

**THE DOCTRINE OF FRUSTRATION TO DEAL WITH
ISSUES IN CONTRACT FRUSTRATION IN THE SRI
LANKAN CONSTRUCTION INDUSTRY**

Ranasinghe Arachchilage Nilanka Madhuni Pathirana

(179175B)

Degree of Master of Science in Construction Law and Dispute Resolution

Department of Building Economics

University of Moratuwa

Sri Lanka

August 2023

**THE DOCTRINE OF FRUSTRATION TO DEAL WITH
ISSUES IN CONTRACT FRUSTRATION IN THE SRI
LANKAN CONSTRUCTION INDUSTRY**

Ranasinghe Arachchilage Nilanka Madhuni Pathirana

(179175B)

Dissertation Submitted in Partial Fulfillment of the Requirements for
the Degree Master of Science in Construction Law and Dispute Resolution

Department of Building Economics

University of Moratuwa

Sri Lanka

August 2023

DECLARATION

Declaration, copyright statement and the statement of the supervisor

I declare that this is my own work and this thesis does not incorporate without acknowledgement any material previously submitted for a Degree or Diploma in any other University or institute of higher learning and to the best of my knowledge and belief it does not contain any material previously published or written by another person except where the acknowledgement is made in the text.

Further, I acknowledge the intellectual contribution of my research supervisor, Ch QS Prof. Mrs. B.A.K.S. Perera for the successful completion of this research dissertation. I affirm that I will not make any publication from this research without the name of my research supervisor as contributing author unless otherwise I have obtained written consent from my research supervisor.

Also, I hereby grant to the University of Moratuwa the non-exclusive right to reproduce and distribute my thesis in whole or in part in print, electronic or other medium. I retain the right to use this content in whole or part in future works (such as articles or books).

Signature:

Date: 09/08/2023

The above candidate has carried out research for the Master's Dissertation under my supervision.

Signature of the supervisor:

Date: 09/08/2023

The doctrine of frustration to deal with issues in contract frustration in the Sri Lankan construction industry

Contract Frustration occurs when the performance of the contract automatically ends without default of either party by a supervening event and it is difficult to conclude whether the contract is frustrating or not as it depends on the subject matter of the Contract. Hence, parties may pursue to excuse their contractual obligations or get advantages by the bad bargain. Since the Doctrine of Frustration and Frustrated contract Acts are commonly used in other English common Law countries to address issues in contract frustration, it is required to examine the Doctrine of Frustration and its applicability to the Sri Lankan construction industry.

Therefore, the aim of this research is to introduce a set of guidelines on which parties should act in a frustrating situation in the Sri Lankan construction industry. Firstly, the ways and the consequences of contract frustration were identified. Then, the concept of the doctrine of frustration and how the Standard form of Contracts has defined frustration was studied. This research employs a qualitative research approach consisting of expert interviews to identify procedures at the project level to deal with the issues of frustration. The collected data were analysed through content analysis. A framework is developed in an effort to technically rationalize the application of the doctrine of frustration.

The findings of the study reveal that it is essential to review available Force Majeure clauses in the contract as the doctrine of frustration does not apply in such situations. Also, Parties shall ensure that they are aware of the doctrine of frustration before they enter into a contract and shall ensure to include some provisions for frustration in the contracts to avoid potential risks and disputes. Moreover, parties may follow the provisions specified in the Frustrated Contract Acts to get the protection of the party's payment rights.

Keywords: *Contract Frustration, Supervening event, Doctrine of Frustration, Frustrated contract Acts, Force majeure clause*

DEDICATION

*I dedicate this piece of research to,
All kind hearts and helping hands,
Together with me,
From the beginning to now,
of the journey of life...*

ACKNOWLEDGEMENT

This research study embraces much dedication and readily assistance received from many people who contributed in abounding ways to complete this research study. Therefore, I take this opportunity to express my gratitude to all of them.

First, I would like to express my deepest gratitude to Ch. QS Prof. Mrs.Yasangika Sandanayake, the Programme Director, Degree Master of Science in construction Law and Dispute resolution, for her constant support and valuable guidance provided throughout the period of the course.

