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MAKING LEASE PAYMENTS A *LESSOR* PROBLEM

Devin C. Berrigan[*]

The frustration of purpose doctrine is a contracts defense that has garnered increased interest since the COVID-19 pandemic's initial wave. To manage this public health emergency, many governments have issued orders restricting the operation of businesses. These orders, while necessary, put commercial lessees in a bind once it came time to pay rent because these restrictions drastically cut their profits. Other frustrating events, like war and natural disasters, cause the same problems, yet the current frustration of purpose doctrine is too narrow to be practically helpful to these lessees. This Note examines the English and Canadian frustration doctrines and draws on both in proposing two alterations to the American doctrine. These alterations would remedy the doctrine's ineffectiveness, brought to light recently by the COVID-19 pandemic, and would attempt to ensure that the risk now falls on the party better equipped to bear it—the lessor.

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I. INTRODUCTION

"Man plans, God laughs."[1] A scheduled flight home is delayed for months because of a pandemic.[2] A vacation rental's view is obscured by smoke from nearby wildfires.[3] A business's permits will not be issued because of a neighbor's refusal to comply with the municipal code.[4] A restaurant can no longer operate for in-person dining because of local, state, or federal orders.[5] All of these are examples of events that might frustrate a contract. It might not seem fair to enforce a contract in these instances because an event outside the control of either contracting party has frustrated the contract's purpose.

The frustration of purpose doctrine is an oft-discussed yet rarely implemented legal doctrine that has garnered increased interest since the United States first felt the COVID-19 pandemic's effects.[6] The inevitability of pandemics, wars, and natural disasters means that these acts of God will continue to frustrate leases into the foreseeable future. In this light, the frustration of purpose doctrine should be reevaluated. This certainty that frustrating events will occur means that a more just solution should be implemented to aid lessees who are stuck in leases and required to pay rents for spaces they no longer need.

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[1] This Yiddish proverb about the unpredictability of life describes the reason for the frustration of purpose doctrine. *See* Saul Levine, *Man Plans, and God Laughs*, PSYCH. TODAY, (Feb. 26, 2016) https://www.psychologytoday.com/us/blog/our-emotional-footprint/201602/man-plans-and-god-laughs (explaining the meaning of the Yiddish phrase).

[2] *See, e.g.*, Sohi Vacations Ltd. v. Waraich, 2021 CanLII 218 (Can. B.C. C.R.T.) (considering a frustration of purpose claim for a pandemic-related flight delay).

[3] *See, e.g.*, Gingras v. Smith-Friesen, 2018 CanLII 826 (Can. B.C. C.R.T.) (analyzing a frustration of purpose claim for a vacation rental cancellation due to smoke from wildfires obscuring the rental's view).

[4] *See, e.g.*, Garner v. Ellingson, 501 P.2d 22, 22–23 (Ariz. Ct. App. 1972) (reviewing a frustration of purpose claim based upon the lessor's failure to fix their nearby property, causing lessees to be denied municipal permits).

[5] *See, e.g.*, AGW Sono Partners, LLC v. Downtown Soho, LLC, 273 A.3d 186, 190 (Conn. 2022) (considering a lessor's claim for a restaurant's failure to pay rent due to a statewide order closing bars and restaurants).

[6] *See* Scott Luskin & Sarah Odia, *Frustration of Purpose and Impracticability of Contracts Due to COVID-19*, JD SUPRA (Apr. 3, 2020), https://www.jdsupra.com/legalnews/frustration-of-purpose-and-25271/ ("For those contracts that do not address unforeseen circumstances, the rarely invoked doctrines of impracticability of performance and frustration of purpose may be relevant during this unprecedented time.").

This Note argues that the frustration of purpose doctrine should be expanded to allow for easier lease payment forgiveness in commercial settings by softening the substantial frustration requirement and clarifying the foreseeability requirement. Part II examines the frustration of purpose doctrine's origin, policy reasons for its implementation, and its current use in the United States. This Part also compares the frustration of purpose doctrines in the United States, the United Kingdom, and Canada. Part III identifies a problem with the doctrine—that it is too narrow to be practically useful—and proposes alterations to it.

II. BACKGROUND

The frustration of purpose doctrine excuses performance when a party's purpose for entering into the contract has been totally, or near totally, destroyed.[7] Generally, "[t]he contract defense of frustration requires that: (1) the [party's] principal purpose[] in making the contract is frustrated; (2) without that party's fault; (3) 'by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made.'"[8] In the foundational case *Krell v. Henry*,[9] which created the frustration of purpose doctrine, the court held that a promisor was excused from his obligation to pay for the room he had rented when the coronation procession he had planned to view from the room was postponed.[10] The court in *Krell* reasoned that because the condition that the coronation would occur was "contemplat[ed by] both parties" and was "the foundation of the contract," its nonoccurrence was sufficient to frustrate the contract and suspend performance.[11]

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[7] *See* Lloyd v. Murphy, 153 P.2d 47, 50 (Cal. 1944) (stating that performance might be excused if an "unanticipated circumstance, the risk of which should not be fairly thrown on the promisor, has made performance vitally different from what was reasonably expected"); *see also* RESTATEMENT (SECOND) OF CONTRACTS. § 265 cmt. a (AM. L. INST. 1981) (noting that one's performance may be made worthless to the other party because of changed circumstances).

[8] Chi., Milwaukee, St. Paul & Pac. R.R. Co. v. Chi. & Nw. Transp. Co., 263 N.W.2d 189, 194 (Wis. 1978) (quoting Wm. Beaudoin & Sons, Inc. v. County of Milwaukee, 217 N.W.2d 373, 377 (Wis. 1974)).

[9] [1903] 2 KB 740, https://www.iclr.co.uk/document/1890226976/casereport_49530/html.

[10] *See id.* at 750–52 (holding that defendant was excused from the remainder of his payment because King Edward VII's coronation was postponed).

[11] *Id.* at 754.

Further, the court noted that the agreement was a license to use the room rather than a demise of the property.[12] The entire nation assumed that the coronation was inevitable,[13] and the event's postponement was so unforeseen that it caused unrest throughout the United Kingdom.[14]

The frustration of purpose doctrine must be distinguished from the related, and often confused, doctrines of impossibility and impracticability. These other doctrines excuse a party's obligations only if they have become incapable or nearly incapable of being performed.[15] Because performance is still possible in cases of frustration,[16] the doctrine generally serves the interests of parties "[who] are to pay money in return for [their] performances," while the doctrine of impracticability generally benefits parties who have agreed to provide a good or service.[17] For example, defendant owners who provided the use of their music hall were excused from performance under the impossibility doctrine when the music hall burned down because they were no longer able to provide that service.[18] But when a contractor no longer needed the concrete medians it had requested from its subcontractor because its state

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[12] *See id.* at 750 ("It was not a demise of the rooms, or even an agreement to let and take the rooms. It is a licence to use rooms for a particular purpose and none other.").

[13] *See* Ben Roberts, *The Complex Holiday Calendar of 1902: Responses to the Coronation of Edward VII and the Growth of Edwardian Event Fatigue*, 28 TWENTIETH CENTURY BRIT. HIST. 489, 489–90 (2017) (noting that Edward VII's coronation was the "only coronation of a British monarch to be postponed due to illness"). Not only was the postponement a surprise, but it was also due to Edward VII's appendicitis diagnosis that was so severe that it required emergency surgery. *See id.* at 500 (explaining the need for emergency surgery due to the rapid deterioration of Edward VII's condition).

