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# DOCTRINE OF IMPRACTICALITY UNDER THE LAW OF CONTRACT: AN OVERVIEW OF ITS DEVELOPMENT

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**Abstract-Sanctity of contract is one of the fundamental principles of contract law. According to this principle, none of the contracting parties can refuse to perform their obligations. However, this principle has some exceptions. One of the exceptions is the doctrine of impracticability, which allows the parties total or partial exemption from their obligations or postponement of the contract given unexpected circumstances or issues. This proposed paper will give an overview of the development of the doctrine of impracticality to share with the audience its historical and theoretical background. This will educate them about the relevance of the doctrine in the present world context. The paper will have three sections. First, the concept and definition of impracticability will be described. Second, a historical background with theoretical underpinnings of early common law and modern law will be discussed with particular reference to the (American) *Uniform Commercial Code*, and *Restatement (second) of contracts*. This will follow concluding remarks.**

**Keywords- contract, discharge of contract, impracticability, principle of binding of contract**

## I. INTRODUCTION

The Latin dictum, *Pacta sunt servanda*, posits that contracts should be performed absolutely as a basic principle in the most legal systems [1]. The sanctity of a contract displays party's absolute liability for obligations assumed. However, under the impracticability doctrine " when an event or a contingency occurs following to the contract formation but preceding to its performance , causing that performance to be impracticability, performance is said to be to be exempted and the contract is discharged" [2]. Indeed impracticability is one of the exceptions of sanctity of contract.

Although, American law is similar to English originally, and both date back to common law but, American law gradually has shifted from its historical origin. A certain doctrine was developed in this field. Since the late 19th century in America and also the early 20th century, words such as " impossible" and "impossibility"( means no possibility) were gradually set aside, and "impracticable" and "impracticability" were used instead[3]. New terms became so much prominent that they began to be used often in legal contexts. This replacement was not purely lexical but, its conditions and contents were also changed largely.

Currently, this doctrine, in the American law has the role of impracticability doctrine and in the laws of England it is known as is shown as the frustration of contract.

In this paper, the concept and definition of impracticability will be overviewed. In the next section, a historical background of early common law and modern law will be discussed. This is followed by discussed with particular reference to the (American) *Uniform Commercial Code* and *Restatement (second) of contracts*.

## II. CONCEPT OF IMPRACTICABILITY

The concept of impracticability is viewed to have been initiated from the common law prerequisite for excuse where performance of the contract is "vitally different" [4] from that originally contemplated by the parties. In interpreting the term impracticability, current courts have paid attention exclusively to a single indication of those changed circumstances where the real cost of performance surpasses the predicted cost of performance [5].

In the view of American law, it is accepted that an issue is impossible when it is not executable. On the other hand, an issue is not executable when it is executable only by means of high and unreasonable cost.

The term impracticability of contract in American law implies conditions that, in spite of non-realization of necessary conditions for frustrating contract, the contract's life would be finished due to unreasonable and high costs of performing the commitment economically. In the other words, although performing contract is possible technically but conditions of performing contract are very different from conditions at the time of contract's conclusion [6].

In the *Restatement (second) of contracts*, in comment "d" following article 261, it is stated that impracticability of contracts includes hardship, cost, illogical or high lost for one of parties [7]. As it can be seen, in contrast to impossibility, doctrine of impracticability of contract does not imply its physically impossibility but also includes changes to circumstances which lead to high hardship and costs for one parties so that be intolerable. This doctrine has broadened scope of contract's loss by sudden events and unpredictable. This flexibility in American law is remarkable.

It can be said that in the common law, contracts involved these two terms, impossibility and frustration of purpose. They were analogous due to the fact that they both necessitated a "supervening event" after the making of contract and before performing contract which changed the contract in such a way it destroyed the price of the performance. The only difference depicted in the common law was whether this event that ensued has in reality caused the performance to be onerous or

made it impossible or costly in order to grant the basis for rescission (the common law term).

The more modern law of contracts *Uniform Commercial Code* basically rejects the terminology of impossibility, or tries to re-explain it by making use of other terminologies. The two concepts of frustration of purpose and impossibility are commonly combined resulting into the single concept of commercial impracticability, 2-615 UCC. The comment 1, 3 of 2-615 UCC's essentially the leading concept or the definition for the section that has the title of "Excuse by Failure of Presupposed Conditions" and is the used terminology which is usually used today is commercial impracticability. Even though, literally, they might be interpreted as the same. However, in actuality and in terms of law they mean two different things. From the legal perspective, the term of impracticability of contract means an extremely difficult and increasingly more burdensome performance that occurs suddenly and in an unanticipated way.

