1-1992

Frustration in English Law – A reappraisal

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FRUSTRATION IN ENGLISH LAW - A REAPPRAISAL

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I. Introduction

There are few doctrines in the English common law of contract that have raised as much theoretical discussion as the doctrine of frustration.[1] The present article attempts a reappraisal of the doctrine, its central thesis being that many of the major controversies centring on the doctrine have been unnecessary as they stem from an omission to view the doctrine in a holistic fashion. Indeed, it is submitted that a more coherent view must proceed from a theoretical reappraisal, which reappraisal would, ironically, lead to a more cogent practical application of the doctrine itself. That theory lies at the core of the doctrine (more so than in other doctrines) is probably due to the inherent nature and underlying rationale of frustration itself. It appears, unfortunately, that the theoretical discussions which have hitherto occupied numerous pages in the law reports have fallen prey to the central critique just mentioned in so far as they have been preoccupied with the juridical basis underlying the doctrine without actually considering the *other* theoretical problems in an holistic analysis that must simultaneously take into account the value of at least partial syntheses of theoretical issues where appropriate.[2] Looked at in this light, the following observations by Lord Wilberforce in *National Carriers Ltd. v. Panalpina (Northern) Ltd*[3] are not in the least surprising:[4]

1. The other major doctrine which has involved such discussion is that of mistake which, as the decision by Steyn J in *Associated Japanese Bank International Ltd v. Credit du Nord SA* [1989] 1 WLR 255 demonstrates, is akin to the doctrine of frustration, at least where common mistake at common law is concerned. Contrast, also, *Krell v. Henry* [1903] 2 KB 740 and *Chandler v. Webster* [1904] 1 KB 493 on the one hand with *Griffith v. Brymer* (1903) 19 TLR 434 on the other.
2. There has, however, been a handful of very perceptive critiques of the doctrine itself: see, eg, Weir "Nec Tamen Consumebatur ... - Frustration and Limitation Clauses" [1970] *CLJ* 189 especially at pp. 191-192; Nicholas, "Rules and Terms - Civil Law and Common Law" (1974) 48 *Tulane L. Rev.* 946 especially at pp. 959-966; and Stannard, "Frustrating Delay" (1983) 46 *MLR* 738. On suggestions as to possible new directions, see Trakman, "Frustrated Contracts and Legal Fictions" (1983) 46 *MLR* 39. An interesting general comparative piece is Dawson, "Judicial Revision of Frustrated Contracts" [1982] *Juridical Rev.* 86. The present article does not, however, deal with the consequences of the doctrine, as to which see, very recently, the comprehensive article by Stewart & Carter, "Frustrated Contracts and Statutory Adjournment: The Case for a Reappraisal" [1992] *CLJ* 66.
3. [1981] AC 675.
4. *Ibid.*, at p. 693.

> "Various theories have been expressed as to its [the doctrine's] justification in law ... It is not necessary to attempt selection of any one of these as the true basis: my own view would be that they shade into one another and that a choice between them is a choice of what is most appropriate to the particular contract under consideration."

Lord Simon of Glaisdale, in the same case, appeared even more sceptical:[5]

> "... a number of theories have been advanced to clothe the doctrine of frustration in juristic respectability ..."

Indeed, the theoretical discussion appears, probably because of its perceived futility, to have petered out in recent years and there is a relative dearth of academic literature on frustration generally. As already alluded to, however, theory *permeates* the doctrine of frustration, and an attempt will be made in this article to reinstate the place of theory in a doctrine that hitherto appears to comprise merely a theoretical preoccupation with its possible juridical bases and a rather fragmented quasi-practical discussion of other aspects of the doctrine itself.

Two final preliminary points are in order. First, this article accepts the unarguable proposition that the doctrine of frustration is heavily dependent upon the factual circumstances of the particular case; difficulties pertaining to the inevitable uncertainties inherent within the application of the law to the facts are thus outside the scope of the present (indeed, any) essay, save for very abstract and philosophical discussions. Secondly (and this is a related point), because of the inevitable factual uncertainty, the focus of this article will not be upon the detailed factual matrix in the relevant cases as such. Indeed, because the focus is on points of general principle, reference will also be made to decisions from other jurisdictions, primarily those that emanate from the United States of America. It is noted that references to cases from this jurisdiction are markedly absent in so far as analyses of English law are concerned - and understandably so: if nothing else, the many state as well as federal jurisdictions often result in a plethora of cases, many conflicting with each other. It is, however, submitted that in so far as the doctrine of frustration in general and the concept of foreseeability[6] in particular are concerned, cases from the United States of America are extremely useful not only because of the relative paucity of discussion in the English context but also because of the surprising regularity of uniform statements of principle that aid in throwing light on the problems concerned from a more general point of view. Further, both the United States case-law as well as other statutory and quasi-statutory provisions help provide us with interesting

5. *Ibid.*, at p. 702.
6. See *infra*, Part V.

suggestions for reform, especially with regard to the concept of prorating in a situation where one contracting party would otherwise be bound to be in breach of contract; this particular point will be elaborated upon when the topic of self-induced frustration is discussed.[7] However, a caveat may be in order: there appears to be a distinction in the American law between impossibility of performance on the one hand and impracticability of performance on the other.[8] Indeed, Professor Treitel suggests that the doctrine of impracticability under American law is probably a broader concept.[9] He *further* distinguishes between "frustration of purpose" and "impracticability", arguing that while both situations are similar inasmuch as performance has not become impossible, each is nevertheless the converse of the other, and that the more liberal cases (where frustration has been allowed) fall within the former category:[10]

> "Impracticability is said to arise when a *supplier* of goods, services or other facilities alleges that supervening events have made performance of his own promise so much more burdensome to him that he should no longer be bound to render it. The argument of frustration of purpose, on the other hand, is put forward by the *recipient* of the goods, services or facilities: it is that supervening events have so greatly reduced the value to him of the other party's performance that he should no longer be bound to accept and to pay the agreed price."

However, it is worthy to note that whilst arguing that impracticability as such is "generally no excuse," Treitel does acknowledge that frustration can operate in certain exceptional circumstances.[11] The learned author's definition of "impracticability" should also be noted - *viz.*, "great financial or commercial hardship to one of the parties."[12]

It is respectfully submitted that while the concept of impossibility of performance is, in both relative as well as theoretical terms,

7. See *infra*, Part VII.
8. See, eg, Palmer, "The Private Effects of Industrial Action" in ch. 6 of *Force Majeure and Frustration of Contract* (1991) ed., McKendrick at pp. 141-142. And *cf., Farnsworth on Contracts* (hereafter *Farnsworth*), vol. II (1990) at p. 542, where the learned author refers to the doctrine of impracticability as "a new synthesis," and at p. 546 where, referring to s. 454 of the First Restatement of the Law of Contracts, he refers to the use in American law of the term "impracticability" as opposed to "impossibility". But this latter reference is at best neutral (see, *infra*, n. 10).
9. Treitel, *The Law of Contract* (1991) 8th ed., at p. 779.
10. *Ibid.*, at pp. 783-784 (emphasis in original text). See also *Farnsworth, supra*, n. 8 especially at p. 559 and ss. 261 and 265 of the Second Restatement of the Law of Contracts; but *cf., Farnsworth, ibid.*, at p. 560, where it is observed that "[t]he Restatement Second synthesis of the doctrine of frustration of purpose is *strikingly similar* to that of the doctrine of impracticability of performance" (emphasis added). See also *Chase Precast Corporation v. John J Paonessa Company, Inc* 566 N.E.2d 603 (1991) at p. 606.
11. See, generally, Treitel, *supra*, n. 9 at pp. 780-783.
12. *Ibid.*, at pp. 780-781.

distinguishable from impracticability, the inquiry remains, in *substance,* the same. If impossibility of performance is construed in more than a literal sense, the line between impossibility of performance and impracticability becomes very blurred indeed;[13] it becomes, at best, an issue of degree rather than kind. The same may be said of the further distinction between frustration of purpose and impracticability unless it is argued that as a general rule, consumers are to be favoured over suppliers. But the present writer would go one step further: the distinction does not solve the basic problem, which is whether the contract ought to be automatically determined *vis-à-vis* both contracting parties in the first place - and this basic problem centres on "line-drawing" in as principled a fashion as possible, regardless of the terminology utilized. It is suggested that the distinction in terms really reflects a difference in attitudes - that the American courts would probably be more liberal in finding frustration in a given fact situation. But a liberality in *attitude* must be distinguished from an *unprincipled* approach. It is thus submitted that whilst the American courts may, on the whole, be more liberal in applying the doctrine of frustration, this does not preclude a *distillation* of *principles* in the American cases which would aid English courts in clarifying as well as systematizing the present law - whilst bearing in mind both the inevitable overlaps between attitude and substance and, more importantly, the stricter attitude of the English courts as reflected in the second central theme stated below.[14] And it is this more modest approach which this article adopts.

II. The Central Themes Stated

Before commencing the analysis in the present essay, it is proposed that the two central themes first be stated. This will set the stage, as it were, for the detailed discussion that follows; these themes will also provide the reader with central points of reference.

Both Hobhouse J (at first instance) and the Court of Appeal in the

13. See, eg, *supra,* n. 12: indeed, it will be submitted that the line betwen "great financial or commercial hardship" and a radical change in obligations is not often clear in practice; *cf.,* the discussion at Part IV, *infra.* And see also the very illuminating observations in *Mishara Construction Company, Inc v. Tranist-Mixed Concrete Corp* 310 N.E.2d 363 (1974) at pp. 366-367 and *Chase Precast Corporation v. John J Paonessa Company, Inc* 566 N.E.2d 603 (1991) at pp. 605-606.
14. See, *infra,* Part II.

recent decision of *J. Lauritzen AS v. Wijsmuller BV, The Super Servant Two*[15] provide excellent judicial pronouncements of the first (and *substantive*) theme which also serves as the major conceptual framework within which analyses may be effected and practical guides for application of the doctrine ascertained. Turning first to Hobhouse J's judgment, it is significant to note the learned judge's reference to the principle of *reasonable control:*[16] if, in other words, the alleged supervening event upon which the argument of frustration is based is in fact within the reasonable control of at least one of the parties, the doctrine cannot be successfully invoked. While ostensibly commensensical, it is submitted that this principle of reasonable control is pivotal to the entire doctrine of frustration and should therefore henceforth be the central organizing principle and reference point of the doctrine itself. As we shall see, all facets of the doctrine to be discussed below turn on this core principle, and, more importantly, many (if not all) of the controversies frequently associated with these facets can be resolved by reference, in the final analysis, to this principle. Although both Bingham and Dillon LLJ did not expressly refer to this principle on appeal, the language and tenor of their respective judgments in fact endorse and reinforce it; this is especially evident from the judgment of Bingham LJ. In his summary of the law, Bingham LJ stated that "[t]he essence of frustration is that it should not be due to the act or election of the party seeking to rely on it" and that "[a] frustrating event must be some outside event or extraneous change of situation."[17] The learned Lord Justice immediately proceeded to observe that "[a] frustrating event must take place without blame or fault on the side of the party seeking to rely on it."[18] Most importantly, he observed towards the end of his judgment:[19]