Next, I would like to pay my indebtedness to my dissertation supervisor, Ch. QS Prof. Mrs.Kanchana Perera for her excellent supervision, guidance, encouragement and constructive criticisms significantly contributed towards the successful completion of this research. Further, I would like to thankful to all other staff members of Department of Building Economics for their immense assistance and advice provided during my Degree of Bachelor of Science in Quantity Surveying in the same Department and throughout the period of Degree Master of Science in construction Law and Dispute resolution. Furthermore, I pay my heartiest gratitude to all non-academic staff members of the Department of Building Economics for the valuable help given.

Special thanks go to all the interviewees and industry practitioners who gave me an immense support and corporation to complete a successful data collection by sharing their valuable knowledge and experiences with me. Last, but not least, I express my heartfelt gratitude to my family, my life partner, my batch mates and all others who were with me during this study for giving their greatest support, honest advices and continuously motivating me to carry out the work successfully.

TABLE OF CONTENTS

DECLARATION	i
ABSTRACT.....	ii
DEDICATION	iii
ACKNOWLEDGEMENT	iv
TABLE OF CONTENTS.....	v
LIST OF TABLES.....	x
LIST OF FIGURES	xi
LIST OF ABBREVIATIONS	xii
LIST OF APPENDICES	xiii
1.0 INTRODUCTION	1
1.1 Background	1
1.2 Problem Statement	3
1.3 Aim and Objectives	4
1.4 Scope and Limitations	5
1.5 Research Methodology.....	6
1.6 Chapter Breakdown.....	7
1.7 Summary	8
2.0 LITERATURE REVIEW	9
2.1 Introduction	9
2.2 Contract Discharge	9
2.3 Contract Discharge by Frustration	10
2.4 Consequences in relation to Contract Frustration	12
2.5 Doctrine of frustration	13
2.5.1 Impossibility or impracticability.....	15

2.5.2	Frustration of Purpose	16
2.5.3	Temporarily or Partial Impossibility.....	17
2.6	The Test of frustration (Theoretical basis).....	18
2.6.1	Implied Term	19
2.6.2	As a matter of construction	20
2.6.3	As a matter of Justice and reasonableness	20
2.7	Grounds for Frustration	21
2.7.1	Destruction of Subject-Matter/specific objective	23
2.7.2	Non-occurrence of Contemplated Event.....	24
2.7.3	Death or Incapacity of Party	25
2.7.4	Government interference.....	25
2.7.5	Illegality	26
2.7.6	Natural Disaster	26
2.8	Limitations of Doctrine of frustration	27
2.8.1	Frustration should not be Self-induced	28
2.8.2	Frustration Operates Automatically	29
2.8.3	Adjustment of Rights (Restitution).....	30
2.8.4	Frustration does not apply to anticipated events	30
2.8.5	Express provisions in the contracts	31
2.9	Express Provisions in the contracts when frustration.....	31
2.10	Level of utilization of Standard from of Contracts	32
2.10.1	Force Majeure	32
2.10.1.1	Difference between Force Majeure and Frustration	33
2.10.2	Mistake.....	34
2.10.2.1	The difference between frustration and common mistake.....	34
2.11	Impact of the event, COVID-19 leading to contract frustration	35

2.12	Application of Acts for frustrated Contracts	37
2.12.1	Frustrated Contracts Act 1943	38
2.12.2	Frustrated Contracts Act 1978	39
2.12.3	Frustration Act 1988	40
2.13	Research Problem Statement.....	40
2.14	Summary	41
3.0	RESEARCH METHODOLOGY.....	43
3.1	Introduction	43
3.2	Research Process	43
3.2.1	Background study	45
3.2.2	Problem statement.....	45
3.2.3	Literature review	45
3.2.4	Research design	46
3.2.5	Research Philosophy	47
3.2.6	Research approach	47
3.2.7	Qualitative research approach.....	47
3.3	Research Technique	48
3.3.1	Data Collection Techniques	48
3.3.2	Population and sample size	48
3.3.3	Technique of Data analysis.....	49
3.3.4	Content analysis	49
3.4	Summary	50
4.0	DATA ANALYSIS AND RESEARCH FINDINGS	51
4.1	Introduction	51
4.2	Expert Interview Survey Analysis.....	52
4.2.1	Professional Qualification of the respondents	53