Currently, in addition to article 2-615of UCC and one chapter of *Restatement (second) contracts* has dealt with impracticability of contract and frustration of contract during articles 261-272.

There is no definition of impracticability in the *Uniform Commercial Code*. Nevertheless, comment 3 and 7 presents some outlines. Comment 3 describes the word "commercial" as essential to consider.

Williston is one of the American author believes that impracticability means unreachable except by paying high costs in commercial sense. Professor Llewellyn specifically coined the term commercial impracticability and evaded apply of common law terminology in an attempt to develop and liberate the courts from the old limitative concepts of excuse [8].

Finally it can be conclude from the above definition that when the performance of contract causes occurrences of new conditions where the commitments one of the performing parties falls in hardship and has to perform the said contract with a cost more than what was stipulated on the date of contract. On the other hand, they use impossibility when the performance of contract is frustrated. Impracticability deals with those sets of circumstances where performance is literally possible but is fundamentally different from that considered by the parties to such an extent as to become impracticable [9].

## III. HISTORICAL BACKGROUND

### *A. Early Common Law*

The doctrine of commercial impracticability has its origins in the English common law doctrine of impossibility. According to the early version of common law, English courts refused to excuse a party to a contract when an event occurred following the making of the contract that affected one party's ability to execute. The court demanded the parties to perform absolutely. *Paradine v.Jane* is the case that is the most often mentioned for this rule of absolute legal responsibility [10]. Assuming that the parties were capable of allocating the risks of any accident by unavoidable requirement. Maybe since this rule caused hash consequences, the courts began to distinguish particular exceptions to its stringent appliance. The exception that emerged became the law of impossibility [11]. According to Williston, the rule did not stay absolute for long. The primary exceptions were illness or death of the obligator and supervening statutory or governmental prohibition of the act to be performed. Since the middle of the 19th century and the further on, the development of the doctrine of impossibility, as reviewed by Williston, was " (The early cases) adopt(ed) a strict rule which require(d) the parties, when they form(ed) a contract, to foresee its consequences as accurately as possible, though at the expense of serious hardship to one of them unforeseen circumstances render(ed) it impossible to perform his promise ( the later cases adopted) a rule giving an excuse under such circumstances"[12]. It was not until 1863 after that the doctrine implied conditions was first changed to incorporate impossibility as a defense in the case of *Taylor v. Caldwell* [13] .Following this case, there is a famous case *Krell v. Henry* [14] about this subject. The doctrine of the excuse in *Taylor v. Caldwell* maintained that even though the contract did not specify the contingency that took place, its occurrence depicted performance as impossible and validated the court's imposition of an implied term to the contract. Impossibility excuse is not a concept that American courts have been comfortable with, but even so they have granted it with reluctance. In general, the courts have restricted its availability to circumstances resembling those in the three traditional categories of impossibility of common law. While the scholarly and judicial debate concerning this excuse carried on, most authorities re-portrayed the impossibility excuse as the doctrine of impracticability of performance [15]. It can be said that the common law acknowledged three exceptions to the general rule of absolute performance. First, courts recognized that the death of a party to the contract caused his obligation to perform to be relieved if performance required his presence or action. Second, when governmental action declared the contemplated performance illegal, courts excused performance of the contract. Initially, this exception permitted the excuse only in the event where the governmental action had the form of a statutory prohibition of the performance. However, afterwards, courts made the rules more flexible in order to include acts of government that either altered the nature of performance or enforced obligations on the performance that caused the performance to be impossible [16]. The famous *Taylor v. Caldwell* [17] case acknowledged the third exception, whereby the destruction of discussed matter of the contract resulted in the execution by the parties to the contract to be excused.

### *B. Modern Law of Impracticability*

Some twentieth century common law courts developed the basis for excuse due to the inadequacy of basic assumptions further than the specific circumstances that had marked the boundaries of excuse earlier. They performed this under various labels such as frustration, impossibility, and implied conditions.