[14] *See id.* at 502 (describing how the postponement left the "Stock Exchange in turmoil" and disrupted daily life in the United Kingdom).

[15] *See* 14 CORBIN ON CONTRACTS § 74.1, LEXIS (database updated 2022) (noting that the impossibility doctrine originally required absolute impossibility but evolved to an impracticability standard that required "an unforeseen, severe hardship" instead).

[16] *See* 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 650 (3d ed. 2004) (explaining that performance in *Krell* was still possible but that it would be without benefit to the defendant).

[17] *Id.*

[18] *See* Taylor v. Caldwell (1863) 122 Eng. Rep. 309; 3 B. & S. 826, http://www.bailii.org/ew/cases/EWHC/QB/1863/J1.html (holding that because the music hall was destroyed without fault of either party, both parties were excused from performance).

department customer changed its order, it was excused from paying for lost profits under the frustration doctrine.[19]

Despite the distinct requirements of these doctrines, their application varies by court. In *Lloyd v. Murphy*,[20] the leading American case on frustration of purpose, the defendant car dealer failed to carry the heavy burden of proving that the value of his lease with the plaintiffs had been destroyed when the federal government limited the sale of automobiles as part of wartime rationing.[21] Unlike in *Krell*, in which the defendant licensee's entire purpose for renting the room was destroyed and he would have gotten nothing that he bargained for had he performed, the defendant car dealer in *Lloyd* was still able to conduct its business, albeit at a smaller and less profitable scale.[22] In addition to the requirement that the purpose of the contract be frustrated, the defendant will not be able to recover if they contributed to the frustration.[23] Finally, foreseeability of the frustrating event is not sufficient to bar recovery; it is, however, "a factor to consider."[24]

A. PUBLIC POLICY CONSIDERATIONS

1. Allocation of Risk. As the court in *Lloyd* explained, the decision of whether to allow the frustration defense rests largely on public

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[19] *See* Chase Precast Corp. v. John J. Paonessa Co., 566 N.E.2d 603, 604–05 (Mass. 1991) (holding that the defendant was not responsible for the state department's decision not to purchase the medians and that the risk had not been allocated to the defendant in the contract).

[20] 153 P.2d 47 (Cal. 1944).

[21] *See id.* at 51 ("Defendant may use the premises for the purpose for which they were leased. New automobiles and gasoline continue to be sold.").

[22] *See id.* (emphasizing that the purpose of the contract has not been frustrated if the business conducted has not been made impossible or illegal).

[23] *See* Chi., Milwaukee, St. Paul & Pac. R.R. Co. v. Chi. & Nw. Transp. Co., 263 N.W.2d 189, 194 (1978) (stressing that the defendant railroad operator contributed to its own frustration because by voluntarily joining Amtrak, it was no longer required to provide passenger rail service, which was the principal reason it had rented the depot space).

[24] *Id.* at 195. Although the defendant could not have reasonably anticipated that the federal government would relieve railroads of its duty to provide passenger service, it had been enduring steady passenger reductions for years and reasonably could have predicted further reductions. *Id.*; *see also Lloyd*, 153 P.2d at 51 (noting that the law authorizing the federal government's order to discontinue the sale of new automobiles had been in effect for over a year and that the entire industry was in the midst of a transition to aid the military as it geared up for World War II).

policy.[25] Often, contracts will allocate the risks from acts of God using a force majeure clause.[26] If the parties do not do so, however, courts may have to determine to which party the contract implicitly assigns the risk.[27] In determining who bears the risk of a contract, courts often consider who is in a better position to mitigate the loss.[28] For example, in *Krell*, because the plaintiff lessor would be able to relet his room for the new coronation date, the defendant was excused from the remainder of the payment.[29] If the contract allocates the risk already, however, courts are less willing to excuse performance.[30] This is true even if the risk has not been explicitly allocated, but instead is so obvious as to be implicitly allocated.[31]

2. Implied Conditions. Excusal of performance is also justified by the idea that the nonoccurrence of an implied condition means that the contract has lost the higher value or special qualifications that

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[25] *See Lloyd*, 153 P.2d at 50 ("The question in cases involving frustration is whether the equities of the case, considered in the light of sound public policy, require placing the risk of a disruption or complete destruction of the contract equilibrium on defendant or plaintiff . . . .").

[26] *See* N. Ind. Pub. Serv. Co. v. Carbon Cnty. Coal Co., 799 F.2d 265, 274 (7th Cir. 1986) ("The contract permits NIPSCO to stop taking delivery of coal for any cause beyond [its] reasonable control . . . including but not limited to . . . orders or acts of civil . . . authority . . . which wholly or partly prevent . . . the utilizing . . . of the coal. This is what is known as a *force majeure* clause." (internal quotation marks omitted)).

[27] *See id.* at 277 (recounting the central question of *Krell v. Henry*).

[28] *See id.* at 278 ("All are doctrines for shifting risk to the party better able to bear it."). The court uses the analogy of a grain grower and grain elevator to explain which party should bear the loss. *Id.* In the instance that a grain grower's crop, which was promised to the grain elevator, is destroyed, discharge is normally allowed because the grower was incentivized to avoid the destruction of their crops and the grain elevator can better absorb the risk because it buys from a variety of growers. *Id.*

[29] *Id.* at 277.

[30] *See id.* at 278 (stating that since the frustration doctrine is meant to shift the risk according to the presumed intentions of the parties, it is not to be used in cases when "the contract explicitly assigns a particular risk to one party or the other"); *see, e.g.*, *In re* CEC Ent., Inc., 625 B.R. 344, 353 (Bankr. S.D. Tex. 2020) (holding that a lessee was not excused from rent payments when the force majeure clause in the contract specifically required the continuation of rent payments during acts of God).

[31] *See* Lloyd v. Murphy, 153 P.2d 47, 51 (Cal. 1944) (emphasizing that although the contract lacked a force majeure clause to deal with the impending war, the war's occurrence was so imminent as to raise the inference that defendant assumed the risk); *see also* Chi., Milwaukee, St. Paul & Pac. R.R. Co. v. Chi. & Nw. Transp. Co., 263 N.W.2d 189, 195 (1978) (noting that during negotiations for their depot agreement, passenger reductions were contemplated but not contracted for so the frustration defense could not be invoked).

the bargaining parties expected the contract to have.[32] This reason relates to the requirement of substantial frustration because the contract's purpose has been frustrated if the consideration being paid has lost its value. The lost value or qualifications must also have been the principal purpose for making the contract.[33] Generally, courts will interpret the party's purpose for a contract broadly, which creates a high bar for parties to meet when trying to get their performance excused.[34]

B. FRUSTRATION AND LEASES

While this doctrine has been used sparingly to excuse performance, it is even more rarely used to excuse a lessee from their rent obligations under a lease.[35] In fact, the leading American

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[32] *See N. Ind. Pub. Serv. Co.*, 795 F.2d at 277 ("Rarely is it impracticable or impossible for the payor to pay; but if something has happened to make the performance for which he would be paying worthless to him, an excuse for not paying, analogous to impracticability or impossibility, may be proper."); *see also* Krell v. Henry [1903] 2 KB 740, 750–51, https://www.iclr.co.uk/document/1890226976/casereport_49530/html (distinguishing its holding from a hypothetical of a cab hired, without special qualifications, to take someone to a derby, because any cab would have served the purpose just as well). The concept of the implied condition was explained earlier in the context of the impossibility doctrine. *See* Taylor v. Caldwell (1863) 122 Eng. Rep. 309, 312; 3 B. & S. 826 http://www.bailii.org/ew/cases/EWHC/QB/1863/J1.html ("[T]he parties must . . . have known that [the contract] could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation.").

