Force Majeure and Hardship clause, the performance excuse: Review of Section 56 of Contract Act 1872 and Doctrine of Frustration under English Law

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Introduction

A universally accepted principle of contract law is "*pacta sunt servanda*" meaning agreement must be kept, imposes on the parties responsibilities for its non execution. These responsibilities remain even if the failureis beyond the parties' power and the parties could not contemplate or anticipate it's happening during the signing of the contract. This principle reflects natural justiceand economic requirements as it binds to their promises and protect the interest of other party [1][an offer accepted becomes a promise; Section 2(b) of Contract Act 1872]Effective economic activity requires and demands reliable promises and thus this principle is always been emphasized all over the world keeping in mind that in many occasions this principle has not fulfilled the aim as the situation has subsequently so changed that the performances of the obligations or keeping promises have become impossible for overwhelmingly and radically changed circumstances that a reasonable party could not have completed it to its perfection[2]. If the party knew that that what was going to happen they would have made the contract differently[3]. This article aims to give an elaborate idea of the concepts of hardship and *force majeure*in the context of Bangladeshi and English law.

Force Majeure and Hardship-The Concepts in General

The two major legal concepts deals with the problem of changed circumstances (change that occur beyond anticipation or too radical that has striken the root of the contract) are those of *force majeure* and hardship. To understand these concepts, these have to be considered on a theoretical and general basis.

Force Majeure (an irresistible compulsion or coercion): The concept *force majeure* came from the French for "*Superior Force*" which is "***Vis Major***" in Latin. This expression has been taken from the Code Napoleon and has a broader meaning than

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[1] Joern Rimke, 'Article on Force majeure and hardship: application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts.' Available at <http://www.cisg.law.pace.edu/cisg/biblio/rimke.html> last accessed on April 10, 2015.

[2] Ibid.

[3] Carole Murray et al, *C.M. Schmitthoff's Export Trade: The Law and Practice of International Trade* (Sweet and Maxwell, 11th edition 2007) 136.

Act of God, though it maybe doubtful whether it includes "all causes you cannot preventand for which you are not responsible"

[Act of God is defined as an event happening independently of human volition, which human foresight and care could not reasonably anticipate or avoid[4]].

The requirements of *force majeure* are:

a. It must proceed from a cause not brought about by the disadvantaged party's default
b. The cause must be inevitable and unforeseeable and
c. The cause must make execution of the contract wholly impossible.

In Matsoukis v Priestman & Co[5] the English Court's interpretation of the words held that they have a more extensive meaning than Act of God or Vis Major. According to the judgment, the words *force majeure* could cover the the dislocationof a business due to a universal coal strike or accidents to machinery, but would not cover bad weather, football matches, or a funeral. In two cases[6] it was decided that a party could not rely on *force majeure* simply because the price it was required to pay for the goods was considerably in excess of the price at which it had contracted to sell them.

In more general terms the following is the possible general definition of *force majeure*,
Force Majeure occurs when 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 impossible. I promised to do this but I cannot due to some irresistible unforeseeable and uncontrollable event.[7]

Force Majuere Clause

Chitty on Contracts has discussed *Force Majeure* clauses mainly in a chapter devoted to exemption clauses and not in the chapter of Frustration.
Chitty said[8]," the expression *Force Majeure* clause is normally used to describe a contractual term by which one (or both) of the parties is excused from performance of the contract in whole or in part, or is entitledto suspend performanceor to claim an extension of time for performance, upon the happening of a specified event or events

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[4] David M Walker, *The Oxford Companion to Law* (OUP, 1980) 14.

[5] 1 K.B. 681(ENG. 1915).

[6] *Brauer & Co. v. James Clark*, 1952 W.N. 422(ENG, (1952) ; *Alopi Parshad & Sons Ltd. V. Union of India* [1960].

[7] A H Puelinckx, 'Frustration, Hardship, Force majeure, imprevision, Wegfall der Geschaftsgrundlage, unmoglichkeit, Changed Circumstance,' 1986 *Journal of International Arbitration* 47.

[8] Hugh Beale, *Chitty on The Law of Contracts*, (Sweet and Maxwell , 2004) 23-058.

beyond his control. .....*force majeure* clauses have been said not to be exemption clauses."