At the dawn of the twentieth century, the test of impracticability was introduced in the case of *Mineral Park Land v. Howard* [18] as another measure for ascertaining impossibility, and therefore excusing performance. The rule as stated in that case was that "a thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and

unreasonable cost" [19]. Up until this decision, the court had never excused the obligator's performance due to only hardship, or due to a contract becoming unprofitable. Nonetheless, for the first time, the court acknowledged that a contract that was not performable except at an excessive cost was not different compared to a contract whose subject matter had been destroyed. Both types of contracts were recognized as impossible to perform [20]. In *Mineral Park,* case [21] he obligator had agreed to remove from the land of the obligee all the earth and gravel needed for the bridge construction. Following the removal of approximately one-half of the necessary materials, the obligator stopped the performance because the rest of the material was below the water level. In reaching the verdict of excusing the obligator's performance, the court discovered that the parties assumed, as the basis of their agreement, that"the land contained the requisite quantity [of earth and gravel] available for use, and that the removal of gravel located below the water level was not within the parties contemplation" [22]. Even though the court gave considerable significance to the ten to twelve fold cost increase associated with this condition, it based its decision on the failure of the parties basic assumptions.

## IV. IMPRACTICABILITY UNDER UNIFORM COMMERCIAL COMMON LAW CODE AND RESTATEMENT (SECOND) OF CONTRACTS

The UCC codifies the impracticability doctrine in section 2-615. As with the common law principle of impossibility, the UCC rationale rests on the doctrine that in some circumstances fairness requires that a court allocate the risks of performance that has become extra onerous than initially contemplated and excuse performance under the contract[23].

Article 2-615 *Uniform Commercial Code* (1978) provides: "Excuse by Failure of Presupposed Conditions

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a 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 or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer [24]".

The first purpose of this UCC is to lay down the least amount of necessities for excusing performance of contract for selling of commodities. The second purpose of this article is to observe and examine the case law from the time of enactment of section 2-615 of the *Uniform Commercial Code* and to try to articulate clear guiding principles in the area of the law of impracticability. The criteria of impracticability of contract is unreasonable difficulty, extreme expanse to one of the parties will be involved.

Nowadays, in addition to section 2-615 UCC, there is a chapter eleven of *Restatement (second) of contracts* in articles 261 to 272 which are about impracticability of performance and frustration of purpose. Article 261 of Restatement *(second) of contracts* implements the *Uniform Commercial Code* test of impracticability for all other types of contracts. This article 261 of *Restatement (second) of contracts* will discuss one of the doctrines of excuse which has been a matter of recent innovation.

Article 261 *Restatement (second) of contracts* provides that:

"Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made [25]."

Article 2-615 American *Uniform Commercial Code* implies sales contracts while Article 261 of the *Restatement (second) of contracts* is not allocated to a specific contract, however, it is applicable for all contracts.

The next three articles, namely 262, 263 and 264 indicate the three issues that this general principle is conventionally implemented for them. They are each concerned with a different sort of supervening impracticability.

Article 262 considers the unexpected event to be death or incompetency of the person whose presence had been necessary for implementation of the commitment. Article 263 considers the sudden accident to be a destruction of the issue under the obligation that had been necessary for implementation of the obligation. Article 264, as well, involves the prohibition or prevention from the implementation of the commitment or obligation by law. These contingencies are proposed as instances, and are not meant to be a comprehensive listing [26].

Both provisions laid down three conditions to be met before performance would be recognized as impracticable. First, there must be occurrence of an unforeseen event. Next, the happening of this unforeseen event must not have been a basic assumption of the contract was made. And finally performance was rendered impracticable by this incidence.

### *A. Temporary Impracticability*

Sometimes, impracticability of performance is temporary because of various reasons. In *Restatement (Second) Contract* in article 269 is about temporary impracticability. It states that: "Impracticability of performance or frustration of purpose that is only temporary suspends the obligor's duty to perform while the impracticability or frustration exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration" [27].

Temporary impracticability only helps the obigator of a duty to execute for until the impracticability lasts together with a rational time after that. In some cases, delay will make

later performance substantially more onerous than had there been no impracticability or frustration.

*B. Partial Impracticability*

The partial impracticability is framed in the *Restatement of Second Contract* 270:" Where only part of an obligor's performance is impracticable, his duty to render the remaining part is unaffected if (a) it is still practicable for him to render performance that is substantial, taking account of any reasonable substitute performance that he is under a duty to render; or(b) The obligee, within a reasonable time, agrees to render any remaining performance in full and to allow the obligor to retain any performance that has already been rendered [28] ".