15. See [1989] 1 Lloyd's Rep. 148 and [1990] 1 Lloyd's Rep. 1, respectively. And see the following comments: (at first instance) - McKendrick, "Self-Induced Frustration and *Force Majeure* Clauses" [1988] *LMCLQ* 3; (on appeal) - McKendrick, "The Construction of *Force Majeure* Clauses and Self-Induced Frustration" [1990] *LMCLQ* 153; Hedley, "Carriage by Sea - Frustration and Force Majeure" [1990] *CLJ* 209; and Battersbey, "Frustration: a limited future" (1990) 134 *SJ* 354; and Chandler, "Self-Induced Frustration, Foreseeability and Risk" (1990) 41 *NILQ* 362.
16. [1989] 1 Lloyd's Rep. 148 at p. 156. See also *per* Lord Haldane in *Tamplin Steamship Co v. Anglo-Mexican Petroleum Products Co* [1916] 2 AC 397 at p. 406; *per* Harman LJ in *Denmark Productions Ltd v. Boscobel Productions Ltd* [1969] 1 QB 699 at p. 736; *per* Griffiths LJ (as he then was) in *Paal Wilson & Co A/S v. Partenreederei Hannah Blumenthal; The Hannah Blumenthal* [1983] 1 AC 854 at p. 882, whose opinion was endorsed on appeal by Lord Diplock: see [1983] 1 AC 854 at p. 919; *per* Rosenn, Circuit Judge in *Gulf Oil Corporation v. Federal Power Commission* 563 F.2d 588 (1977) at p. 599; *per* Celebreeze, Senior Circuit Judge in *Roth Steel Products v. Sharon Steel Corporation* 705 F.2d 134 (1977) at pp. 149-150; and *per* Goldberg, Circuit Judge in *Nisho-Iwai Co Ltd v. Occidental Crude Sales Inc* 729 F.2d 1530 (1984) at pp. 1540-1543.
17. [1990] 1 Lloyd's Rep. 1 at p. 8
18. *Ibid.*
19. *Ibid.*, at p. 10.

> "... the real question ... is whether the frustrating event relied upon is truly an outside event or extraneous change of situation or whether it is an event which the party seeking to rely on it had the means and opportunity to prevent but nevertheless caused or permitted to come about."

It follows from these observations that none of them can be satisfied if one of the parties, having had reasonable control of the circumstances leading to the alleged frustrating event, has nevertheless allowed that event to happen. Before turning to the second central theme, it might be apposite to pause to consider the argument that the general principle of reasonable control is merely another way of expressing the principle of radical change in obligation, the most famous enunciation of which is encapsulated within the now-famous observations by Lord Radcliffe in *Davis Contractors Ltd v. Fareham Urban District Council.*[20]

While it is admitted that the radical change in obligation rationale is very similar to the general principle of reasonable control,[21] it is submitted that the latter principle should be adopted because it functions better as an unifying strand, for although the radical change in obligation rationale can also explicate most areas of the law relating to frustration, it is less useful in clarifying certain specific areas where doubt remains, for example, those that pertain to the issues of foreseeability and self-induced frustration. It may, at bottom, be primarily one of linguistic usage and appropriateness, although, as I have just attempted to argue, there is probably also a real and distinct difference in both function and result.

The second central theme is more *attitudinal* in nature, and is neatly encapsulated within the following observation by Bingham LJ in *The Super Servant Two:*[22]

> "Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended."

20. [1956] AC 675 at p. 729. And see *per* Lord Roskill in *Pioneering Shipping Ltd v. BTP Toxide Ltd* [1982] AC 725 at pp. 751-752, where the learned Law Lord observed: "It is clear ... that the House [in the *Panalpina* case [1981] AC 675] approved the now classic statement of the doctrine by Lord Radcliffe in *Davis Contractors Ltd* ... whatever may have been said in other cases at earlier stages of the evolution of the doctrine of frustration. ... It should therefore be unnecessary in future cases, where issues of frustration of contracts arise, to search back among the many earlier decisions in this branch of the law when the doctrine was in its comparative infancy."

21. And *cf.,* Denning LJ's (as he then was) formulation on the concept of "contemplation" in *British Movietonews Ltd v. London and District Cinemas Ltd* [1951] 1 KB 190. See also *Chicago, Milwaukee and St. Paul Railway Company v. Hoyt* 149 US 1 (1893) especially at p. 15; and *Northern Pacific Railway Company v. American Trading Company* 195 US 439 (1904) at pp. 466-467.

22. [1990] 1 *Lloyd's Rep.* 1 at p. 8.

This theme is not new and Bingham LJ cites, in fact, from a number of leading cases.[23] In addition, the extremely parsimonious attitude towards the frustration of leases as evidenced in the various judgments in *National Carriers Ltd v. Panalpina (Northern) Ltd*[24] is yet another instance of this rather strict approach.

This second theme supplements the first in the following manner: while the fact that the general principle of reasonable control provides substantive constraints, this second principle provides the necessary attitudinal constraints. It may be objected that all this leaves frustration in a vague and therefore unsatisfactory state. However, I shall attempt to demonstrate, in the concluding part of this article, why this objection, while convincing, does not detract, in the final analysis, from the cogency of the analysis offered in the instant essay.

III. A Preliminary Issue: The Possible Juridical Bases of Frustration

Although the possible juridical bases of frustration have, as already pointed out, been the central preoccupation of judges as well as academic commentators, it is submitted that this preoccupation has been misconceived, and only detracts from a clarity of approach that is central to the aims of the present essay - a point that is more than hinted at in judicial terms by Lord Wilberforce and Lord Simon of Glaisdale in observations quoted above.[25] It is not, therefore, proposed that a detailed analysis be undertaken of these possible bases, which are, in any event, already well-summarized in the leading English texts.[26] Generalizing, it may not be too far off the mark to observe that the juridical bases fall, more often than not, into one of two very general categories: a kind of objective theory implemented by the court itself or a subjective theory premised on justice and fairness which is obviously also implemented by the court concerned. The theory of the implied term and the more "well-regarded" theory of construction fall within the former category while the "just and reasonable" rationale falls within the latter. Sceptics argue that the former is merely the latter in more formal (and therefore acceptable) garb. Supporters of the former approach, while prepared to discard the

23. *Ibid.* See also *per* Lord Radcliffe in *Davis Contractors Ltd v. Fareham Urban District Council* [1956] AC 696 at p. 727; and *per* Lord Roskill in *Pioneering Shipping Ltd v. BTP Toxide Ltd* [1982] AC 725 at p. 752. This theme is also not peculiar to English law: see eg, *Smith v. Roberts* 370 N.E.2d 271 (1977) at p. 273; and *Northern Illinois Gas Company v. Energy Cooperative Inc* N.E.2d 1049 (1984) at p. 1059. Reference should also be made to Treitel, *Doctrine and Discretion in the Law of Contract* (1981) at p. 11.
24. [1981] AC 675.
25. See *supra*, nn. 4 and 5.
26. And for a good recent judicial survey, see generally *National Carriers Ltd v. Panalpina (Northern) Ltd* [1981] AC 675.

rationale centring on the implied term,[27] point to construction as being the more readily legitimate process of analysis. The usual compromise is a hazy amalgamation of both categories in various language, usually emphasizing both the objective process of construction and the underlying rationale of justice and fairness;[28] the following observations by Bingham LJ in *The Super Servant Two* illustrate the emphasis on the rationale of fairness:[29]

> "The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances."

In point of fact, however, the process of ascertaining the juridical basis of frustration leads us nowhere both from theoretical as well as practical points of view. The various arguments muddy, with respect, the theoretical waters, whilst the end result does not aid in the formulation of practical guidelines for application. Unfortunately, however, the major theoretical discussion has focused precisely on this sphere of the doctrine. What, then, of other facets of frustration which do, in fact, constitute the practical aspects of the doctrine itself? Let us first turn to a rather standard issue in frustration, *viz.*, the issue of increased costs.

27. See the now-famous remark by Lord Radcliffe in *Davis Contractors Ltd v. Fareham Urban District Council* [1956] AC 696, where the learned Law Lord states (at p. 728): "This approach [of implying a term as the basis for the doctrine of frustration] is in line with the tendency of English courts to refer to all the consequences of a contract to the will of those who made it. But there is something of a logical difficulty in seeing how the parties could even impliedly have provided for something which ex hypothesi they neither expected nor foresaw; ... By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself." See also, in an extra-judicial capacity, Lord Wright, *Legal Essays and Addresses* (1939) at p. 259.

28. See eg, *per* Lord Denning MR in *Ocean Tramp Tankers Corporation v. V/O Sovfracht, The Eugenia* [1964] 2 QB 226 at p. 239. See also *per* Lord Wilberforce in the *Panalpina* case, *supra*, n. 4. Yates, "Drafting Force Majeure and Related Clauses" (1991) 3 *JCL* 186 at p. 190 refers to such an approach as "a hotchpotch".

29. [1990] 1 Lloyd's Rep. 1 at p. 8. But *cf.*, McKendrick, "Frustration and Force Majeure - Their Relationship and a Comparative Assessment" in ch. 3 of McKenrick, *supra*, n. 8 at p. 33. Interestingly, Andrew Rogers, "Frustration and Estoppel" in *ibid.*, ch. 5, especially at p. 77-78, suggests that estoppel may *better* achieve a just and reasonable result.

IV. The Issue of Increased Costs

Of all the manifold arguments utilized in the attempted invocation of the doctrine of frustration, the most oft-used is that of increased costs. It is, however, equally clear (at least from the English case-law) that this argument will not be countenanced by the courts, at least where it is either the sole or main argument prayed in aid.[30] The underlying reason for this parsimonious attitude by the courts is not at all difficult to discern: the English courts have long frowned upon any attempt by a contracting party to extricate himself from a bad bargain. This approach is consonant not only with the more theoretical rationale of freedom of contract but also with the reality accepted by businessmen that profits and losses are part and parcel of the risks that are inherent within the conduct of business.[31] In addition, if a party could easily extricate himself from a bad bargain with impunity, intolerable uncertainty would be generated for the business community as a whole. Thus, in the sphere of economic duress, for

30. See eg, the oft-cited cases of *Davis Contractors Ltd v. Fareham Urban District Council* [1956] AC 696; *Tsakiroglou & Co Ltd v. Noblee Thorl GmbH* [1962] AC 93; and *Ocean Tramp Tankers Corporation v. V/O Sovfracht, The Eugenia* [1964] 2 QB 226. See also *Wates Ltd v. Greater London Council* (1983) 25 BLR 1. *Contra* the approach of Lord Denning MR in *Staffordshire Area Health Authority v. South Staffordshire Waterworks Co.* [1978] 1 WLR 1387 especially at pp. 1397-1398 - an approach that has been heavily criticized: see eg, *Cheshire, Fifoot and Furmston's Law of Contract* (1991) 12th ed., at p. 578 and Treitel, *supra,* n. 9 at p. 782.