[33] *See* RESTATEMENT (SECOND) OF CONTRACTS. § 265 cmt. a (AM. L. INST. 1981) ("[T]he purpose that is frustrated must have been a principal purpose of that party in making the contract . . . . The object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense.").

[34] *See* Swift Canadian Co. v. Banet, 224 F.2d 36, 38 (3d Cir. 1955) (holding that a buyer of animal pelts was not excused from payment because the seller had shipped the pelts according to the contract, even though unforeseen circumstances prevented their entry into the United States); *see also* 2 FARNSWORTH, *supra* note 16, at 654 (describing the *Swift Canadian* case in terms of frustration of purpose); Brenner v. Little Red Sch. House, Ltd., 274 S.E.2d 206, 209–10 (N.C. 1981) (holding that the plaintiff's purpose in contracting with defendant for a spot in their school was not just for his child to attend, but more broadly so that the school would hold a space open for the child and prepare to teach the child).

[35] *See Lloyd*, 153 P.2d at 49 (noting that, especially in the English courts, where the doctrine developed, the frustration of purpose doctrine has not been applied to leases and that many American courts have not allowed the defense); *see also Krell*, 2 KB at 750 (explaining that the agreement in question was not to lease the rooms, but a license for the use for a particular purpose).

case on frustration involves a lessee who was made to pay their rent.[36] A leasehold is a conveyance, not just a contract, so the bar to demonstrate frustration has often been held higher.[37] A transfer of a land estate transfers additional rights to the grantee than what a party would receive in a contract.[38] Courts tend to require more out of lessees because they do not want to excuse payments if a business is merely less profitable than expected, consequently increasing the incentive to litigate.[39] Although the standard is high, one court has held that incidental uses still available to a lessee are not enough to block a frustration defense.[40] Although uncommon for courts to excuse lessees,[41] one court did so when the lessor refused to make repairs to adjacent premises that the city required for the lessee to get their business permit.[42]

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[36] *See Lloyd,* 153 P.2d at 48 ("[P]laintiffs leased to defendant for a five-year term . . . .").

[37] *See id.* at 49–50 (describing the few times frustration of purpose has excused a tenant); *see also* 2 FARNSWORTH, *supra* note 16, at 658 ("Although most of the other lease cases have also recognized that the doctrine of frustration applies to leases, lessees have had little in bringing themselves within the doctrine's requirements.").

[38] *See* Wood v. Bartolino, 146 P.2d 883, 886 (N.M. 1944) ("A contract may be frustrated, but a demise is more than a contract; it is a conveyance of an estate in land . . . . It transfers proprietary as well as personal rights.").

[39] *See Lloyd,* 153 P.2d at 52 ("Litigation would be encouraged by the repudiation of leases when lessees found their businesses less profitable . . . ."); *see also* Mel Frank Tool & Supply, Inc. v. Di-Chem Co., 580 N.W.2d 802, 806–09 (Iowa 1998) (holding that a chemical company had failed to carry the burden of proving its affirmative defense when it did not show evidence that their lease had lost all value when regulations changed preventing them from storing only some of their inventory at the leased premises); Essex Lincoln Garage, Inc. v. City of Boston, 175 N.E.2d 466, 467 (Mass. 1961) ("[A] contracting party cannot be excused [under the doctrine of frustration] where the only 'frustration' consists in the fact that known risks assumed by [the contracting party] have turned out to be to his disadvantage" (quoting Baetjer v. New England Alcohol Co., 66 N.E.2d 798, 803–04 (Mass. 1946) (second alteration in original))).

[40] *See* 20th Century Lites, Inc. v. Goodman, 149 P.2d 88, 92 (Cal. App. Dep't Super. Ct. 1944) (holding that frustration may be invoked even if "incidental uses" remain for the lease).

[41] *See* 2 FARNSWORTH, *supra* note 16, at 658 (detailing why excusals have been so rare).

[42] *See* Garner v. Ellingson, 501 P.2d 22, 24 (Ariz. App. 1972) (holding that the lessee was excused from obligations under their one-year lease when the lessor, who also owned an adjacent building, refused to make repairs that the city required for the lessee to obtain a permit for their movie theater and bookstore they had planned to open).

C. COVID-19 AND LEASES

The COVID-19 pandemic has brought an onslaught of cases involving lessees asserting the frustration of purpose defense.[43] By and large, these challenges have been unsuccessful for a variety of reasons. Allocation of risk within the lease has prevented several lessees from asserting the defense,[44] as has failure to demonstrate substantial frustration[45] and foreseeability.[46]

CEC Entertainment, better known as Chuck E. Cheese, unsuccessfully argued that the COVID-19 pandemic and related government restrictions on its operation were frustrating events because the force majeure clauses in its lease agreements obligated

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[43] *See, e.g.*, *In re* CEC Ent., Inc., 625 B.R. 344, 361 (Bankr. S.D. Tex. 2020) (holding that the frustration doctrine did not relieve CEC of their lease obligations because force majeure clauses in the contracts superseded the defense); Victoria's Secret Stores, LLC v. Herald Sq. Owner, LLC, No. 651833/2020, 2021 WL 69146, at *1 (N.Y. Sup. Ct. Jan. 7, 2021) (holding that the parties did allocate the risk of the lessee not being able to operate its business, even though the specific reason for the government law requiring shutdown was not enumerated in the lease); A/R Retail, LLC v. Hugo Boss Retail, Inc., 149 N.Y.S.3d 808, 824 (N.Y. Sup. Ct. 2021) ("[T]he adverse economic effects of the pandemic [did not] rise to the level of triggering an extra-contractual common law right to rescind a 13-year lease."); Gap, Inc. v. Ponte Gadea N.Y., LLC, 524 F. Supp. 3d 224, 235 (S.D.N.Y 2021) (holding that the pandemic did not frustrate the store's purpose of operating a retail business); 35 E. 75th St. Corp. v. Christian Louboutin, LLC, No. 154883/2020, 2020 WL 7315470, at *4 (N.Y. Sup. Ct. Dec. 9, 2020) (holding that decreased profitability was insufficient to warrant the frustration doctrine's application); Int'l Plaza Assocs. L.P. v. Amorepacific US, Inc., No. 155158/2020, 2020 WL 7416598, at *2 (N.Y. Sup. Ct. Dec. 14, 2020) (denying lessor's motion for summary judgment as premature to allow for further discovery before a determination of foreseeability could be made).

[44] *See CEC Ent., Inc.*, 625 B.R. at 357–58 (holding that the operator of Chuck E. Cheese locations was prevented from asserting a frustration defense because a force majeure provision allocated risk to operator); *Victoria's Secret Stores*, 2021 WL 69146, at *1 (granting the landlord's motion for summary judgment against lessee because the risk of not being able to operate their business was expressly allocated to lessee in the contract).

