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The Doctrine of Impossibility of Performance and the Foreseeability Test

The doctrine of impossibility is a concept in the law of contracts used to grant relief to a promisor whose contractual performance becomes vitally different from what had reasonably been expected of him due to the occurrence of a supervening event. Generally speaking, until 1863 impossibility of performance was not a defense to an action for damages arising out of nonperformance. Taylor v. Caldwell presented the first general formulation of the doctrine of impossibility. In Taylor, an owner of a music hall was relieved of his liability to pay damages for failing to have the hall available under the terms of the lease when prior to the time of performance, the hall was accidently destroyed by fire. The court granted relief on the principle that:

in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

Because of the principle's limited scope, relief was given only where performance became impossible by certain types of supervening events such as: the death or incapacity of a person whose services were the subject of the contract; the destruction of the specific thing

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For the English treatment, see generally J. Chitty, Chitty on Contracts, §§ 1261-1307 (1968); R. McElroy, Impossibility of Performance (1941) [hereinafter cited as McElroy]: Aubrey, Frustration Reconsidered—Some Comparative Aspects, 12 Int'l and Comparative Law Quarterly 1163 (4th series 1963) [hereinafter cited as Aubrey].


3. Id. at 314.
that was contracted for or was essential to performance; or the prohibition of performance by a subsequent change in the law.\(^4\)

The common law trend has been to expand the number and kind of situations in which a party may invoke impossibility of performance as a defense. Today, "[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."\(^5\) The most modern formulations of the doctrine of impossibility are found in section 2-615 of the Uniform Commercial Code\(^6\) and section 281 of the Proposed Draft of the Restatement of Contracts.\(^7\) Under the provisions of the Code and Restatement, three conditions must be met if the promisor is to be discharged from his obligation: (1) the performance must be made impracticable by (2) the occurrence of a contingency, (3) the non-occurrence of which was a basic assumption on which the contract was entered.\(^8\)

Traditionally, one of the conditions required for the application of


\(^5\) Mineral Park Land Co. v. Howard, 172 Cal. 289, 293, 156 P. 458, 460 (1916) (citation omitted); City of Veron v. City of Los Angeles, 45 Cal. 2d 710, 290 P.2d 841 (1955).

\(^6\) Section 2-615 of the Uniform Commercial Code provides:

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 non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

\(^7\) Section 281 of the proposed draft of the Restatement of the Law (Second) of Contracts (Tent. Draft No. 9, 1974) provides:

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, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

the doctrine of impossibility was that the event which made performance impossible must have been unforeseen by the parties at the time the contract was made. Where the event was found to be foreseeable, courts have denied relief unless the party seeking relief had provided for the contingency in his contract. In this situation, if the event was foreseeable, courts inferred that since the party did not provide for the contingency, he assumed the risk of its occurrence. Consequently, courts held the party liable for damages even though his performance might have been commercially impracticable. Considering the traditional legal rationale used for granting relief under the doctrine of impossibility, this conclusion by the courts seems proper. For if relief is premised on the notion that the parties intended that a state of facts remain unchanged, the foreseeability of the event would bar courts from finding such an intention with regard to an event that was foreseeable.

The modern legal rationale of impossibility is not premised on the intention of the parties as to the continued existence of a state of facts; rather, it is based on the court's balancing the community's interest in having contracts enforced according to their terms against the commercial senselessness of requiring performance. Both the Code and Restatement adopt this rationale through the use of the term “impracticable” as opposed to “impossible.”

Because of the expansion of the doctrine of impossibility, a number of writers have expressed their dissatisfaction with the continued use of the foreseeability test as a barrier to the application of the doctrine of impossibility. The argument against the use of foreseeability is given in the text.
that the test penalizes a party for failing to forecast all future contingencies and to deal with them in the contract. In addition, the foreseeability test fails to question whether the party actually assumed or should assume the risk of the supervening event. The purpose of this article is to examine the criticisms of the foreseeability test, to examine its application under the Code, and to formulate criteria which may lead to better results when this test is applied.

CRITICISMS OF THE FORESEEABILITY TEST

The first criticism made against this test is that it employs the reasonable man standard in determining whether an event is foreseeable.¹³ No doubt such a standard has a great working value for the court, but it penalizes an individual who fails to foresee the foreseeable.¹⁴ The foreseeability test assumes that parties entering a contract are aware of all the possible contingencies existing at the time the contract was made. In reality, this is not true. When parties enter into the contracting process, it is unlikely they perceive all the possible contingencies which may impede their performance. Rather, parties limit their attention to a number of situations which they choose by some initial process of selection. Between businessmen, the most likely situations on which the parties focus their attention are those which relate to performance and price, as opposed to contingencies that may interfere with performance.¹⁵

Situations have arisen where the court has misapplied the test. Some courts have held that a party should have reduced his qualifications to writing under circumstances where not even a reasonable man could have anticipated the supervening event.¹⁶ In one case an event

