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Doctrine of Commercial Impracticability with Resemblance to the Frustration of Purpose of Private International Contracts: An Analytical Study

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ABSTRACT

In this modern era of business transactions, the parties are in a state of discernment while deciding the contractual obligations. The doctrine of commercial impracticability has proved benevolent for International business transactions, like sword or shield. The parties entering into the business transactions have certain purposes. If the purposes are destroyed due to the supervening circumstances, they may avoid contractual obligations as the contract becomes commercially impracticable for them. Sometimes, the doctrine of commercial impracticability is considered closer to the English concept of frustration of the purpose of contracts. Article 2-615 of the Uniform Commercial Code (USA) provides the basic concept of commercial impracticability; although several interpretations of courts are available, in different ways and on different aspects; that may cause the capacity of parties regarding the presumption of the true construction of the private, International contract. Now, there is an immense need to further elaborate and categorize the concept of the doctrine of commercial impracticability and doctrine of frustration of international contracts, both in legal and practical aspects, in emerging economic states, especially in Pakistan. This research article scrutinizes the optimistic approach followed by the superior courts of Pakistan by applying the provisions of Contract Act 1872 to interpret the provisions relating to frustration. This article also identifies the suitable standards of the doctrine of the excuse of performance of contracts in Pakistan and marks its application in Pakistan, as to whether the courts are

following the strict standards or even recognizing these doctrines for the parties to get shelter as an excuse to perform their contractual obligations or not.

Introduction

There are several principles and doctrines that have emerged and applied by the courts of law; the distinct thing is that there are quite different standards that would apply on International, as well as, and on domestic business transactions. We can say that there are different interpretations and applications of same doctrines, on domestic and International business transactions, such as the Commercial Impracticability of contracts. "The practical importance of such distinction rests on the fact that, in the interests of international trade, state normally allows the parties wide freedom to select the law governing international commercial contracts."[1] So, the principles would apply, accordingly, on the choice of law by the contracting parties of an international transaction. Sometimes the doctrine of commercial impracticability considers as nearer to the English concept of frustration of purpose of contracts. Article 2-615 of the Uniform Commercial Code (USA) provides the basic concept of doctrine of commercial impracticability; although there is several interpretations from courts are available, in different ways and on different aspects.[2] The Judge Slows designed the doctrine as "A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at excessive and unreasonable cost."[3]

The doctrine of "commercial impracticability" has replaced the concept of 'impossibility' that liberalizes the common law rule. The inflation in currency, that effect substantial costs, does not amount to commercial impracticable, as it was foreseeable.[4] The Impracticability is categorically; "for the sharing of risk between the contracting parties in practice."[5]

During the formation of an agreement as discussed above, the parties are in discernment to foresee the possible hardships that would hinders the performance of agreement by either party to the contract. Generally, the parties try to avoid or unwillingly to bear the burdens of those events that are beyond their control. In the terms of contract it is specifically mentioned that "the promisor shall not be responsible for any loses occasioned by any Act of God, strike, lockout, riot or civil commotion, combination of workmen, breakdown of machinery, fire or any cause

contemplated in the term force majeure…"[6] these anticipated events are termed as force majeure clauses in contractual terms. Such type of clauses relieve the promisor from liabilities, whatsoever, arises out of the non-performance of his parts covenants in specified circumstances. Though, we can say that the Force Majeure clauses has close affinity to the doctrine of frustration as recognized by the common law courts; although it has narrow implication as relieving effect, to the same intervening transaction.[7] Sometimes theses clauses, in English Agreements, are generally adopted the French words in its context; that would allow aid to the construction of contract and sometimes refer the same meanings as mentioned in French Law.[8]

Prodigious Justifications of Commercial Impracticability

Beforehand the courts begin to reshape the contract law, merely the intentions, concerning to the contract, of parties, as express terms would have considered while interpreting the ambiguities in such contract. Later on, the courts started using its judicial mind apart from the express terms and constructed the implied terms involving the serious concerned of parties. The roots of impracticability doctrine are linked as an implied term that replicated the literal performance of an agreement became impossible; which the promisor can be excused in supervening contingency.[9]

The standards for the defense of impossibility was expanded and even flexibly intervened where the cost for the performance of agreement extensively increased so as to make the performance, of obligations, commercially impracticable.[10] However, the rationalizations attached to the doctrine are firmly based on two basic assumptions, firstly, the performance of an obligation became commercially impracticable and secondly, that impracticability must be the consequence of an unforeseen or unexpected contingency.[11]

The most general justification about impracticability doctrine is that it covers the unseen gap in the terms of contract and it mentions the risk, related to the performance of contract, which the parties had not allocated for themselves. Therefore, the justification regarding gap-filling component of impracticability doctrine in based on unforeseen contingencies that caused catastrophic consequences; it is all because the contracting parties, deliberately did not or was unable to negotiate the contractual risk that were unforeseen to them.[12] The adverse risk could be

managed through two modes of activity; firstly, by risk control; and secondly, through residual risk management. A party can reduce the adverse risk by minimizing the cost related to the probability and effectiveness of an unfavorable event, although the risk cannot be eliminated entirely. However, a party does not go beyond the risk control because its interest sticks with expected cost related to the risk neutrality; But the party whose interest are up to risk-aversion should adopt the second category as management of residual risk by the arrangement of suitable insurance policy, or hedging financial or factor market. The ultimate object of risk management is to allocate the cost of risk managing activity as well as to residual risk.[13]