[45] *See Gap, Inc.*, 524 F. Supp. 3d at 235 ("Gap has not shown that the purpose of the Lease . . . was 'so completely' frustrated by the COVID-19 pandemic that 'the transaction [makes] little sense.'" (quoting Crown IT Servs., Inc. v. Koval Olsen, 728 N.Y.S.2d 708, 711 (N.Y. App. Div. 2004))); *35 E. 75th St. Corp.*, 2020 WL 7315470, at *4 (explaining that a loss in profitability is insufficient to show substantial frustration).

[46] *See Gap, Inc.*, 524 F. Supp. 3d at 234 ("[T]he possibility of [a blanket prohibition on non-essential business] was referenced in the Lease itself, defeating any claim that the possibility was 'wholly unforeseeable.'"); *A/R Retail*, 149 N.Y.S.3d at 826 (holding that lessee was not excused from rent payments because the risk of government restrictions was addressed in the contract).

CEC to pay rent despite government regulations.[47] Gap, a popular clothing store chain, also unsuccessfully asserted a frustration defense.[48] The court noted that, despite Gap's claims "that the pandemic . . . frustrated . . . [its ability] to operate a retail business," the company failed to demonstrate this claim because it was able to operate for curbside pickup and to open some Manhattan locations for in-person shopping, meaning its purpose was not substantially frustrated.[49] Hugo Boss, the lessee of a retail store in a luxury shopping center owned by the plaintiff, was another business that failed to successfully assert a frustration of purpose defense during the pandemic.[50] In that case, the court reasoned that the presence of force majeure provisions requiring rent payments despite government orders adequately demonstrated that the restrictions the business was suffering under were foreseeable.[51]

D. FRUSTRATION IN OTHER COUNTRIES

Before proposing a solution, this Note compares how the frustration of purpose defense has evolved in two other countries with common law systems, the United Kingdom and Canada. This comparison tracks the origins and evolution of the defense in these countries to glean helpful modifications for the American version.

1. United Kingdom. The English test for frustration of purpose is quite similar to the American test.[52] Central tenets to the doctrine

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[47] *See CEC Ent., Inc.*, 625 B.R. at 359–61 (enforcing CEC's North Carolina and Washington leases because the force majeure clauses superseded frustration doctrine).

[48] *See Gap, Inc.*, 524 F. Supp. 3d at 235 ("While undeniably unfortunate, the COVID-19 pandemic has not amounted to a frustration of the Lease's purpose of Gap operating a retail business at the Premises.").

[49] *Id.*

[50] *See A/R Retail*, 149 N.Y.S.3d at 826 ("[W]hile the pandemic undeniably has hurt Tenant's business, the narrow doctrine of frustration of purpose is inapplicable as a matter of law.").

[51] *See id.* ("[S]uch a provision suffices to demonstrate that the government closures and capacity restrictions that interfered with Tenant's use of the Premises in this case were not 'wholly unforeseeable.'" (quoting *Gap, Inc.*, 524 F. Supp. 3d at 234)).

[52] *See* Davis Contractors Ltd. v. Fareham Urb. Dist. Council [1956] AC 696, 729 https://www.iclr.co.uk/document/1951000082/casereport_24665/html ("[F]rustration 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 performance is called for would render it a thing radically different from that which was undertaken by the contract.").

include that the frustrating event cannot have been caused by the party seeking relief, that the doctrine should be narrowly applied, and that its purpose is to achieve an equitable result.[53] English courts, however, did not recognize the defense for leases until well into the twentieth century,[54] explaining previously that the doctrine was inapplicable to "a demise of unfurnished premises for a term of years."[55] When an English court eventually extended the doctrine to leases, it reiterated that the doctrine should be applied "hardly ever."[56] The court further explained that the frustration doctrine is a narrow exception to the common law rule that "the performance of absolute promises is not excused by supervening impossibility of performance,"[57] which was established in *Paradine v. Jane*.[58] The holding in *Paradine*,[59] while centuries old, has remained important to contract law because it demonstrates the principle that parties are responsible for bargaining for their best interest.[60]

One aspect of the English version of the defense that differs from the American version is that in English courts, a finding of frustration immediately discharges both parties of any obligations

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[53] *See* Canary Wharf v. Eur. Meds. Agency [2019] EWHC 335 (Ch) ¶ 24 https://www.iclr.co.uk/document/2019000444/transcriptXml_2019000444_2019031210462673/html (restating five propositions identified by Lord Chief Justice Tom Bingham as to the purpose of the English doctrine).

[54] *See* Nat'l Carriers Ltd. v. Panalpina (N.) Ltd. [1981] 1 AC 675 (HL) 717, https://www.iclr.co.uk/document/1981003098/casereport_18010/html ("In principle the doctrine should be equally capable of universal application in all contractual arrangements.").

[55] Swift v. MacBean [1942] 1 KB 375, 377, https://www.iclr.co.uk/document/1890626705/casereport_74612/html. The court in *Swift* held that the frustration doctrine was likewise inapplicable to a lease of furnished premises. *See id.* at 377–78 ("There is no distinction for this purpose between the letting of furnished and unfurnished premises.").

[56] *Nat'l Carriers Ltd.* [1981] 1 AC at 692.

[57] *Id.* at 686.

[58] *See* [1647] 4 (KB), http://www.bailii.org/ew/cases/EWHC/KB/1647/J5.html (holding that the defendant lessee was required to pay rent to the plaintiff lessor even though he was expelled from the property for three years during the English Civil War because the lessee created a duty for himself in the contract and could have allocated the risks differently).

[59] *See id.* ("[W]here the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him.").

[60] *See* 14 CORBIN ON CONTRACTS, *supra* note 15, § 74.1 (explaining that the theory behind the strict common law rule *pacta sunt servanda* was that "the breaching party should protect its interests by negotiating a suitable provision in the contract that addressed the possibility of severe hardship").

of further performance.[61] The English test also requires that the frustrating event make performance under the contract "radically different" from what was supposed by the parties.[62] Thus, the English test requires courts to evaluate the claim "first quantitatively . . . then qualitatively."[63] As in the American system, force majeure clauses in the English system function to limit the frustration defense by providing evidence that the risks of a supervening event have been assumed by one of the contracting parties.[64]

English courts, like American courts, choose to limit the application of the doctrine on public policy grounds. First, the courts do not want to excuse a party from their contract simply because they have bargained poorly.[65] Second, because the finding of

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[61] *See Nat'l Carriers Ltd.* [1981] 1 AC at 701 ("[T]he doctrine has been developed by the law as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances."). Rescission of the contract is the general remedy under the American doctrine too, but reformation of the terms of the contract is also an available remedy. *In re* CEC Ent., Inc., 625 B.R. 344, 357 (Bankr. S.D. Tex. 2020); *see* Spencer v. Slavin, No. 09 MISC 397931(GHP), 2011 WL 285147, at *8 (Mass. Land Ct. Jan. 18, 2011) (explaining when an instrument can be reformed because of frustration); Printing Indus. Ass'n of N. Ohio, Inc. v. Graphic Arts Int'l Union, Loc. 546, 628 F. Supp. 1103, 1110 (N.D. Ohio 1985) (recognizing that reformation is an available remedy for frustration of purpose).