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¹⁵ Foreseeability as used in the law of contracts with respect to damages differs from its use as applied to the doctrine of impossibility. Foreseeability serves as a limitation on risk assumption, in the case of contract damages, as opposed to the enlargement of risk assumption in the case of impossibility. Furthermore, in situations employing the doctrine of impossibility the promisor's conduct does not create the risk of the supervening event. However, in the case of contract damages, the promisor's conduct is what creates the risk. For a general discussion of the concept of foreseeability as applied to contract damages see Corbin, supra note 1, §§ 1006-13.
was found to be foreseeable even though the parties testified that at the time of contracting neither one of them anticipated the subsequent change in events.\textsuperscript{17} Furthermore, the test has been used when in all likelihood resort to the concept was unnecessary because the court could have reached the same result by applying a different analysis.\textsuperscript{18}

The greatest hardships are created by use of the foreseeability test in cases where the source of difficulty could be said to be foreseeable, but the nature and extent of the risk were not. An example of this situation was evidenced in \textit{Morrow, Inc. v. Paugh},\textsuperscript{19} where the promisor contracted to lease a truck. The contract provided that the truck was to be returned in the same condition save normal wear and tear. Subsequently, the truck was accidently destroyed by fire through no fault of the promisor. Certainly, the promisor assumed and foresaw the risk of destruction through his own negligence but did not anticipate destruction by fire without any fault on his part. However, the court held that the promisor should have foreseen the possibility of destruction by fire and provided for it in his contract.\textsuperscript{20}

The first criticism, therefore, has centered on the court's determination of whether the event was foreseeable by the party at the time he entered the contract. Though the test may be probative in determining whether the party should be held to have assumed the risk of the foreseeable event, it ignores whether the party was actually aware of the possible contingency or whether he appreciated the potential harm which the event could cause. For these reasons, foreseeability should not be conclusive in determining whether the party assumed the risk of the foreseeable event.

\textsuperscript{17} Megan v. Updike Grain Corp., 94 F.2d 551 (8th Cir.), \textit{cert. denied}, 305 U.S. 663 (1938).
\textsuperscript{18} See, e.g., Lloyd v. Murphy, 25 Cal. 2d 48, 153 P.2d 47 (1944) (evidence available that lessee was trying to find a way out of a bad bargain); Gold v. Salem Lutheran Home Ass'n of the Bay Cities, 53 Cal. 2d 289, 347 P.2d 687 (1960) (aleatory contract i.e., contract premised on the happening or non-happening of an event); Portland Section of Counsel of Jewish Women v. Sisters of Charity, 513 P.2d 1183 (Ore. 1973) (perpetual contract for the care of one designated person); Salinger v. General Exchange Insurance Corp., 217 Iowa 560, 250 N.W. 13 (1933) (defendant could have taken the step to prevent his performance from becoming impossible).
\textsuperscript{19} 120 Ind. App. 458, 91 N.E.2d 858 (1950) (en banc); Mitchell v. Ceazan Tires, Inc., 25 Cal. 2d 45, 153 P.2d 53 (1944) (general "war talk" at the time party entered lease contract made it reasonably foreseeable that government would restrict the sales of tires. However, defendant did not anticipate that such restrictions would reduce sales by 99 percent). However, most commentators disagree with such cases. "Foreseeability of the source of difficulty does not, therefore, preclude unforeseeability of the extent of the difficulty from being a basis for relief." Aubrey, \textit{supra} note 1, at 1185 n.71.
\textsuperscript{20} 120 Ind. App. at 464-65, 91 N.E.2d at 860-61.
The second criticism levied against the foreseeability test is that it infers that a party has assumed the risk of the supervening event by failing to provide for it. The difficulty with this assumption of risk theory is that it fails to question whether the party actually did assume or should assume the risk of the supervening event. Many factors enter into the contracting process which may prevent one from inserting a clause covering all of the possible contingencies which may be foreseen at the time of contracting. Such factors as the parties' business relationship, their bargaining position, and a party's ability to draft an all-inclusive excuse clause may result in the absence of a contract provision. Moreover, some of the same factors which prevent the insertion of a clause may be probative of the party's non-assumption of risk.

Because of the parties commercial practice and trade usage, they may feel there is no need to bargain over an excuse clause. If the parties have been able to work their problems out in the past, they probably believe they will be able to do so in the future. Moreover, the attitude of some businessmen towards the use of contracts may discourage another party from attempting to insert a clause for fear that pressing the issue may cause delay or a breakdown in negotiations.

Commercial practice and trade usage may also be probative of non-assumption of risk where a foreseeable contingency makes performance commercially impracticable. Evidence that parties have shared the losses created by contingencies in the past could serve as justifica-

21. In Lloyd v. Murphy, 25 Cal. 2d 48, 54, 153 P.2d 47, 58 (1944), the court stated: The purpose of a contract is to place the risks of performance upon the promisor, and the relation of the parties, terms of the contract, and circumstances surrounding its formation must be examined to determine whether it can be fairly inferred that the risk of the event that has supervened to cause the alleged frustration was not reasonably foreseeable. If it was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed. Cf., West Los Angeles Inst. for Cancer Research v. Mayer, 366 F.2d 220, 225 n.9; Smit, supra note 12, at 314.

