**COURSE TITLE: LAW OF CONTRACT**

**COURSE CODE: LPB 202**

**TOPIC: Discharge by Frustration**

1. **Introduction**

The principle of discharge by frustration makes a contract to be discharged where after the contract has been formed there exist some changes in circumstances which makes the performance of the contract impossible to be done.

The Court of Appeal in ***Nigerian Bank for Commerce and Industry v. Standard (Nig.) Eng. Co. Ltd,[[1]](#footnote-1)*** defines frustration as the premature determination of an agreement between parties; an agreement lawfully entered into and in course of operation at the time of its premature determination, owning to the occurrence of an intervening even or change of circumstances so fundamental as to be regarded by law both as striking at the root of the agreement and as entirely beyond what was contemplated by the parties when entered into the agreement.

Frustration occurs whenever the law recognizes that without no fault of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would make it a thing radically different from what was undertaken by the contract, to lead to frustration, the intervening circumstance must be one which must be so fundamental as to destroy the basis of the agreement. The principle of frustration assumes that the frustrating event was not caused by the default of either party to the contract.

The doctrine of frustration was related that if the performance of a contract depends on the existence of affairs, then the destruction of or disappearance of that of that state of affairs, without the default of either of the parties, will discharge them from the contract.

To this must be added that frustration occurs under situations that are totally out of the control of the parties. In such a situation, it is the court that can determine whether an event constitutes a frustrating event as to grant an automatic discharge to the parties to the contract.

This topic will therefore focus on the various theories, on which the doctrine is based, application of the doctrine, its legal consequences and statutory provisions dealing with frustration.

**1.2 Theories of Frustration**

There abound some theories upon which the doctrine is based. The rationale for projecting the theories is to justify the doctrine and to involve some general formula for describing the conditions in which it operates. Some of the theories are discussed thus:

**1.2.1 Implied Term of Theory**

The implied theory is that a contract is discharge where it impliedly provides that in the frustrating events which have happened, it shall cease to bind. The implied theory was the legal classic exposition in ***Tamplin S.S Co Ltd v. Anglo Mexican Petroleum Products Co. Ltd.[[2]](#footnote-2)***

The court stated that:

*“a court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it in order to see whether or not from the nature of it. The parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied; though it be not expressed in the contract”.*

The point which has been raised against the theory of implied term is that at the time the contract come into existence, the parties have no common view as to the frustrating event and they could not have provided for the consequences in the terms of the contract. It has been established that frustration occurs by law, not by the intentions of the parties. If it is the intention of the parties, the contract will be frustrated, when the frustrating events occurs. It merely gives effect to their intention. In ***United Cinema & Film Distribution Co. v. Shell BP Petroleum Dev. Company***[[3]](#footnote-3). The court held that it was ideal the contract did not make specific provision for that eventuality. It is not left to the parties to say that there has been frustration or not, it is the duty of the contract.

Therefore, the contract was discharged by frustration when the Baifran government took over the properties of the defendants. This also illustrates the construction theory. In most cases, the parties did not anticipate ort provide for what actually happened. Implied term provided for something the parties either expressed or foresaw. The implied theory is at variance with the doctrine of frustration. It is therefore, an artificial theory.

**1.2.2 Foundation of the Contract**

The foundation of the contract theory was based on Lord Haldane statement in the *Tamplin case* which stated “when people enter into a contract which is dependent for the possibility of performance on the continued availability of a specific thing comes to an end by reason of circumstances beyond the control to the parties, the contract is prima facie regarded as dissolved. This statement was regarded as the surest ground to rest the doctrine of frustration. This no doubt, is the appropriate way to describe frustration as the performance of a contract may depend on the availability or existence of certain thing. It may be rightly described as the foundation of the contract. [[4]](#footnote-4)

In addition, the radical change of circumstances so fundamental to the root of the contract has also been described as the destruction of the foundation of the contract; Thus in ***Davis Contractors Ltd v. Fareham UDC,***[[5]](#footnote-5) Lord Radcliff stated the true test as follows:

***“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 performances is called for would render it a thing radically different from that which was undertaken by the contract. Nonh’aec in foedera veni: it was not this promised to do.***

The Supreme Court adopted this approach in ***Araka v. Monier Construction Co. Ltd***,[[6]](#footnote-6) the appellant leased his house the respondent company for use as a residence by the company employees to be occupied when the Biafran authorities expelled all expatriates personnel under their control in June 1967. The Supreme Court considered whether the contract became frustrated Bello J.S.C held that the contract had been frustrated because its foundation had disappeared. The important thing is that there must be such a change of circumstances that if the contract was not brought to an end, the parties would be performing obligations different from what they originally had contracted to perform. The foundation of the contract or the destruction of a specific thing which makes performance impossible can be said that he is discharge by failure of consideration. The theory of failure of consideration has been rejected because when it applies to frustration, the failure of consideration must be total. Frustration can occur in cases of partial destruction or part performance of contract.