Commercial Hardship as Servile to Commercial Impracticability

Commercial hardship denoted as a supervening event that, if happened, the party could excuse for the performance of contractual obligation; although, the determination of claims by the courts, based on the factor of commercial impracticability, are criticized. The term "Hardship" is used, in the courts of United States, interchangeably with the concept of "Impracticability"; it causes a considerable confusion in understanding because the claims that lie under the doctrine of commercial impracticability may fall in several other kinds of supervening contingencies and arguably in this notion, the hardship can fall one of such supervening events. However, the parties claiming the "Commercial Hardship" for excusing the performance of contract will follow the strict standards of impracticability doctrine as per elaborated under the U.C.C and judicial determinations.

All the claims that lie within the category of impracticability defense, the court inclines to follow the same procedure for the justification of those supervening contingencies. In Gulf Oil V. Federal Power Commission (F.P.C), the court is of opinion that;

The crucial question in applying that doctrine to any given situation is whether the cost of performance has in fact become so excessive and unreasonable that the failure to excuse performance would result in grave injustice.

Therefore, this analysis is pertaining, to the supervening event, involving the "Commercial Hardship" in the claims. Again it's a matter of

conjecture since the judicial determination for the excuse that based on hardship of performance is criticized and on the other side of coin, it is considers as one of the event that may cause the intervention of commercial impracticability defense.

Legal Orthodox of Frustration

Frustration occurs, just like doctrine of commercial impracticability in limited sense, when the commercial aims invoked in an international contract were diminished without the fault of either party. When the parties are encountered with the situation that is fundamentally change the circumstances unexpectedly. However, every contingency could not invoke the intervention of the doctrine of frustration but such contingency make the performance of contractual obligation more onerous, costly, drastically changed then was expected by parties under contract. Certain examples could include the sudden and excessive fluctuation regarding cost of performance, just like impracticability doctrine, the means for performance or supply sources became unavailable of failed practically. These contingencies do not operate the frustration defense but they could invoked if the happening of such event changed the circumstances fundamentally different so as it cannot be possible for parties to execute the promised obligations; in Davis Contractors Ltd V Fareham UDC Davis Contractors Ltd V Fareham UDC, the lord Redcliff observed as "Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni, it was not this that I promised to do."

So, a thing is clear about consequences of supervening event, according to lord Redcliff, there must not be fault of even party and comes with rings like "it was not that I promised," then the parties will excuse the performance under the defense of frustration.

By elaborating the frustration test and grounds for excuse the lord Simon observed as:

> It is not uncommon for parties to an executory contract to be surprised by events that they had not anticipated, such as a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like, during its execution. The deal they

> have made is not affected by this, though. The contract ceases to be enforceable if, on the other hand, a court determines, in its discretion, that the parties never agreed to be bound in a fundamentally different situation that has now unexpectedly arisen, not because it is just and reasonable for the court to qualify the terms of a contract, but because the parties never agreed to be bound in a fundamentally different situation.

In the light of above statement lord Simon spread light of three phases of frustration, firstly, it is of executory contract, secondly, the supervening cause would be of fluctuation or rise of contractual cost or an unexpected hindrance or the event like that and the parties got the point themselves that it was not they agreed for because of fundamentally changed and unexpected situation, lastly, the courts intervention is not arbitrary but based on the true construction of the ambiguous contractual terms as it deems "just and reasonable."

Paradox Resembling Frustration of Purpose

The perception of frustration, as termed in American legal system mentioned in Restatement (Second) of Contracts (US) and it is quite distinction for doctrine of impossibility; although it has the same contextual meaning as merged in common-law courts as principle of frustration with respect to the purpose lied in contract; further, in US the courts extract the meanings of frustration of purpose as the doctrine of frustration in English law. However, it not a comprehensive principle of excuse that could covers the various type of supervening events but itself a distinctive featured doctrine. The invoking test for the principle of frustration of purpose has similar ascribed statutory test for invoking impracticability doctrine under U.C.C article 2-615: as "where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary." Although, the "doctrine of the frustration of purpose" is widely recognized, not only by UK courts but also lies within the ambit of article 2-615 of U.C.C. The parties could excuse of the basis of this doctrine and in addition to the scope; if in a business transaction, the failure to gain adequate profit may also fall under principle of frustration of purpose. On the divergence of preceding

approach the UK courts has conceded the application of frustration of purpose in the transactions particularly related to commercial.

