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### INTERPRETING CONTRACTS: A COMMON LAW DILEMMA

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#### *Introduction*

The problem of judicial interpretation is to hold a just middle way between excess of valour and excess of caution. A too daring expounder is in danger of laying down sweeping rules without attending to the probable variations in the circumstances to which they will be applied; . . . On the other hand, the pedestrian timidity that shrinks from hazarding any general conclusion will only land us in a still less desirable state, that of having no principle at all, but a heap of unrelated instances which . . . may or may not . . . be consistent with one another.†

The common law court traditionally has been faced with a dilemma. The court can exercise caution in construing mercantile agreements by examining only the explicit words of the agreement in interpreting the intention of the parties. Or in contrast, the court can be creative in construing agreements. Employing valour, the judge then seeks to ascertain the intention of the parties from the circumstances surrounding the transaction, from their business conventions and conceivably, from the judge's own perception of what is fair and reasonable in the situation.

The choice of approaches is a difficult one with significant consequences for merchants. Most frequently, no single approach towards interpretation will prevail. Judges rather employ combinations of approach. Sometimes they are inclined towards caution in construction and other times towards valour. To some extent, the choice of approach actually adopted will depend upon the ideological predisposition of the judge. A predilection in favour of judicial caution will encourage the court to search earnestly for the intention of

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† Per Frederick Pollock, *Judicial Caution and Valour* (1929), 45 L.Q. Rev. 293, at p. 296.

the parties among the literal words of their contracts. What the parties obviously desired will automatically become what the court will uphold.

A predisposition in favour of judicial valour will lead to a very different type of approach. The judge will likely delve into circumstances which operate outside of the letter of the contract. He will assess the trade practices, business customs and usages which the merchants did not explicitly incorporate into their agreement. He may even decide according to his own conception of equity in the context under study.

The predisposition of the judge has a practical import in relation to commercial transactions. Indeed, the very result of each case will hinge upon the degree to which the court prefers caution or valour in interpreting contracts. Excessive caution induces in the judge an unflinching belief in the autonomy of the merchants, a respect for their expressed will. Judicial valour inclines the court towards a constructive analysis, a creative method of interpretation. Where caution prevails, only the literal contract itself determines whether an agreement exists between the parties. The judge merely enforces their desires as contractors. Where valour predominates, the pre-eminent device in interpretation is whether the judge, not the merchants, believes that there is a valid contract. Mercantile intent serves as only one instrument in this greater judicial design of construction.

This article seeks to analyze to what extent common law judges are inclined towards a cautious or a bold approach in construing nonperformance obligations in commercial contracts. The study analyzes whether particular judicial methods of construing nonperformance obligations in contracts are functional and the extent to which they are useful in practice. Emphasis is given to the philosophical values of judges, their approaches to construction and the link between their indigenous values and their interpretation of nonperformance clauses in business contracts. This article recognizes that judicial ideology is essential in the development of the common law. Yet the existence of a judicial methodology, a process of consistent reasoning, is even more fundamental if the common law of nonperformance is to ensure the viability of commerce.

### *I. Mercantile Autonomy in the Common Law.*

For centuries, within the common law tradition, the value of freedom of contract as both a philosophical and pragmatic notion, has been asserted. Freedom to contract was the natural consequence of *laissez-faire*.<sup>1</sup> the freedom to agree. Merchants who were “. . . of full age

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<sup>1</sup> For advocates of the philosophy of “laissez-faire” see Mill, *Principles of Political Economy* (1848); Smith, *The Wealth of Nations* (1776); Spencer, *Justice* (1891);

and competent understanding" were to have the "... utmost liberty of contracting". Courts were bound to treat such free will as "sacred . . . and enforced by Courts of Justice".<sup>2</sup> The view had the support of economic and political theory<sup>3</sup> as well as the concurrence of the traditional Law Merchant.<sup>4</sup> Honour among businessmen was an essential ingredient in avoiding reciprocal ill-will in business. Mercantile relations were to be based upon *mores* devised by merchants themselves as a reflection of their own business needs and interests. Practical sense reinforced the suppletive role of law in relation to business. Merchants were reputedly equipped by past experience in business dealings to cater to their own commercial needs. Their trade relations could conceivably survive without stringent legal controls that would otherwise hinder them in allocating their business obligations.