31. Bailhache J in *In Re An Arbitration between Comptoir Commercial Anversois and Power, Son and Company* [1920] 1 KB 868 at pp. 878-879 observed: "Nothing, in my opinion, is more dangerous in commercial contracts than to allow an easy escape from obligations undertaken ..." Higginbotham, District Judge in *Mainline Investment Corporation v. F C Gaines, Jr* 407 F.Supp. 423 (1976) at p. 427 observed: "Certainly a sudden and precipitate change in the price of a commodity can hardly be held to constitute an 'extraordinary' event. The central purpose of the price agreement is to fix the price and consequently the risk of price fluctuation." Heiple J in *Northern Illinois Gas Company v. Energy Cooperative, Inc* 461 N.E.2d 1049, (1984) also stated (at p. 1059): "... as any trader knows, the only certainty of the market is that prices will change. Changing and shifting markers and prices from multitudinous causes is endemic to the economy in which we live. Market forecasts by supposed experts are sometimes right, often wrong, and usually mixed. If changed prices, standing alone, constitute a frustrating event sufficient to excuse performance of a contract, then the law binding contractual parties to their agreements is no more." But *cf.,* the learned judge's later remarks (at p. 1061, citing *Gulf Oil Corporation v. Federal Power Commission* 563 F.2d 588 (1977); "A party seeking to excuse his performance must show that he can operate *only* at a loss and that the loss will be so severe and unreasonable that failure to excuse performance would result in grave injustice." This suggests that there is still scope for frustration in the situation of a *severe* increase in costs; see also the main text, *infra.* On inherent business risks, see also *per* L. Hand, Circuit Judge in *Companhia De Navegacao Lloyd Brasileiro v. C G Blake Co Inc,* 34 F.2d 616 (1929) at p. 619; *per* Swofford, Chief Judge in *Missouri Public Service Company v. Peabody Coal Company* 583 S.W.2d 721 (1979) at p. 728; *per* Evans CJ in *Valero Transmission Company v. Mitchell Energy Corporation* 743 S.W.2d 658 (1987) at p. 663; and *per* Clark, Chief Judge in *Esplanade Oil & Gas, Inc v. Templeton Energy Income Corporation* 889 F.2d 621 (1989), especially at p. 624.

example, the courts have drawn a clear and distinct line between mere commercial pressure on the one hand and economic duress on the other.[32] One may criticize the bright-line methodology adopted, but there is no doubt that the concept of certainty is firmly ingrained within the psyche of businessmen generally.[33]

However, at least one writer has very perceptively pointed to the fact that increased cost is, more often than not, the major reason for the attempted invocation of frustration and that there is, in fact, no reason in principle why the factor of increased costs should not constitute a cogent reason for a successful pleading of the doctrine;[34] in the learned author's words:[35]

> "The difficulty with this reasoning [that increased costs are insufficient] is that, except for the case of the death of a party to a truly personal service contract, or the destruction of a unique chattel, greater expense (or decreased value) is the only result of an event claimed to be frustrating and the only reason why one of the parties wants to treat the contract as terminated."

This argument is obviously persuasive, and there are indications in the judgments of at least two Law Lords in *Tsakiroglou & Co. Ltd v. Noblee Thorl GmbH*[36] that increased costs might constitute a valid ground for frustration where they were so extreme as to be "astronomical." Such a possibility is also contemplated (in the United States of America) by the Restatements of The Law of Contracts[37] and the Uniform Commercial

32. See Phang, "Whither Economic Duress? Reflections on Two Recent Cases" (1990) 53 *MLR* 107 at pp. 110-112, and the authorities cited therein.
33. See *ibid.*, at p. 114. *Cf.*, also, Palmer, *supra*, n. 8 at p. 150.
34. See Schlegel, "Of Nuts, and Ships, and Sealing Wax, Suez, and Frustrating Things" (1969) 23 *Rutgers L. Rev.* 419.
35. *Ibid.*, at p. 427. See also *ibid.*, at pp. 441-442.
36. See [1962] AC 93 at pp. 118 and 128-129, *per* Lord Reid and Lord Hodson, respectively. *Cf.*, also, the view of Treitel, *supra*, n. 9 at p. 783.
37. See s. 454 of the First Restatement of the Law of Contracts and Comment (d) to s. 261 of the Second Restatement of the Law of Contracts, the latter of which, however, acknowledges that the criterion of increased expenses cannot be too liberally applied (see, also, *infra*, n. 38). *Cf.*, Comment (a) to s. 265 of the Second Restatement of the Law of Contracts.

Code,[38] as well as the case-law.[39] And Professor Dawson has pointed out that it was precisely because of hyperinflation in Germany that the courts of that country were encouraged (despite the lack of clear language in the civil code) to develop a doctrine of impossibility that took into account the adverse social situation - a development that continued apace even after inflation was no longer a problem.[40] Indeed, and utilizing the test suggested by Lord Radcliffe referred to earlier,[41] increased costs (either alone or in conjunction with other facts and factors) could possibly transform the originally contemplated contractual obligations into something radically different.

Given the rather unsatisfactory state of the law as briefly described above, it is submitted that the way forward is to effect a compromise between the Scylla of the sanctity of bargains and the Charybdis of increased costs. There ought, in other words, to be some provision made for the successful invocation of the doctrine where costs have increased to such an extent that it becomes unfair to hold the losing party to his bargain; and it becomes unfair simply because the degree of increase is such as to radically change, in substance at least, the original contractual obligation such that it becomes no longer feasible to argue that the court should maintain the sanctity of a bargain which has, in the circumstances, in effect ceased to exist. The *first central principle* set out above, *viz.*, the principle of reasonable control, provides, it is submitted, a valuable point of reference: where the costs are considered to be beyond the reasonable control of the parties, the doctrine of frustration ought, *ceteris paribus,* to operate. One difficulty with this argument is the fact that increased costs are, for the most part at least, *literally* beyond the control of the parties

38. See s. 2-615, the full text of which is reproduced at *infra,* n. 108. For present purposes, the following extract from para. 4 of the Official Comment to the section is apposite: "Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. But a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section." Though, *cf.,* the interpretation of *Farnsworth, supra,* n. 8 at p. 547.

39. See eg, *Transatlantic Financing Corporation v. United States* 363 F.2d 312 (1966) at p. 319 ("... it may be an overstatement to say that increased cost and difficulty of performance never constitute impracticability ..."). See also *J P Butler v. Edward Nepple* 354 P.2d 239 (1960); *American Trading and Production Corporation v. Shell International Marine Ltd* 453 F.2d 939 (1972) at p. 942; *Gulf Oil Corporation v. Federal Power Commission* 563 F.2d 588 (1977) at p. 600; and *Helms Construction and Development Co v. State of Nevada* 634 P.2d 1224 (1981) at p. 1225.

40. See Dawson, "Judicial Revision of Frustrated Contracts: Germany" (1983) 63 *BUL Rev.* 1039 and, by the same author, "Effects of Inflation on Private Contracts: Germany, 1914-1924" (1934) 33 *Mich. L. Rev.* 171.

41. See *supra,* n. 20.

concerned. This argument must therefore be considered *in conjunction with* the issue of foreseeability: where the increased costs are either unforeseen or unforeseeable, they would be considered to be beyond the reasonable control of the parties. This was indeed the position in the American case of *Aluminium Company of America v. Essex Group Inc,*[42] where frustration was found in a situation where to have held otherwise would have resulted in a loss totalling more than US$60 million. This line of reasoning merely emphasizes a point made at the outset of this article - that the doctrine of frustration must be applied in a holistic fashion. This would be an appropriate point at which to turn to the rather thorny issue (under English law at least) of foreseeability.

V. Foreseeability

If discharge for frustration is indeed allowed because of a supervening event over which none of the parties had reasonable control, it ought to follow that if the event concerned was, in fact, either foreseen or foreseeable, the doctrine cannot be succesfully invoked. To put it another way, if a party to the contract either foresaw the event happening (i.e., as a certainty or near-certainty) or ought (as a reasonable person) to have foreseen the said event happening, the circumstances leading to the alleged frustrating event (and the actual event itself) must *ex hypothesi* have been within the *reasonable control* of the parties themselves. What little English authority there is, however, appears to suggest the exact opposite.[43] This means one of at least two things: either that these

42. 499 F.Supp. 53 (1980). See also *per* Drapeau J in *Glens Falls Indemnity Co. v. Perscallo (Bulich, Intervener)* 216 P.2d 567 (1950) at p. 569 where, however, the linkage is not so clearly established.

43. The literature is inconclusive: somewhat curiously, for example, Swadling, "The Judicial Construction of Force Majeure Clauses" in ch. 1 of McKendrick, *supra,* n. 8 at p. 7 and McKendrick, "Frustration and Force Majeure - Their Relationship and a Comparative Assessment," *ibid.,* ch. 3 at p. 29 appear to treat the English authorities eschewing foreseeability as exceptions rather than the rule. See also, Dawson, *supra,* n. 2 at pp. 86, 87, 104, 105 (although this is a broader comparative piece). It is, however, submitted that the (English) authorities to the contrary constitute fairly formidable obstacles. And see, in this regard, McInnis's very thorough and well-researched essay, "Frustration and Force Majeure in Building Contracts" in ch. 9 of McKenrick, *supra,* at p. 151, where the learned author observes: "One unfortunate consequence of the latitude open to the court in construing the contract is that there are dicta in numerous cases which support the view that a contract cannot be frustrated by a risk that was either foreseen or foreseeable, as well as dicta from other cases where the courts have acceded to frustration even though there was foreseeability. Given this state of affairs it seems hasty to conclude either that foreseeability precludes the operation of the doctrine of frustration or that it does not." However, the author does proceed to detail arguments *against* the utilization of the concept of foreseeability in the establishment of frustration, contrary to the views proffered in the instant article: see *ibid.,* at pp. 153 and 161.

precedents are wrong or that the general principle of reasonable control argued for in the second part of this article is misconceived. In accordance with the central thesis of the instant essay, it is submitted that these English cases have to be reconsidered as they are wholly at variance with the central idea behind the doctrine of frustration, which is that the contract is automatically discharged not because of any fault on the part of either of the parties but, rather, because of a supervening event that radically alters the contractual obligations.

