

IMPRACTICABILITY AND FRUSTRATION

Introduction

- Traditional Standard - *Pacta sunt servanda* ("Agreements must be kept")
- Exceptions -
 - 1. Personal Services agreements made impossible by death
 - 2. Supervening illegality
- Modern view - Continued existence of a particular state of facts is an implied or constructive condition.
- Automatic Impracticality/Impossibility
 - 1. Death of party who is to perform
 - 2. Supervening illegality
 - 3. Destruction of the subject matter

The UCC and the Restatement (Second)

- UCC § 2-615. Excuse by Failure of Presupposed Conditions.
- Except so far as a seller may have assumed a greater obligation....:
- (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not in breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made....

Categories:

- 1. Destruction, deterioration or unavailability of the subject matter or tangible means of performance.
- 2. Failure of contemplated mode of delivery or payment.
- 3. Supervening prohibition or prevention by law.
- 4. Failure of the intangible means of performance.
- 5. Death or Illness.

Destruction or Unavailability of the Subject Matter or Tangible Means of Performance

- *Taylor v. Caldwell*, 122 Eng. Rep. 309 (K.B. 1863)
- Allocation of risk of destruction

Failure of the Contemplated Mode of Performance

- Including Delivery or Payment
- No general right of substitution if provision goes to the essence of the contract.
- If incidental obligation, issue is, “does a commercially reasonable substitute exist?” If yes, Impracticability defense is unavailable.

UCC § 2-614. Substituted Performance

- (1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.
- (2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

Supervening Prohibition or Prevention by Law

- Difference between contract for an illegal purpose and supervening illegality
- Illegality cannot be the result of non-performing party's action
- Failure of the Intangible Means of Performance
 - Old rule - applies when performance is rendered impossible by an act of God, the law or the other party.
 - Modern rule – expands old rule to include strikes and other impracticalities.
- Relation to “Force Majeure” clauses

Death or Disability

- Performance of essential person who becomes ill or dies may be excused.
- No excuse if performance is delegable.
- Foreseeability and contributory fault doctrines do not apply.
- Apprehension of Impracticability or Danger
- Reasonable apprehension of impracticability or danger, even if subsequently proven erroneous, serves the same purpose as actual impracticability

Impracticability - an Evolving Area of the Law

- Traditional rule - only actual impossibility served to excuse performance.
- Current Doctrine - Impracticality can excuse performance. See UCC 2-615
- Impracticality = “not attainable except by means and with an expense impracticable in a business sense.” Williston
- Impracticability > Impracticality
(Restatement 2d)

Existing Impracticability

- Rules are generally the same as supervening impracticality, except:
 - 1. Party seeking to use doctrine must show an absence of reason to know the facts of the impracticality prior to contracting
 - 2. Results in a void contract, as opposed to discharge of existing contract

Frustration of the Venture

- Doctrine usually applies to one who can no longer obtain benefits, rather than one who cannot perform
- *Krell v. Henry*, 2 K.B. 740 (1903)
- Temporary Impracticability or Frustration
- Leads to a right to suspend performance
- If “temporary” is actually indefinite length, non-prevented party may terminate agreement.

Partial Impracticability

- Excuses the parts of performance that have become impractical, but, if possible and reasonable, substitute performances must be rendered. If this constitutes substantial performance, remainder of agreement must be performed.

Assumption of the Risk

- If risk is contractually assumed, that supersedes Impracticability defense.
- Whether risk is assumed may be based on facts rather than explicit language of the agreement.
- Foreseeability
- Failure to provide for a foreseeable contingency (other than death or illness) constitutes assumption of the risk
- Standard allows for lots of judicial “interpretation.”

Force Majeure Clauses

- Definition - An unexpected and disruptive event that may operate to excuse a party from a contract.

Force Majeure Clauses

- Example: (a) Suspension: If, by reason of fire, earthquake, labor dispute or strike, act of God or public enemy, any municipal ordinance, any state or federal law, governmental order or regulation, or other cause beyond Production Company's control which would excuse Production Company's performance as a matter of law, Production Company is prevented from or hampered in the production of the Picture, or if Production Company's production of the Picture is postponed or suspended, or if, by reason of any of the aforesaid contingencies or any other cause or occurrence not within Production Company's control, **including but not limited to** the death, illness or incapability of any principal member of the cast of the Picture, the preparation or production of the Picture is interrupted or delayed and/or, if Production Company's normal business operations are interrupted or otherwise interfered with by virtue of any disruptive events which are beyond Production Company's control ("Production Company Disability"), then Production Company may postpone the commencement of or suspend the rendition of services by Director and the running of time hereunder for such time as the Production Company Disability shall continue; and no compensation shall accrue or become payable to Director hereunder during the period of such suspension. Such suspension shall end upon the cessation of the cause thereof.