[62] *See* Canary Wharf v. Eur. Meds. Agency [2019] EWHC 335 (Ch) ¶ 27, https://www.iclr.co.uk/document/2019000444/transcriptXml_2019000444_2019031210462673/html (arguing that a radical change in the nature of the contract is the best formulation of the frustration doctrine). One court asserted that because of the all-or-nothing results of an application of the frustration doctrine against one party or the other, the frustration doctrine does not always result in justice, although achieving justice is its purpose. *See* Edwinton Com. Corp. v. The Sea Angel [2007] EWCA (Civ) 547 ¶ 112, http://www.bailii.org/ew/cases/EWCA/Civ/2007/547.html ("Ultimately the application of the test cannot safely be performed without the consequences of the decision, one way or the other, being measured against the demands of justice.").

[63] Bank of N.Y. Mellon (Int'l) Ltd. v. Cine-UK Ltd. [2021] EWHC 1013 (QB) ¶ 209, https://www.iclr.co.uk/ (search "[2021] EWHC 1013 (QB)"). The court first must evaluate quantitatively the claim in terms of the time left on the lease after the supervening event is likely to subside. *Id.* Then, the court must qualitatively evaluate whether the performance has become radically different. *Id.*

[64] *See* HUGH BEALE, CHITTY ON CONTRACTS § 26-061 (34th ed. 2021) ("A force majeure clause may be relied upon as evidence that the parties have made express provision for the event which has occurred so that the doctrine of frustration is thereby excluded.").

[65] *See* Pioneer Shipping Ltd. v. BTP Tioxide Ltd. [1982] AC 724 (HL) 752, https://www.iclr.co.uk/document/1971003471/casereport_37805/html ("[T]he doctrine is not

frustration immediately discharges the contractual duties, it is a strong remedy that should be granted carefully.[66]

Although the common law defense of frustration still exists in the United Kingdom, most frustrated contracts under English law are covered by the Law Reform (Frustrated Contracts) Act 1943.[67] The law does not change the standard used to determine frustration, but rather alters the consequences of a frustrated contract.[68] Unlike the common law, which requires automatic discharge of the contract, the Act allows courts to sever the contract in certain circumstances to allow for some continued performance.[69] The Act also allows for the recovery of money already paid, which the common law did not.[70] And, slightly different than the purpose of the common law doctrine,[71] the purpose of the Act is to prevent the "unjust enrichment of either party to the contract at the other's expense."[72]

During the COVID-19 pandemic, there have been few instances of companies asserting the frustration defense in the United Kingdom.[73] A recent case discussed the use of a proportionality test when defendant lessees asserted a "temporary frustration defense."[74] In circumstances when the frustrating event will not last for the entire length of the contract, it is possible to successfully

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lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains.").

[66] *See id.* at 728–29 ("Because frustration has such draconian consequences for the parties, the question whether there has been frustration should be one [for] the court.").

[67] *See* Law Reform (Frustrated Contracts) Act 1943, 6 & 7 Geo. 6 c. 40, § 2 (listing certain contracts not included under the Act, including charterparties and insurance contracts).

[68] *See id.* § 1 (describing the adjusted rights and liabilities of parties to the contracts under the Act, but not defining a standard for frustration).

[69] *See id.* § 2 ("Where it appears to the court that a part of any contract to which this Act applies can properly be severed from the remainder of the contract . . . the court shall treat that part of the contract as if it were a separate contract.").

[70] *See id.* § 1 (stating that money paid under the contract may be recovered as well as money for a "valuable benefit" that had been conferred).

[71] *See supra* notes 27–33 and accompanying text.

[72] BP Expl. Co. Ltd. v. Hunt [1979] 1 WLR 783 (QB) 799. https://www.iclr.co.uk/document/1971000266/casereport_46483/html.

[73] Peter de Verneuil Smith, Adam Kramer & William Day, *COVID-19: Force Majeure, Frustration and Illegality in English Law: A Detailed Guide*, THOMSON REUTERS (Apr. 20, 2021), https://uk.practicallaw.thomsonreuters.com/w-024-6685.

[74] *See* Bank of N.Y. Mellon (Int'l) Ltd. v. Cine-UK Ltd. [2021] EWHC 1013 (QB) ¶ 194, https://www.iclr.co.uk (search "[2021] EWHC 1013 (QB)") (highlighting the idea of "temporary frustration" caused by the COVID-19 pandemic advanced by the defendant in response to demands for rent payments).

assert a frustration defense depending on the ratio of the length of frustration to the length of time remaining in the contract.[75] An important note, especially in the context of a pandemic, is that the parties do not have to wait and see how long the frustrating event lasts; rather, the contract can be discharged if a reasonable person could find that the event would lead to substantial frustration.[76]

Just as in the United States, lessees in the United Kingdom will likely be unsuccessful in challenging their leases using the complete frustration defense based on the few cases that have thus far been decided.[77] One court wrote that the COVID-19 pandemic and related government regulations "would, or at least could, qualify as a supervening event,"[78] but that the ordered closures could not be expected to last more than eighteen months so the frustration defense was not successful.[79] This court did note, however, that a decision may come out differently when a lease ends during an expected lock-down as opposed to after one.[80] Another court, ruling on a case involving nonpayment of rent by a lessee following multiple government-imposed lockdowns, asserted that previous frustration cases do not support the argument that rent should be

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[75] *See id.* ¶ 196 (noting that discharge may be allowed even if a possibility of performance remains). This determination is known as the "proportionality test." *Id.*

[76] *See id.* ("Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by the contract or not. They must be entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds." (citation omitted)).

[77] *See, e.g.*, Salam Air SAOC v. Latam Airlines Grp. [2020] EWHC 2414 (Comm) ¶ 56, http://www.bailii.org/ew/cases/EWHC/Comm/2020/2414.html (finding a lessee's argument that their leases had been frustrated by the Covid-19 pandemic weak); *Bank of N.Y. Mellon*, EWHC 1013 (QB) ¶ 247 (granting summary judgment to landlords in their claims for overdue rent payments which accrued during the COVID-19 pandemic).

[78] *Bank of N.Y. Mellon*, EWHC 1013 (QB) ¶ 209.

[79] *See id.* (ruling for the landlords on summary judgment because of an expectation that the leases had years remaining for performance once the frustrating event subsided). In *Salam Air*, however, the court does not explicitly address whether the pandemic was a supervening event, but rather focuses on the airline's assumption of the risk. *See Salam Air*, EWHC 2414 (Comm) ¶ 54 ("The risk that SalamAir might be unable to undertake passenger flights from Muscat or elsewhere in Oman for some significant period, or that there might be a dramatic and long-lasting fall in the demand for air travel more generally, were risks inherent in the commercial operation of the Aircraft and assumed by SalamAir under the Aircraft Leases.").