If the parties could have foreseen (and, *a fortiori,* if they did in fact foresee) that the alleged frustrating event would happen, it is submitted that the alteration, even though it occurs as a matter of fact, is no longer radical because foreseen or foreseeable. Indeed, it could be argued that by foreseeing the alleged event and not providing for it, both parties had voluntarily assumed the risk of the event happening,[44] so that neither may now invoke frustration as an excuse to have the contract discharged. As already mentioned, however, what English pronouncements there are appear to suggest that the contract is still capable of frustration even if the alleged frustrating event was either foreseen or foreseeable: see, especially, *Tatem Ltd v. Gamboa*[45] and the remarks by Lord Denning MR in *Ocean Tramp Tankers Corporation v. V/O Sovfracht, The Eugenia.*[46] Indeed, Lord Denning went so far as to observe thus:[47]

44. The concept of assumption of risk is to be found in many cases, often (as here) in conjunction with that of foreseeability. It is submitted that, like foreseeability, the concept of assumption of risk is relevant but cannot be conclusive. As Trakman, for example, points out, the parties may not want to antagonize customers or jeopardize the agreement: that the concept assumes too much rationality on the part of merchants at a psychological level; that they may want to avoid disruptions in the form of protracted negotiations; that they may fail to understand the risks involved; and that they may want to avoid drafting complex force majeure clauses: see Trakman, "Interpreting Contracts: A Common Law Dilemma" (1981) 59 *Can. Bar Rev.* 241 especially at pp. 263-272. But *cf.,* Swan, "The Allocation of Risk in the Analysis of Mistake and Frustration" in Reiter and Swan (eds.), *Studies in Contract Law* (1980), Study 7; the "Introductory Note" in the chapter entitled "Impracticability of Performance and Frustration of Purpose" in the Second Restatement of the Law of Contracts, vol. 2 (1981); as well as Comments (b) and (c) to s. 261 and Comment (a) to s. 265 of this Restatement.

45. [1939] 1 KB 132.

46. [1964] 2 QB 226 at p. 239. Reference should also be made to what appears to be a contrary approach in *In Re Arthur, Arthur v. Wynne* (1880) 14 Ch.D. 603 especially at pp. 608-609; *Walton Harvey, Limited v. Walker and Homfrays, Limited* [1931] 1 Ch. 274 especially at pp. 282 and 285-286; and *Reid House Pty v. Beneke & Ors* (1987) 5 ACLC 451 at p. 457. See also *per* Parker J, albeit *obiter,* in *Silver Coast Shipping Co. Pte Ltd v. Union Nationale Des Co-operatives Agricoles Des Cereales, The Silver Sky* [1981] 2 *Lloyd's Rep.* 95 at p. 98; *per* Lord Brandon of Oakbrook in *Paal Wilson & Co A/S v. Partenreederei Hannah Blumenthal, The Hannah Blumenthal* [1983] 1 AC 854 at p. 909; and *Wong Lai Ying v. Chinachem Investment Co. Ltd* (1979) 13 BLR 81.

47. [1964] 2 QB 226 at p. 239. *Cf. Transatlantic Financing Corporation v. United States* 363 F.2d (1966) 312. But *cf., Glidden Company v. Hellenic Lines, Limited* 275 F.2d 253 (1960) at p. 257 *(per* Lumbard, Chief Judge).

> "It has frequently been said that the doctrine of frustration only applies when the new situation is 'unforeseen' or 'unexpected' or 'uncontemplated', as if that were an essential feature. But it is not so. The only thing that is essential is that the parties should have made no provision for it in their contract. The only relevance of it being 'unforeseen' is this: if the parties did not foresee anything of the kind happening, you can readily infer they have made no provision for it: whereas, if they did foresee it, you would expect them to make provision for it. But cases have occurred where the parties have foreseen the danger ahead, and yet made no provision for it."

It is submitted, with respect, that the Master of the Rolls was wrong in relegating the concept of foreseeability to that of a mere factor in the ascertainment as to whether the parties had expressly provided for the alleged frustrating event (in fact, a topic that will be dealt with in the next part) for the reasons already set out above. This writer agrees, however, that there is, under certain circumstances to be elaborated upon in the next part, an overlap between the concepts of foreseeability on the one hand and express provision on the other; but, as we shall see, this is an overlap only and thus the Judge's opinion to the effect that the former is subsumed within the latter cannot be supported. Indeed, the numerous cases on frustration from the United States of America uniformly and expressly endorse the element of foreseeability argued for in the present part.[48] Nor do Lord Denning MR's earlier observations in *British Movietonews Ltd v. London and District Cinemas Ltd,* where he stated that "[w]e no longer credit a party with the foresight of a prophet or his lawyer with the draftsmanship of a Chalmers" and that "[w]e realize that they have their limitations and make allowances accordingly"[49] detract from this critique for, as shall be argued below, foreseeability in an absolute sense is unrealistic. Further, and contrary to the Judge's approach, the fact that the alleged frustrating event was foreseeable has been held, in some cases at least, to entail a duty on the part of the party alleging frustration to *expressly*

48. The more recent decisions include *Frank B. Bozo, Inc. v. Electric Weld Division of the Fort Pitt Bridge Division of Spang Industries, Inc* 423 A.2d 702 (1980); *Helms Construction and Development Co v. State of Nevada* 634 P.2d 1224 (1981); *Yoffe v. Keller Industries, Inc* 443 A.2d 358 (1982); *Bende and Sons, Inc v. Crown Recreation, Inc, Kiffe Products Division* 548 F.Supp. 1018 (1982); *Roth Steel Products v. Sharon Steel Corporation* 705 F.2d 134 (1983); *Northern Illinois Gas Company v. Energy Cooperative, Inc.* 461 N.E.2d 1049 (1984); *Valero Transmission Company v. Mitchell Energy Corporation* 743 S.W.2d 658 (1987); and *Martin v. Commonwealth of Pennsylvania, Department of Environment Resources* 548 A.2d 675 (1988); and *Western Properties v. Southern Utah Aviation, Inc* 776 P.2d 656 (1989). See also, Dawson, "Judicial Revision of Frustrated Contracts: The United States" (1984) 64 *BUL Rev.* 1 and Hunter, "Commentary on Pitfalls of Force Majeure Clauses" (1991) 3 *JCL* 214 at pp. 214-215.

49. [1951] 1 KB 190 at p. 202.

provide for that event in the contract itself.[50] There is, admittedly, a handful of American cases that suggests otherwise. In *Transatlantic Financing Corporation v. United States,* for example, J. Skelly Wright, Circuit Judge observed:[51]

> "Foreseeability or even recognition of a risk does not *necessarily* prove its allocation ... Parties to a contract are not always able to provide for all the possibilities of which they are aware, sometimes because they cannot agree, often simply because they are too busy. Moreover, that some abnormal risk was contemplated is *probative* but does not *necessarily* establish an allocation of the risk of the contingency which actually occurs."

However, these cases do not, it is submitted, dismiss the concept of foreseeability out of hand but, rather, express reservations about too liberal an application of the concept itself. This is perfectly understandable in the light of the evident fact that a particular concept can mean different things in different contexts. It would indeed appear that in the context of the law of contract, the term "foreseeability" is not an altogether happy one: in the law relating to remoteness of damage, for example, the House of Lords in *Koufos v. C. Czarnikow Ltd, The Heron II*[52] took great pains to point out the traditionally wider ambit of the concept of foreseeability as applied in the sphere of tort law and preferred, instead, the rubric of "reasonable contemplation" in the context of contract law. It is submitted that a similar approach should be adopted toward foreseeability in relation to the law of frustration: in other words, the concept of foreseeability cannot be taken too far so as to cover the remotest of possibilities for to do so would be, in effect, to completely undermine the rationale of fairness. As Clark, Circuit Judge succinctly put it in the American decision

50. See eg, again taking the more recent decisions because of constraints of space, *Yoffe v. Keller Industries, Inc* 443 A.2d 358 (1982); *Opera Company of Boston v. The Wolf Trap Foundation for the Performing Arts* 817 F.2d 1094 (1987) at pp. 1102-1102; and *Reid House Pty Ltd v. Beneke & Ors* (1987) 5 ACLC 451 at p. 457.

51. 363 F.2d 312 (1966) at p. 318 (emphasis added). See also *per* Browning, Circuit Judge in *West Los Angeles Institute for Cancer Research v. Ward Meyer et al* 366 F.2d 220 (1966) at p. 225 (emphasis added): "We think it proper to assume that the Supreme Court of Oregon follows the now more widely accepted view that foreseeability of the frustrating event is not *alone* enough to bar rescission if it appears that the parties did not intend the promisor to assume the risk of its occurrence." See, further, the material and provisions from the Second Restatement of the Law of Contracts cited at *supra,* n. 44, and the cases cited *infra,* at nn. 54, and *City of Savage v. Ray Formanek* 459 N.W.2d 173 (1990) at p. 177. *Cf.,* what, it is submitted, is the neutral approach of Teitelbaum, District Judge in *Aluminium Company of America v. Essex Group, Inc* 499 F.Supp. 53 (1980) at p. 76. See also *Farnsworth, supra,* n. 8 at pp. 554-556 and 563-564, where the author argues that foreseeability, whilst a factor, is not *per se* conclusive.

52. [1969] 1 AC 350.

of *L.N. Jackson & Co., Inc. v. Royal Norwegian Government:*[53]

> "This approach practically puts the burden upon the promisor to show non foreseeability. Carried to its logical limits such a view would practically destroy the doctrine of supervening impossibility ..."

The determination must thus be, in the final analysis, one of *degree:*[54] if, in fact, the alleged frustrating event is *actually foreseen,*[55] that would evidently constitute the high degree of foreseeability sufficient to exclude the operation of the doctrine; any other situation must depend on the assessment of the court as viewed from an *objective* point of view. The American cases that appear to eschew the concept of foreseeability will, on a close analysis, actually support the interpretation taken here, although not, perhaps, with regard to the proposition just ventured with regard to foreseen events.[56] This interpretation is also in accordance with the view of Professor Treitel who observes that:[57]

> "The inference that the parties contracted with reference to the event (and so took the risk of its occurrence) can only be drawn if the event was either actually foreseen or if the degree of foreseeability was a very high one. It is not sufficient if the low degree of foreseeability which constitutes the test of remoteness in tort is satisfied ... To support the inference of risk-assumption, the event must be one which any person of ordinary intelligence would regard as likely to occur. Moreover, the event or its consequences must be foreseeable in some detail."