The traditional faith in the sanctity of merchant agreements was generalized, indeed institutionalized in the common law, until ultimately, it became an absolute rule of law.<sup>5</sup> The business contract

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Bentham, *Theory of Legislation* (Hildreth's translation, 4th ed., 1882); Ricardo, *Works* (McCulloch's ed., 1881); Mill, *On Liberty* (Oxford, 1933); Ritchie, *Natural Rights* (London, 1894); Ricardo, *Principles of Political Economy and Taxation* (1911).

<sup>2</sup> Per Sir George Jessel M.R., *Printing and Numerical Registering Co. v. Sampson* (1875), L.R. 19 Eq. 462, at p. 465.

For cases ingraining "laissez-faire" into the law see, for example, *Godcharles v. Wigmen* (1886), 113 Pa. St. 431; *People v. Coler* (1901), 166 N.Y. 1.

The supremacy of individual liberty over a system of peremptory law is emphasized both as a principle of political economy and as a reflection of societal need. See in general hereon Becker and Barnes, *Social Thought from Lore to Science*, Vol. II (1952), pp. 518-524, 671-672; Taylor, *Laissez-faire and State Intervention in Nineteenth Century Britain* (1974); Fine, *Laissez-faire and the General Welfare State* (1956). Other economists giving some emphasis to laissez-faire in their writings: include, Senior, *An Outline of the Science of Political Economy* (1938); Bastiat, *Sophismes économiques* (trans. Deachman, 1934); Say, *Treatise on Political Economy* (trans. by Prinsep, Phil., 1857); Menger, *Grundsätze der Volkswirtschaftslehre* (Wien, 1923).

<sup>3</sup> On the significance of good faith as an inherent element of an agreement, see Powell, *Good Faith in Contracts* (1956), 9 *Curr. Leg. Prob.* 16. See too, Goodhart, *English Law and the Moral Law* (1953), pp. 100 *et seq.*; Denning, *The Need for a New Equity* (1952), 5 *Curr. Leg. Prob.* 1; Trakman, *Good Faith in Business: Theory and Fact* (1979); Trakman, *The Effect of Illegality in The Law of Contract: Suggestions for Reform* (1977), 55 *Can. Bar Rev.* 626, at pp. 628 *et seq.*

<sup>4</sup> For a general discussion hereon see: Malynes, *Consuetudo, Vel, Lex Mercatoria* (3rd ed., 1686); Mitchell, *An Essay on the Early History of the Law Merchant* (1904); Bewes, *The Romance of the Law Merchant* (1923); Burdick, *Contributions of the Law Merchant to the Common Law in 3 Selected Essays in Anglo-American Legal History* (1909), p. 34; Brodhurst, *The Merchants of the Staple in 3 Selected Essays in Anglo-American Legal History* (1909), p. 16; Trakman, *The Evolution of the Law Merchant: Our Commercial Heritage* (1980), 12 *J. of Mar. L. & Com.* 1; (1981), 13 *J. of Mar. L. & Com.* 153.

<sup>5</sup> This "absolute" obligation approach has its origins in such early English cases as, for example, *Paradine v. Jane* (1647), Aleyn 26, 82 K.B. 897. For articles and texts

became sacrosanct. The judge merely interpreted the *consensus ad idem*<sup>6</sup> (the meeting of the minds) of the parties. It was the plain meaning, the obvious language of their contract, which governed the court in determining the extent of their business obligations. Any judicial construction to the contrary amounted to a violation of the sanctity of commercial agreements. Any attempt "... to contradict . . . a written contract good upon the face of it . . ." was impermissible in law.<sup>7</sup>

The rule connoting this sanctity of promises had its counterpart in the notion that agreements should be binding in law. Merchants should be free to contract at will, binding themselves to obligations to which they had committed themselves by contract. Herein lay the essence of the strict legal construction of obligations in business. To secure the good faith of merchants the law was to compel them to honour their own obligations. The legal system merely enforced the promises of businessmen, echoing their mutual consent, their accord and their satisfaction.