[80] *See Bank of N.Y. Mellon*, EWHC 1013 (QB) ¶ 209 ("I am not considering a case where the contractual Lease term . . . ended during a or an expected lockdown. That could be argued to be a different situation.").

excused if the lease can no longer be used for its intended purpose.[81] This court further held that an unjust enrichment argument should not be used to support a frustration claim when the contract has not been discharged.[82]

2. Canada. The Canadian courts adopted their frustration of purpose test from a leading British case, *Davis Contractors Ltd. v. Fareham Urban District Council*,[83] in which a contractor unsuccessfully claimed that their contract to build houses was frustrated because of a labor shortage and that they should have been paid based on quantum meruit[84] instead of the original contract price.[85] Like the English courts, Canadian courts have rejected the "implied term" theory of the frustration doctrine,[86] and instead have adopted the "radical change in the obligation" approach.[87] The Canadian doctrine has a familiar strictness in its application due to the absolute nature of the remedy[88] and its nature as a "special exception which justice demands."[89] Like in both the American and English tests, foreseeability of a frustrating event does not automatically preclude the doctrine's application in

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[81] *See* London Trocadero (2015) LLP v Picturehouse Cinemas Ltd. [2021] EWHC 2591 (Ch) ¶ 141, http://www.bailii.org/ew/cases/EWHC/Ch/2021/2591.html ("[T]here is a longstanding principle that an inability of a tenant to use premises for the purposes intended at the time the lease was granted will not provide a defence to a claim for the payment of rent."). The court argued that allowing a defense for failure of consideration would extend the frustration doctrine to create temporary or partial frustration, which is not recognized in the law. *Id.* ¶ 168.

[82] *See id.* ¶¶ 169–70 (arguing that to allow a failure of consideration defense to a contract still in existence would not be "right as a matter of principle" and could lead to injustice because of the arbitrary allocation of loss that would occur). This is, however, assuming that the contract is still in existence. *Id.*

[83] [1956] AC 696, 729–30, https://www.iclr.co.uk/document/1951000082/casereport_24665/html.

[84] *Quantum Meruit*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship.").

[85] *Davis Contractors Ltd.*, AC 696 at 728–30.

[86] Naylor Grp. Inc. v. Ellis-Don Constr. Ltd., 2001 SCC 58, para. 54 (Can.) ("The implied term theory is now largely rejected because of its reliance on fiction and imputation.").

[87] *Id.* para. 56.

[88] *See* Indus. Overload Ltd. v. McWatters, 1972 CarswellSask 32, para. 6 (Can. Sask. C.Q.B.) (WL) ("[T]he discharge of a contract on the ground of frustration occurs automatically upon the happening of the frustrating event . . . .").

[89] *Id.* para. 6 (citing Hirji Mulji v. Cheong Yue SS. Co. [1926] AC 917 (PC) 927 (appeal taken from Can.)).

Canada.[90] All versions of the doctrine also "assume[] that the frustrating event was not caused by the fault of either party to the contract."[91] The courts also recognize several types of common frustrating events, including subsequent changes in the law or supervening illegality.[92] The doctrine may also apply in "situations where the contract may be both physically and legally capable of being performed but would be totally different from what the parties intended were it performed after the change that has occurred."[93] The policy goals underlying the defense in Canada are similar to those in the American doctrine, including preventing injustice and encouraging parties to allocate the risk.[94]

All of Canada's thirteen provinces and territories, except Nova Scotia and Quebec, have a version of the Frustrated Contracts Act.[95] As an example, Ontario's statute empowers courts, as with the English statute, to order repayment of benefits received,[96]

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[90] *See id.* ("The fact that the parties, at the time of contracting, actually foresaw the possibility of the event or new circumstances in question does not necessarily prevent the doctrine of frustration from applying when that event takes place.").

[91] *Id.* para. 10.

[92] *See* Petrogas Processing Ltd. v. Westcoast Transmission Co., 1988 CarswellAlta 75, para. 49 (Can. Alta. Q.B.) (WL) ("Subsequent changes in the law having a fundamental effect on performance of the contract and supervening illegality are treated as similar but distinct sources of frustration . . . ."), *aff'd*, 1989 CarswellAlta 60 (Can. Alta. Ct. App.).

[93] Cowie v. Great Blue Heron Charity Casino, 2011 ONSC 6357, para. 23 (Can. Ont. S.C.).

[94] *See Petrogas Processing Ltd.*, 1988 CarswellAlta 75, para. 50 (noting that generally courts will not intervene if a contract is frustrated because the parties could have stipulated certain risks in the contract beforehand unless the event was "so unforeseeable or so destructive of the commercial purpose" that enforcing the contract would be unjust (citation omitted)).

[95] *See* Frustrated Contracts Act, R.S.A. 2000, c F-27 (Can. Alta.); Frustrated Contract Act, R.S.B.C. 1996, c 166 (Can. B.C.); The Frustrated Contracts Act, R.S.M. 1987, c F190 (Can. Man.); Frustrated Contracts Act, R.S.N.B. 2011, c 164 (Can. N.B.); Frustrated Contracts Act, R.S.N.L. 1990, c F-26 (Can. Nfld.); Frustrated Contracts Act, R.S.O. 1990, c F.34 (Can. Ont.); Frustrated Contracts Act, R.S.P.E.I. 1988, c F-16 (Can. P.E.I.); The Frustrated Contracts Act, S.S. 1994, c F-22.2 (Can. Sask.); Frustrated Contracts Act, R.S.N.W.T. 1988, c F-12 (Can. N.W.T.); Frustrated Contracts Act, R.S.Y. 2002, c 96 (Can. Yukon); Frustrated Contracts Act, R.S.N.W.T. 1988, c F-12 (Can. Nun.).

[96] Frustrated Contracts Act, R.S.O. 1990, c F.34, s 3 (3) (Can. Ont.) ("[T]he court, if it considers it just to do so having regard to all the circumstances, may allow the other party to recover from the party benefitted the whole or any part of the value of the benefit.").

repayment of sums received,[97] and severance of part of the contract.[98]

Canadian courts acknowledge the application of the frustration doctrine to leases,[99] adopting reasoning from a seminal English case.[100] Canadian courts have also thus far been reluctant to excuse lease payments using COVID-19 as a frustrating event.[101] First, applying the "radically different" approach to the circumstances of the lease in question, courts have found that the nature of the contractual obligations did not change.[102] Additionally, courts have contended that frustration did not apply because the governmental regulations were only temporary frustrating events.[103] Finally, when the contract contains a force majeure clause, one Canadian

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[97] *Id.* s 3 (2) ("[The court] may allow the party to retain or to recover, as the case may be, the whole or any part of the sums paid or payable not exceeding the amount of the expenses.").

[98] *Id.* s 3 (7) ("Where it appears to the court that a part of the contract can be severed . . . the court shall treat that part of the contract as if it were a separate contract that had not been frustrated and shall treat this section as applicable only to the remainder of the contract.").

[99] *See* Cap. Quality Homes Ltd. v. Colwyn Constr. Ltd., 1975 CarswellOnt 852, para. 30 (Can. Ont. C.A.) (WL) ("I adopt the reasoning of Viscount Simon and his conclusion that there is no binding authority precluding the application of the doctrine of frustration to contracts involving the lease of lands."); *see also* 2284064 Ont. Inc. v. Shunock, 2017 CarswellOnt 19417, para. 70 (Can. Ont.) (WL) ("There is no question that the doctrine of frustration applies to contracts affecting land.").

[100] *See* Cricklewood Prop. & Inv. Tr. Ltd. v. Leightons Inv. Tr. Ltd. [1945] AC 221, 228–29 (observing that frustration could occur in leases, although rarely, and that to say otherwise because a lease is the conveyance of an estate rather than a contract would be circular reasoning); *see also* First Real Props. Ltd. v. Biogen Idec Can. Inc., 2013 CarswellOnt 15027, paras. 41–46 (noting that the frustration doctrine applies to leases if the foundation of the contract is destroyed, as held in *Cricklewood*).