The reader might, however, observe that the guidelines pertaining to foreseeability are rather vague and possibly strict. It is admitted that this is the case, as it must inevitably be where issues of fact and degree are

53. 177 F.2d 694 (1949) at p. 699. See also *Opera Company of Boston v. Wolf Trap Foundation for the Performing Arts* 817 F.2d 1094 (1987) at pp. 1100-1103.
54. See the acknowledgment of this in the *Opera Company of Boston* case, *supra,* n. 53 at pp. 1101-1102. See also *Cliffstar Corporation v. Riverbend Products, Inc* 750 F.Supp 81 (1990) at p. 84.
55. Although, in the nature of things, absolute foresight is, of course, impossible. What is referred to here is such a high degree of foreseeability as to amount to knowledge that the alleged frustrating event would happen as a *virtual certainty.*
56. See the comments in the Second Restatement of the Law of Contracts cited at *supra,* n. 44. Though *cf., per* Harlington Wood, Jr, Circuit Judge in *The Waldinger Corporation v. Ashbrook-Simon-Hartley, Inc* 775 F.2d 781 (1985) at p. 786 where the learned judge observed that "[t]he applicability of the defense of commercial impracticability ... turns *largely* on foreseeability" (emphasis added).
57. See Treitel, *supra,* n. 9 at pp. 800-802. The author distinguishes the English cases to the contrary by arguing that the high standard of foreseeability he argues for (see the main text) did not exist in those decisions. *Cf.,* Greig & Davis, *The Law of Contract* (1987) at pp. 1317-1318 where the authors state that whilst foreseeability is important, it cannot be conclusive. It is submitted that this approach is similar in substance to that advocated in the present article.

involved.[58] It is important to reiterate at this juncture that the views just proffered are wholly consistent with the first general principle of reasonable control.[59] More important, at least in so far as the present objection is concerned, is the fact that even if the courts do adopt a rather strict approach, this would also be entirely consistent with the *second* general principle set out above.

VI. Express Provision[60]

The generally accepted proposition is that where a contractual provision expressly covers the alleged frustrating event, that provision, and not the doctrine of frustration, will apply. The rationale underlying this proposition is, once again, entirely consistent with the first general principle stated above, *viz.*, that pertaining to reasonable control: where the parties have expressly evinced an intention, that manifestation of control will govern; as a corollary, the alleged frustrating event, having been provided for in the express terms of the contract itself, cannot be argued to be a supervening event over which the parties have no reasonable control.[61] While this is the established theory, the practical reality has, however, been quite different. Decisions of courts at the highest levels have indicated that courts will not lightly interpret express

58. Some broad guidelines may be found in the judgment of Swofford, Chief Judge in *Missouri Public Service Company v. Peabody Coal Company* 583 S.W.2d 721 (1979) at p. 726 as follows: "A commercial, governmental or busines trend affecting a contract's value which would be foreseeable to a party with wide experience and knowledge in the field and, perhaps, not to a party with less; a loss to a party with vast resources and ample supply of raw materials to perform a bad bargain would be less harmful than to a party without them; and, the application of the doctrine and the equitable principles inherent therein might call for relief in one instance and not another based upon these factors, and others, outside the strict confines of the contract itself."

59. See the approach, language and tenor of the court in *Nisho-Iwai Co Ltd v. Occidental Crude Sales, Inc* 729 F.2d 1530 (1984). More directly illustrative of the link between the concept of foreseeability on the one hand the principle of reasonable control on the other is the decision of Traynor J (with whom the other judges concurred) in the Supreme Court of California case of *Lloyd et al v. Murphy* 153 P.2d 47 (1944) especially at p. 50.

60. See generally Yates, "Drafting Force Majeure and Related Clauses" (1991) 3 *JCL* 186; Swadling, *supra,* n. 43; and Furmston, "Drafting of Force Majeure Clauses," the latter two essays of which constitute chs. 1 and 2, respectively, of McKendrick, *supra,* n. 8.

61. Indeed, most force majeure clauses *expressly* refer to the concept of reasonable control: see, eg, *Gulf Oil Corporation v. Federal Energy Regulatory Commission* 706 F.2d 444 (1983); *Martin v. Commonwealth of Pennsylvania Department of Environmental Resources* 548 A.2d 675 (1988); *Atlantic Richfield Company v. ANR Pipeline Company* 768 S.W.2d 777 (1989); and *Wong Lai Ying v. Chinachem Investment Co. Ltd* (1979) 13 BLR 81. And see the *general* acknowledgment of this fact by Goldberg, Circuit Judge in *Nisho-Iwai Co Ltd v. Occidental Crude Sales, Inc* 729 F.2d 1530 (1984) at p. 1540, cited at, *infra,* n. 107.

contractual provisions as precluding a successful pleading of frustration.[62] However, these decisions really go to the strictness with which the provisions concerned are construed, and do not militate against the basic proposition enunciated above. It might, of course, be argued that the strict approach to construction generally adopted by the courts runs counter to the second general principle, *viz.*, the limited circumstances under which frustration may be pleaded. One possible rationalization runs as follows. There are two steps in the analysis, and it is only at the first that the strict approach as embodied within the second general principle should be applied in all its rigour. The first step is to ascertain whether or not the doctrine applies in accordance with the general principles (at common law) laid down in the relevant case-law. At this stage, and as just mentioned, the approach of the court ought to be extremely strict since frustration is perceived, in accordance with the second general principle, as a measure of last resort. The second step pertains to purported exclusion of the doctrine via an express contractual provision: at this point, it is submitted that the classical notion of freedom of contract (and attendant choice by the parties themselves) becomes of paramount importance; this notion favours (as far as is legally possible) the continued validity of the contract concerned.[63] It can therefore be seen that both the first as well as second central themes are prominently involved in this particular aspect of the law relating to frustration.

VII. Self-Induced Frustration[64]

This particular aspect of the doctrine is particularly difficult. Dormant for a great many years, the various problems have been recently brought to the fore, in both direct as well as indirect ways, by a case already referred to, *viz.*, *The Super Servant Two*.[65] Briefly put, the major problems centre on two main issues: first, whether negligent conduct can constitute self-

62. See, eg, *Metropolitan Water Board v. Dick, Kerr & Co. Ltd* [1918] AC 119; and *Bank Line Ltd v. Arthur Capel & Co.* [1919] AC 435. See also McKendrick, *supra*, n. 43 at pp. 29-31, who advocates a more liberal approach by the courts. On the relevance of foreseeability as a factor, see *supra*, Part V.

63. *Cf.*, in the sphere of common mistake at common law, *per* Steyn J in the *Associated Japanese Bank* case [1989] 1 WLR 255 at p. 268.

64. See the very comprehensive analysis in Swanton, "The Concept of Self-Induced Frustration" (1990) 2 *JCL* 206.

65. [1989] 1 Lloyd's Rep. 148; affirmed [1990] 1 Lloyd's Rep. 1. And see the general analysis by McKendrick, *supra*, n. 43 at pp. 31-34 and 36-46 in the context of the advantages of force majeure clauses; self-induced frustration is discussed at pp. 40-44.

induced frustration;[66] the second main issue pertains to the concept of election and concerns the correctness (or otherwise) of Professor Treitel's proposition of law[67] which is succinctly stated by Dillon LJ in *The Super Servant Two* as follows:[68]

> "... where a party has entered into a number of other contracts with other parties and an uncontemplated supervening event has the result that he is deprived of the means of satisfying all those contracts, he can, provided he acts 'reasonably' in making his election, elect to use such means as remains available to him to perform some of the contracts, and claim that the others, which he does not perform, have been frustrated by the supervening event."

Before considering these two issues, it might be appropriate to note the basic law of, and rationale underlying, the concept of self-induced frustration. The basic law may be simply stated: as frustration is dependent on the existence of a supervening event due to the fault of neither party, the courts will disallow the operation of the doctrine where the alleged frustrating event is in fact brought about by the fault of the party seeking to rely upon it. This appears to be an absolute rule of morality, as evidenced by observations to that effect in the House of Lords decisions of *Cheall v. Association of Professional Executive Clerical and Computer Staff*[69] and *Alghussein Establishment v. Eton College.*[70] The first main issue raised with regard to negligence really centres on the question

66. Intentional conduct would clearly constitute self-induced frustration: see, eg, the leading decision of the Privy Council in *Maritime National Fish v. Ocean Trawlers Ltd* [1935] AC 524; *Mertens v. Home Freeholds Company* [1921] 2 KB 526; and *Suburban Newspapers of Greater St Louis, Inc. v. The Kroger Company* 886 F.2d 1060 (1989)

67. See Treitel, *The Law of Contract* (1987) 7th ed., at pp. 700-701 (this was the edition then available at the time the case was heard). The author arrived at his proposition of law by varying the facts of *Maritime National Fish v. Ocean Trawlers Ltd* [1935] AC 524, which variation of facts became a real issue for the court's decision in *The Super Servant Two* [1989] 1 Lloyd's Rep. 148; affirmed, [1990] 1 Lloyd's Rep. 1. See also, to like effect, Waddams, *The Law of Contracts* (1984) 2nd ed., at pp. 283-284; Greig & Davis, *supra,* n. 57 at pp. 1321-1322; and McElroy & Williams, *Impossibility of Performance* (1941) at pp. 239-240.

68. [1990] 1 Lloyd's Rep. 1 at p. 13.

69. [1983] 2 AC 180 at p. 189 (*per* Lord Diplock).

70. [1988] 1 WLR 587 at p. 595 (*per* Lord Jauncey of Tullichettle). See also *per* Harnsberger J in *Francis Milton Gibson v. J T Allen Agency* 407 P.2d 708 (1965) who, in delivering the opinion of the court, observed (at p. 709) that "[t]o sanction Gibson's [the defendant's] profiting by his own wrongdoing would offend right and justice and should never be tolerated in the Halls of Justice." See also *per* Lee J in *Navajo Freight Lines, Inc v. Richard O Moore and William C Van Dyke* Colo. 463 P.2d 460 (1970) at p. 462. Though *cf.,* Swanton, *supra,* n. 64 especially at pp. 223 and 226. At a more general level, it should also be noted that the concept of self-induced frustration itself cannot be *relied* upon by a party in order to establish a *repudiation* of the contract for *his* own *benefit:* see *F C Shepherd & Co Ltd v. Jerrom* [1987] QB 301.

as to what is meant by "fault".[71] The second main issue goes, it is submitted, to the scope of self-induced frustration itself.

The issue as to whether or not negligent conduct can constitute self-induced frustration was, until recently, none too clear. The traditional starting-point, a dictum by Lord Russell of Killowen in *Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corporation Ltd,*[72] was, unfortunately, non-committal.[73] The cases since the *Joseph Constantine* case have been no more helpful.[74] The courts have, in fact, been rather adroit at avoiding this thorny issue by utilizing, amongst other things, the device of characterizing. By characterizing the alleged frustrating event as something that does not entail discussion of the state of mind of the party seeking to rely on frustration, the courts have managed to steer clear of this problematic issue.[75] The recent decision of *The Super Servant Two*[76] aids in no small measure in enabling a definitive view to be laid down. The decision itself cannot technically stand for the proposition to be proffered in the instant essay, as neither a breach of contract nor a breach of the tortious duty of care was found on the facts. Indeed, counsel for the party relying upon frustration (the defendants) conceded that the fact that a party was in breach of either of these duties would preclude the operation of the doctrine.[77] He argued, however, that if neither of these two duties was breached, the doctrine would operate. At first instance, Hobhouse J rejected the argument, holding that where the alleged frustrating event was within the reasonable control of the party seeking to rely on the

71. It is interesting to note that where the statutory embodiment (in s. 7 of the UK Sale of Goods Act 1979) of the closely analogous doctrine of *res extincta* is concerned, "fault" is defined, in s. 61 of that Act, as meaning "wrongful act or default," thus suggesting something *wider* than mere deliberate conduct, which is indeed the argument made below with regard to this issue. The corresponding provisions and comment in the American Uniform Commercial Code are even clearer: see s. 2-613 and the Comment thereon ("'Fault' is intended to include negligence and not merely wilful wrong"), as well as s. 1-201, para. (16).