Even the UNIDROIT Principles have accepted a similar view saying that a party's non- performance is excused if that party proves that the non- performance was due to an impediment beyond its control, and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contractor to have avoided or overcome the impediment or its consequences.[9]

Drafting *Force Majure Clauses*

There are a number of common characteristics to most *force majeure* clauses. The traditional approach of drafting a *force majeure* clause is to list specific events that may be triggered by natural. human or other factors[10]. These events are often divided into two parts.

The first part covers a list of specific events and its contents varies from contract to contract. This list could be very long covering many matters and run to a few pages.

This list includes matters such as

1. Acts of God
2. War
3. Riots and other major upheaval
4. Terrorist act
5. Explosion
6. Insurrection
7. Hostilities
8. Flood
9. Earthquake
10. Hurricanes
11. Thunderstorm
12. Extreme weather condition
13. Strike
14. Lockout

The second part covers more general statement of the events which fall within the scope of the clause, such as" similar events which reasonably may impede prevent or delay the performance of this contract'. [11]

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[9] UNIDROIT Principles, art 7.1.7(UNIDROIT meaning International Institute for the Unification of Private law).

[10] Firoozmand M.R., *The impact of supervening impossibilityevents on the performance of contractrual obligations: the concept of force majeurein international petroleum contracts* (Phd. Thesis, University of Dundee, 2006) 52.

[11] Ewan McKendrick, 'Article on Preparing For the Unexpected: Force Majeure and Hardship clauses in Practice' D153, January 2013.

One thing worth mentioning here is that sometimes theses clauses are kept open ended and problem with this approach is that it makes a contract cumbersome, infelicitous and unskilled, specially to the non legally trained mind.

An example on *force majeure* clause is given below under a licensing digital information contract is given below:

1. Neither party shall be liable in damages or have the right to terminate this agreement for any delay or default in performing hereunder if such delay or default is caused by conditions beyond its control including, but not limited to Acts of God, Government restrictions (including the denial or cancellation of any export or other necessary license), wars, insurrections and/or any other cause beyond the reasonable control of the party whose performance is affected.

2. Neither party shall be liable for any failure or delay in performance under this agreement(other than for delay in the payment of money due and payable hereunder) to the extent said failures or delays are proximately caused (1) by causes beyond that party's reasonable controland occurring without limitation, failure of suppliers , subcontractors, and carriers, or party to substantially meet its performance obligations under this Agreement. Provided that, as a condition to the claim of nonliability, the party experiencing the difficulty shall give the other prompt written notice, with full details following the occurrence of the cause relied upon. Dated by which performance obligations are scheduled to be met will be extended for a period of time equal to the time lost due to any delay so caused.

3. [Licensor]'s failure to perform any term or condition of this Agreement as a result of conditions beyond its control such as, but not limited to, war, strikes, fires, floods acts or damage or destruction of any network facilities or servers, shall not be deemed a breach of this Agreement.

   Note: Disruption in service caused by one or more of the following should not be excused by a *force majeure*clause:

   a. Server failure
   b. Software glitches
   c. Disputes with copyright owners
   d. Licensor labor dispute

Hardship

Hardship requires a change in circumstances so severe and fundamental that the promisor cannot be held to its promise in spite of the possibility of performance. "If an unforeseeable event, not within the control of the disadvantaged party, occurs or becomes known after contracting, and the equilibrium of the contract is

fundamentally altered for either party because of an increased cost of performance or the decrease in value of the performance to be received, hardship results".[12]

Article 6.2.2 of UNIDROIT provides that There is a hardship where the occurrence of the events fundamentally alters the equilibrium of the contract either because of cost of a party's performance has increased or because the value of the performance a party receives has diminished and

a. The events occuror become known to the disadvantaged party after the conclusion of the contract;
b. The events could not reasonably have been taken into account by the disadvantaged party at te time of the conclusion of contract
c. The events are beyond the control of the disadvantaged party and
d. The risk of the events was not assumed by the disadvantaged party.

Mulla in his book[13] has explained hardship. He said as these principles (*force majeure* and hardship) based on the principle ***pacta sunt servanda*** and stress that a party is bound to perform even if the performance becomes extremely onerous, allow adaptation of the contract in cases of hardship.

Hardship entitles the disadvantaged party to request the other party to enter into renegotiation of the original terms of the contract with a view to adapting them to the changed circumstances. This request should be made without delay ,indicating the grounds on which the request is sought. Such Request does not confer any right to not perform or withhold performance by the disadvantaged party.