**1.3 Application of the doctrine of frustration**

The operation of the doctrine in practice can best be appreciated by a consideration of the types of events which the Courts have treated has frustrating events in various cases. Also, further insight into the workings of the doctrine can be achieved by considering the various types of contract, in which the doctrine of frustration has been successfully invoked.

**1.3.1 Destruction of the subject-matter**

The application of the doctrine of frustration has been applied to cases where the subject-matter of the contract is destroyed. This situation was considered in the case of ***Taylor v. Caldwell***[[7]](#footnote-7); in this case, the claimant hired out a music hall in Surrey for the purpose of holding four grand concerts. The claimant went to great expense and effort in organizing the concerts. However, a week before the first concert was due to take place the music hall was destroyed by an accidental fire. The claimant sought to bring an action for breach of contract for failing to provide the hall and claiming damages for the expenses incurred

The claimant's action for breach of contract failed. The contract had been frustrated as the fire meant the contract was impossible to perform.

In the Nigerian case ***Benthworth Finance (Nig.) Ltd v. Alhaji Sanni Bakori***,[[8]](#footnote-8) the defendant obtained a lorry under high purchase agreement for the sum of N5428 payable by 18 installments. The plaintiff claimed the sum of N1574 as balance and claimed that the defendant was in default of payment and thereby terminated the agreement. The defendant stated that the vehicle was involved in an accident and the plaintiff took possession. The insurers paid N2247 to the plaintiffs and also sold the vehicle for N500. The defendant pleaded that the agreement had been discharged by frustration. The court held that the accident constituted parties from liabilities. Physical destruction of the subject-matter of the contract before performance falls due as always been accepted as frustrating event. It is noteworthy that a contract may be frustrated where what is destroyed is not the subject-matter but something essential for its performance. For instance, a contract to install equipment in a particular factory may be frustrated by the destruction of the factory.

**1.3.2 Death or Incapacity**

Certain personal contract such as contracts of employment, apprenticeship are discharged by the death of either party ***Cutter v. Powell***.[[9]](#footnote-9) Some commercial contract requires the use of personal skill in which case the death of that party can discharge the contract. A contract may be frustrated where the continued performance involved serious risk of the health of person to the contract, ***Condor v. The Baron Knight Ltd***[[10]](#footnote-10), for instance, a contract to write a book or where a person who has booked a course was so seriously injured.

**1.3.3 Unavailability of subject-matter**

A contract may be frustrated if the person or the thing essential for its performance becomes unavailable. For instance, a ship may be seized, or detained or requisitioned, the charter parties are frustrated. The Gulf War cases illustrated this point. The acts of seizure, detention or requisition are frustrating events. During the Nigeria Civil War, the Federal Government was empowered by a decree to requisition any property which is subject-matter of the contract, Decree 39 of 1967 as amended by Decree 43 of 1969. Section 2 provides

*“where anybody having in his possession, custody or control any land, vehicle, or article relating to a vehicle or vessel falls to comply with any requisition lawfully made in accordance with provision of this Decree, the authority may seize the possession of an appropriate the land, vehicle, vessel, or vehicle as the case may be”.*

In ***Benthworth Finance (Nig) Ltd v. Basiru Adeyemi***[[11]](#footnote-11) it involved an alleged seizure of vehicle, which was the subject-matter of a contract. The plaintiff’s lorry was under hire purchase agreement under monthly installment.

For months thereafter, the Nigerian Army requisitions the lorry. The defendants stopped payments of the installments and when sued, he pleaded that the army requisitioning the lorry had discharged the hire purchase agreement. Adefarashin J. held that the defendant failed to prove satisfactorily that the vehicle had been requisitioned. Secondly, that if there had been requisition, it appeared to have been intended to be a temporary nature. For this reasons, the court held that the contract had not been frustrated. The requisition by the army was not intention to affect the rights and liabilities of the parties.