22. In the drafting of contracts between parties having fair equality of bargaining power, the words finally written in the instrument are often the result of a hard-fought compromise. To inject too many imaginable catastrophes into the negotiations is to cause irritation, doubt, even frustration of making. Patterson, supra note 1, at 946. See also Farnsworth, supra note 12, at 886.

23. See Berman, Excuse for Nonperformance in the Light of Contract Practices in International Trade, 63 COLUM. L. REV. 1413 (1963), where the writer suggests that in the area of international trade, if the parties have not expressly qualified their promise, the obligor assumes all other risks. The Uniform Commercial Code recognizes that the history of prior dealings is very important in settling disputes. UNIFORM COMMERCIAL CODE § 1-205. But see A.L. Jones & Co. v. Cochran, 33 Okla. 431, 126 P. 716 (1912), where evidence of custom of trade which excused a grower when his crop failed was excluded by the court. For further discussion, see text accompanying note 70 infra.
tion for allocating the burden of loss over both parties under the present contractual relationship.

Another factor which contributes to the absence of a provision covering possible contingencies, even where the event is foreseeable, is the bargaining power each party possesses. A requirement that if the event is foreseeable, the party must expressly qualify his promise assumes he is capable of doing so. However, this is not true when the bargaining power of the parties is disproportionate. For this reason, when a party has no say over the terms of the contract he is at the mercy of the stronger party and must hope that the stronger party will be self-sacrificing when performance turns out to be commercially impracticable. Here again, the absence of a provision may be more probative of the non-assumption of risk rather than the assumption of it. In cases where the party has no control over the terms of the contract, such factors as the superior knowledge of the stronger party and the nature of contract may indicate that the weaker party does not assume the risk of all foreseeable contingencies existing at the time of negotiation. For instance, contracts for the manufacture of a particular product according to the terms and specifications of a stronger party present a situation where the weaker party should be able to assume that such an undertaking is possible without having to qualify his promise.

A final factor which contributes to the absence of contractual language dealing with possible contingencies is the inability of laymen to forecast all the possible risks and deal with them in one all-inclusive clause. Businessmen who do attempt to forecast future developments and provide for them in their agreements oftentimes find their efforts to be in vain because of the court's *ejusdem generis* construction of the clause. Under a *ejusdem generis* construction, general words following specific words are read to include only things of the same type and nature as those described by the specific words. The case of *Excelsior Motor Mfg. & Supply Co. v. Sound Equipment* demonstrates the court's use of this rule of construction. In *Excelsior*, the defendant

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24. See, e.g., Savage v. Peter Kiewit Sons Co., 249 Ore. 147, 432 P.2d 519 (1967). The Savage court recognized that bidding on construction contracts is very competitive and one has little choice on the terms of the agreement. See text accompanying notes 64 through 66 infra.

25. For further discussion, see text accompanying note 61 infra.


27. 73 F.2d 725 (7th Cir. 1934).
seller sought relief under a clause which excused the seller "on the happening of such contingencies as may be provided against in the contract, such as an embargo, war, or causes beyond his control."28 The seller was unable to perform on time because of engineering and other mechanical difficulties, and he sought to be excused under the "causes beyond his control" clause. The court refused him this relief, holding that the clause, on \textit{ejusdem generis} grounds, covered only those casualties that were similar to those specifically listed.29

Despite the court's narrow construction of excuse provisions, the terms of an excuse provision though not covering a particular contingency may reflect the nature of the risk which a businessman thinks should excuse his performance. To this extent, a provision which excuses a seller for "causes beyond his control" may be probative of the non-assumption of risk.30

In addition to drafting problems imposed by \textit{ejusdem generis} construction, there is some question as to whether a seller can insert a clause which would give him more relief than presently available under section 2-615 of the Uniform Commercial Code. Comment 8 of section 2-615 states:

\begin{quote}
Generally, express agreements as to exemptions designed to enlarge upon or supplant the provisions of this section are to be read in the light of mercantile sense and reason, for this section itself sets up the commercial standard for normal and reasonable interpretation and provides a minimum beyond which agreement may not go.31
\end{quote}

Though no reasons are given for why a seller should not be able to shift more of a risk upon his buyer, it would appear that this comment should be read together with the Code's provisions on good faith and unconscionable contracts.32 One writer believes the drafters did not intend this provision to bar a seller from contracting for greater relief.33

This second criticism demonstrates that the mere fact that a party has not qualified his promise should not necessarily be used to infer that he assumed the risk of the foreseeable event. Factors which contribute to the absence of a provision covering a foreseeable contingen-

28. \textit{Id.} at 728.
29. \textit{Id.}
30. \textit{See} \textit{Patterson, supra} note 1, at 950.
32. \textit{Id. §§} 1-203, 2-302.
cy may well be probative of the promisor's non-assumption of risk. For this reason, the court should be conscious of factors other than foreseeability and the absence of a provision excusing the promisor in determining risk assumption.