Appraisal of the Doctrine of Commercial Impracticability with Doctrine of Frustration

The basis for the excuse from contractual obligation, in US or English legal system, does not allowed these principles to be applied in both, domestic as well as international contractual obligations, on very firm grounds. The approach followed in English doctrine invoked that the rules of commercial hardship, frustration of purpose and commercial impracticability or the like principles would not be considered while deciding the fate of contractual covenants in an international commercial transaction. These principles are not only accepted by the US courts but also incorporated in the statutory provisions as article 2-615 of U.C.C. There are several rulings of US courts, by invoking the above doctrines, allowed the excuse to parties in several commercial transactions. Further, the parameters were also mentioned about the extent of hardships, eventualities, increased in costs for the performance of contract, before the parties sustained an excuse from its part's prescribed obligations.

The courts can grant relief in a wider range, under the provisions of U.C.C, than the frustration doctrine under the English Law. The article 2-615 read with article 2-616 of U.C.C provides the scope and options of remedial magnitudes that could be followed by the deciding court; once it would conclude that whether the supervening contingency rendered the performance, partially or wholly, impracticable. Further, these provisions are not only investing the courts, a power to terminate the status of contract and discharged the parties from concerned liabilities that would aroused under the contract, but the discretion to made adequate adjustments or modifications; as essential for achieving a "just and reasonable" result; for the assignment of statutory rights and where the performance of firmed obligations are partially impracticable.

Procedure Pertaining to the Claim of Excuse

Generally, when certain set of standards are settled by the statute for the excuse of the performance from a contract, also revealed the procedure to that effect, and after following the disruptive commercial procedure; the adjustment of business undertakings, be done as efficiently as possible. In

an international commercial dealing, there are certain parameters that should be taken by both the parties; the seller while making the plans of ordering the forthcoming operation should know about the obligations relating to the stockpiled goods or any other fractional production that could be available. Altogether, it must be in the knowledge of buyer about the reliance on the capability of seller to make certain production; specifically, when there is risk of cost fluctuation exists and substitute of such deal might be necessary as the availability of other sources of production. Under U.C.C the flexible procedure has been provided for the safeguarding the interests of both sellers and buyers; in which, section 2-615 clauses (d) and (c) compulsory required the seller to provide the notice, of non-performance or partial performance, to the buyer; and on the other part, under section 2-616 mentioned certain options to the buyer, once he receive the notice from such seller.

Allocation Ratio of the Available Supply

If the seller, for instance, is in production business and after entering into the contract his plant destroyed then it is not necessary for him to give, proportionate quantity of goods, to the buyer. Although, if seller has certain warehouse for stocking of such production, then under U.C.C. he is duty bound to provide notice, to the buyer, for the delay or non-performance due to non-delivery. Further to allocate the goods that are in his possession, and not already specifically sold, in a manner that is "fair and reasonable." However, the code also recognized any kind of adequate modification in the contract as "seller may have assumed the greater obligation," the contractual terms does not affect the seller's under to notify to the buyer; such procedure is to manage the potential hardship under the contract was excusing by the seller could affect the innocent buyer and the later condition is to make the burden of seller, to elect his regular customers as though they are not party to contract, just to save the sagacity of such business. There are several methods for the allocation of stocked goods as reasonable; primarily it was presumed reasonable to divide the goods among several buyers as equally but if a buyer's order is significantly large than the others, whether because of his firmed reliance on seller's supply of goods or the operation of his own business in larger scale, in this situation if the equal treatment method followed then it would not be equitable. Altogether, if the allocation ratio made on the basis of the quantity of the orders of buyer then it seemed reasonable.

The essences for the allocation of the goods are acknowledged for the protection of an innocent buyer that may cause due to the whims of such seller. In this notion, it is upon judicial construction of the contractual terms; that particularly mentioned the allocating ratio, or considers it a "fair and reasonable" allocation of volume of goods, but remains a matter of conjecture due to its various approaches on different set of cases.

Prerogatives of Buyer upon Excuse

As per the requirement of U.C.C, as already discussed, a precondition, about the buyer's receiving of notice that sent by seller, for prior to claim such excuse. The prerogatives of buyers, explicitly, mentioned under U.C.C as;

> (1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under preceding section he may by written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of whole contract under the provisions of this article relating to breach of installation contracts (2-612), then also as to the whole, (a) terminate and thereby discharge any unexecuted portion of the contract; or (b) modify the contract by agreeing to take his available quota in substitution. (2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding thirty days the contract lapses with respect to any deliveries affected. (3) The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section.

The parties are bound by the provisions of above-mentioned section and explicitly provide the limitation for the buyer to modify such contract, if deems necessary, or otherwise contract will cease to be exist if such notification, from buyer, is not made within thirty days. Significantly, these provisions could not be ignored by the parties to the contract but with the exception that the seller presumes his greater obligation under such contract.