Interestingly enough, Comment (d) to s. 261 of the Second Restatement of the Law of Contracts actually utilizes the abovementioned provisions to buttress the proposition there tendered that negligent conduct *does* constitute "fault" under the doctrine of *frustration!*.

72. [1942] AC 154 at p. 179. The other judgments are also relevant, but equally inconclusive. For a perceptive jurisprudential essay centring on the question of onus of proof, see Stone, "Burden of Proof and the Judicial Process: A Commentary on *Joseph Constantine Steamship, Ltd v. Imperial Smelting Corporation, Ltd*" (1944) 60 *LQR* 262.

73. But *cf.,* Williams in (1941) 5 *MLR* 135 especially at p. 137.

74. See, eg, *Chitty on Contracts* (1989) 26th ed., vol. I at p. 1054, and the cases cited therein.

75. See, e.g., *F C Shepherd & Co Ltd v. Jerrom* [1987] QB 301.

76. [1989] 1 Lloyd's Rep. 148; affirmed [1990] 1 Lloyd's Rep. 1. See also McKendrick, *supra,* n. 43 at pp. 44-46.

77. [1990] 1 Lloyd's Rep. 1 at p. 10.

doctrine, the plea of frustration could not succeed.[78] This, it will be remembered, is a straightforward application of the first central principle. On appeal, the Court of Appeal affirmed Hobhouse J's decision. Although not expressly utilizing the concept of "reasonable control" both Bingham and Dillon LLJ's judgments can only be rationalized by reference to this basic concept.[79] Since conduct which did not constitute either a breach of contract or tortious negligence[80] could be considered self-induced frustration (and therefore no frustration in law), it would follow that conduct which constitutes tortious negligence ought, *a fortiori,* to constitute self-induced frustration based on the general principle of reasonable control: the events leading to tortious negligence *must,* by virtue of the very nature of the tort itself, have been *foreseeable* and *therefore* within the *reasonable control* of the party concerned. It is significant to note, once again, the *interaction and linkage* between negligent conduct constituting self-induced frustration on the one hand (the existence of which has just been submitted) and the concept of foreseeability on the other. Indeed, one writer has suggested, in an article that has not, it is submitted, received the attention it deserves, that the idea of foreseeability should be incorporated within the concept of self-induced frustration, thus avoiding, *inter alia,* discussion of states of mind *per se;*[81] however, and as we have just seen, the link is one of interaction, with the basic idea mooted now being taken as confirmed by *The Super Servant Two,* as discussed above. The result, therefore, is not dependent on the state of mind of the party *per se* but is premised, rather, more on the notion or concept of *causation or responsibility.*[82] The following statement by Walker J in *Ebberts et al v. Carpenter Production Co*[83] succinctly summarizes this focus on the concept of causation:[84]

> "This act whether negligent or more than negligent, is of the same sort as that considered in cases cited above ... It certainly had the *same*

78. See [1989] 1 Lloyd's Rep. 148 especially at p. 156. See also Treitel, *supra,* n. 9 at p. 804; and McKendrick, *supra,* n. 15 at pp. 5 and 157, respectively; see also by the latter, *supra,* n. 43 at p. 45. Though, *cf., per* Walton J. in *Yrazu & Anor v. Astral Shipping Company* (1903) Com. Cas. 100 at p. 105 and *per* Lord Denning MR in *Hare v. Murphy Brothers* [1974] ICR 603 at p. 607.
79. And see *supra,* the discussion at Part II.
80. Although such conduct could include "negligent conduct" in the layman's sense of the word, albeit not giving rise to a legal duty of care that has been breached. See also White, *infra,* n. 99.
81. See Hall, "Frustration and the question of foresight" (1984) 4 *LS* 300. But *cf.,* Swanton, *supra,* n. 64 at p. 219. See also, in a similar vein, *per* Hannen J, delivering the judgment of the court in *Baily v. De Crespigny* (1869) LR 4 QB 180 at p. 185.
82. See, eg, *per* Bingham LJ in *The Super Servant Two* [1990] 1 Lloyd's Rep. 1 at p. 10. *Cf.,* also Palmer, *supra,* n. 8 at p. 105. See also Swanton, *supra,* n. 64 at pp. 212-213 and 217; Greig & Davis, *supra,* n. 57 at pp. 1320-1321; and *Corbin on Contracts* (1962) vol. 6 at pp. 347-348.
83. 256 S.W.2d 601 (1953).
84. *Ibid.,* at p. 619 (emphasis added).

result so far as creating an impossibility is concerned."

This utilization of the concept of causation is, it is submitted, appropriate, although where it is used with regard to the issue of election (to which our attention must now turn), problems may in fact arise.

Turning to the second issue (that of election), it would be appropriate to first set out the general arguments both for and against the proposition mooted by Professor Treitel[85] to the effect that where a party is in danger of being in breach of one or more contracts in a situation where he is unable to fulfil his obligations to all contracting parties because of a supervening event, that party ought to be allowed to avail himself of the doctrine of frustration in order to escape possible contractual liability. Support for Professor Treitel's view lies in the notion of fairness: as the party concerned was not responsible for the supervening event, he ought, in all fairness, to be allowed to utilize the doctrine of frustration to escape liability; it would not be fair to fix him with responsibility by classifying his choices as to which contractual obligations he wishes to fulfil as acts of self-induced frustration. The arguments against Professor Treitel's views are, however, equally persuasive and take us back to the basic difficulty already considered in some detail in the context of the issue of increase in costs:[86] that the party concerned entered into his contracts taking the risk, as all businessmen must, that he would, if a supervening event occurred, be placed in precisely the dilemma the defendants found themselves in *The Super Servant Two;* this being the case, the party ought to accept contractual liability for breach of contract.[87] Unlike the former issue of the possibility of negligent self-induced frustration just discussed, this issue fell squarely for the court's decision in *The Super Servant Two.* The defendants, who owned two transportation units *(viz.,* the *Super Servant One* and the *Super Servant Two)* contracted with the plaintiffs to transport the latter's drilling rig, there being no specific allocation of the transportation unit to be utilized although the defendants had intended to use the *Super Servant Two* in fulfilment of the contract. The *Super Servant Two* sank, and the defendants, relying on Professor Treitel's views, sought to argue, *inter alia,* that the contract ought to be frustrated as they had already entered into other contracts which required the utilization of *Super Servant One.*

85. See *supra,* nn. 67 and 68, and the accompanying main text. This is also the view of Waddams, Greig & Davis, and McElroy & Williams: see *supra,* n. 67.
86. See *supra,* Part IV.
87. *Cf., Hong Guan & Co Ltd v. R Jumabhoy Ltd* [1960] AC 684 where, however, the focus was really on the construction of a force majeure clause. And see Hudson, "Prorating in the English Law of Frustrated Contracts" (1968) 31 *MLR* 535 at pp. 539-541. It is also of interest to note that the factor of business risks was in fact expressly referred to in the leading decision of *Ocean Trawlers Ltd v. Maritime National Fish Ltd* by the Nova Scotia Supreme Court prior to appeal to the Privy Council: see [1934] 4 DLR 288 especially at p. 298.

Hobhouse J, at first instance, refused to follow Professor Treitel's view, holding that there had been self-induced frustration; the learned Judge observed:[88]

> "It [i.e., Professor Treitel's view] may be convenient to the promisor who has entered into more contracts than he can perform to be allowed to choose which promises he will satisfy and which (without himself incurring any penalty) disappoint. But the proposition will look much less attractive or reasonable to the promisee who may be suffering very heavy losses as a result of the promisor's non-performance. It is *within the promisor's control* how many contracts he enters into *and the risk should be his.* The proposition [by Professor Treitel] has to be supported if at all as a matter of the express or implied terms of the contract. If the promisor wishes this result he must bargain for *the inclusion of a suitable force majeure clause* in the contract."

Two points are evident from the passage just quoted: first, one should note the learned Judge's express reference to the general principle of reasonable control; and, secondly, a *link* between the issue of election on the one hand and that of express provision[89] on the other is established. Hobhouse J's decision was affirmed on appeal. Interestingly, Bingham LJ at least implicitly rejected any threshold consideration of arguments centring on fairness;[90] on the facts of the case, the defendants, who sought to rely on frustration, had a literal option to use an alternative means to perform their contractual obligations, although that would have meant breaching their contract with another party.[91] Dillon LJ, the other Judge, agreed, although he *did* appear to consider the *fairness* of the situation as well: he noted that some of the documents suggested that the defendants had "after the loss of the *Super Servant Two,* negotiated extra fees with the parties with whom they had other contracts of carriage before finally

88. [1989] 1 Lloyd's Rep. 148 at p. 158 (emphasis added). But in the latest edition of Professor Treitel's book (the eighth, published in 1991), the learned author embarks (at pp. 805-806) on rigorous defence of his previous views (as to which, see, *supra,* nn. 67 and 68). The arguments, whilst cogent and powerful, are geared to meet the specific reasoning in the *Super Servant Two* itself, and do not affect the more general argumentation contained in the present article.

89. See *supra,* Part VI.

90. He commented thus on the *Maritime National Fish* case [1935] AC 524 ([1990] 1 Lloyd's Rep. 1 at p. 10): "In that case the Privy Council declined to speculate why the charterers selected three of the five vessels to be licensed but, as I understand the case, regarded the interposition of human choice after the alleged frustrating event as fatal to the plea of frustration." It should, however, be noted that the *Maritime National Fish* case was *not* a case where the issue presently considered arose for decision; Professor Treitel merely varied the facts of the case in his work for the purpose of discussion: see, *supra,* n. 67.

91. *Ibid.,* at p. 9.

allocating the *Super Servant One* to perform those other contracts."[92] The court thus came down firmly on the side of disallowing a party to extricate himself from what it felt to be a business risk voluntarily assumed. This conclusion has the virtue of certainty, for acceptance of Professor Treitel's views would have entailed the further consideration of potentially vague arguments centring on fairness. Evidence of the defendants' possible exploitation of the situation, as alluded to by Dillon LJ above,[93] probably further weakens the argument from fairness. More important, perhaps, from the perspective of fairness, is the fact that unfairness could, as Hobhouse J pointed out,[94] have equally accrued to the *other* party. The fact remains, however, that the result to the losing party (here, the defendants) is harsh. And, quite apart from the argument from fairness which (as we have just seen) is not all that persuasive, there is one further argument that the defendants in *The Super Servant Two* could have, but did not, raise in argument.