If the party fails to renegotiate on adaptation of new terms within a reasonable time, either party can go to court. The court may, under reasonable circumstances either

a. Order the termination of the contract at a date and on terms to be fixed by the court

Parties invoke hardship clause generally in long term contracts which is executor in nature.

Chitty in his book [14] briefly explained that *force majeure* clauses and hardship and intervener clauses are frequently inserted into commercial contracts. The effect of theses clauses is to reduce the practical significance of the doctrine of frustration as where express provision has been made in the contract itself for the event which has actually occurred, and then the contract is not frustrated. As a result, the wider the ambit of the contractual clauses, the narrower is the practical scope of the doctrine of frustration.

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[12] Sarah Howard Jenkins, Exemption for non Performance: UCC, CISG, UNIDROIT principles—A comparative assessment (1998) 72 *Tulane Law Review* 2015-2030.

[13] Pollock and Mulla, *Indian Contract and Specific Relief Act* (LexisNexis 12th ed) 1129.

[14] Beale, above note 8, 23-067.

Drafting Hardship clause

Ewan McKendrick in his article has explained[15] hardship clause as "a clause which is less frequently encountered in commercial contracts but is not uncommom in long term contracts is a hardship clause which is inserted into a contract to deal with unforeseen events which make performance of the contract more onerous than originally anticipated."

He has cited a case[16] which is an example of hardship clause, where the terms of the hardship clause were

a. If at any time or from time to time during the contract period therehas been any substantial change in the economic circumstancesrelating to this Agreement and (notwithstanding the effect of the other relieving or adjusting provisions of this Agreement) either party feels that such change is causing it to suffer substantial economic hardship then parties shall (at the request of either of them) meet together to consider what (if any) adjustments (s) in the prices..... are justified in the circumstances in fairness to the parties to offset or alleviate the said hardship caused by such change.

b. If the parties shall not within ninety days after any such request have reached agreement on the adjustments (if any) in the said prices.... The matter may forthwith be referred by either party for determination by experts....

c. The experts shall determine what (if any) adjustments in the said prices or in the said price revision mechanism shall be made.... and any revised prices or ant change in the price revision mechanism so determined by such experts shall take effect six months after the date on which the request for review was first made.

We see that this kind of clause defines the circumstances in which hardship exists and also work on procedure to be adopted in this event that these circumstances occur. This clause also works on a mechanism to be applied in the event when the parties fail or refuse to enter into negotiations with a view to adjusting the contract. In the above case we see that an intervention of a third party expert or arbitrator when the parties fail to reach an agreement themselves.

Thus the hardship clause enables to keep the relationship to continue even on different terms. As we have said, in long term contracts, the parties incorporate hardship clause for the reason being that in long term contracts the parties want to be prepared for upcoming unforeseen situations (those situations or events which couldn't be anticipated at the time of making the contract) which might render the

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[15] Ewan McKendrick, 'Preparing for the unexpected: Force Majeure and Hardship clauses in Practice' D153, January 2013 <www.scl.org.uk>

[16] *Superior overseas Development Corporation v British Gas Corporation* [1982] 1 Lloyd's Rep 262 (CA) 264-265.

future performance onerous if not impossible. Especially events like financial changes or commercial impossibilities. So renegotiations with the terms of the contract might help them still go with the contract and perform it.

Regarding performance of the contract, with renegotiated terms it would seem likely that a court will enforce a term which requires the parties to act in good faith[17]. And this good faith depends upon the circumstances of the case and nature of the contract.[18]

Relationship between *force majeure* and hardship clause

Both of these clauses are used in relation to each other as both of these clauses covers situations of changed circumstances and shares like characteristics. The important difference between these two isin hardship, the performance of the disadvantaged party has become much onerous, but not totally impossible. In *force majeure*, the performance of the party becomes impossible, at least temporarily. Hardship creates a reason for a change in the contractual plan of the parties where aims of the parties always remains to carry out the contract, however, in *force majeure*, the result is nonperformance, and it deals with the suspension or termination of the contract.

Historical Development of these clauses in English law and the Contract Act 1872

As we know by now that whereas doctrine of frustration is implied in every contract by the operation of law, *force majeure* is a matter of contract between the parties. When a party contracts to insert *force majeure* clause in their contract, the Common law principle of frustration (or our principle of Supervening impossibility, section 56 of the Contract Act 1872) will not apply in accordance with the ***pacta sunt servanda*** .The same observation is true for hardship clause too. We can see that the ICC arbitrators also admitted the application of principle *rebus sic stantibus*(Latin, meaning at this point of affairs; in this circumstances)though with limitation.