FORESEEABILITY UNDER THE CODE

The historical development of section 2-615 presents a valuable starting point for examining the role of foreseeability under the Code. Unlike many of the Code's provisions, section 2-615 has no official counterpart in the former Uniform Sales Act. Section 2-615 is the work of Professor Karl Llewellyn who drafted a similar provision for the Revised Uniform Sales Act. Though one writer has stated that the Code should not have attempted to codify the doctrine of impossibility, Llewellyn contended that a Code provision was essential to compensate for inadequacies of the common law doctrine of impossibility. One of these inadequacies was the lack of protection the common law afforded businessmen who for one reason or another were unable to insert an excuse clause in their contracts. To correct this situation, Llewellyn prepared section 87 of the proposed Revised Uniform Sales Act. Llewellyn was of the opinion that businessmen should have protection without the need for a clause granting them relief.

Though it was never enacted as a provision of the Uniform Sales Act, section 87 was carried forward verbatim into the May 1949 draft of the Uniform Commercial Code. Section 87 opened with the prefatory language "between merchants unless otherwise agreed." In this form, section 87 provided relief to a party despite the absence of a provision dealing with a specific contingency so long as the party seeking excuse met the other requirements of the section. Because the drafters feared the prefatory language of section 87 could be read to...

35. For further discussion, see text accompanying notes 21 through 29 supra.
36. Section 87 of the proposed Revised Uniform Sales Act (unpublished), quoted in Hawkland, supra note 33, at 77, states:
   Between merchants unless otherwise agreed and subject to section 86 on substituted performance
   (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraph (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made commercially 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. . . .
38. See note 36 supra.
give relief to a party who in fact assumed the risk of a foreseeable event, the 1949 version of 2-615 was amended to read "[e]xcept so far as a seller may have assumed a greater obligation." The effect of this change was to give relief so long as the party seeking relief did not specifically assume the risk of the foreseeable event.

Thus, the main barrier to relief under the Code is the question of risk assumption and not foreseeability. To the extent foreseeability is probative of risk assumption, foreseeability is a barrier to relief under the Code. But because foreseeability is not a conclusive factor of risk assumption, it can be argued that relief is available even where the party foresaw the event where evidence is available which would negate risk assumption. Such factors as the extent and degree of loss which the event creates as compared to those risks normally assumed by current business practices, the remoteness of the foreseeable event from those generally encountered in the particular trade or business, the parties prior dealings, and the nature and purpose of the contract may negate the inference that a party assumed the risk of the foreseeable event.

In addition to the Code's non-conclusive attitude toward foreseeability, the question of when an event should be considered foreseeable appears to require a more subjective analysis. Comment 1 to section 2-615 provides:

This section excuses a seller from timely delivery of goods contracted for, where his performance has become commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting.

Requiring the contingency to have been within the contemplation of the parties directs the court to focus its attention on the nature of the risk, the terms of the contract, and the surrounding circumstances in order to determine if the parties contemplated the possible contingency. It might be argued that this analysis requires the determination of whether the parties were actually aware of the possible contingency at the time of contracting as opposed to whether they should have been aware of it.

39. See Hawkland, supra note 33, at 78.
40. The statute is set out in full at note 6 supra.
41. See Symposium, supra note 8, at 882-83; Schlegel, supra note 1, at 447-48; Corbin, supra note 1, § 1333, at 371; Restatement of the Law (Second) of Contracts, supra note 12, at 49. One writer suggests that the test to be applied under section 2-615 should be "how remote the contingency is from the contract, how clearly it falls within the contemplated business risks, and assurance that whatever contingencies develop are outside the seller's control." Spies, supra note 8, at 253. For further discussion, see text accompanying notes 58 through 71 infra.
42. Uniform Commercial Code § 2-615, Comment 1 (emphasis added).
The apparent willingness of the Code to allow relief despite the foreseeability of an event is a welcomed improvement to the doctrine of impossibility. However, whether the courts are prepared to apply a more realistic foreseeability test is yet to be seen. There is some indication that they are. Perhaps the reluctance on the part of courts to apply a more realistic test is in part due to the traditional purposes the test served and the lack of criteria by which to determine risk assumption.

FORMULATING CRITERIA

The present version of the foreseeability test serves essentially three purposes. First, it encourages parties entering into a contract to anticipate and expressly provide for possible contingencies. Second, it provides an easy method for courts to allocate the losses arising from the supervening event. And third, it prevents expanding the doctrine of impossibility so far as to furnish a possible means of escape for the unscrupulous party who is seeking to evade a just contractual obligation.