A preliminary point should be made prior to the elaboration of this other argument: the (present) issue of election is distinct from the (previous) issue as to whether or not negligent conduct can constitute self-induced frustration in so far as the former is premised upon *deliberate* action on the part of the party pleading frustration. This would, in turn, entail the concept of *intention* as distinct from foreseeability.[95] It is at this point that it may be argued that a possible confusion (largely of linguistic usage) may be raised, and which would constitute the basic thrust of the argument now tendered. What, to put it another way, is meant by "intention" in the context of a (deliberate) election? In a "catch 22" situation, such as existed in *The Super Servant Two,* it can be argued, using the argument from *criminal* cases on intention,[96] that *motive* must be distinguished from, and is therefore irrelevant to, intention.[97] If this argument is accepted, the fact that the party did not desire to breach his contract is immaterial. This argument would, incidentally, be consistent with the general principle of strict liability in the law of contract.[98] Such an approach would also appear to be consistent with the approach in *The*

92. [1990] 1 Lloyd's Rep. 1 at p. 13.
93. *Ibid.*
94. See *supra,* n. 88.
95. A point stressed in the criminal law relating to the mental element required for murder, although the lines of distinction (especially in hard cases) are not always clear: see generally *R. v. Moloney* [1985] AC 905; and *R. v. Hancock* [1986] AC 455. See also (1951) 67 *LQR* 283. But *cf.,* the recent controversy: Lord Goff, "The Mental Element in the Crime of Murder" (1988) 104 *LQR* 30 and Williams, "The *Mens Rea* for Murder: Leave It Alone" (1989) 105 *LQR* 387.
96. See, eg, *R. v. Steane* [1947] 1 KB 997 at p. 1004; and the cases cited at *supra,* n. 95.
97. Though *cf.,* with regard to the *layman's* usage: see, eg, Anscombe, *Intention* (1957) at para. 12 which is, however, rather ambiguous in the final analysis. *Cf.,* also (1951) 67 *LQR* 283.
98. Though see the recent paper by the Law Commission, *Contributory Negligence as a Defence in Contract* (1990) (Working Paper No. 114).

Super Servant Two itself, where a very *literal* view was taken of the concept of election: as long as the party pleading frustration literally had a choice open to him, then his election must be assumed to be intentional and deliberate, regardless of his desire not to breach any of the contracts to which he was a party. It is at this juncture submitted that a possible confusion in linguistic usage may exist. If the "intentional" act of election is taken as being the actual choice as to which contractual obligations should, and which should not, be fulfilled, it is difficult to argue that there has not been election, conceived in *those* terms. It might, however, be possible to argue that the "intentional" act of election is correctly characterized in this manner only if a *literal* approach is taken, which approach would be acceptable even to the *layman*. It might be possible to argue, further, that the "intentional" act of election should, *instead*, be characterized in a more specialized, *ie, legal* manner: that the intention of the party in question in a fact situation like *The Super Servant Two* must have been to breach the contract(s) concerned, and that, on the facts, it is clear that there was *no* such intention. Can it not, in other words, be argued that the intention required in so far as election is concerned is intention as to the legal consequences as opposed to intention as to the factual circumstances?[99] After all, the crux of frustration lies in the radical consequences that have arisen as a result of the frustrating event. The difficulty that immediately arises with this line of argument is evident: the distinction between motive and intention drawn earlier has not only been blurred but has also, in

99. But *cf.*, the approach suggested (albeit in different contexts) by *H Parsons (Livestock) Ltd v. Uttley Ingham & Co. Ltd* [1978] QB 791 (distinction between type and extent of loss in the context of remoteness of damage under contract law) and (in the criminal sphere of statutory assault, drawing, again, a similar distinction between the existence of physical harm and its extent) *R. v. Mowatt* [1968] 1 QB 421 (endorsed by the recent House of Lords decision of *R. v. Savage* [1991] 3 WLR 914, especially at 939). The distinction between the ordinary and legal uses of the concept of "negligence" is, however, of more general explanatory value here: see White, "Carelessness, Indifference and Recklessness" (1961) 24 *MLR* 592 at p. 592.

effect, been erased.[100] It is, however, submitted that the distinction between motive and intention drawn in the criminal cases may be inapplicable to the present context because of *policy* reasons. The criminal cases where the conception of intention has been extensively discussed involve the crime of murder. A stricter approach by the courts in such cases is thus understandable. Further, even in criminal cases, motive and intention *can* coincide.[101] In addition, and having regard to the approach suggested here, the distinction offered in the context of intention is really one between use of the concept in an extra-legal sense and use of it in a legal sense. Further, it is at least arguable, as already indicated, that the use of intention suggested in the instant paragraph is in accordance with arguments of fairness which, however (as we have seen), are controvertible. It is, in any event, submitted that the court can avoid the problem by adopting a general device already utilized by other courts *vis-*

100. Yates, for example, appears to endorse the distinction, treating the entire issue from the perspective of causation in the literal sense outlined above: see Yates, *supra,* n. 60 at p. 191. See also White, "Intention, Purpose, Foresight and Desire" (1976) 92 *LQR* 569 where it is argued that "intention" on the one hand and "purpose" and "desire" on the other are separate and distinct concepts (see pp. 573-575 and 576-581, respectively; see also Lord Goff, *supra,* n. 95 at pp. 42-43). It is, however, submitted that this argument is convincing only in so far as the concept of "intention" has reference to a particular act on the part of the party concerned. Whilst it must be admitted that *that* party's intention to avoid a breach of contract can be alternatively characterized as a "purpose", "motive" or "desire", it is submitted that classifying it as a *"legal"* concept of "intention" as suggested in the main text is equally plausible (but *cf.,* Duff who argues for the application of an *ordinary* meaning to the concept of "intention": see "The Obscure Intentions of the House of Lords" [1986] *Crim. L.R.* 771); and the *legal* context is exemplified by factors that go *beyond* the *literal act* of choosing in what is, in essence, a "catch 22" situation, the approach proposed here taking into *express* account *policy* factors *(cf.,* Stone, *supra,* n. 72, albeit in a somewhat different context).

An alternative explanation is suggested in Williams, *The Mental Element in Crime* (1965) (at p. 37) where a distinction is drawn between intending the act (in the *purely physical* sense of the word) and intending the *consequences* of *that* act (see also, by the same author, *Textbook of Criminal Law* (1983) 2nd ed., at pp. 74-78, and "Oblique Intention" [1987] *CLJ* 417 at p. 418; as well as Anscombe, *supra,* n. 97). Indeed, the author necessarily incorporates the element of "desire" into the concept of intention. Utilizing this reasoning, it can hardly be argued that the party concerned intends the consequences in the form of a breach of contract. At this juncture, however, it will be noticed that this argument is essentially the same as that tendered in the main text, save for the fact that there is no distinction made between the extra-legal on the one hand the legal on the other. It is, however, submitted that the distinction between extra-legal and legal (although smacking of the inevitable element of definitional fiat) reduces the confusion that might result from the introduction of *other* modes of *characterization* in the form of concepts such as "purpose", "motive" and "desire", which introduction is apt to muddy the linguistic waters rather than clear them.

101. See, eg, *per* Lord Lane CJ in *R. v. Nedrick* [1986] 1 WLR 1025 at p. 1027.

à-vis other facets of frustration,[102] *viz.*, that of *characterization.*[103] The ultimate result, however, is dependent, in the final analysis, on the court's preferred rationale - either the argument of *fairness* to the party seeking to rely on frustration (and thus attempting to avoid a finding of self-induced frustration) *or* the argument premise upon a *literalist* construction of intention which not only maintains *strict* liability but also draws a sharp distinction between intention and motive.[104]

It is this writer's view that, regardless of the cogency of the various views just presented, the general principle of reasonable control would appear to favour Professor Treitel's view inasmuch as it could be argued that a party in the defendants' position in *The Super Servant Two* had no reasonable control over his position, provided that the situation could not have been foreseen.[105] It is, however, acknowledged that an argument could be made on the other side that in so far as the *election* was concerned, the party concerned did indeed have reasonable control over what is argued to be a breach of contract. This brings us back to the problem of characterization referred to earlier: which is the "intentional" act of election? Further, it could be argued that the proposition that there was no reasonable control begs the question in so far as it assumes that there is frustration in the first place. Under these circumstances, it would appear that this is the only aspect of frustration that has not been positively settled by applying the general principle of reasonable control.

An excellent judicial summary of the relevance of the first principle (of reasonable control) to both the aspects of self-induced frustration discussed above may be found (albeit in a reverse order) in the judgment

102. See *supra*, n. 75.

103. See, as illustrative judicial examples, *Eyre v. Johnson* [1946] 1 KB 481 at pp. 483-484; *Lebeaupin v. Richard Crispin and Company* [1920] 2 KB 714 at p. 718; *Klauber et al v. San Diego St Car Co* 30 P. 555 (1892) at p. 556; *Dorn et al v. Goetz et al* 193 P.2d (1948) 121 at p. 125; *Oosten v. Hay Haulers Diary Employees and Helpers Union* 291 P.2d 17 (1955) at p. 22; *Yoffe v. Keller Industries, Inc* 443 A.2d 358 (1982) at p. 360; and *Roth Steel Products v. Sharon Steel Corporation* 705 F.2d 134 (1983) at p. 150. But for an instance where the possible characterization concerned was held by the court to be immaterial to the result, see *Glenn R. Sewell Sheet Metal, Inc et al v. Nick Loverde et al* 451 P.2d 721 (1969) at p. 728.

The problems relating to several concurrent "intentions" are not discussed here, although it would appear that in such a situation the *dominant* intention should prevail: see eg, albeit in different contexts, *Sinnasamy Selvanayagam v. The King* [1951] AC 83 and *Waugh v. British Railways Board* [1980] AC 521. *Cf.*, also *R. v. Ahlers* [1915] 1 KB 616 at p. 625.

104. See generally the discussion above and Hedley, *supra*, n. 15. See also, generally, Trakman, *supra*, n. 44.

105. "X cannot, with any due regard to the English language, be said to 'intend' a result which is wholly beyond the control of his will:" *per* Asquith LJ in *Cunliffe v. Goodman* [1950] 2 KB 237 at p. 253.

of the court in the American decision of *Nisho-Iwai Co Ltd v. Occidental Crude Sales Inc;*[106] the following observations by Goldberg, Circuit Judge are particularly apposite:[107]

> "'Force majeure' has *traditionally* meant an event which is *beyond the control* of the contractor ... and contractual force majeure clauses typically incorporate this requirement ... The term 'reasonable control' has come to include two related notions. First, a party may not affirmatively *cause* the event that prevents his performance ... The second aspect of reasonable control is more subtle. Some courts will not allow a party to rely on an excusing event if he could have taken reasonable steps to prevent it. ... The rationale behind this requirement is that the force majeure did not actually prevent performance if a party could reasonably have prevented the event from happening. The party has prevented performance and, again, breached his good faith obligation to perform by failing to exercise *reasonable diligence.*"

There is one remaining alternative which constitutes an at least partial solution of the dilemma the defendants found themselves in *The Super Servant Two* and which avoids, in the process, the all or nothing results canvassed above - *prorating.* The concept of prorating is well-established in

106. 729 F.2d 1530 (1984) - although if the concept of causation, *infra,* n. 107, is taken to refer to negligent conduct only, only the former aspect would be covered; but *cf.,* the *distinctive* aspects embodied within the quotation itself and it should be borne in mind that the same concept can have different meanings in different contexts.