In order to sanctify promises, common law courts adopted the Latin doctrine *pacta sunt servanda*,<sup>8</sup> by which agreements were to be

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dealing with the evolution of the doctrine of impossibility see: Page, The Development of the Doctrine of Impossibility of Performance (1920), 18 Mich. L. Rev. 589; Conlen, Intervening Impossibility of Performance as Affecting the Obligation of Contracts (1918), 66 U. Pa L. Rev. 28; Patterson, The Apportionment of Business Risks Through Legal Devices (1924), 24 Col. L. Rev. 335; Woodward, Impossibility of Performance as an Excuse for Breach of Contract (1901), 1 Col. L. Rev. 529; Corbin, Frustration of Contract in the United States of America (1947), 28 J. Comp. Leg. and Int. L. 1; Comment, Contracts: Excuse of Performance by Existence of Condition Causing Unforeseen Expense (1916), 4 Cal. L. Rev. 407; Patterson, Constructive Conditions in Contracts (1942), 42 Col. L. Rev. 903; Farnsworth, Disputes over Omissions in Contracts (1968), 68 Col. L. Rev. 860; Gow, Some Observations on Frustration (1953), 3 Int & Comp. L.Q. 291; Wade, The Principle of Impossibility in Contract (1940), 56 L.Q. Rev. 519; Webber, Frustration of Contract (1951), 4 Curr. Leg. Prob. 283. It is contested whether international contractors (involved in the sale of generic goods) lack the ability to anticipate intervening performance risks. For the view that international contractors have a high level of risk anticipation. See Berman, Excuse for Nonperformance in the Light of Contract Practices in International Trade (1963), 63 Col. L. Rev. 1413. But See Farnsworth, *op. cit.*, *ibid.*

On the difficulties encountered by businessmen in attempting to exhaust all relevant aspects of nonperformance in their business contracts, see Lord Atkin in *Phoenix Insurance Company of Hartford v. DeMonchy* (1929), 141 L.T.R. (n.s.) 439, at p. 445 (H.L.); Price, Thinking and Experience (1955), pp. 155 *et seq.*; James, The Principles of Psychology (1890), p. 253; Williams, Language and the Law (1945), 61 L.Q. Rev. 384.

<sup>6</sup> On *consensus ad idem* see, in general Corbin on Contracts (1952); Williston, A Treatise on the Law of Contracts (1938); Cheshire & Fifoot, The Law of Contract (9th ed., 1976); Guest, Anson's Law of Contract (24th ed., 1975); Treitel, The Law of Contract (4th ed., 1975); Fridman, The Law of Contract in Canada (1976).

<sup>7</sup> *Raffles v. Wichelhaus* (1864), 2 Hurlstone & Coltman 906, 159 Exch. 375.

<sup>8</sup> The legal principle of *pacta sunt servanda*, as a developed concept in law was only entrenched in the Western legal tradition in medieval times. During this period the

binding in law. Performance undertakings were to be strictly preserved without change, save in terms of the agreement itself. Courts, like merchants, were obliged to respect the business undertakings of merchants. Excuses from performance were to remain impermissible in law, except where the parties themselves had provided for non-performance by their own voluntary agreements. The *pacta sunt servanda* doctrine was extreme in its original application in the common law. No excuse from contractual obligations was to be permitted in law where a merchant "... created a duty or charge upon himself" by his own willing act. No "accident" nor even "inevitable necessity" was to excuse a merchant "... because he might have provided against it [the hazard] by his contract".<sup>9</sup>

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fundamental precepts of natural reason and conscience developed into binding principles of law. Accordingly, it is in the writings of the natural lawyer that the sanctity of promises was most succinctly articulated. The link between the sanctity of promises and strict liability was aptly depicted by the German lawyer von Puffendorf: "Now whenever men enter into any agreements, the social nature of man requires that they must be faithfully observed. For if an agreement lacks this guarantee, much the largest part of the advantage which accrues to mankind from the mutual interchange of duties would be lost . . . . Furthermore, if it were not necessary to keep promises, it would be in no way possible with any confidence to base one's calculations on the assistance of other men . . . . For when I have done something on my side of an agreement, my contribution or labour has been irretrievably lost, if the other person breaks faith . . . . And it is not right that I should be scoffed at, because I believed another person to be an honourable and upright man. It is therefore, a most sacred precept of natural law, and one that governs the grace, manner and reasonableness of all human life, *That every man keep his given word*, that is, carry out his promises and agreements. In von Puffendorf, *De Jure Naturae et Gentium*, Book III, ch. IV, sec. 2 (trans. by C.H. and W.A. Oldfather, Oxford, 1934, italics added). For further references to this scholar, see *infra*, footnote 27.

Von Puffendorf's comments found a noticeable echo in the writings of the American jurist Roscoe Pound, who noted many years later: "... [A] man's word in the course of business should be as good as his bond and . . . his fellow men must be able to rely on the one equally with the other if our economic order is to function efficiently." In Roscoe Pound, *Introduction to the Philosophy of Law* (1954), p. 155.