Buyers Restricted Excuse under Doctrine of Impracticability

There is no as such provision under U.C.C that explicitly discharge the buyer from his part's obligation, upon happening of some development, which was not agreed under the terms of seller-buyer agreement that may

invoked the impracticability doctrine. The impracticability excuse, which provides under the code, would only relieve the seller.[14] Plausibly it seems like that the code followed the concept as supplement in the perspective of buyer, as the code expressed that "unless dispatched by the particular provisions of this Act, the principle of law and equity… shall supplement its provisions."[15] By following the spirit of this code, the doctrine of frustration as parallel principle could relieved the buyer where an unforeseen event caused the buyer, unable to perform such contractual obligation, and also recognized, under several circumstances, by US courts.[16] Although, the same interest of buyer is also mentioned in the draft of *Restatement Contracts* but it is extremely rare as in *Re W.H Edgar & Son*[17] the contract was not discharged, on the part of buyer, even there was severe market drop, to accept the delivery; although the question were left opened, about the circumstances in which buyer's obligation, in general panic.[18]

The lacunae could be covers if the series of events are mentioned in the seller-buyer contract; then there would be no need to refer the provision of excuse under U.C.C or other Acts, because contract would be terminated itself, the covenants of buyer. A remains, upon the happening of an unforeseen event, the matter for discharge of buyer is a conjecture.

A Comparative Analysis of Excuse Pertaining to the Increase in Cost

There were several ample occasions, due to the economic and political crises aroused during preceding decades, when the US courts used the provisions of U.C.C particularly related to the impracticability of contractual obligations. For instance, the hub of cases raised due to the Suez Canal closure or abruptly increased in oil prices because of "Arab Oil embargo" and the like events. These contingencies hindered the trade flow, delayed, or prevented the parties for the performance of their contractual obligations. A keen analysis of the cases specifically related to these analogous circumstances and contingencies; the US courts and English courts got different approach, but in fact, the outcomes of such decisions were substantially the similar.[19]

The claims of parties related to the sharp increase in performance cost and hardship, having numerous types and magnitude concerning to losses, demonstrates the hub of cases concerning to the doctrine of commercial

impracticability. The comment on article 2-615 by denoting economical and financial downturns can cause the parties to excuse

> 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 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.[20]

This comment has absolutely acknowledged and expressed the standards for the application of impracticability doctrine in these commercial transactions but the English courts does not followed the essence of doctrine of frustration in the commercial related transaction, involving the increased in cost for performance, and they followed it only up to the perception of Henry v. Krell.[21]

The Hub of Suez Canal Cases

Suez cases foundation the series of disputes, involving the prescribed relief on the basis of cost increased for the performance of contractual obligations. It was contended that, the contingency was unobvious; the circumstances for the performance became fundamentally changed. This was because of the military operations, caused the closure of Suez Canal on 2nd day of November 1956, among the states of Israel and Egypt. In these series of cases there were several contracts, involving exporters from East Africa, made for goods sold under CIF (cost, insurance, freight); those international contracts were formulated before the military operations were began and the closure of such canal but the date of the performance, shipment of goods on port for exporting, was matured after the closure of Canal. However, upon the closure of Canal, it was banned for the further shipment of goods; but the shipment would have possible via an alternative sea voyage of the "Cape of Good Hope." The reasoned, for claiming of excuse, that the maritime route via alternative shipment from "Cape of Good Hope" caused the parties heavy additional expenses for the performance, because of longer route than the voyage through the closed Suez Canal.[22] In this notion, the approach of US courts and the

English courts are up to the mark as both followed different standards of interpretation of such contentions but their upshots were the same as that was not "excessive and severe hardships." In the opinion of English courts, while annulling the claims of parties to excuse, holds that in the doctrine of frustration the hardships are not lied, as for commercial transactions; so as contractual excuse would not be sought on these footage.[23] Altogether, the US courts refused to allow the excuse, on the basis that change of excessive increased in cost, does not lie as hardship under the standards of commercial impracticability.[24] As per Skelly Wright J. that "While it may be an overstatement to say that increased cost and difficulty of performance never constitute impracticability, to justify relief there must be more of a variation between expected cost and the cost of performing by an available alternative than is present in this case, where the promisor can legitimately be presumed to have accepted some degree of abnormal risk, and where the impracticability is urged based on added expense alone."[25]

The above statement cleared, the absurdity regarding increased cost in series of Suez Canal contentions that while entering an international transaction there is an implied legitimate presumption of bearing "some degree of abnormal risk." By securitizing the two approaches, one should judge that the both legal systems has their own standards for adjudicating the contingencies under the certain doctrines of excuse; but the justification of US courts, for rejecting the contentions for the excuse of performance, seems more acute and reasonable, for putting the parties to perceive the sphere of commercial impracticability in discernment.

Doctrine of Commercial Impracticability in Pakistan

The legal system of Pakistan is highly influenced by British common law system; although the concept of frustration exists in *The Contract Act 1872* but the concept of commercial impracticability should be extract from the texts. In Contract Act 1872 section 56 elaborates the frustration doctrine, the act describes as follows "A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."[26]

Although, the draftsman used the word "impossible" rather than 'frustration or impracticable' for the performance of an obligation due under the terms of contract. It invests a huge responsibility on Judge to use

the judicial mind for the construction of a supervening event that could make the contract frustrated.