The doctrine of frustration grew gradually from the absolute contract principle at common law[19]

Prior to 1863, when the famous case Taylor v Caldwell [20] was decided, supervening events were not regarded an excuse for non performance because the parties could have provided for such contingencies in their contract itself.[21] Once the contracting party had taken any obligation, was bound to fulfill it.This onerous rule is an

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[17] *Menifest shipping company ltd v Uni Polaris Insurance companyLtd*(The Star Sea) [2001]UKHL 1, para [50].

[18] *Compass Group UK and IrelandLtd v Mid Essex hospital Services NHS Trust* [2012] 2 ALL ER (comm.) 300.

[19] Trietel, *G.H., Frustration and Force Majeure* (London: Sweet and Maxwell, 1994) 13

[20] *Taylor v Caldwell* (1863) 3 B.& S. 826.

[21] *Barker v Hodgson*(1814) 3 M. & S. 267.

example of the classic 'absolute contract' rule from the case Paradine v Jane[22]where a lessee who was sued for arrears of rent pleaded that he had been evicted and kept out of possession by an alien enemy; such an event was beyond his control, and had deprived him of his profits of the land from which he expected to receive the money to pay the rent. He was, however, held liable on the ground that "Where the law creates a duty orcharge and the party is disabled to perform it and hath no remedy over, there the law will excuse him.....but when the party of his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."[23]

This apparent rational judgment, though peculiar (as there was physical destruction of the subject matter of the contract) continued to be enforced until 1863. However, in 1863 in Taylor V Caldwell case[24]the defendants had agreed to permit the plaintiffs to use a music hall for concerts on four specified nights. After the contract was made but before the first night arrived, the hall was destroyed by fire.

Giving the judgment, Blackburn J of Queen's Bench, held that the defendants were not liable in damages. The rationale was since the doctrine the sanctity of contracts applied only to a promise which was positive and absolute, and not subject to any condition express or implied. The court employed the concept of an implied condition to introduce the doctrine of frustration into English law, since it might appear from the nature of the contract that the parties must have known from the beginning that the fulfillment of the contract depended on the continuing existence of a particular person and thing.

Blackburn J. explained the qualification as "If the performance of the ..... Promise of the bailee to return the thing lentor bailed becomes impossible because it has perished; this impossibility (if not arisen from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the bailee from the performance of his promise to redeliver.[25]

The court held that the particular contract in question was to be construed: "as subject to an implied condition that the rules shall be excused in case, beforebreach, performance becomes impossible from the perishing of the thing, without default of the contractor...."[26]

We have observed that about two centuries after the case Jane vparadine was decided, the courts of England introduced the theory of implied terms into a contract to exempt the performance of specially from the famous Coronation cases[27] where

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[22] (1664) Aleyn 26.
[23] Ibid.
[24] *Taylor v. Caldwell* (1863) 3 B& S 826
[25] Ibid 839.
[26] Ibid.
[27] *Krell v.Henry*, 2. K. B. 740 (Eng. 1903).

due to illness of the King Edward VII, contracts for the rent of room overlooking the routes of the coronation procession were held to have been discharged due to the postponement of the ceremonies.[28]

Frustration: Meaning, Scope and applicability under Section 56 of the Contract Act 1872

Section 56 of the Contract Act stipulates:

"An agreement to do an act impossible in itself is void. 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.

Where one person has promised to do something which he knew, or with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promise for any loss which such promise sustains through the non performance of the promise."

In **Hamara Radio and General Industries Ltd Co. v State of Rajasthan[29],** it was said that the essential principles on which the doctrine of frustration is based is the impossibility, or, rather, the impracticability in lawor fact of the performance of a contract brought about by an unforeseen or unforeseeable sweeping change in the circumstances intervening after the contract was made. In other words, while the contract was properly entered into in the context of certain circumstances which existed at the time it fell to be made, the situation becomes so radically changed subsequently that the very foundation which subsisted underneath the contract as it were gets shaken, nay, the change of the circumstances is so fundamental that it strikes at the very root of the contract, then the principle of frustration steps in and the parties are excused from or relieved of the responsibility of performing the contract which otherwise lay upon them.

In Ram kumar v. P C Roy & Company[30] it was noticed that the doctrine 'frustration of contrac' is invented by the court in order to supplement the defects of the actual contract. The theory of the implied condition has never been acted on by the Court as aground of decision, but is merely stated as a theoretical explanation whereas in England in Taylor v Caldwell[31] the court took decision based on implied condition of the contract which was in contrast with the absolute contract concept argued and accepted in Paradine v. Jane.