4.2.2	Respondents' years of experiences	55
4.3	Concept of the Doctrine of frustration under common Law	57
4.3.1	Consequences of a frustrated contract	58
4.3.2	Theoretically basis of Doctrine of frustration	62
4.3.3	Grounds for contract frustration.....	62
4.3.4	Is COVID a supervening event to frustration?.....	64
4.3.5	Limitations for contract frustration	68
4.3.6	The factors not amounting for contract frustration	70
4.4	Concept of Doctrine of frustration under standard form of contracts	73
4.4.1	Force Majeure vs Contract frustration	75
4.4.2	Mistake Vs Contract Frustration	77
4.4.3	Does Standard form of contract really address the contract frustration.....	78
4.5	Frustrated Acts	80
4.5.1	Awareness of frustrated contract Acts issued under common Law	80
4.6	Application of the concept of Doctrine of frustration at the project level ..	83
4.6.1	Consequences affected to the Parties of contract in the Project	87
4.6.2	Remedies followed by the parties	88
4.6.3	Application of Doctrine of frustration	90
4.7	Summary	92
5.0	CONCLUSION AND RECOMENDATIONS	93
5.1	Introduction	93
5.2	Aim and Objectives of the Research Study	93
5.3	Conclusion.....	94
5.4	Recommendations	99
5.5	Limitations of the Research.....	100
5.6	Further Research Directions.....	101

REFERENCES	102
------------------	-----

LIST OF TABLES

Table 2.1 Grounds of frustration of contracts.....	22
Table 4.1 Respondents' profile.....	53
Table 4.2 Consequences in the Contract Frustration.....	59
Table 4.3 Grounds for contract frustration.....	63
Table 4.4 Is COVID supervening event to frustration.....	65
Table 4.5 Limitations for contract Frustration.....	69
Table 4.6 Factor not amounting for contract frustration.....	71
Table 4.7 Concept of Force majeure vs Frustration.....	75
Table 4.8 Provisions in FCA.....	82
Table 4.9 The event occurred in the Project for the contract frustration.....	83
Table 4.10 Supervening event in the contract.....	86
Table 4.11 Steps followed by the parties.....	88

LIST OF FIGURES

Figure 1.1	Chapter Breakdown.....	7
Figure 2.1	Types of parties' excuse for Non-Performance.....	14
Figure 2.3	Case law related to the frustration.....	23
Figure 2.4	Limitations of doctrine of frustration.....	28
Figure 3.1	Methodological framework for research.....	44
Figure 3.2	Nested Research Methodology.....	46
Figure 4.1	Procedure of Research objectives.....	51
Figure 4.2	Respondents' years of experience.....	56
Figure 4.3	Theoretical basis accepted by Experts.....	62
Figure 4.4	Allocation of Risk in SBD, FIIDC for contract frustration.....	73
Figure 4.5	Addressing of contract frustration in Standard form of contract.....	79
Figure 4.6	Awareness of the FCAs.....	81
Figure 4.7	Feasibility of adopting provisions in FCAs.....	82
Figure 4.8	Consequences faced by parties.....	87
Figure 5.1	Framework for set of guidelines to technically rationalize the application of the doctrine of frustration.....	98

LIST OF ABBREVIATIONS

Abbreviations	Descriptions
CIDA	Construction Industry Development Authority
COVID-19	Novel Coronavirus disease 2019
FCA	Frustrated contracts Act
FIDIC	Fédération Internationale Des Ingénieurs-Conseils
LNMJ	Law Net Ministry of justice
SBD	Standard Bidding Document
UK	United Kingdom

LIST OF APPENDICES

Appendix 1: Interview Guideline.....	117
Appendix 2: Sample Interview Transcript	129