The legal consequences are also mention in section 65 as if the parties must return the benefits that they were obtained in a void agreement or "the contract is bound to restore" or the parties to such contract must make compensation to which they received such contractual advantage.[27] Although, the conception lies under this section has limited scope but it may only invokes when a contract becomes void as recognized by the court of law.

The section 21 of *the Specific Relief Act* provides certain perspectives in which the "contracts not specifically enforceable"[28] from which the compensation may be adequate remedy or the performance of long-terms contractual obligations of more than three years and some other grounds but these might links to the impracticability doctrine but generally does not cover the standards of such doctrine. Under this statue, if a party filed a suit for the specific performance but the court did not allowed such contention and dismissed such suit then that party cannot sue for getting the compensation as for the contractual breach of obligations.[29] The court will presume, about the intent of parties, as per the contract in writing to be an "equitable and conscientious."[30] It allows the courts to decide the fate of an agreement by adopting the blunt judicial intervention and discretionary construction into the contractual business transactions.

The contract price with respect to the business transactions involving sales of certain goods, apart from the agreed amount of goods, may be added or deducted with respect to the custom duty or tax whether chargeable or not chargeable at the time of contract; then the other party will receive the increased amount than contract price and vice versa.[31] However, the law adopts the equitable approach towards recognizing the slight hardship, with respect to duty or tax, in seller-buyer relationship but on the other side it also diminished the sanctity of contract and foreseeability test in this perspective and it remains as open question for criticism in international transitions relating to the sales of goods.

The standards of doctrine are categorically defined by the courts of Pakistan and there are several judicial decisions holding the essence of doctrine concerning several issues of frustration.[32] It had been settled that, the rule of frustration is whether it is the exception to the concept of absolutism of contract or not; the Supreme Court holds that the frustration

doctrine is not the exception to such rule but if a party breached any obligation under the terms of agreement, then such party shall pay the damages because he would not have the default in performing which is not prohibited under law.[33] In *Abdul Muttalib v Razia Begum*,[34] it was held that the doctrine of frustration could only apply to the "executory contracts"[35] but if the contractual obligations are completed as agreement gained the status of "executed contract"[36] then frustration defense will not apply.

In *Messrs Balagamwalla Cotton Ginning and Pressing Factory, Karachi v. Lalchand*[37] it was held that the "frustration depends on the nature of contract and event which have been occurred." In this case the court did not recognize the hardship defense of defendant as appellants on the grounds that it should be foreseen to the party, while entering in such contract, about the possible alternatives for the performance of his contractual obligations and the court dealt such non-performance as breach of contractual obligations. But it could be frustrated if the performance became more onerous for the performance of contractual obligations by parties.[38] However, on such onerous changing circumstances the injured party, even after the establishment of doctrine of frustration, would get "fair compensation or *quantum meruit*" in this regard.[39]

For describing the legal effect of doctrine of frustration, the Supreme Court settled a principle and observed as "when there is frustration the dissolution of the contract occurs automatically. It does not depend upon the choice or election of either party."[40] However, it is restricted that, once an occurrence or event intervenes then the contract will automatically be frustrated, basically, it shows the strong judicial rational which the trial Judge observes while deciding the fate of contract and it excluded the parties will and again it becomes a matter of conjecture.

Critique's Approach vis-à-vis Judicial Adjustment

The Courts, while applying the test of applicability of doctrines of excuse, could have equitable power for the judicial intervention during dealing with the mechanism of contractual contentions of parties. Due to the mechanism of judicial adjustment the courts could modify the transaction for the interest of parties under fairness and trying to evade from unjust and severe results; that possibility done by courts when it was forced to contend to impose the whole burden on losing party.[41]

By considering the judicial adjustment of contractual terms the Professor Dawson hardly questioned on the judicial capability states as When basic provisions are revised by a judge, who knows only what he can learn from presiding at a trial, the result will probably be so unacceptable to both parties that by their own agreement they will reject the dictated terms and reassert the right they fortunately still retain, to recover control over their own affairs.[42]

Obviously, a judge could perceive the diverged contentions of disputing parties and could hardly decide what is seems equitable for their reliefs but if he settled certain terms, by modification of the terms of agreement judicial intervention, that may against the intent of both parties, and they will resettle it accordingly. Further, he also advocated that, if a contract became ceased to be exist due to the intervention of frustration defense, then how it could be possible to compel the parties to accept the modified contract as manufactured by the courts, to replace such original contract.[43] The ultimate objection could on the risk-sharing adjustment and the commercially impracticability defense as an expansive with impact of predictability and uncertainty. The complex standard of excuse requires balancing rather than threatening to the rationality and coherence of contract law, as it could be cleared under these conceptions as "The well entrenched belief in the sanctity of contracts is certainly a significant factor in the restrictive judicial attitude towards the commercial impracticability defense. Another significant factor is the uncertainty that application of the doctrine to any significant number of cases would produce between the parties to other contracts, and the even more uncertain effect that decisions favorable to excuse claims would have on the economy."[44]

However, judicial adjustment, no doubt, entrenched the sanctity of the notion of contract and significantly should be restricted in that perspective; but on the other side, the uncertain application of impracticability defense on several series of cases made it more confusing with respect to other cases of such magnitude in nature.

