

11/5/13

Impossibility, Impracticability, & Frustration of Purpose

- Common law Impossibility

- Paradine v. Jane (1647)

- Paradine leased land to Jane & Army conquered territory to live off land → Army did not excuse Jane from producing food
- Fact that army was on land did not excuse performance
- Either b/c contract liability was very strict back then
- If Jane was concerned about Army living on land she should have put it in K
- or if it didn't believe that Jane was completely unable to use the land
- Paradine won but Jane could file a separate claim against Paradine

- Taylor v. Caldwell

- Implied provision for excuse in case of impossibility e.g. when party dies or disabled
- Taylor sued for advertising expenses based upon not being able to have the concert b/c the hall burnt down (reliance damages)

E.g. open

→ or in bailments where the property is destroyed through no fault of either party (or dies)

- Result: Caldwell does not need to reimburse Taylor's expenses b/c it wasn't his fault building burned

- Krell v. Henry

- Frustration of purpose b/c no procession

- An extension of the implied condition doctrine where:

- The condition was a foundation of K

- Performance of the K was prevented by

~~not performance~~ non-occurrence of that condition



(Telman)
He is not a fan of this test for frustration of purpose b/c it doesn't distinguish Cobby from Krell

- non-occurrence was not contemplated by the parties

- In modern K we have Force Majeure clauses → Catastrophic event beyond control

Transatlantic Financing Corp. v. US

- Suez Canal closed

- K was impracticable & they want restitution

- US said no modification b/c they could

- Skelly Wright

- impossibility doctrine expanded to encompass impracticability

- 3 elements

- unexpected event (satisfied)

- risk not allocated to party

seeking excuse of performance

- unexpected event renders performance commercially impracticable

- impracticability does not kick in every time there is an unexpected increase in costs

- Transatlantic could have insured against this contingency

- Conclusion: performance not excused & quantum meruit remedy unavailable

Transatlantic should have had insurance

- risk more likely to Transatl.

~~1850 v. Carbon Equity Coast~~

- Frustration of Purpose R 2d § 265

- Event occurs that substantially frustrates a party's purpose in entering the K

- The parties had a basic assumption that the event would not occur

- performance excused if party seeking excuse not at fault & does not bear risk

- NIPSCO v. Carbon County Coal Co.

- Terms of the agreement?

- 20 yrs to buy set amount of coal

- Price floor, subject to escalation

- What's & requirements K?

- Where supplier agrees to provide everything the buyer needs.

- But NIPSCO must buy 1.5 Mil tons, whether it needs it or not

- Impracticability & frustration

- using impracticability b/c

UCC says if gov't regulation renders a K impracticable you can get out of it

- but only applies to sellers & they should have used frustration of purpose

- This doctrine is really about assignment of risk - see § 2-615

It's rarely impracticable for the buyer to pay, but his purpose must be frustrated

- Leave for another day the question of whether IN recognizes the defense

- Specific performance makes no sense

- Coal company went out of business

- No one wants coal

- The business should have gone out of business in first place

- Impracticability R2d § 261

• if an event occurs that renders performance impracticable

- And the parties had a basic assumption that the event would not occur
- Performance is excused if the party seeking excuse was not at fault & does not bear the risk

- UCC on Impracticability

§ 2-615 basically follows R2d § 261, except:

- Seems only to apply to sellers
- Seller may assume obligations & thus waive the defense by K
- Creates explicit impracticability defense based on govt regulation
- Seller may allocate production in a fair & reasonable manner

11/7/13

- Defenses - Even though K is formed it is void or voidable b/c of the formation (not properly formed)
- Excuses - something happened during K that made it excusable
- Intro to Conditions
 - Conditions vs. Promises: failure of condition discharges other party's duties, breach of ~~prom~~ promise only gives rise to damages
 - Consequences of failure of condition more severe
 - Breach of promise results in claim for remedy, while failure of condition excuses performance like defenses
 - Conditioning a promise reduces promisor's risk
- Clark v. West
 - Issue: the K language
 - abstains from intoxicating liquor then additional \$4/page
 - Dispute
 - West says that total abstinence is consideration for additional \$4/pg → Can't work
 - Clark says it is a condition precedent to payment which could be (& was) waived
 - Does West really care about sobriety? Or about good work?

- If this were consideration then there would be no K

~~ought make sense to be a modification~~

- Law

- Is sobriety consideration or a condition?

- it must be a condition; if it were consideration then no obligation to perform on either side

- Was there a waiver here?

- Waiver involves voluntary & intent, and relinquishment of a known right

- Purpose of the doctrine is to prevent a forfeiture (a great loss falling to one party that is disproportionate to another party's injury)

- Not to recognize waiver here would indeed entail a forfeiture on Professor Clark's part

- Public policy: Should you be able to make things condition when it doesn't change performance?

- Waiver & Modification

Modification

- Requires consideration at CL, not UCC
- If SOF applies, need writing
- Must be agreed to by both parties & once done cannot be undone by a single party
- Effects permanent change in K

Waiver

- Consideration not req.
- Need not be in writing
- Unilateral - does not require agreement
- Can be revoked, unless other party relied
- May only have temp. effect

- Express & Constructive Conditions

- Express conditions follow an "if... then" formula
- on condition that, provided that, subject to

- One party's contractual obligations are conditioned on the other's performance of the condition

- Always enforced unless enforcement would result in a forfeiture ex. 98% of work by May 1, condition of timely delivery may not be enforced

- Constructive conditions

- UCC gap-fillers help Ct's determine rules for time, manner & place of delivery & manner of payment

- CL rule: if one party's performance takes time, the default rule requires that party to perform first

- Marin Building Prods. v. Bayside Construction

- Was the jury instruction proper? 2 options

- Same Ct's rejection of performance permitted unless bad faith

- R. 2d § 228: "reasonable person" standard applies even though K gives one party discretion

- Applies where objective evaluation is possible

- Not where rejection is a matter of aesthetics or fancy

- Ct should imply terms that parties would have agreed to

- You would have used dif. material if you wanted a better wall

- But what about?

- "Artistic effect clause"?

- "First class in every respect"
- Provisions from form K's not clearly intended to apply to the aesthetics of a mill-finish factory wall
- Why does Posner think parties did not bargain for a provision that would give GM a unilateral right to reject Marin's work? Why would Marin agree to this is Posner's side so obviously it doesn't apply. ~~But~~ ~~to~~ ~~the~~ ~~Carli~~ L says cannons of construction can go either way
 - Give effect to the parties intent & they wouldn't have intended this to be in there
- Introducing: the CISG (Convention on International ^{sale of goods}
 - The main thing to know about CISG
 - It's Supreme (see US constitution)
 - Other things to know
 - Applies to international sales of goods
 - Between parties whose places of business are in different states
 - And both states are parties to the CISG
 - Does not apply to goods sold for personal or household use (Business ^{to Business transactions})
 - On ships, vessels or aircraft
 - Have to contract around it so "governed by UCC not CISG"
- All you need to know about the CISG
 - Firm offer require neither writings nor consideration (Art 16)

- NO Statute of frauds (Art 11)
- NO PER (Art 8)
- EASY Battle of Forms
 - Article 19(1): No MIR - any reasonable method of acceptance
 - Art 19(2): Additional terms come in unless material
 - Art 19(3): Everything is material
- Result: Offeror's terms govern (which may not be fair, but at least it's clear)
 - Never know what is offer
 - so people prefer the UCC