However, the foreseeability test as administered under the common law has outlived its usefulness. Parties do not look to the law of contracts for guidance in their business conduct, but rather they look to it for enforcement of or relief from their contracts. For both social and economic reasons it is good that parties are encouraged to perform their promises. However, the notion that a contract promise is absolute and that relief will not be given where the party foresaw the possible contingency and did not provide for it leads to inequitable results in some cases. Furthermore, simplicity in administration of the doctrine of impossibility does not justify the failure of the court to ask the more difficult question: should this party be relieved from his contractual obligation? Nor does the fear that the unscrupulous party will seek relief justify a refusal to apply a more realistic foreseeability test.

The real inquiry under the doctrine of impossibility should be to determine whether the contract has become commercially impracticable and whether the party seeking relief has assumed the risk of the supervening event. Commercial impracticability is the determination by the court that performance has become vitally different from that

43. See note 48 infra and accompanying text.
44. For further discussion, see text accompanying notes 19 through 20 supra.
which the party reasonably expected at the time the contract was made. This determination is made by balancing the community's interest in having contracts enforced according to their terms against the commercial senselessness of requiring performance. On the other hand, assumption of risk is the determination by the court that the party undertook to perform despite how different his performance might subsequently become. In making this latter determination the court must look to the facts surrounding the making of the contract. To this extent, foreseeability may be one factor which is probative of risk assumption. However, it should not be a conclusive factor barring relief under the doctrine.

A number of courts have recognized that foreseeability is only probative of risk allocation. In Transatlantic Financing Corp. v. United States, a suit arising out of the closing of the Suez Canal, the court by way of dicta observed that the mere fact the parties were aware of hostilities between Israel and Egypt and the subsequent nationalization of the canal by Egypt did not necessarily mean the shipper assumed the risk of the canal's closing. The court stated:

Foreseeability or even recognition of a risk does not necessarily prove its allocation. Parties to a contract are not always able to provide for all the possibilities of which they are aware, sometimes

45. Lloyd v. Murphy, 25 Cal. 2d 48, 54, 153 P.2d 47, 50 (1944); Williston, supra note 1, § 1931. The U.C.C. speaks of impracticability as an alteration in the essential nature of performance. Uniform Commercial Code § 2-615, Comment 4. Compare the English test which centers on whether the supervening event has made performance of the contract "a thing radically different from that which was undertaken by the contract." Ocean Tramp Tankers Corp. v. V/O Sovfracht (the Eugenia), 2 Q.B. 226, 239 (1964). Obviously, the point at which a contract becomes impracticable is not subject to easy determination. Essentially, it must turn on the hardships created by the supervening event and the commercial senselessness of requiring performance. For further discussion, see text accompanying note 11 supra.


47. If the party expressly assumed the risk of performance, the determination is based upon the parties' expressed intention. Where no expressed assumption exists, the court bases its decision on its own sense of justice as gleaned from the surrounding circumstances at the time the parties entered the contract. See Corbin, supra note 1, §§ 1328 and 1331; G. Griswode, Law of Contracts, § 176 (1947); Smit, supra note 12, at 313; Note, The Fetish of Impossibility, supra note 1; Symposium, supra note 8, at 889.


49. 363 F.2d 312 (D.C. Cir. 1966).
because they cannot agree, often simply because they are too busy. Moreover, that some abnormal risk was contemplated is probative but does not necessarily establish an allocation of the risk of the contingency which actually occurred.\textsuperscript{50}

Under the present version of the foreseeability test, if an event is foreseeable the court requires the party to have provided for it in his contract. Finding no provision, the court then draws the inference that the party had assumed the risk. Such an inference should not be drawn until a full inquiry into the facts surrounding the making of the contract has been made.

In investigating the facts the court's initial inquiry should be whether the event was contemplated by the parties at the time of contracting. This need not be an inquiry into the subjective state of minds of the individuals. As one writer stated:

"Contemplation" is appropriate to describe the mental state of philosophers but is scarcely descriptive of the mental state of businessmen making a bargain.\textsuperscript{51}

Nevertheless, the court should attempt to determine if the party seeking excuse was aware of not only the possibility, but also the probability of the contingencies interfering with the contract. This determination can be made from the terms of the contract and the surrounding circumstances.