Although, in researchers view, positive judicial intervention for the true construction of the ambiguous terms of contract under consideration, by following the strict standards of equity and impracticability tests; by rationalizing the probable approach of disputing parties, could be in position to made adequate modifications in the compromised contract and act as bridge to their broken terms of long-term contract.

Reconsiderations Upon the New Emerging Concepts of Commercial Impracticability and Doctrine of Frustration

However, after considering the thorough study of enormous cases and events, it remains indiscernible to delineate the firm approach for the measurement of the magnitude of the doctrine of commercial impracticability. The courts followed the standards of impracticability and occasionally, extracted the innovative tests of applicability on certain contingencies and sometimes the variety under differ circumstances. The doctrine has its roots linked with impossibility doctrine, doctrine of frustration, doctrine of hardship and could also link to the English doctrine of frustration. Although, the US courts are more smartly followed the innovative defined standards under "doctrine of commercial impracticability than the "common-law courts"; although, the upshots of the applications of the standards of excuse for contracts are similar like Suez Canal series of cases.

Conclusion and Recommendations

After a thorough discussion on the various approaches, for allowing the disputing parties to excuse the performance of such contractual covenants; the following points could be concluded.

1) The parties, entering an international contractual transaction, have enough information that they should incorporate in drafting the contractual obligations. Thus, as an essence, they must incorporate all the possible hardships that could renders their business transactions impracticable.

2) The parties have distinct knowledge about every aspect of their business deal, however, they must engrave, in the terms of contract, all the contingencies that should be foreseen to them while in the state of negotiating the contractual obligations and otherwise they could not get the shelter of doctrine of impracticability.

3) The impracticability doctrine would only apply to the executory contracts and not on the contracts that have already been executed by the parties to contract, although they should avail other remedies with respect to their post-contractual contentions.

4) Generally, if a party to contract has failed to perform his part's obligations, he must pay the damages, as for the breach of

contract; but if it becomes dreadful to him because of the supervening contingency then the court, under the shadow of impracticability doctrine, may allow the promisor for his part's obligation and could mitigate the damages by applying "Two-tier Damages Rule."

5) For highlighting the application of doctrine there are strict and scrutinized standards applied by the trial court for raising the impracticability excuse, as the skimmed existence of non-happening of certain contingency as basic assumptions, unforeseen ability for allocation of risk allocation and the aftermath of which rendered as commercially impracticability of performance.[45]

6) The doctrine of commercial impracticability imposes the duty of Good Faith upon the seller, although the English law does not recognize the good faith standard in commercial transaction, but if he ignores or reluctantly delay in performance that afterwards made it impracticable then it will term as self-induced impracticability. So, in this situation the impracticability doctrine does not allow excuse to the seller, but courts would deal the dispute accordingly.

7) Initially, the courts were congested, within only following the express intentions of parties to contract but afterwards the courts, by applying the judicial mind with respect to the implied terms that involving the serious concerned of such parties as the doctrine of impossibility but further raising the standards and making flexibilities in existing doctrines, for acknowledging the modern economical barriers, the impossibility doctrine falls under the category of commercial impracticability defense.

8) In the production related business transactions, the impracticability doctrine would only invoke, if the seller is the actual producer of such crop or product and due to the destruction of field or production machinery made the contract as physically impossible, but if the seller is the wholesaler then in this perspective; the impracticability doctrine would not allowed the excuse but will requires that seller to make such preferential arrangements to fulfilling his part's contractual obligations.

9) Commercial hardship as servile to the commercial impracticability; as when a party claim excuse for the performance of contract by invoking commercial hardships for performance, then the strict standards for impracticability defense must be insured by the courts.

10) The legal orthodox of doctrine of frustration invoked, just like commercial impracticability, when commercial aims of contracting parties were diminished without hijacking under the sphere of self-induced frustration, because of happening of un-expected event.

11) The doctrine of frustration of purpose has its widespread acknowledgement under U.C.C. but has, under modernized concept of frustration, limited application by UK courts and just not like impracticability doctrine, does not recognized in commercial transactions by common-law courts.

12) The doctrine of commercial impracticability has more liberalized and well defined by US courts, but the doctrine of frustration has certain lacunae and required further judicial determinations for defining the exact meaning to such doctrine. Just like Suez Canal determinations of cases, although, the results of both doctrines were same, but the parties may perceive the impracticability doctrine in more discernment than doctrine of frustration.

13) The impracticability doctrine has very limited acknowledgement of the supervening contingencies involving the buyer to claim for excuse to take delivery of goods. Commonly, the courts are reluctant to allow such relief and it remains a matter of conjecture on the part of buyer in this perspective.

