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Contracts - Impossibility - Inaccessibility of Usual and Customary Route - Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966)

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CURRENT DECISIONS

Contracts—IMPOSSIBILITY—INACCESSIBILITY OF USUAL AND CUSTOMARY ROUTE. In October, 1956, two months after the nationalization of the Suez Canal by Egypt, a shipping company executed a voyage charter with the United States to carry a cargo of grain from Texas to Iran, the contract stipulating the destination, but not the route to be followed. In November, before the ship reached Suez, the canal was blockaded and closed to traffic by the Egyptian Government. After proper notification, the ship changed its course and sailed around the Cape of Good Hope, delivering the goods in Iran late in December. The shipping company collected the contract price, then, claiming that the closing of the Canal had rendered performance impossible, brought an action to recover the added cost attributable to the ship's forced deviation from the normal sea route.¹ The United States District Court for the District of Columbia dismissed the libel, and an appeal was taken to the United States Court of Appeals.²

The Appellate Court assumed that since no definite route was mentioned in the contract, the parties expected performance to be by the "usual and customary" route, which they held to be the Suez Canal. However, the court decided that the Canal's closing did not render the contract commercially impracticable under Section 2-615 of the Uniform Commercial Code,³ since performance around the Cape was not vitally different from performance through the Canal.

Initially, the common law held a promisor strictly to the terms of his agreement.⁴ This rule was applied until the middle of the nineteenth cen-

1. Plaintiff's theory of relief was quantum meruit for the added expense of \$43,972.00, above and beyond the contract price of \$305,842.92, in extending a 10,000 mile voyage by some 3,000 miles. The court not only held that this cost difference was insufficient to constitute impracticability, but also said that quantum meruit was an improper remedy, since the ship-owners had already collected their contract price and were now seeking relief for the additional expense of the trip around the Cape. Quantum meruit could only have been a remedy for the entire performance.

2. *Transatlantic Financing Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966).

3. Under the UNIFORM COMMERCIAL CODE, Section 2-615, a seller is excused from contractually agreed performance if three conditions are met: (1) a contingency must occur; (2) performance as agreed must thereby be made impracticable; and (3) the non-occurrence of the contingency must have been a basic assumption on which the contract was formed.

4. *Paradine v. Jane*, Aleyn 26, 82 Eng.Rep. 897 (K.B. 1647) "(W)hen the party by his own contract creates a duty of charge upon himself, he is bound to make it good,

tury when, in *Taylor v. Caldwell*,⁵ the court of King's Bench held for the first time that supervening destruction or non-existence of subject matter considered essential to the contract would excuse the promisor from liability. At present, there is a trend from the old view⁶ requiring strict performance toward a more liberal modern view,⁷ which excuses performance when it has become impracticable because of extreme or unreasonable difficulty, expense, injury, or loss involved, rather than only when it is scientifically or actually impossible.⁸

Despite this trend, there were only three generally recognized classes of cases in which nonperformance was excused prior to the advent of the Uniform Commercial Code:⁹

if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

5. 3 B.&S. 826, 122 Eng.Rep. 309 (K.B. 1863).

6. *Wilson v. Page*, 45 Tenn.App. 475, 325 S.W.2d 294, 298 (1958): "Where a person by his contract or agreement charges himself with an obligation possible to be performed, he must perform it, and he will not be excused therefrom because of unforeseen difficulties unusual or unexpected expenses, or because it is unprofitable or impracticable."

See also: *Columbus Ry. Power & Light Co. v. City of Columbus*, 249 U.S. 399 (1919); *United States v. Spearin*, 248 U.S. 132 (1918); *Wills v. Schockly*, 52 Del. 295, 157 A.2d 252 (1960); *Phelps v. School Dist.*, 302 Ill. 193, 134 N.E. 312 (1922); *Summers v. Midland Co.*, 167 Minn. 453, 209 N.W. 323 (1926); *Maryland Cas. Co. v. Seattle*, 9 Wash.2d 666, 116 F.2d 280 (1941); *Bunch v. Potter*, 123 W.Va. 528, 17 S.E.2d 438 (1941); 17 C.J.S. *Contracts*, Sec. 459 (1939).

7. 6 WILLISTON ON CONTRACTS, Sec. 1931 (rev.ed. 1938).

8. *Wood v. Barrolino*, 48 N.M. 175, 146 P.2d 883, 886 (1944). *Accord*, *City of Vernon v. City of Los Angeles*, 45 Cal.2d 710, 290 P.2d 841 (1955); *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 Pac. 458 (1916); *Strauss v. Kazemakas*, 100 Conn. 581, 124 Atl. 234 (1924); *Whelan v. Griffith Consumers Co.*, 170 A.2d 229 (D.C. Munic. Ct. App. 1961); *Fisher v. United States Fid. & Guar. Co.*, 313 Ill.App. 66, 39 N.E.2d 67 (1942); *Powers v. Siat*, 244 Minn. 515, 70 N.W.2d 344 (1955); *Cosden Oil & Gas Co. v. Moss*, 131 Okla. 49, 267 Pac. 855 (1928).

9. 6 WILLISTON ON CONTRACTS, Sec. 1935 includes a fourth class of cases where impossibility is due to the failure of some means of performance, contemplated but not contracted for. However, he classified these cases as standing on a more debatable ground, although he felt that the law seemed to be tending in this direction.