Temporary unavailability may frustrate a contract if it is clear from the nature of the contract that it was to be performed within the time specified. For instance, a contract to sing or to perform in a party on a particular day can be frustrated if the performer is taken ill that day;[[12]](#footnote-12) In ***Jackson v. Union Marine insurance Co Ltd,***[[13]](#footnote-13) a ship was chartered to carry rails in January, she went aground and was not repaired until August, the delay frustrated the contract as the ship was riot available at the time for the particular voyage. So also in Bank Line Ltd v. Authur Capel & Co (1919) AC 435, a ship was chartered for 12months from April 1915 to April 1916. She was requisitioned before delivery and the owner could not procure the release till September 1916. In action, the House of Lords held that the charter party was frustrated. The court stated

*“the requisitioning destroyed the identity of the chartered service and made the character as a matter of business a totally different thing”.*

**1.3.4 Subject-matter unavailable from a particular source**

A contract may be discharged where the subject-matter was to be obtained parties, for instance, where goods are to be imported from a particular country and such import is prevented by reasons of war, natural disasters, or prohibition of export or goods are to be result of general drought or disease.

It is important to note that the operation of this situation depends on the following things itemized thus:

**i. Express Reference**

Where there is express reference that the goods are to be taken from specified source, the contract is frustrated if the source fails in ***Howell v. Coupland***,[[14]](#footnote-14) a farmer sold 200 tons of potatoes to be ground on land specified in the contract the corp failed and it was held the contract was frustrated. It was an exclusive source of supply and if it were several sources. The contract will not be frustrated.

**ii. Source by one party only**

If a contract makes no reference to any source but one of the parties intended to get the supply or subject-matter from one source. The failure of that source will not lead to frustration,[[15]](#footnote-15) Similarly, where in a contract of sale, the buyer’s source of payment fails. A contract was held not to be frustrated merely became the buyer intends to pay with money to be remitted from a foreign country or source and the remittance is prevented by delay in changes in exchange-control regulations, ***Universal Corp v. Five Ways Properties Ltd[[16]](#footnote-16)*** or source of funds becomes exhausted ***Janes Paezy v. Haendler & Nateman Gamb H***[[17]](#footnote-17)

In all these cases, the buyer can get supply funds from other sources. Where however, there is no express reference to the source but both contemplated that a source will be used, the contract are sometimes construed as containing implied reference to the source. Failure of source contemplated by the parties will frustrate the contract. Where the source is contemplated by one party only, the court rejected the plea of frustration, ***Lipton v. Ford***.[[18]](#footnote-18)

iii. Partial Failure

Where a contract of sale specifies the source from which the goods are to be taken the total failure of that source will lead to frustrated Blackburn Bobbins Co. Ltd.[[19]](#footnote-19) Where there is a partial failure, the common law and statutory provisions have diverse repercussions. Thus in ***Howell v. Coupland,[[20]](#footnote-20)*** the seller delivered the same quantity produced, the court held that he was not liable for the rest of the quantity sold. The view is that the seller is bound to deliver only the quantity actually produced. The statutory provision is that the buyer is not bound to accept the quantity produced if it is less than the contracted for.

Where a seller made a number of contracts, to deliver goods from a specified source and the source fails in parts, will the total failure of the source frustrate the contract? For example, a buyer expects to receive from a buyer 1200 tons of grains which he intends to sell to six customers, but as a result of partial failure, 900 tons were delivered as a result of failure to produce enough. One view is that all the contracts are frustrated because the seller cannot perform them all in full. This is supported by statutory provisions.

**1.3.5 Change in Law**

A well-recognized frustrating event is a subsequent change in the law. A new change can occur by the promulgation of a new law or decree or edict or local government bye-law which renders contract illegal. An example is Decree No 16 of 1977 which prohibited the importation and sales of sparkling wines, ready-made dresses, cars with engine capacity in excess of 2500 cc. The consequence was that all contracts for the importation of these goods became frustrated from the date the decree took effect. The case of ***Obayuwana v. The Governor of Bendel State[[21]](#footnote-21)*** is illustrative of frustrating event by subsequent legal change.

The appellant was appointed a member of Oredo Customary Court in 1977; the contract was to be effective until March 1981 the Governor of Bendel State revoked the appointment by virtue of Customary Court (Revocation) Order with effect from Jan.1980. The plaintiff sought a declaration that the purported revocation of his appointment was null and void and that he was entitled to his salary up to March 1950. The trial court held that although the revocation order by the Governor is unlawful and unconstitutional, the plaintiff’s appointment was effectively terminated by frustration as from March 1980 by consequent legal change. The Supreme Court up held and confirmed the judgment of the trial court.