14) Impracticability doctrine is widely, lies under the judicial construction of ambiguous terms of contract, followed the judicial adjustment as in terms of damage-mitigation as the risk-sharing and the modification of existing contract, are usually criticized as it overrides the concept of *"Pacta sunt Servenda."*

15) In Pakistan the determination of existence of impracticability doctrine may be perceives in limited sense and the laws of Pakistan are not up to the mark that could put the parties to know about the firmed approach of frustration defense in law; however, it invests highest level of judicial responsibility and discretion that for the international parties is not a good sign; because the courts should not apply their discretion arbitrarily but it leads to uncertainty.

Recommendations

It is necessary to design some default rules, relating to the discharge of contractual obligations, which would limit the scope of efficient discharge

of contingencies. The following are the recommendations for the better understanding of the approaches particularly to the doctrine of commercial impracticability and doctrine of frustration.

1) The parties to international contract should, during negotiation of terms of agreement, mentioned in force majeure clause every possible foreseen contingency, that could make the performance as commercially hardship or impracticable, and their flexible parameters to resolve them to resolve such dispute out of the court because the impracticability doctrine could be enlightened as shield or occasionally, as sword to such parties to contract.

2) The UK courts should adopt the innovative approach of US courts with respect to the true construction of supervening contingencies, although both has their separate standards and approaches but the same as per the results. However, in this scenario, the "common-law courts" should overlap certain impracticability doctrinal applicability test into the common law precedents.

3) The UK courts should reconsider the refined approach of concept of the frustration of purpose as per adopted by the US courts under U.C.C and should extend its area of applicability pertaining to the commercial transactions, rather to reject the approach from its totality.

4) The US courts should debar or at least reluctant to modify the contractual obligations as judicial adjustment under impracticability defense because it may ignore the approach of parties towards the sanctity of international contracts.

5) Although the positive intervention of judicial adjustment could be justified by securing the damaged deals of international parties but if such modifications are not accompanying the previous intentions of parties that existed at the time of making such contract, then it could put the court in the state of arbitrarily using its discretion that may go against the spirit of judicial principle pertaining to justice in commercial transactions. As a recommendation, the courts, after successfully incorporating the impracticability test, upon the assent of both disputing parties, appoint certain commission for the modification of such long-term contract but remained, if it failed then the court should abruptly follow the strict standards of doctrine of commercial impracticability rather to compromise with the judicial spirit towards justice.

6) The impracticability doctrine was designed and also suitable for transactions involving, in perspective linking to the cost fluctuations, developed countries but third world countries. The doctrine does not follow the double or triple inflation of price and heavy loss incurred due to hyper-inflation in third world country. As a recommendation, the test of impracticability doctrine, especially with respect to the currency devaluation in developing and underdeveloped countries; should be more flexible than applying on the business markets of economically developed countries.

Recommendations for Applicability of Suitable Doctrine in Pakistan

As discussed above that there is only section under the *Contract Act 1872* that recognized the concept of frustration in limited sense and vests an extraneous discretionary power, over the determination of such kind of dispute, to the judge; that the international contractual parties do not appreciate. Simultaneously, due to non-availability of required laws that could comprehensively, guide the courts, the contingencies that the parties could bother and firmly accepts the optimistic judicial intervention. However, Section 56 could not afford the requirements of tests for the applicability of frustration defense or impracticability doctrine in contracts where Pakistani laws would apply.

In Pakistan, for the better determination of commercial impracticability related disputes, there should be some legislation passed on this area of contract laws like the US code of U.C.C and *Restatements of Contracts* or the "Law reforms (Frustrated contracts) Act, 1943" (UK). The complexities should be erected by shifting from the "doctrine of frustration" towards the "doctrine of commercial impracticability," as discussed in preceding paragraphs that the impracticability doctrine is more innovative, reliable and acknowledge the modernized supervening contingencies and could afford more flexible determination of dispute among international contracting parties.

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Notes and References

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[2] Force Majeure and Frustration of Contract, ed., McKendrick, Ewan, ed. 2 (Informa Law from Routledge, New York 2013) 11-13.

[3] Halpern. W, Sheldon, "Application of doctrine of Commercial Impracticability; Searching for the Wisdom of Solomon," *The University of Pennsylvania Law Review,* Vol. 135, No. 5 (Jun., 1987), 1123.

[4] Duesenberg. W, Richard, "Contract Impracticability: Courts begin to Shape," *The Business Lawyer,* Vol. 32, No. 3 (April 1977).

[5] Sykes. O, Alan, "The Doctrine of Commercial Impracticability in a Second-Best World," *The Journal of Legal Studies,* Vol. 19, No. 1 (Jan., 1990), 43-94.

[6] Force Majeure and Frustration of Contract, ed. Ewan Mckendrick, 2nd ed., (Informa Law from Routledge), 1995, 5.

[7] Nicholas, "Force Majeure and Frustration," *American. Journal of Comparative Law,* 27, (1979), 231.

[8] "Force Majeure and Frustration of Contract," ed. Ewan Mckendrick, 2nd ed., (Informa Law from Routledge), 1995, 6.