Article 270 of *Restatement (Second) Contracts* is dedicated to partial impracticability of contracts. This article states that wherever only a part of the performance of the obligator's obligation is impracticable , then this will have no impact on the rest of his obligation , if the two following conditions being provided: As it can be seen, the performance for obligator can be impracticable and non-executive only in some of its parts. If impracticability of some part makes performing of other parts so difficult that it leads to impracticability, then the contract will be impracticable as a whole and the rules which were described in articles 261 and 266 would thus be applied in this case. If the obligator performs the executable portions of the performance then, in this condition, he can take legal action for restoration in order to compensate losses. If the part of obligator's performance which is impracticable is very insignificant so that there is possibility to perform the major part of contract, yet his duty to perform remains intact. The issue that whether this part is principal or not, depends on its impact on obligee's reasonable expectations [29].

## V. CONCLUSION

Finally, doctrine of impracticability of contract is an exception to the principle of sanctity of contract. Historically, America law gradually has moved from its origin in the common law to modern law apropos this doctrine. It means that the two concepts of frustration of purpose and impossibility are commonly in common law combined resulting into the single concept of commercial impracticability. The doctrine of impracticability has been codified in article 2-615 *Uniform Commercial Code* for sale of contract, and article 261 *Restatement (second) of contracts* for all kind of contracts.

It is the recommended here that when performance a contract in a case faces hardship because of the occurrence of an unforeseen event and it must not have been a basic assumption of the contract was made and moreover performance was rendered impracticable by this incidence, the doctrine of impracticability should apply.

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## REFERENCE

[1] H. C. Black, Black's Law dictionary, 5th ed, West Publishing Company, 1979, p999.

[2] A. Odiadi, 'sub-Saharan debt: The imperative contract adjustment' (2008) p 27.

[3] G. Treitel, the Contract of Law, 10th ed, Sweet and Maxwell: London, 1999, p 819.

[4] S. Williston, The Law of Contracts, 5th ed, Baker: New York, 1931.

[5] J. G. Ryan, "UCC 2-615: Excusing the impracticable" vol. 60 Law Review p 575, 1980.

[6] J. Poole, Textbook on Contract Law, 8th ed, Oxford: University Press, 2006.

[7] Restatement (second) of contracts 1981, 261, comment d.

[8] A. Nakazato, "Uniform Commercial Code Section 2-615: Commercial Impracticability from the Buyer's Perspective" vol.51 Temple Law Quarterly p518, 1978.

[9] J. Calamari, J. Perillo, Contracts, 2nd ed, West Publication Co, United Stated, 1977, pp 477-78.

[10] [1647] 82 897 ER, p 897.

[11] H. A. Lewis, 'Allocating Risk in Take-or-Pay Contracts: Are Force Majeure and Commercial Impracticability the Same Defense' vol. 42. Southwestern Law Journal, p 1047,1988.

[12] R. Sommer, "Commercial Impracticability-an Overview" vol.13 Duquesne Law Review, P521, 1974.

[13] [1863] 3 B & S 826.

[14] [1903] 1903 KB2 470.

[15] H. A. Lewis, "Allocating Risk in Take-or-Pay Contracts: Are Force Majeure and Commercial Impracticability the Same Defense", vol.42 Southwestern Law Journal, p 1047, 1988.

[16] H. A. Lewis, "Allocating Risk in Take-or-Pay Contracts: Are Force Majeure and Commercial Impracticability the Same Defense" vol. 42 Southwestern Law Journal, p 1047, 1988.

[17] [1863] 3 B & S 826 p309.

[18] [1916] 172 Cal 289.

[19] E. H. Bergin, J. Walker E Bulletin, 'Force Majeure and Impossibility of Performance Guide' (2008) http://www.joneswalker.com/news-publications-551.html

[20] P. Walter, 'Commercial Impracticability in Contracts' vol. 61 St. John's Law Review, p225,1986.

[21] [1916] 172 Cal 289, p 458.

[22] [1916] 172 Cal 289, P 459.

[23] H. A. Lewis, "Allocating Risk in Take-or-Pay Contracts: Are Force Majeure and Commercial Impracticability the Same Defense" vol. 42 Southwestern Law Journal, p 1047, 1988.

[24] Uniform Commercial Code 1978, 2-615.

[25] Restatement (Second) of Contracts Restatement (Second) of Contracts 1981, 261.available at: http//www.westlaw.com

[26] D.L. Jacobs, "Legal Realism or Legal Fiction? Impracticability under the Restatement (second) of contracts", vol. 87 Commercial Law Journals, p 289,1982.

[27] Restatement (second) of contracts Restatement (second) of contracts 1981, 269.

[28] Restatement (Second) of Contract 1981, 270.

[29] Restatement (second) of contracts 1981, Comment b, 270.