**1.3.6 Outbreak of War**

The outbreak of war renders illegal all contractual transactions between citizens of countries at war. A Nigerian citizen cannot enter into contractual obligations with an alien enemy or a person resident or who carries on business in an enemy territory.

The case of ***Chief Oguaga v. Armels Transport Ltd***[[22]](#footnote-22) provided a test decision at the Supreme Court on the issues of frustration of contract. During the war, the plaintiff took his Mercedes Benz car to the defendant’s garage at Aba for repairs. Aba was under the control of the Biafran authority. The car was in the garage for 18 months because the defendants were unable to obtain spare parts for the repairs as a result of the embargo the Federal Military Government placed upon the importation of goods.

The defendants also argued that they had to evacuate their garage from Aba to Ihiala when the Federal Army overrun Aba, and eventually abandoned the car in the garage.

The court invited the defendant’s counsel to provide judicial authorities in which civil war had been successfully established as aground of frustration of contract. The trial court held that the contract was not frustrated because the defence could not cite any authority. The decision was confirmed by the Supreme Court that there was no frustration since both parties were resident in Biafran, and the contract was concluded during the civil war. The issue of alien enemy, therefore did not arise and contract could not have been frustrated by the civil war. The only material facts were that the defendants were forced to flee in the face of the advancing federal troops. This constituted a frustrating event but by physical impossibility of performances and the subject-matter of the contract fell into hands of the enemy troops.

On a clear analysis of the facts, the Supreme Court was wrong in stating that there was no frustration. The statement in that cases that the civil war could not operate to frustrate a contract was misleading. The Nigeria Civil war frustrated so many contractual obligations and the distinction whether the war is civil or international is untenable civil war, whether then or now provided many frustrating events to persons resident within the enemy territory and those within or outside the enemy territory. The Supreme Court happily has corrected itself in subsequent decisions and held that civil war operated as frustrating events to discharge parties from their contracts.

**1.4 The Legal Consequences of Frustration**

Once the court decides that a contract has been discharged by frustration it must follow this up by a consideration of the legal consequences of this state of affairs, and decide who is retain or return money or other property, who is to bear any loses, or how such losses are to be apportioned between the parties.

Frustration discharges a conduct automatically when the frustrating event occurs. The court can determine that the contract was frustrated even when the parties continue to regard the contract as subsisting after the frustrating event has occurred. The legal effect does not depend on the opinions for the parties to the contract. What the parties believe is not the determining factor, but the relevance cannot be regarded. ***Hirji Mulji v. Cherog Yue SS Co. (1926) The Wenjiang[[23]](#footnote-23)***

Since frustration operates automatically, it appears the contract is determined without putting any of the parties to the election particularly the innocent party, either party can invoke frustration. In a breach of contract, the innocent party may determine to terminate the contract. In case of frustration, both parties can invoke the frustrating even to ask for a discharged from the contract. In ***Bank Line Ltd v. Arthur Capel Co***,[[24]](#footnote-24) a ship was under charter was requisitioned, frustration was claimed by the ship owner, even though the charter was willing to pay the agreed hire, and the ship owner will actually profit from the frustration. As it happened in ***Tamplin*** case,[[25]](#footnote-25) the court rejected the plea of frustration on the ground that the ship owner will make a profit from the contract.

It is important to note that the Common Law makes it possible that right which had accrued before frustration remained enforceable. This was illustrated in ***Chandler v. Webster[[26]](#footnote-26)*** where the hirer was liable to pay the remaining £41.155 although the contract was frustrated. The hirer claimed to recover £100 already paid but since there was no total failure of consideration, the court refused to grant the request. The common law rule did not allow injustice to prevail by allowing the innocent party to recover the sum of money due on the ground that there was no total failure of consideration. In previous decisions, payment could only be recovered only where the consideration had wholly failed.[[27]](#footnote-27)

**1.5 Statutory Provisions Dealing With Frustration**

In Britain, the English Law Reform (Frustrated Contracts) was enacted in 1943. In Nigeria, the former Western Region enacted with minor modifications the English Law as Contracts law of Western Nigeria in 1959.[[28]](#footnote-28) In 1961, the Federal Government enacted the Law Reform (Contracts) Act which applied to Lagos, Oyo, Ogun and Bendel States. The other regions, the East and North operated the English common law on frustration. The provisions of Section 4 of the Law Reform (Contract) Law, 1961 provides that the Act applies only to contracts that have been discharged by frustration and equally to contracts that have been discharged by frustration and equally to contracts to which the government is a party.