[9] See in Second Chapter: *Taylor v. Caldwell, 122 ER 309 (1863), 312.* Although the principle that referred was impossibility doctrine but if a party could pay damages then it could not be termed as impossible, however, one can considers as the impossibility doctrine as merged into the sphere of commercial impracticability.

[10] See in First Chapter: The comments of J. Sloss in *Mineral Park v. Howard 172 cal. 289, 156 (1916), 458.*

[11] US, *Restatement (Second) of Contracts,* s 261.

[12] The reason behind not allocating the risk would be as the contractual cost was not justifiable or because the parties would assumed that, the results of allocating the risk would cause strain in there relation of long-terms contract.

[13] Triantis, G. George, "Contractual Allocation of Unknown Risk: A Critique of the Doctrine of Commercial Impracticability," *The University of Toronto Law Journal*, Vol. 42, No. 4 (Autumn, 1992), 454-455.

[14] Ibid. s 2-615.

[15] Ibid. s 1-103.

[16] See La Cumbre Country Club v. Santa Barbara Hotel Co., 205 Cal. 422, 271 Pac. 476 (1928).

[17] W.H Edgar & Son V. Grocers Wholesale Co., 298 Fed. 878 (8th Cir. 1924).

[18] Ibid., See also, C.C., R.J.L., J.G.O., "The Uniform Commercial Code and Contract Law: Some Selected Problems," *University of Pennsylvania Law Review*, Vol. 105, No. 6 (Apr, 1957), 905.

[19] Force Majeure and Frustration of Contract, ed. Ewan Mckendrick, 2nd ed., (Informa Law from Routledge), 1995, 314.

[20] Uniforms Laws Annotated, "Uniform Commercial Code," Vol. 1B, op cit., 195-196.

[21] *Krell v Henry* [1903] 2 KB 740. In which the contract were about domestic transactions and firmly applied the doctrine of frustration but not specifically about commercial transactions abroad.

[22] Carole Murray; David Holloway; & Daren Timson-Hunt, Schmitthoff's Export Trade: The Law and Practice of International Trade, 11th ed., (London Sweets & Maxwel 2007), 126.

[23] Force Majeure and Frustration of Contract, ed. Ewan Mckendrick, 2nd ed., (Informa Law from Routledge), 1995, 316. See also, *Glidden Co. v. Hellenic Lines Ltd.* 275 F. 2d. 253 (2d. Cir. 1960).

[24] Ibid., see also, *American Trading and production Corp. v. Shell International Marine Ltd*. 453 F. 2d. 939 (1972).

[25] *Transatlantic v. U.S*. 363 F. 2d. 312 (1966), 319.

[26] The Contract Act, 1872 s 56.

[27] Ibid., s 65.

[28] The Specific Relief Act, s 21.

[29] Ibid., s 29.

[30] Ibid., s 32.

[31] The Sales of Goods Act, 1930, s 64A.

[32] Hafiz M. Usman Nawaz, "Outbreak of War as a Cause of the Frustration of contract; Recent Developments," (LLM diss., International Islamic University, Islamabad, Pakistan 2012), 51.

[33] PLD 1980 SC 122.

[34] Abdul Muttalib v. Razia Begum, PLD 1970 SC 185.

[35] Executory contracts are those agreements in which the obligations are yet to be performed by either party to the contract; so, if the contract is under performance or during the performance; forthwith any supervening event intervenes and made the performance impossible.

[36] Such kind of contracts in which all the parties already performed their part's obligations is called executed contract. In this type of contract; if a party has any kind of legal objection or contentions then they may file suit for the recovery of damages but shall not, either party, could claim the doctrine of frustration's defense.

[37] *Messrs Balagamwalla Cotton Ginning and Pressing Factory, Karachi v. Lalchand,* PLD 1961 (W. P.) Karachi, 1.

[38] See *Messrs Jaffer Bros. Ltd. v. Islamic Republic of Pakistan and Another*, PLD 1978 Karachi, 585.

[39] See *Gulamali v. Pakistan*, PLD 1960 (W. P) Karachi, 581.

[40] Hafiz M. Usman Nawaz, "Outbreak of War as a Cause of the Frustration of contract; Recent Developments," (LLM diss., International Islamic University, Islamabad, Pakistan 2012), 52. See also PLD 1980 SC 122.

[41] Halpern, W. Sheldon, "Application of the Doctrine of Commercial Impracticability: Searching the Wisdom of Solomon," *University of Pennsylvania Law Review*, Vol. 135, No. 5 (Jun., 1987), 1169.

[42] Ibid. see, Dawson, "Judicial Revision of Frustrated Contracts: The United States," 64 B.U.L Rev. 1, (1984), 28.

[43] Ibid.

[44] Wallach, "The Excuse Defense in the Law of Contracts: Judicial frustration of the U.C.C. Attempt to liberalize the Law of Commercial Impracticability," 55 *Notre Dame Law*. 203, (1979), 218.

[45] Basically, these are the legal test of commercial impracticability that should be considered by the trial judge for allowing the party to excuse for the performance of his part's contractual obligations.

The End