This section of the text is cited in *Merl F. Thomas Sons, Inc. v. State, Alas.*, 396 P.2d 76 (1964) (a case with facts strikingly similar to *Transatlantic Financing Corp. v. United States*), where plaintiff bid to clear a highway right of way. However, ice at the contemplated river crossing had melted, leaving the only possible ice crossing seventy miles to the north. Since plaintiff could not move its heavy equipment across the ice at the contemplated crossing, the court held that the contract was made impossible, and plaintiff was discharged, despite the fact that this condition did not appear in the contract.

- (1.) When performance is made illegal by legislative act or by judicial, executive, or administrative order.¹⁰
- (2.) Death or illness of the promisor, where his particular performance was bargained for.¹¹
- (3.) Non-existence or injury of a specific thing or person necessary for performance, or the material deterioration of such specific thing.¹²

The Commercial Code adds to these three classes an additional test of commercial impracticability,¹³ which has heretofore only appeared by court construction of the theory of implied conditions.¹⁴ Having thus codified the modern rule into statute, the Uniform Commercial Code does not go on to define commercial impracticability,¹⁵ but leaves it to the discretion of the courts.¹⁵ However, the Code does say that increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance.¹⁶

In *Transatlantic Financing Corp. v. United States*¹⁷ the District Court decided that the closing of the Suez Canal was an unforeseen contingency not reasonably within the contemplation of the parties;¹⁸ nevertheless,

10. *Scovil v. McMahon*, 62 Conn. 378, 26 Atl. 479 (1892); *Cordes v. Miller*, 39 Mich. 581 (1878).

11. *Browne v. Fairhall*, 213 Mass. 290, 100 N.E. 556 (1913); *Blakely v. Sousa*, 197 Pa. 305, 47 Atl. 286 (1900).

12. *Virginia Iron & Coke Co. v. Graham*, 124 Va. 692, 98 S.E. 659 (1919); and cases cited therein.

In addition, the RESTATEMENT provides for the situation where the non-existence of particular facts makes performance impossible: RESTATEMENT, CONTRACTS, Sec. 461, Comment (a): "There is no tenable reason for allowing a discharge for the non-existence of a tangible specific thing that by the terms of a contract or the contemplation of the parties is essential to its performance, and denying a discharge where other means of performance similarly essential or contemplated cease to exist."

13. UNIFORM COMMERCIAL CODE, Section 2-615, Comment 3. (A much broader classification than Williston's "debatable" fourth category, *supra* note 9.)

14. See *Ontario Deciduous Fruit Growers v. Cutting*, 134 Cal. 21, 66 Pac. 28 (1901). In this case, a contract for the sale of fruit was held to be subject to the implied condition that the fruit was to be grown on the vendor's own land; consequently, he was not required to supply fruit from another source at a greater expense when a drought ruined his own crop. See also *Browne v. United States*, 30 Ct.Cl. 124 (1895).

15. UNIFORM COMMERCIAL CODE, Section 2-615, Comment 2.

16. UNIFORM COMMERCIAL CODE, Section 2-615, Comment 4.

17. *Supra* note 2.

18. The court decided that the nationalization by Egypt of the Canal Corporation and formation of the Suez Users Group did not necessarily indicate that the Canal would be blocked even if a confrontation resulted. However, the court did say that these circumstances indicated a "willingness by Transatlantic to assume abnormal risks, and this fact should legitimately cause us to judge the impracticability of performance

the court did not feel that the detour around the Cape was so vitally different from the contemplated route through the Canal¹⁹ as to constitute "commercial impracticability," since the goods shipped were not subject to harm from the longer route, the vessel and the crew were fit to proceed around the Cape, and the difference between expected cost and actual cost of performing was not sufficient.²⁰ By considering such factors as plaintiff's personal ability to perform, the court construes commercial impracticability to include something previously foreign to the doctrine of impossibility,²¹ thus presenting important guidelines for future cases to be decided under this section of the Uniform Commercial Code. Although the question remains as to what substituted voyage would be sufficient to render performances impossible, the opinion of the court implies that had the goods or ship been unable to withstand the trip around the Cape, or had the amount of loss been greater, the contract may have been nullified.

As one of the initial interpretations of commercial impracticability under the Uniform Commercial Code, *Transatlantic* represents the current position of the Federal Courts on the doctrine of impossibility. In all probability, with the advent of such a flexible new concept, further expansion of the area of excuse will be forthcoming in the near future as the trend toward liberality in discharging promisors continues.

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by an alternative route in stricter terms than we would were the contingency unforeseen."

19. One other U. S. case in which performance around the Cape was required when the Suez Canal was closed was *Glidden Company v. Hellenic Lines*, 275 F.2d 253 (2d Cir. 1960). This involved a charter for transportation of materials from India to America "via Suez Canal or Cape of Good Hope, or Panama." Because of the express provision for an alternative route, the court held that the shipper was not discharged from performance.

20. In so ruling, the court reached the same conclusion as the leading British cases requiring performance around the Cape when the Canal was closed, but based the decision on a different point of law. In *Ocean Tramp Tankers Corp. v. V/O Sovfracht* (1964) 2 Q.B. 226, a ship was trapped in the Canal during the Crisis. The shipowners were held to be estopped from pleading impossibility because they had breached the contract by entering the Canal with anti-aircraft shells bursting overhead, thus endangering ship and cargo. By way of dictum, the court also decided that the shipowners would not have been discharged had the ship stayed out of the Canal, since the ship and crew were fit for a longer voyage; the particular cargo was not likely to deteriorate, and the time of arrival was not material. See also *Tsakiroglou & Co., Ltd. v. Noble Thorl G.m.b.H.*, (1960) 2 Q.B. 348 (Cape of Good Hope becomes the usual and customary route when the Canal is rendered inaccessible).

21. "The mere personal inability of a promisor to perform is no excuse. This is