First, the negotiations leading up to the making of the contract may reveal the party's awareness. One might argue that the parol evidence rule would bar the admissibility of such evidence where the contract was fully integrated. However, the better view is that the parol evidence rule only bars the use of negotiations for purposes of adding to or varying the written agreement and not for the purpose of determining whether the event was foreseeable.\textsuperscript{52}

Courts might also consider provisions in similar contracts entered by the party seeking to be relieved of performance to see similar contracts by the party seeking excuse if the "unforeseen" events had been by the party seeking to be relieved of performance to see if the "unforeseen" events had been provided in those contracts. In \textit{Glidden Co. v. Hellenic Lines, Ltd.},\textsuperscript{53} another case arising out of the closing of the Suez Canal, the court took cognizance of the promisor's successful in-

\begin{itemize}
  \item \textsuperscript{50} Id. at 318 (citations omitted).
  \item \textsuperscript{51} Patterson, \textit{supra} note 1, at 947.
  \item \textsuperscript{52} See Farnsworth, \textit{supra} note 12, at 887; McElroy, \textit{supra} note 1, at 243; Glidden \textit{v. Hellenic Lines, Ltd.}, 275 F.2d 253, 256-57 (2d Cir. 1960).
  \item \textsuperscript{53} 275 F.2d 253 (2d Cir. 1960).
\end{itemize}
sertion of a relief clause in another contract covering the possibility of
the canal’s closing. The Glidden court considered this information to be
probative of the party’s awareness.54

Finally, the nature and source of the event and its remoteness to the
subject matter covered in the contract may be an indication of whether
it was the type of risk that a businessman would generally be aware of. For example, a normal rise or decline in prices as a result of normal market supply and demand is the type of event which most reasonable businessmen are conscious of on a daily basis.55 Yet a marked increase in cost caused by an oil embargo, a general strike or government imposed rationing or restrictions are contingencies which might be so remote as to indicate the party’s lack of awareness.56

In each case the court will be presented with a different set of facts. Though the three suggested factors mentioned above57 may not be applicable in all cases, they do present the type and nature of evidence which a court should consider in determining whether an event was foreseeable.

After having determined whether the event was foreseeable, the
court must then determine whether the promisor should be held to
have assumed the risk. Generally, the court will try to base its deter-
mination on the intentions of the parties. However, where the parties
have failed to express their intentions, such an analysis is impossible.
For this reason, it would appear that the court in making any determi-
nation as to risk assumption is premising its decision not only on the
foreseeability of the event but also on its own sense of justice. The
court, in essence, is weighing the loss suffered by the promisor against
the potential disappointment of the promisee’s expectation interest.58
For this reason, any determination as to whether a party assumed the
risk of contingency not expressly provided for should also be based on
consideration of factors such as: the nature, purpose and terms of the
contract; the commercial senselessness of requiring performance; the
bargaining positions of the parties; and, the ability of the individual

54. Id. at 257.
55. Uniform Commercial Code § 2-615, Comment. 4.
56. Id. The degree of foreseeability required should approach virtual certainty as opposed to a mere outside chance. McElroy, supra note 1, at 244. Cf. Note, UCC § 2-615: Sharp Inflationary Increases in Cost as Excuse from Performance of Contract, 50 Notre Dame Lawyer 297, 304-06 (1974). For further discussion, see note 41 supra.
57. See text accompanying note 52 through 56 supra.
58. The problem is that of allocating, in the most generally satisfactory way, the risks of harm and disappointment that result from the supervening events. Corbin, supra note 1, at 327.
party to insure against the disabling event or to bear or distribute the loss. All of these factors represent policy considerations in determining where the loss should fall. Each might be said to be premised on the theory that it is better for the loss to be placed upon one party as opposed to the other and in some instances on both.

Consideration has been given to the nature, purpose and terms of the contract by some courts in determining where the risk of the supervening event should be placed. For example, in United States v. Wegematic, the Federal Reserve Board invited five electronic manufacturers to submit proposals for an intermediate-type, general purpose electronic digital computer. The defendant submitted its bid characterizing its machine as a “truly revolutionary system utilizing all of the latest technical advances.” The Board accepted the defendant's bid on the assumption that the defendant was capable of producing such a machine. Subsequently, the defendant encountered engineering difficulties and sought cancellation of the contract on the grounds of impossibility. The court held that since the purpose of the contract was not for the development of a computer but rather for the furnishing of a computer, the risk of all engineering difficulties rested on the defendant. Hence, the Wegematic court was influenced in making its determination as to risk assumption by the purpose of the contract as evidenced by the nature of the agreement.

