. 45.13 (Oxford University Press 2012).

formation of the contract which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract.[61] It has been held by Lord Ratcliffe that:

> [F]rustration occurs whenever the law recognizes 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 was promised to do.[62]

Common law doctrine of frustration is different from the doctrine of exemption, under Article 79 CISG and *force majeure* under Article 7.1.7 UNIDROIT Principles. This is because frustration leads to automatic discharge of the contract,[63] even though sundry remedies provided under the Law Reform (Frustrated Contracts) Act 1943 can apply, but Articles 79 and 7.1.7 respectively only excuse liabilities from damages.

Under the CISG, non-performance due to an exempting impediment is nevertheless seen as a breach though such breach does not attract damages,[64] but this is not seen as such under the common law doctrine of frustration and this explains why damages is not applicable under the common law frustration as damages entails breach.[65] It will be worthwhile to make the observation that there is an important difference between the common law's approach to frustration and the conceptual basis of Article 79. At common law, the contract is only frustrated if the intervening event has destroyed its substratum or so radically interfered with performance that the whole complexion of the contract has been altered: hence a temporary impediment is not sufficient unless it has this effect, though in certain occasions it can be allowed.[66] Both under Article 79 of the CISG and Article 7.1.7 of the UNIDROIT Principles, a temporary impediment of substantial gravity clearly is a sufficient excuse, especially when it is such that temporarily renders the performance of the contract impossible.[67]

The English statutory law is one of the legs of the tripod upon which this article rests. It is a body of laws that is comprised of statutory laws like the Sale of Goods Act of 1979. The statutory laws are those positive enactments of the Act of Parliament; they are the product of draughtsmen and always reflect common law and judicial activism. Furthermore, the Sale of Goods Act 1979 is the ultimate legislation that governs contracts of sale of goods in the United Kingdom; it is applicable in England, Scotland, Northern Ireland, and Wales. It is the amended and consolidated version of the defunct Sale of Goods Act of 1893.[68]

> Section 7 of the Sale of Goods Act 1979 provides that:
> Where there is an agreement to sell specific goods and subsequently without any fault on the part of the seller or buyer the goods perish before the risk passes to the buyer, the contract is avoided.

The scope of the application of this section (section 7 of Sales of Goods Act 1979) is that it only applies to specific goods that have perished, there must be agreement to sell, and the risk has not been passed to the buyer. It will be germane to note as an aside that there are other statutory enactments like the Trading with the Enemy Act of 1939 which operations can act to frustrate a contract under the English Law.[69]

On further analysis of section 7 of the 1979 Act, it will be important to point out that English statutory law, as shown under section 7 of the Act, favours concrete solutions to specific problems as opposed to general principles and the vague, open-minded style of drafting of Article 79 of the CISG[70] and Article **7.1.7** of the UNIDROIT Principles.[71]

It has been canvassed that the extensive use of indefinite legal concepts and the abstract nature of many norms in the CISG do not augur well with the expectations of the English legal community, where it has been argued that ambiguity in legislation leads to uncertainty in law and this is undesirable in the tradition of commercial law.[72] To buttress the above point, a phrase like 'due to an impediment' used in Article 79 of the CISG and Article 7.1.7 is elastic and bogus; it provides no guidance for interpretation or adjudication of what can be the typical impediment.[73]

Section 7 of the Sale of Goods Act 1979 is in sharp contrast with the provisions of both Article 79 of the CISG and

[61] Chitty on Contracts 1633 (27th ed., London: Sweet and Maxwell 1994); *See also* Nigel Baker, *Frustration of Contract*, 4(11) Employment Law Newsletter (ELN) 86 (1999); the writer held that 'A contract can be frustrated where unforeseen events, beyond the control of the parties to the contract, render its performance impossible or radically different from that which was first envisaged when the contract was concluded.'

[62] *Davis Contractors Ltd v. Fareham Urban District Council* (1956) AC 696.

[63] Treitel, *supra* n. 25, at 52.

[64] Eldon H. Reiley, *The UN Convention and Related Transnational* Law 137, 140, para. 6.3 (Carolina Academic Press 2008) .

[65] Schwenzer et al., *supra* n. 60, at 663, para. 45.60.

[66] *Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.* (1916) 2 A.C. (397); *see also* Bugden & Lamont-Black, *supra* n. 60, at 648, para. 25–027 where the writers argues that: 'the application of the overall test of frustration in any particular case may often require a multi-factorial-approach taking into account both matters in existence at the time of the contract and subsequent matters'.