[101] *See, e.g.*, Bank of Montreal v. 2643612 Ont. Ltd., 2021 ONSC 4401, para. 18 (holding that the frustration doctrine does not apply to a lessee who owned and operated a restaurant during the COVID-19 pandemic).

[102] *See id.* paras. 18–19 (maintaining that the fundamental purpose of the contract was simply to lend and repay money); *see also* Braebury Dev. Corp. v. Gap (Canada) Inc., 2021 ONSC 6210, para. 43 ("Given that Gap was not required to operate its retail store under the lease, its inability to do so cannot be said to have radically altered the lease's terms . . . . By contrast, if Gap had been required under the lease to operate the premises as a retail store, its inability to do so by a supervening event may have risen to the level of radical change required to engage the doctrine of frustration." (footnote omitted)).

[103] *See Bank of Montreal*, 2021 ONSC 4401, para. 18 ("[T]he pandemic-related measures do not constitute a permanent disruption."); *Braebury Dev. Corp.*, 2021 ONSC 6210, para. 44 ("[T]o frustrate a contract, the supervening event must be a permanent, as opposed to a temporary, setback.").

court found that the clause controlled.[104] Courts generally hold that COVID-19 qualifies as a frustrating event under the Canadian doctrine, yet one court reached the opposite conclusion when a settlement payment agreement was made during the pandemic.[105] Another court noted that frustration did not apply because the mere existence of the COVID-19 pandemic did not alter the nature of the contract in any way.[106]

While the frustration defense has largely failed to excuse lessees and other contracting parties, it did come to the rescue of one Canadian family whose airline tickets were canceled because of the pandemic.[107] The British Columbia Civil Resolutions Tribunal, which has jurisdiction over certain small claims, reasoned that, even though the defendant family could have used a flight voucher to travel back to Canada at a later date, they were justified in taking a rescue flight because they had already been stranded for over two months and had had three return flights canceled.[108] The Tribunal also applied the frustration doctrine and ordered the refund of dance competition fees to the parents from their daughters' dance academy when their 2020 competition was canceled.[109] The nature of the Tribunal gives tribunal members great latitude to hear, decide on, and interpret evidence, meaning that the decision would

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[104] *See Braebury Dev. Corp.*, 2021 ONSC 6210, para. 46 ("[T]he existence of the force majeure clause clearly shows that the parties to the lease contemplated situations in which, due to circumstances beyond the control of the parties, performance of obligations under the lease would be delayed, hindered, or prevented, and made provision in their contract accordingly.").

[105] *See* Sub-Prime Mortg. Corp. v. Kaweesa, 2021 ONSC 739, para. 29 ("[T]he supposed supervening event—the pandemic—was contemplated by the parties at the time of contracting, since it was ongoing then with no prospect of early resolution.").

[106] *See* Royal Bank of Can. v. 974585 Can. Corp., 2021 ONSC 2908, paras. 19–20 (emphasizing that the business had earned no income before the onset of the pandemic and that the agreement was "nothing more than the lending of a sum of money upon certain terms," which was not altered by the pandemic).

[107] *See* Sohi Vacations Ltd. v. Waraich, 2021 CanLII 218, para. 28 (Can. B.C. C.R.T.) (holding that the pandemic was a frustrating event that radically changed the nature of plaintiff travel agent's obligation to provide a return flight when all flights were canceled).

[108] *See id.* paras. 26–27 (emphasizing that the contract may not have been frustrated after the first two cancellations but was by the third).

[109] *See* Ward v. S.R.F. Holdings Ltd., 2020 CanLII 1446, paras. 17, 32–33 (Can. B.C. C.R.T.) (holding that the postponement of a yearly event constituted a cancelation and, thus, a frustrating event).

likely have not been decided in favor of applicants in the traditional court system.[110]

III. ANALYSIS

The problem with the United States's current frustration of purpose doctrine is that it is too narrow to be helpful to most lessees in need. Its narrow application is widely acknowledged[111] and has even led to some advocacy to abolish it.[112] Two public policy reasons support expanding the frustration of purpose doctrine. First, lessors are generally in a better position to bear the burden of a frustrating event because they can mitigate damages by reletting the property to a new lessee.[113] Second, it is unfair to make a lessee continue to pay rent if the lease is now worthless to the lessee.[114] This Note proposes that the current standards should be altered to better help lessees be excused from frustrated leases.

A. FIRST ALTERATION

The first proposed alteration is easing the requirement that the principal purpose be substantially frustrated. Courts should try to read a party's intention for entering into a contract narrowly, allowing implicit conditions to be more readily accepted. American

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[110] *See id.* paras. 6–9 ("[T]he CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.").

[111] *See* 30 RICHARD A. LORD, WILLISTON ON CONTRACTS § 77:94 (4th ed. 2022) ("The doctrine of commercial frustration should be limited in its application and narrowly applied to preserve the certainty of contracts."); *see also* Garner v. Ellingson, 501 P.2d 22, 24 (Ariz. Ct. App. 1972) ("The doctrine of frustration has been severely limited to cases of extreme hardship so as not to diminish the power of parties to contract.").

[112] *See* Lavneet Dhillon, Note, *Abolishing the Doctrine of Frustration*, 54 U.C. DAVIS L. REV. 2605, 2632 (2021) ("In light of the inconsistencies surrounding the doctrine's application, this Note argues that the best solution is to abolish the doctrine entirely.").

[113] *See* N. Ind. Pub. Serv. Co. v. Carbon Cnty. Coal Co., 799 F.2d 265, 277 (7th Cir. 1986) (discussing *Krell v. Henry* by asking "to which party did the contract (implicitly) allocate the risk?" and nothing that "[s]urely Henry had not intended to insure Krell against the possibility of the coronation's being postponed, since Krell could always relet the room, at the premium rental, for the coronation's new date" and "[s]o Henry was excused").

[114] *See* RESTATEMENT (SECOND) OF CONTRACTS. § 265 cmt. a (AM. L. INST. 1981) (explaining that a frustrating event may warrant discharge if its occurrence is "so severe that it is not fairly to be regarded as within the risks that he assumed under the contract").

courts could take a lead from the British Columbia Civil Resolutions Tribunal in its approach to settling claims.[115] In deciding that the defendant family's flight plans were frustrated, the Tribunal—whether intentionally or not—read the purpose of the contract narrowly.[116] Courts following the common law would likely decide that the purpose of the contract was to provide a return flight home, which the company would have been able to provide. However, the Tribunal recognized the importance of the particular flight home bargained for in the contract and read the purpose narrowly.

One factor courts could use to determine the principal purpose is how significantly the frustrating event changes the nature of the impacted business. Furthermore, while society does not want to let business owners escape a lease simply because their enterprise is less profitable than expected, lost profits could also be a factor in determining frustration. While the failure of a business is always a possibility, neither the lessor nor lessee would assert that an unprofitable business was assumed in the contract. But if the business has no profit, it cannot be reasonably expected that the business will be able to pay rent.