59. 360 F.2d 674 (2d Cir. 1966). Other cases where the court has been influenced by such factors as the nature, purpose and terms of the contract include B.P. Ducas v. Bayer Co., 163 N.Y.S. 32, 36 (1916), wherein the court construed the terms “contingencies beyond their control” as shifting the risk of every contingency whether foreseen or not. The speculative or aleatory nature of the contract has influenced some courts in determining risk assumption. Shedd-Bartush Foods of Illinois v. Commodity Credit Corp., 135 F. Supp. 78 (N.D. Ill. 1955), aff'd., 231 F.2d 555 (7th Cir. 1956) (speculative); Gold v. Salem Lutheran Home Ass'n of the Bay Cities, 53 Cal. 2d 289, 347 P.2d 687 (1960) (aleatory). The purpose of the contract was considered in National Presto Industries, Inc. v. United States, 338 F.2d 99 (Ct. Cl.), cert. denied, 380 U.S. 962 (1965), where the court held that a government procurement contract resembled a “joint enterprise” experiment in which the government was not only concerned with the end product but with the process as well. The court gave relief to the promisor for unexpected expenses on the theory of mutual mistake. Presto, supra, at 109. Cf., Natus Corp. v. United States, 371 F.2d 450 (Ct. Cl. 1967). Consider also West Los Angeles Institute for Cancer Research v. Mayer, 366 F.2d 220 (9th Cir.), cert. denied, 385 U.S. 1010 (1965), wherein the purpose of the contract was to allow the promisor to take advantage of tax savings. Subsequently, the tax commissioner ruled in an unrelated case that such tax advantages would not be allowed on transactions similar to the promisor's. The court held that since one of the purposes of the contract was to enable the promisor to take advantage of possible tax savings, he did not assume the risk of the unfavorable tax ruling even though such was foreseeable. For other cases where the purpose of the contract influenced the court's decision, see 20th Century Lites, Inc. v. Goodman, 64 Cal. App. 2d 938, 149 P.2d 88 (1944); Portland Section of Counsel of Jewish Women v. Sisters of Charity, 513 P.2d 1183 (Ore. 1973); Hinchman v. City Waters Co., 179 Tenn. 545, 167 S.W.2d 986 (1943).

60. 360 F.2d at 675.
Another approach some courts have used in determining risk assumption is an examination of the expertise of the parties and to determine which party drafted the contract terms and what the other party expected. For example, in *Helene Curtis Industries, Inc. v. United States,* the court held that a contractor did not assume the risk of non-performance where the government, who drafted the terms of the contract, knew or should have known that its specifications could not be met. This type of analysis is premised on the theory that a party who has undertaken to perform according to the other party's specifications should be able to assume that performance in accordance with the terms of the contract is possible.

Another factor that should be examined in assessing risk assumption is the commercial senselessness of requiring a party to perform. In circumstances where this factor has been held controlling, the courts have determined that the promisor did not assume the degree of risk which is created by the supervening event. For example, in *Whelan v. Griffith Consumers Co.,* the defendant contracted to deliver fuel oil to the plaintiff's farm home. The defendant failed to make a timely delivery because of a 14 inch snow fall. Because of the defendant's failure, the plaintiff's water pipes froze. The court denied plaintiff's claim for damages on the grounds that under the circumstances the driver of the defendant's truck was not required to defy the elements and plow into an impassable roadway. Thus, the court based its decision as to risk assumption on the senselessness of requiring defendant's performance.

As mentioned earlier, one of the criticisms levied against the foreseeability test is the hardships it creates where the party did not appreciate the extent and nature of the foreseeable risk. This hardship is re-

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61. 312 F.2d 774 (Ct. Cl. 1963); *cf.*, R.M. Hollingshead Corp. v. United States, 111 F. Supp. 285 (Ct. Cl. 1953) (contractor was under no duty to determine if compliance with government specifications could produce the desired result); City of Littleton v. Employers Fire Insurance Co., 169 Col. 104, 453 P.2d 810 (1969) (promisor did not assume the risk that a water tank could be built according to the plans). *Compare Hol-Gar Mfg. Co., A.S.B.C.A. No. 6865, 62 BCA ¶ 3551, rev'd, Hol-Gar Mfg. Co. v. United States, 360 F.2d 634 (Ct. Cl. 1966), where the Armed Service Board of Contract Appeals held that an experienced contractor who accepts a fixed-price contract to produce an item never before made under performance specifications assumes the risk that performance may be impossible.*

62. 170 A.2d 229 (D.C. Mun. App. 1944). *See also* Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 P. 458 (1916) (court relieved promisor of his duty to excavate gravel which laid beneath the water level and would have cost 10 or 12 times more than originally expected); *Mitchell Canneries, Inc. v. United States, 77 F. Supp. 498 (Ct. Cl. 1948) (promisor did not assume the risk of local crop failure and was not expected to complete his contract by going out of state to secure substitute); Northern Corp. v. Chugach Electric Ass'n, 518 P.2d 76 (Alaska 1974).

63. For further discussion, see text accompanying note 19 supra.
moved when commercial senselessness as well as foreseeability is considered in determining the assumption of risk question.

Two other factors which also should be considered by the court are the bargaining positions of the parties and the ability of the parties to bear or distribute the losses. These two factors have not received much attention by the courts in deciding the risk assumption issue.

Where the bargaining strength of the parties is unequal, the weaker party is usually in no position to shift or share any risk with his promisee. The promisor's willingness to perform the contract without being able to shift all or part of the risk of the foreseeable event may resemble an act of submission.64 The promisor in these cases becomes a gambler, betting on the non-intervention of the foreseeable event. Usually, the stronger party is in a better financial position to bear the loss created by the supervening event than is his weaker promisor. Thus, despite the foreseeability of the event, the court should be conscious of the promisor's ability to shift the risk in determining whether the promisor should be held to have assumed the entire risk of the foreseeable event.