[67] Ziegel, *supra* n. 36, para. 6.

[68] Fidelma White, *Sale of Goods Law Reform: an Irish Perspective Sale of Goods Law Reform*, 42(2) CLWR 172 (2013); the author writes that 'The cornerstone of sale of goods law in the common law world is the English Sale of Goods Act 1893. The 1893 Act was not a reforming statute; instead, it sought to make sales law more accessible via a statutory codification of the existing common law.'

[69] S. 1(2) of this Act Emergency Laws (Miscellaneous Provisions) Act 1953, s. 2: it is a criminal offence to supply any goods to or for the benefit of an enemy 225 or to obtain any goods from an enemy in time of war. Indeed, both at common law and under this statute, all commercial intercourse between a British subject and an enemy becomes illegal upon the outbreak of war. 227 As a result, any existing contract of sale which involves such intercourse by reason of the performance or further performance of the contract is frustrated by the outbreak of war, or upon one of the parties acquiring the status of an enemy.

[70] *Review of the Convention on Contracts for the International Sale of Goods, 2000–2001*34 (Pace International Law Review ed., Kluwer Law Int'l 2002).

[71] Barry Nicholas, *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* Ch. 5, 5–1 to 5–24 (Matthew Bender 1984); he was of the opinion that:

> 'Elastic words are obviously more undesirable in an international enactment than in a national one. A national enactment is drafted against a background of one system of law and the draftsman can fairly confidently predict how his text will be understood by the courts, particularly if he uses words which have already acquired a patina of legal meaning. An international enactment, on the other hand, has no such background or context.'

[72] *Ibid.*

[73] *Ibid.*

Article 7.1.7 of the UNIDROIT Principles. The former provides for narrow elements through which the question of frustration can be answered, unlike the latter's wider and more encompassing elements.[74] The elements that must be present and operative before section 7 of the 1979 Sale of Goods Act can apply are to wit: the goods to which the agreement relates must be specific goods, there must be an agreement to sell and not the actual sale, the goods must have perished, the risk must not have passed to the buyer, and the goods must have perished without any fault of the parties.[75] It will be right to add that the above listed elements are not in tandem with both the CISG and the UNIDROIT Principles. A quick overview of the provision of the CISG will show that Article 79 of the CISG is radically different from the provision of section 7 of the Sale of Goods Act 1979.[76]

4 Impossibility perspective in the doctrines

By and large, the doctrines of *force majeure*, exemption and frustration will avail a party seeking to be excused from the consequences of damages if he can show that the inhibiting event was unforeseeable, insurmountable, external and impossible of performance or being overcome.[77]Aditi Patanjali and a host of other writers use these doctrines interchangeably,[78] though making sure to draw the line whenever there is an obvious discrepancy among these impossibility doctrines.

Interestingly, these three doctrines are all the product of the *clausula rebus sic stantibus* principle. This principle is an exception to the rule of mandatory performance of contractual obligations or what is widely referred to as the theory of sanctity of contract (*pacta sunt servanda*). The effect of the *clausula rebus sic stantibus* is to discharge contractual obligations because circumstances have changed since the conclusion of the contract, so as to destroy a basic assumption which the parties had made when they entered into the contract.[79] Rapsomanikas[80] supporting the close link among impossibility doctrines, concurred with the opinion that:

> Whether one's preference is directed toward the term 'frustration', 'impossibility', or 'changed circumstances', the situation expressed by all these words is basically the same; in all legal traditions, it arises when unforeseen occurrences, subsequent to the date of the contract, render performance either legally or physically impossible, or excessively difficult, impracticable or expensive, or destroy the known utility which the stipulated performance had to either party.[81]

There are other similar provisions like Article 8.108 of the Principles of European Contract Law (PECL), Article 3:104 of the Draft Common Frame of Reference (DCFR) and Article 88 of the Common European Sales Law (CESL)[82] which are in consonance with the subject matter of this article, since they are all provisions of impossibility doctrine. Franco Ferrari, while tracing the relationship between Article 79 of the CISG and Article 3:104 of the DCFR writes that:

> Both the CISG and the DCFR exempt the debtor or the buyer from liability when some impediments occur. Thus there can be no doubt that Article 111-3:104 DCFR (Excuse due to impediment) which governs the consequences when an event which is not the fault or responsibility of the debtor from performing the obligation is largely modelled on Article 79 of the CISG.[83]

The basic doctrine of impossibility of performance is a common factor among these laws; there are diverse approaches and perspectives in the different laws of how this doctrine operates. All these three doctrines are exceptions to the principle of strict contractual liability according to which the obligor is responsible for any failure to bring about the promised result, even after observance of due diligence.[84]

5 Conclusion

The legal instruments of focus (CISG, UNIDROIT Principles and English Law) are generously applicable in

[74] The Sale of Goods Act 1979 is considered to be the classic example of a codifying statute; i.e. it draws on established judge-made common law principles and converts them into a more accessible statutory form, it is an improvement on the original but repealed Sale of Goods Act of 1893 as drafted by Sir Mackenzie Chalmers. Technicalities thrived during Chalmers' era and this can be seen by the technically narrow way s. 7 is drafted.