The English Court observed Frustration as Lord Radcliff in Davis Contractors v Fareham Urban District Council[32]narrated ".....frustrationoccurs whenever the law

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[28] Ibid.

[29] AIR 1964 Raj205:1964 Raj LW 313 (DB).

[30] AIR 1952 Cal 335.

[31] Ibid.

[32] [1956] A.C. 696.

recognizes that without default of either party, a contractual obligation has become inapplicable 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"

He also added," .....It was not this that I promised to do. There is, however, no uncertainty as to the materials upon which the Court must proceed. The data for decision, on the one hand, the terms and conditions of the contract, read in the light of the then circumstances and, on the other hand, the events which have occurred. In the nature of thing there is often no need for any elaborate enquiry. The court must act upon a general impression of what its rule requires. It is for that reason that special importance is necessary attached to the occurrence of an unexpected event that, as it were, change the faceof the things. But even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play."

In the same judgment he added that "There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed be a different thing than that contracted for"

In **Satyabrata Ghose v Mugneeram Bangur and Co**[33]the court explained section 56 of Contract Act and said the word impossible has not been used in the sense of physical or literal impossibility. The performance of act may not be literally impossible, but it may be impracticable and unless from the point of view of the object and which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the at which he promised to do.

Commercial Impossibility

Another point to remember is that the impossibility under section 56 does not include commercial impossibility. The loss or damage suffered by the promisor in the course of fulfilling the obligations cannot absolve him from liability in the least degree. The mere fact that the contract has been rendered more onerous does not of itself, give rise to frustration.[34] In this case, there was a firm price contract for supply of ghee to the Union of India. The price of ghee rose abnormally due to the Second World War. The Supplier's claim for a higher rate on the basis of equity was negatived by the Supreme Court. The Court found that the agent were fully aware of the altered circumstances and held that the mere fact that the circumstances in which the contract was made was altered, the contract was not frustrated. [35]

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[33] AIR 1954 SC 44.

[34] *Alopi Parshad and sons Ltd. V Union of India*, AIR 1960SC 588, *Easun Engineering Co Ltd V Fertilizers and chemicals Travancore Ltd*, AIR 1991 Mad 158.

[35] Ibid.

Physical Impossibility

An indefinite stoppage of work (Physical impossibility which couldn't be anticipated earlier) pursuant to a government order coupled with a compulsory sale of plant has been held to be sufficient to cause frustration.[36]

No self- induced frustration

A contracting party cannot be relieved from the performance of his part of the contract if the frustration of the contract is self generated or the disability is self induced. [37] So the essence of frustration is that it should not be due to the act or election of the party and it should be without any default of either party and, if it was party's own default which frustrated the adventure, he could not rely on his own default to excuse him from liability under the contract.[38]

Frustration under English Law and Section 56 of Contract Act: A comparison

The periphery of frustration is very broad under English Law, whereas the area of frustration under section 56 is limited in comparison to English law. Section 32 of Contract Act (Contingency of contract) and Section 22 (Mistake) also make performance impossible under contract Act after the contract is entered into.

The present situation for *force majeure* and frustration under Contract Act is as follows; International commercial contracts, e.g., contracts for procurement of seeds, fertilizers, chemicals etc. that Bangladesh's government agencies enter into foreign suppliers usually have a standard *force majeure* clause that excuses performance for the period during which any of the *force majeure* events specified therein exist.

Domestic contracts (where both the contracting parties are Bangladeshi), particularly the ones relating to building construction and the real estate development in Bangladesh offers an interesting extension of the concept of *force majeure* . *Force Majeure* in such contracts tend to make a little or no distinction between a *force majeure* event properly so called and a case of hardship. The definition of *force majeure* is broadening with the contracting parties making new entries in the list of events, the parties believe, are beyond their control. While the natural calamities defying human control rank as the historically recognized exemption from performance, new events, often, interestingly, non natural phenomena,(it is also been recognized in English law where we have seen terrorist act and hostilities are new entry in the list of *force majeure* clause)are qualifying, by agreement of the parties, as *force majeure*.