The principle of *pacta sunt servanda* acquired its authoritative significance in the common law in 1647 in the case of *Paradine v. Jane*. There the court emphatically stated: "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract". *Supra*, footnote 5, at p. 27. Accordingly, a transactor who promises to perform without qualification assumes the risk that he may be prevented from performing by extrinsic circumstances, by war, riots, labour disturbances, etc. The ideology is succinct. The promisor is bound to perform because, had he wished otherwise, he could have avoided entering into the arrangement or he could have contracted upon different terms. For instance, he could have regulated the disruption by providing for non- or part performance expressly in his contract. See, in general, Wehberg, *Pacta Sunt Servanda* (1959), 53 Am. J. Int'l. L. 775. For further references, see *infra*, footnote 35.

<sup>9</sup> See *Paradine v. Jane*, *ibid.* For an American authority using equivalent reasoning see *Stees v. Leonard* (1874), 20 Minn. 448, at p. 451, where Young J. stated: "The general principle of law which underlies this case is well established. If a man binds

The rule that bound promisors to their obligations evolved within a limited context; but it soon applied to a variety of transactions before English courts. In *Paradine v. Jane*, the binding force of obligations made without express qualification gained support in the common law. A tenant was bound to pay rent to a landlord even though the invading Prince Rupert of Germany had forcibly evicted the tenant from possession of the land. No relief from payment of rent was to be tolerated in law. Had the tenant wished to obtain an excuse from his obligations, he should have so provided expressly in his agreement. No contractual relief would accrue to a contractor who failed to provide for relief in his contract. His silence at the time of contracting meant that he intended to perform his contractual duties unconditionally. He had, in other words, assumed the risk of nonperformance. If the "... lessee is to have the advantage of casual profits, so he must run the hazard of casual losses . . .".<sup>10</sup>

The implications of *Paradine v. Jane* soon began to show the flaws of *pacta sunt servanda* as a methodology in the common law. Circumstances inevitably arose beyond the control of the parties in which a contractor pleaded for a legal excuse from performance even though he had not provided for such an excuse in his contract. Both the absolute obligation rule and the doctrine of *pacta sunt servanda* began to lose their status as autonomous principles of the common law. Courts sought to recognize the flexible needs of commerce in times of market and political instability. Judges became creative by having recourse to judicial discretion in remedying the insufficiencies of contracts. *Paradine v. Jane* came to represent the most extreme proposition in favour of the binding force of obligations. Soon common law courts began to water down this early authority of 1647. Situations arose in which common law courts felt that the imposition of an unconditional promise to perform would be unduly harsh in its effects upon the promisor. Performance hazards were depicted as unforeseen in nature, with consequences so harsh in impact as to warrant some form of judicial assistance in favour of the promisor. Judges employed diverse techniques in order to grant relief from obligations which were assumed without express qualification in contract. They adopted the role of reasonable interpreters. No merchant would reasonably be obliged to assume a performance risk in

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himself, by a positive, express contract, to do an act in itself possible, he must perform his engagement, unless prevented by the Act of God, the law, or the other party to the contract. No hardship, no unforeseen hindrance, no difficulty short of absolute impossibility, will excuse him from doing what he has expressly agreed to do. This doctrine may sometimes seem to bear heavily upon contractors; but, in such cases, the hardship is attributable, not to the law, but to the contractor himself, who has improvidently assumed an absolute, when he might have undertaken only a qualified, liability. The law does no more than enforce the contract as the parties themselves have made it."

<sup>10</sup> *Paradine v. Jane*, *ibid.*

conditions of undue economic hardship. Courts implied terms into contracts granting relief from performance on the assumption that the parties themselves would have provided likewise had they anticipated the disruption of their performance at the time of contracting. So too, judges maintained that the foundation of the agreement, its object or purpose, had disappeared in the face of political and economic upheavals. Alternatively, they permitted nonperformance simply because they deemed that justice so demanded.