[75] *Benjamin's Sale of Goods* 285, para. 6–029 (A. G. Guest ed., 6th ed., Sweet & Maxwell 2002).

[76] Para. (1) of Art. 79 of the CISG describes the circumstances when a party 'is not liable' for a failure to perform any of his obligations. Para. (2) is an extension of the first paragraph and is concerned with the effect of non-performance by a third party whom the contracting party has engaged to perform some of his duties. Para. (3) regulates the period of the exemption and para. (4) imposes a duty of notification on the party failing to perform. Para. (5) deals with the consequences of non-performance and the remedies available to the parties.

[77] Babatunde Osadare, Force Majeure *and the Performance Excuse: A Review of the English*

Doctrine of Frustration and Art. 2-615 of the Uniform Commercial Code (2010) file:///C:/Users/Ndubuisi/Downloads/cepmlp_-car13_39_912775406%20(1).pdf (accessed 13 Mar. 2017).

[78] Sarah Howard Jenkins, *Exemption for Non-performance: UCC, CISG, UNIDROIT Principles – A Comparative Assessment*, 72 Tul. L. Rev. 2015–2030 (1998); the writer agreed that: '*Force majeure* under the Principles is a restatement of exemption under the Convention with some clarification of the remedial rights reserved.'

[79] Treitel, *supra* n. 25, at 57–58, para. 2–045.

[80] Rapsomanikas, *supra* n. 3, at 551–605.

[81] Hans Smit, *Frustration of Contract: A Comparative Attempt at Consolidation*, 58 Colum. L. Rev. 287, 287 (1958).

[82] Art. 88 of the CESL 2011 Provides thus:

(1) A party's non-performance of an obligation is excused if it is due to an impediment beyond that party's control and if that party could not be expected to have taken the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.

(2) Where the impediment is only temporary the non-performance is excused for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the other party may treat it as such.

(3) The party who is unable to perform has a duty to ensure that notice of the impediment and of its effect on the ability to perform reaches the other party without undue delay after the first party becomes, or could be expected to have become, aware of these circumstances. The other party is entitled to damages for any loss resulting from the breach of this duty.

[83] *The CISG and Its Impact on National Legal Systems* 402 (Franco Ferrari ed., European Law Publishers).

[84] Jan Kleinheisterkamp, *Art 7.1.7*, in *Commentary on the UNIDROIT Principles of International Commercial Contracts* (PICC) 766, para. 1 (Stefan Vogenauer ed., Oxford 2009).

Europe and the analytical discussions on doctrine of impossibility of performance in this article will help to ameliorate the misunderstanding of these doctrines among jurisdictions and parties whose choices of law permit the application of any of the nomenclature upon which impossibility of performance doctrine can manifest.

The doctrine of exemption/*force majeure*/frustration is also very much in touch with all the major law of contract doctrines.[85] The comprehensive exposition and analysis of the points of convergence and divergence in the doctrines of exemption/*force majeure*/frustration offered by this article will provide a new dimension towards a more valuable appreciation, application and interpretations of exemption/*force majeure*/frustration, especially when parties who are not at fault are faced with a situation where unforeseen inhibition, which they cannot control or which consequences they cannot overcome happens to render performance of the contract impossible.

[85] The relationships between the doctrine of exemption/*force majeure*/frustration with other legal principles and doctrines like mistake, hardship, risk, avoidance are important to note. It is also worth mentioning that it has been suggested that the doctrine of estoppel has a strong link with the impossibility doctrine. It was held in the case of *Black Clawson Intl Ltd v. PaprierwerkeWaldhof-Aschaffenburg* (1975) AC 591 that frustration may be excluded on the ground that the party relying on it had affirmed the contract. But this reasoning was rejected in *BP Exploration Co Ltd v. Hunt*, where Lord Goff held that 'Where estoppel might prevent a party from relying on a legal right, they could not prevent a party from relying on frustration because frustration is not a legal right but a legal doctrine.'