Hardship events, e.g., unusual escalation of price of building price (a deviation from the Alopi Parshad Case), or sudden scarcity of such materials, though falls outside the classical definition of *force majeure*, could be seen to be excusing performance to the same extent to which natural calamities, e.g., earthquake or tsunami would do

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[36] *Metropolitan Water Board V Dick, Kerr,& Co.* [1918] A.C.119.

[37] *Ecom's Controls (India) Ltd V Bailey Controls Co* AIR 1998 Del 365; 1998(2) Arb LR 188 (Delhi).

[38] *G A Galia Kotwala and Co Ltd V K.R.L. Narsimhan* AIR 1954, Mad 119.

under the terms of a particular contract. In the same vein, political commotion, blockades and strikes, commonplaces in Bangladesh, for their massive disruptive effect on transportation across the country, is increasingly being considered as a strong candidate for recognition by the parties as a *force majeure* event.

When it comes to incorporation by the parties of the aforesaid new *force majeure* events in contracts, **the parties are seen to be shifting from the conventional risk avoidance or risk aversion trend to a calculated risk allocation or risk sharing arrangement.** While *force majeure* clauses are geared to relieving the affected party of its performance obligation, it could often be the case that such relief would benefit neither the party bound to perform nor the party entitled to performance. Delay consequent upon the occurrence of a *force majeure* event acts to the detriment of both the parties: on the one hand, the party entitled to performance would not getting the performance in due time; on the other hand, the party bound to perform would not be receiving his return, price, or consideration in time because of his inability to perform in time. This mutual detriment forces the parties to provide for certain contingencies in their contract. Construction and real estate development contracts in Bangladesh, for example, could provide that in the event price escalation of building materials up to a certain limit, the employer would compensate the contractor by making an additional payment, or granting an extra concession, or otherwise in such manner as the parties think appropriate. Right to stoppage of work would be granted to the contractor in extreme cases only, for example, when such arrangement would not be financially viable

Conclusion

Though the parties of the contract both under English law and Contract Act solemnly follow the doctrine ***pacta sunt servanda*** and try to fulfill their performance, for inevitable reasons those performance could not be completed for some unforeseen reasons, reasons could not be anticipated at the making of the contract. As a result, the contract is frustrated. But the area covered by frustration is very limited. To cure this, the parties today enclose in their contract *force majeure* or hardship clause or both to overcome such situations where they have to shoulder onerous obligations totally different from the obligations they have taken while entering into the contract.

Parties are becoming more reluctant to invoke frustration both here and abroad can be seen in the decision of Coulson J in Gold Group Properties v BDW trading,(and many other unreported real estate cases in Bangladesh) where it was held that a development agreement had not been frustrated as a result of advice given to the defendant developer that the properties were unlikely to meet their contractually agreed prices.[39] One of the reasons given by Coulson J for this conclusion was that the development agreement made express provision for what was to happen in the

[39] *Gold Group Properties Ltd v BDW Trading Ltd* (formerly known as Barratt Homes Ltd) [2010] EWHC 323(TCC), [2010] BLR 235.

event that there was a need to reduce the minimum prices. The agreement permitted the parties to renegotiate the Schedule of Minimum Prices. Given that the contract contained a provision which dealt with the situation which has occurred. It could not be said that the contract had been frustrated.

In both countries the increasing width of these clauses is one reason for the restricted role of the doctrine of frustration or Contract Act. So it could be understood that the doctrine of frustration will be excluded where the contract contains a *force majeure* or a hardship clause which expressly provides for the event which occurred as Gold Group Properties.[40]

Insertion of these two clauses in modern contracts specially estate development and commodity or commercial contracts lessening the need for expansive doctrine of frustration, as the parties are free to include situation under these clauses which might have effect to frustrate the contract and handles the new situation in a more effective manner with or without making the contract void . Thus these clauses play an important role in modern commercial contract by permitting the parties to

a. Define for themselves the circumstances in which their *force majeure*or hardship clause is to operate.
b. The contracting parties if they wish include in the clause an event which would not be sufficient to frustrate the contract.
c. The contracting parties will have enough freedom in case of deciding the consequences which are to follow from the occurrence of theses clauses. This lessens the rigidity and protects the parties from the drastic consequences of a finding that the contract has been frustrated, which is against the wishes of the parties.

Like English law, *force majeure* clauses help parties to avoid or lessen their obligations in case of a supervening event which is beyond their control. If these clauses are not part of the contract, then the concept of frustration of contract the concept frustration under English law recognized by section 56 of the Contract Act would operate to help the parties from the liabilities they have not undertaken.

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[40] Ibid.