Section 4(1) where a contract governed by law has become impossible of performance or has been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract the follow provisions of this section, shall subject to the provisions of Section 3 of this Act have effect in relation there to. The Law Reform (Contracts) Law 1961 confirms the decision in ***Fibrosa*** case by permitting the recovery of money prepaid towards the performance of a contract and abolished any liability to pay, if in fact, payment had not been made.

**Provision of Section 4(2)**

All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharge shall in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid and in the case of sums so payable cease to be payable. This section allows the recovery of advance payment where there has been a failure of consideration. The subsection provides that the money is recoverable as money recoverable as money received and not as money recoverable on a consideration which has failed as in ***Fibrosa*** Case.

Section 4(2) further provides if the party to whom sums were so paid or payable incurred expense before the time of discharge in or for the purpose of the performance of the

contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or as the case may be, recover the whole or any part of the sums so paid or payable, not been an amount in excess of expenses so incurred. The court has discretion to decide whether or not the party who has incurred expenses towards the execution of the contract can recover, and the amount. The court, however, cannot allow him to recover above the expenses incurred. However, the party is only entitled to retain any sums already paid to him. So, if no sum has been paid to him, he cannot recover any amount whatever the expenditure incurred toward, execution of the contract. Section 4(3) of the Act allows a party who has done something towards execution of the contract, which constitutes a valuable benefit to the other to recover a sum of money not exceeding the value of the benefit so conferred by him.

The Section provides where any party to the contract has, for reason of anything done by any other party thereto in, for the purpose of or performance of the contract, obtained a valuable benefit (other than payment of money to which subsection 22 applies) before the time of discharge, shall be recoverable from him by the said other party such sum (if any) not exceeding the value of the said benefit to the party obtaining it, as the court considers first having regard to all the circumstances of the case’ what is valuable benefit as contained in provision of the section it has been suggested that valuable benefit should be interpreted widely to include a situation where work has, in fact, been done on the defendants land by the plaintiff, even though this may have been destroyed before the defendant derived any advantage from it.

1. (2002) 8 NWLR (pt. 768) 104 [↑](#footnote-ref-1)
2. (1916) 2 AC at pp.403-404. [↑](#footnote-ref-2)
3. (1973) 3 UILR 439 [↑](#footnote-ref-3)
4. As in the Suez Canal cases, the availability of Suez Canal for navigation is regarded as the foundation of a charter party, W.J Tatem Ltd v. Gamboa (1939) 1 KB 132. [↑](#footnote-ref-4)
5. (1956) AC 696 [↑](#footnote-ref-5)
6. (1978) 3 Bds 826 [↑](#footnote-ref-6)
7. (1896) 1 QB 13 [↑](#footnote-ref-7)
8. (1973) NCLR 426 [↑](#footnote-ref-8)
9. (1795) 6 TR 320 [↑](#footnote-ref-9)
10. (1966) 1 WLR 87 [↑](#footnote-ref-10)
11. (1973) 3 UILR 453 [↑](#footnote-ref-11)
12. Robinson v. Davidson (1871) LR 6 Ex. 269. [↑](#footnote-ref-12)
13. (1874) LR 10 CP. 125 [↑](#footnote-ref-13)
14. (1876) QBD 258 [↑](#footnote-ref-14)
15. Blackburn Bobbins Co. Ltd. v. T.W. Allen Ltd. (1918) 1 KB 467 [↑](#footnote-ref-15)
16. (1979) 1 All ER 552 [↑](#footnote-ref-16)
17. (1981) 1 Llyod’s Rep. 302. [↑](#footnote-ref-17)
18. (1917) 2 KB 647 [↑](#footnote-ref-18)
19. (Supra). [↑](#footnote-ref-19)
20. (1876)1 QBD 256 [↑](#footnote-ref-20)
21. Suit No SC 214/1973 (unreported) [↑](#footnote-ref-21)
22. Suit No SC 214/1973 [↑](#footnote-ref-22)
23. (No 2) 1983) 2 Lioyds Rep. 400 AC 497. [↑](#footnote-ref-23)
24. (1919) AC 415 [↑](#footnote-ref-24)
25. (1916) AC 397 [↑](#footnote-ref-25)
26. (1904) 1 KB 493 [↑](#footnote-ref-26)
27. Whincup v Hughes (1871) LR 6 CP. [↑](#footnote-ref-27)
28. Cap. 25 of 1959 [↑](#footnote-ref-28)