107. *Ibid.,* at p. 1540 (emphasis added).

American law[108] and there is some English academic literature that suggests this solution.[109] There is also some English case-law that might

108. As Dawson, *supra,* n. 2 at p. 92 observed, prorating "is no longer a novelty in American decisions." And see the Uniform Commercial Code section 2-615(b); s. 2-615 reads as follows:

> "Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
>
> (c) The seller must notify the buyer reasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer."

See also para. 11 of the Official Comment as well as s. 2-616 which sets out the general procedure in so far as the buyer is concerned.

Useful reference may also be made to the First Restatement of the Law of Contracts, s. 464 which reads as follows:

> "(1) Where a promisor makes two or more bargains and facts then exist or subsequently occur that on grounds of impossibility prevent the imposition of a duty to perform all the promises in their entirety, or that discharge a duty to do so that has arisen, but partial performance capable of ratable apportionment to the several bargains is possible, the promisor is under a duty to make such apportionment and is otherwise discharged, except as stated in subsection (2).
>
> (2) The right to damages of a promisee in a bargain who has been given ground by the promisor at the time of its formation to believe that the promisor has neither already made other bargains nor will make later bargains limiting his possibility of performing all his promises, is not diminished by such other bargains."

A sampling of the *American cases* on prorating include the following: *Jessup & Moore Paper Co. v. Piper et al* 133 F.108 (1902); *Garfield & Proctor Coal Co v. Pennsylvania Coal & Coke Co* 84 N.E. 1020 (1908); *Metropolitan Coal Co v. Billings* 89 NE 115 (1909); *Acme Mfg Co v. Arminius Chemical Co* 264 F.27 (1920); *Consolidation Coal Co v. Peninsular Portland Cement Co* 272 F.625 (1921); *Ranney-Davis Mercantile Co v. Shawano Canning Co* 206 P.337 (1922); and *Chemetron Corporation v. McLouth Steel Corporation* 381 F.Supp. 245 (1974) (where s. 2-615(b) of the Uniform Commercial Code is expressly referred to) (affirmed, 522 F.2d 469 (1975)). And see (more recently) *Cliffstar Corporation v. Riverbend Products, Inc* 750 F. Supp. 81 (1990) which, however, concerned an action for summary judgment.

109. See Hudson, *supra,* n. 87 and, by the same author, "Prorating and Frustration" (1979) 123 *SJ* 137. See also *Benjamin's Sale of Goods* (1987) 3rd ed., at pp. 273-275 and 1016-1017; *Chitty on Contracts, supra,* n. 74 at pp. 1025-1026; McKendrick, *supra,* n. 43 at pp. 43-44; Yates, *supra,* n. 60 at p. 203; and *cf.,* Treitel, *supra,* n. 9 especially at pp. 775-776 and 806 who suggests, instead, a rule of law based on the order in which the contracts were made; this would, however, ensure certainty at the expense of fairness. The larger question (what is fairness and how it can be achieved, if definable in the first place) is, of course, outside the purview of the present article. For an American perspective, see Corbin, *supra,* n. 82 at p. 408 *et seq.* And see, in a much more general vein, Trakman, "Winner Take Some: Loss Sharing and Commercial Impracticability" (1985) 69 *Minn. L.Rev.* 471.

provide a point of departure for the development of such a doctrine,[110] although the judgments are, it is submitted, insufficiently clear to provide anything more than a hint in this direction. The applicability of the doctrine is, however, subject to reasonable conduct on the part of the party relying on it both with regard to the grounds for prorating as well as the manner in which such prorating is to be effected.[111] It is suggested that if accepted in principle, the concept of prorating ought to be *statutorily* introduced. The concept itself is inherently attractive, and is reminiscent of the legislative compromise under the Law Reform (Frustrated Contracts) Act 1943.[112] The problem, however, is that the very concept of prorating presupposes a not insignificant amount of discretion that must be given to Judges. And, in the nature of things, it will be difficult to set out legislative guidelines that are not extremely general in nature. This is not, however, an insuperable problem as illustrated by the very terms of the 1943 Act just mentioned.[113] One difficulty may remain, even if the concept of prorating is otherwise acceptable: could it be argued that the 1943 Act already allows for the flexibility that prorating is intended to provide? The short answer to this question is simply that prorating provides a *different* type of flexibility compared to that provided under the 1943 Act. Prorating would allow for a compromise solution in a situation such as that which existed in *The Super Servant Two* where the Act would not. It is suggested that the concept of prorating should be seriously considered, although,

110. See the cases cited by Hudson in his articles: *supra,* nn. 87 and 109. See also *Intertradex SA v. Lesieur-Tourteaux SARL* [1977] 2 Lloyd's Rep. 146 at p. 155; [1978] 2 Lloyd's Rep. 509 at p. 513, CA; *Continental Grain Export Corporation v. STM Grain Ltd* [1979] 2 Lloyd's Rep. 460 at p. 473; and *Bremer Handelsgesellschaft mbH v. C Mackprang Jr* [1979] 1 Lloyd's Rep. 221 at pp. 224 and 228. The issue was, however, skirted in the following cases: *Bremer Handelsgesellschaft mbH v. Continental Grain Co* [1983] 1 Lloyd's Rep. 269 especially at pp. 291-294; and *Bremer Handelsgesellschaft mbH v. Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep. 109 especially at p. 115. But *cf.,* the position of *non*-contractual claimants, thus making the English position (if indeed the principle of prorating is affirmed in the first place) narrower than the American position as embodied in s. 2-615(b) of the Uniform Commercial Code (reproduced at *supra,* n. 108): see *Pancommerce SA v. Veecheema BV* [1982] 1 Lloyd's Rep. 645 at pp. 652-653, where Bingham J (as he then was) acknowledged that the English position was narrower than the American one; this opinion was affirmed on appeal: see [1983] 2 Lloyd's Rep. 304 at p. 307.

111. "Distribution 'pro rata' does not mean an equal amount for each customer; nor does it mean deliveries in exact proportion to amounts contracted for. A fair distribution may require that preference shall be given for some needs and uses over others": see Corbin, *supra,* n. 82 at p. 415. See also the provisions reproduced at *supra,* n. 108.

112. For a review of the history and problems surrounding the all or nothing effects upon a finding of frustration, see Treitel, *supra,* n. 9 at pp. 809 *et seq.*

113. See also Treitel, *supra,* n. 112 as well as *supra,* n. 23 at pp. 18-19, where the problems of the Act are detailed in the context of a larger theoretical canvass. *Cf.,* Lord Goff, "The Search for Principle" in (1983) 69 *Proceedings of the British Academy* 169 at pp. 181-182. See also very recently, Stewart & Carter, *supra,* n. 2. For a radical approach under American law allowing for a "reformation" of the contract, see *Aluminium Company of America v. Essex Group, Inc* 499 F.Supp. 53 (1980). This may not, however, represent the norm, even under American law: see, eg, Dawson, *supra,* n. 48.

once again, its adoption would depend upon the basic policy approach of either the courts or the legislature, i.e., whether certainty or flexibility is the objective desired.

VIII. Conclusion

This article proposed two central general principles that should henceforth govern the law relating to frustration under English law. It also attempted to demonstrate how many of the hitherto unresolved difficulties in the law (many of them of long-standing) could be rationally resolved by adopting these principles, in particular, the first pertaining to reasonable control. To recapitulate, adoption of the principle of reasonable control would open the way for the issue of increase in costs to be considered instead of being summarily dismissed; the constraints provided by the second central principle (that the plea of frustration should not easily succeed) and that of foreseeability would aid in providing some tenable boundaries for application of the doctrine. The element of foreseeability itself is, we have seen, entirely consistent with the principle of reasonable control, and it was suggested that a reformulation of its parameters might be in order. The aspect relating to express provision, too, was seen to be linked not only to the principle of reasonable control but also to other aspects, such as foreseeability. Finally, we saw the application of the principle of reasonable control aided in the clarification of one problematic area in the sphere of self-induced frustration: *viz.*, whether negligent conduct can constitute self-induced frustration, although it might not be of much substantive aid in clarifying the second problem, that pertaining to the concept of election, for which prorating (as introduced by either the courts or legislature) might be a better solution.

It is also hoped that the present essay has illustrated the importance of a holistic approach toward frustration. Indeed, the present writer ventures to suggest that the necessity for such an approach is probably critical whenever a doctrine that is heavily dependent upon theoretical concepts is considered. As has been sought to be demonstrated,[114] much of the theoretical preoccupation has, unfortunately, been in a rather futile direction.

Finally, we must return to two related and rather persuasive critiques of the approach adopted in the present article: that it is too simplistic and reductionist, and, secondly, that it leaves frustration in a rather vague and unsatisfactory state. While it is acknowledged that simplicity should not be pursued for its own sake (in particular where it would lead to reductionism), it is submitted that an attempt at simplification is desirable,

114. See *supra*, Part III.

especially when a particular doctrine (such as that considered here) has become overly fragmented whilst ironically adhering to a vague general notion that is, in fact, an impoverished and attenuated version of a set of more substantive and practical principles. Turning to the critique centring on vagueness, it is suggested that the main dissatisfaction with the suggested approach is misconceived in so far as it envisages an end to the uncertainty generated by the very factual nature of the specific case itself. That the application of the doctrine goes hand in glove with the facts of the particular case is itself an inevitable fact that cannot be denied. After all, Lord Roskill in *Pioneer Shipping Ltd v. BTP Toxide Ltd* observed that "[w]here questions of degree are involved, opinions may and often legitimately do differ."[115] Given the inevitability of uncertainty, the way forward is really towards the gathering together of a set of unifying principles which would best resolve many of the controversies that the doctrine of frustration has hitherto generated. The principles suggested here are, admittedly, simple and general. Where, however, no more can be attempted, especially when the very nature of the doctrine does not permit more, it is submitted that the search for mythical rules should be abandoned and the application of concrete and coherent principles be implemented instead.

115. [1982] AC 725 at p. 752. See, to precisely the same effect, *ibid., per* Lord Diplock at p. 744. The differences in opinion in the leading Australian High Court decision of *Codelfa Construction Proprietary Limited v. State Authority of New South Wales* (1981-1982) 149 CLR 337 also illustrates this point. On the open-endedness with regard to *remedies* under the 1943 Act, see Treitel, *supra,* n. 113. See also Stewart & Carter, *supra,* n. 2.