For example, a large retail business, like Victoria's Secret, which leases commercial space in the prime shopping district of Manhattan, clearly intends to operate an in-person business open to tourists and passersby. A court reading its contract's purpose broadly would say that it intends to operate a retail business only. But a narrow reading would acknowledge the nature and context. Therefore, when a pandemic strikes and government regulations limit travel and force stores to close, the lease has been frustrated. Even if a retail location is open for curbside pickup or can still operate as a warehouse to fulfill online orders, those activities were not the intention of the lessees when selecting the location.

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[115] *See supra* notes 107–110 and accompanying text.

[116] *See* Sohi Vacations Ltd. v. Waraich, 2021 CanLII 218 para. 28 (Can. B.C. C.R.T.) ("I find the contract between Sohi and the Waraichs was frustrated because the pandemic was an unforeseeable event, not provided for in the contract, and not either party's fault."). This narrow reading is exemplified in the Tribunal's recognition that the purpose of the contract was not just to have a flight home, but to have a flight home within a relatively limited timeframe, which the defendant was unable to provide. *See id.* para. 27 ("Although Sohi implies that the Waraichs could have used a flight voucher to travel at a later date, there was no certainty as to when such travel could occur. By the time of the May 18 flight cancellation, the Waraichs had already waited in India for nearly two months beyond their initial return booking.").

B. SECOND ALTERATION

A second alteration to the doctrine is to clarify the foreseeability requirement. While courts have held that the frustrating event does not have to be completely unforeseeable,[117] a clearer standard would be easier for courts to apply. Frustrating events like natural disasters, wars, and pandemics are inevitable. This does not mean, however, that all frustrating events are foreseeable. The court should evaluate whether the specific frustrating event at issue was reasonably foreseeable.

For example, wars in general are foreseeable, but a specific attack may not be.[118] In *Lloyd*, World War II and its effects were foreseeable frustrating events to the parties to the lease because the government restriction, which interfered with defendant's business by curbing the sale of new automobiles, had been the law for over a year when the lease was signed.[119] In late 2019 and early 2020, however, even as COVID-19 spread throughout Asia, many did not expect or predict the extent to which it would impact the United States.[120] Although the public has knowledge that pandemics occur,

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[117] *See* Chi., Milwaukee, St. Paul & Pac. R.R. Co. v. Chi. & N.W. Transp. Co., 263 N.W.2d 189, 195 (Wis. 1978) ("[F]oreseeability of the frustrating event is not alone enough to bar recission if it appears that the parties did not intend the promisor to assume the risk of its occurrence." (citation omitted)).

[118] Attacks on the United States during peacetime—whether it be by a foreign nation like the bombing of Pearl Harbor, an act of terrorism like the attacks of September 11, 2001, or an act of domestic terrorism like the Boston Marathon bombing—are unpredictable by design. *See* Linton Weeks, *5 Other Surprise Attacks That Changed History*, NPR (Sept. 6, 2011, 12:09 PM), https://www.npr.org/2011/09/06/140156564/5-other-surprise-attacks-that-changed-history (describing consequential surprise attacks throughout history).

[119] Lloyd v. Murphy, 153 P.2d 47, 51 (Cal. 1944). Wars in general are always foreseeable, and in this specific case, the possibility that automobiles would be restricted by the government was so foreseeable as to almost be a certainty, which is partially why the frustration defense did not apply. *See id.* ("Automobile sales were soaring because the public anticipated that production would soon be restricted. These facts were commonly known . . . .").

[120] By the end of March 2020, Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, estimated that the United States would have 100,000 to 200,000 COVID-19 deaths. Matthew Yglesias, *Fauci Predicts Over 100,000 COVID-19 Deaths in the United States*, VOX (Mar. 29, 2020, 12:30 PM), https://www.vox.com/2020/3/29/21198723/coronavirus-deaths-estimate-fauci. By late May 2022, however, over 1,000,000 people had already died from COVID-19 in the United States. Adeel Hassan, *The U.S. Surpasses 1 Million Covid Deaths, the World's Highest Known Total*,

diseases have spread at smaller scales in recent years and a reasonable person would not have foreseen this specific pandemic's lasting impacts. Therefore, COVID-19 should be considered an unforeseeable event not contemplated by either party in most instances, unlike World War II in *Lloyd*. Although many contracts have force majeure clauses describing government restrictions on business activity, very few could rightfully be understood to have contemplated the extent to which the COVID-19 pandemic would ravage the United States.

C. OTHER CONSIDERATIONS

To improve the American doctrine, courts and state legislatures should consider two aspects of the frustration defense abroad: (1) promoting a uniform statute and (2) adopting a proportionality test. The uniformity of the Frustrated Contracts Acts in both the United Kingdom and Canada would improve the American system by making the remedies more predictable, even if it would not change the method of determining frustration.[121] Although it is difficult to adopt a uniform statute across all fifty states, the proposal of a uniform statute would be a first step at addressing the disparity of the defense across different states.

Further, adopting a proportionality test[122] would be enormously beneficial to frustrated plaintiffs without unjustly enriching one party or the other. A frustrating event, like a COVID-19 lockdown, may leave the possibility of future performance while completely frustrating it in the present. By evaluating the length left in a contract, courts could fairly determine when excusal is appropriate.

D. COUNTERARGUMENTS

Considering that these proposals are extensive alterations to the current frustration doctrine, there are some arguments against expanding the doctrine. First, loosening the requirements of the

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N.Y. TIMES, https://www.nytimes.com/2022/05/19/us/us-covid-deaths.html (last updated May 19, 2022).

[121] *See supra* notes 66–70, 95–98 (discussing the Frustrated Contracts Acts in the United Kingdom and Canada, respectively).

[122] Bank of N.Y. Mellon (Int'l) Ltd. v. Cine-UK Ltd. [2021] EWHC 1013 (QB) ¶ 196; *see supra* notes 74–76.

frustration doctrine could threaten the sanctity of contracts and the power of parties to contract. It is possible that an expanded frustration defense will discourage careful contract drafting if lessees view the defense as a get-out-of-jail-free card allowing for excusal of performance even if the risks have already been allocated in the contract. Fundamentally, society wants to encourage good faith in contracting, and this good faith could be threatened if there are perceived "easy outs" tempting lessees. Second, because risks are usually already allocated in contracts using a force majeure clause or something similar, this expanded doctrine will be ineffective because lessees will still be precluded from asserting it.

These proposed alterations to the frustration doctrine will not, however, threaten the sanctity of contract because the alterations do not eliminate the parties' ability to use force majeure clauses to allocate the risks of frustrating events. Therefore, a broader doctrine will not inhibit lessors from carefully contracting away the possibility of a lessee asserting a frustration defense. Further, a narrow remedy does not mean it is ineffective. Despite the current defense's strict requirements, parties are still occasionally relieved from their obligations, so loosening the requirements will only continue to aid those lessees who need it.

IV. CONCLUSION

Almost 120 years after King Edward VII's coronation was postponed for emergency surgery, contracting parties still rely on frustration of purpose as a last-ditch effort to be excused from a contract. While parties are unsuccessful more often than not, the doctrine still has the potential to be of use in the twenty-first century. When acts of God occur, at least one party to a contract is bound to bear the risk of a frustrated contract. In proposing to expand the frustration of purpose doctrine, this Note attempts to alter the doctrine so that the risk falls on the party better equipped to bear it; namely, the lessors. Lessees have historically had a particularly difficult time winning frustration cases, but altering the doctrine would allow for excusal more often without endangering the sanctity of the contract.