Perhaps the reason courts have been reluctant to consider the bargaining positions of the parties in determining risk assumption is due to the traditional remedies administered in cases of impossibility. Traditionally, the only remedy available where performance has become impossible, was to completely discharge the contract leaving the parties in the same position as they were at the time the supervening event occurred. As a result of this remedy, the promisee lost the complete value of his expectation interest, while the promisor had to bear the loss of his reliance expenditures, absent any restitutionary recovery.65 The Uniform Commercial Code has apparently taken the position that in some situations the court should make equitable adjustments between the parties and at the same time enforce the contractual relationship.66 Consequently, with this recognition by the Code that courts can adjust the rights and duties of the parties, per-

64. See Cuneo and Crowell, *Impossibility of Performance Assumption of Risk or Act of Submission*, 29 LAW & CONTEMP. PROB. 531 (1964); Farnsworth, supra note 12, at 886; *Restatement of the Law (Second) of Contracts*, supra note 12, at 43. Relief on the grounds of unconscionability is unlikely. UNIFORM COMMERCIAL CODE § 2-302, Comment 1.


haps future courts may be more conscious of the bargaining position of the parties in allocating the risk of the foreseeable event.

A final factor which is related to the bargaining positions of the parties is the consideration of which party is in a better position to insure against the disabling event, to bear the loss, or to distribute it. This policy consideration allows the court to view the parties relative to their commercial setting in determining the proper and equitable allocation of loss resulting from non-performance by one of the parties. For example, the fact that a promisor is a middleman capable of spreading the risk over more individuals as opposed to a producer may justify placing more risk upon him where he has failed to shift the risk expressly in the contract and the event was foreseeable. The equities of this result are supported by the drafters of the Proposed Restatement of Contracts, wherein they state:

The fact that a supplier has not taken advantage of his opportunity expressly to shift the risk of a shortage in his supply by means of contract language may be regarded as more significant where he is a middleman, with a variety of sources of supply and opportunity to spread the risk among many customers on many transactions by slight adjustment of his prices, than where he is a producer with a limited source of supply, few outlets, and no comparable opportunity.

Moreover, the commercial trade usage or custom may indicate whether a party was expected to insure or otherwise protect himself against the risk. The failure of that party to take appropriate steps outside the contractual arrangement to protect himself despite foreseeability of the risk may serve as an equitable ground for placing the loss on him. This factor was the basis of the court's decision on risk assumption in Canadian Industrial Alcohol Co. v. Dunbar Molasses Co. In that case the middleman-seller was to supply molasses to the buyer "of the usual run" of a named refinery. When the refinery re-

68. See generally Symposium, supra note 8, at 894-95; The Fetish of Impossibility, supra note 1, at 101-12.
69. RESTATEMENT OF THE LAW (SECOND) OF CONTRACTS, supra note 12, at 49.
70. See generally The Fetish of Impossibility, supra note 1, at 98 n.25; Schlegel, supra note 1, at 442 n.115; ReSTATEMENT OF THE LAW (SECOND) OF CONTRACTS, supra note 12, at 50. For further discussion, see text accompanying notes 22 through 23 supra.
duced its production below its normal level, the seller was unable to meet his contract requirements with the buyer, and was unsuccessful in obtaining molasses elsewhere. The seller sought to avoid plaintiff’s claims for damages on the grounds of impossibility of performance. However, the court held the seller liable in damages since he had not taken reasonable efforts at the time of contracting to assure his source of supply by entering into a contract with his supplier. Here the court, judging from the commercial setting, imposed on the seller a duty to assure himself a source of supply. In some situations, cases may arise where trade usage or customs would not have imposed a duty on the promisor to take extraordinary steps to protect himself against the risk of supervening event.

As has been demonstrated, many factors, in addition to foreseeability, should be weighed by the court in determining whether a party should be held to assume the risk of the foreseeable event. While indeed foreseeability is one policy consideration probative of risk assumption, other policy considerations may call for the determination of non-assumption of risk. These include: the nature, purpose, and terms of the contract; the commercial senselessness of requiring performance; the bargaining position of the parties; and the ability of the parties to insure against, to bear or to distribute the loss.

CONCLUSION

An analysis of cases in which the impossibility doctrine has been applied demonstrates that there must be a greater appreciation by the courts of the need to apply a more realistic foreseeability test to commercial contract situations. The fear that a more realistic test will open the door to possible abuse of the doctrine of impossibility is unfounded. The limits of good faith and reasonableness are adequate to prevent abuse. Neither the need to provide certainty in the law nor the simplistic administration of the doctrine justifies the failure of the court to give a party relief in the proper case. Moreover, awareness that foreseeability is only one factor probative of risk assumption and that in some situations a party should be given relief regardless of foreseeability, will lead to more just and equitable results under the doctrine of impossibility.

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