This constructive logic recurred in common law decisions. In *Taylor v. Caldwell*, a fire thwarted a contract for the rental of a music hall. The contract of rental made no provision for the consequence of fires. The court followed a line of reasoning different from that of *Paradine v. Jane*. The tribunal found an implied condition in the contract, namely, that the rental was conditioned upon the continued existence of the music hall in a state that was fit for the purpose of rental. An "... excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of . . ." <sup>11</sup> the music hall. By implication of law, the court was willing to complete the agreement, adding a term to the contract even though the contractors themselves had failed to provide for such an excuse in their express terms. Yet in so deciding, the intention of the parties was not disregarded. The principle of *Paradine v. Jane* did not die. Instead, the court fictionalized the intent of the parties. <sup>12</sup> It assumed that the parties themselves would have desired the termination of the contract had they anticipated the disruption of their performance. The *foundation* of their agreement had disintegrated by virtue of an unforeseen disaster. Had the parties anticipated the fire they themselves would have excused performance. Physical impossibility therefore arose as a ground for non-performance. An intention to excuse performance was imputed to the parties by way of judicial construction.

In *Krell v. Henry* this role of judicial construction was extended even further. An agreement to hire a room specifically for the purpose of observing coronation proceedings was thwarted in design by the cancellation of the coronation procession. The contract made no express provision for the cancellation. Performance was still possible. The room was still available for rent. No physical impossibility of performance existed, distinguishing this case from *Taylor v. Caldwell*. Yet the court granted an excuse from performance on the grounds that the *foundation* of the contract, viewing the procession, had substantially disappeared. Nor was the fictional intention of the parties ignored. The cancellation of the coronation procession,

<sup>11</sup> (1863), 3 Best & Smith 826, 122 K.B. 309, at p. 314. (Q.B.), per Blackburn J.

<sup>12</sup> For discussion on the use of fictions, see *infra*, footnotes 31 and 175.

Vaughan Williams advocated, "... cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made . . .".<sup>13</sup>

The common law cases that followed further entrenched this constructive approach towards the right of nonperformance in contract. The doctrine of impossibility or frustration grew to encompass excuses from performance in the event of physical or legal impossibility or because requiring performance would impose an unduly onerous responsibility upon the promisor. Contractors were relieved from their commitments on the grounds that their performance had become impossible, substantially more difficult or significantly more costly. Indeed, the right of courts even to adjust the terms of contracts in the light of changed circumstances was given recognition in the Law Reform (Frustrated Contracts) Act of 1943.<sup>14</sup>

Practical reasons were invoked to justify the right of judicial intervention in contracts. There were suggestions that agreements often could not be performed because of sudden physical mishaps or major economic catastrophes. Relief from performance was permitted in the face of intervening restrictions imposed by governments upon trade relations. Nonperformance was allowed because of military upheavals which arose beyond the control of the parties and impeded their capacity to perform. The law of nonperformance therefore shielded the promisor from disruptive hardships created by Acts of God and Acts of Man. Excuses from performance were granted in the face of extraneous intrusions which hindered the free flow of commerce in international markets. To compel the promisor to perform in such conditions, courts maintained, would be to risk the economic disintegration of trade across national boundaries, to the loss of promisor, promisee and the international community alike.<sup>15</sup>

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<sup>13</sup> [1903] 2 K.B. 740, at p. 752.

<sup>14</sup> 6 & 7 Geo. VI, c. 40. For discussions on the adoptions of this legislation see: (1974), 51 A.L.J. Proceedings; Restatement (Second) of Contracts (Tent. Draft No. 9, 1974); Williams, The Law Reform (Frustrated Contracts) Act 1943 (1944); Coons, Approaches to Court Imposed Compromise—The Uses of Doubt and Reason (1964), 58 N.W. L. Rev. 750; Comment: Loss Splitting in Contract Litigation (1951), 18 U. Chi. L. Rev. 153; Swenson, Comment (1948), 46 Mich. L. Rev. 401. See too: Report on the Need for Frustrated Contract Legislation in British Columbia (Project No. 8, Report No. 3 of the Law Reform Commission of British Columbia, 1971); Percy, The Application of the Doctrine of Frustration in Canada in Studies on Canadian Business Law (ed. Fridman, 1971); Payne, Reform of the Law of Frustrated Contracts in Saskatchewan (1960), 25 Sask. Bar Rev. 94; Falconbridge, Frustrated Contracts: The Need for Law Reform (1945), 23 Can. Bar Rev. 469; Donovan, Law Reform in Victoria, [1960] J.B.L. 62.

<sup>15</sup> The view that a contract is frustrated or rendered impossible in the event of a disruptive Act of God or act of man is a notion well established in the common law systems. In English law, this approach has been used in, *inter alia*, these cases: *Joseph*



The range of situations in which common law courts granted relief from performance grew with the passage of time. Excuses from obligations were permitted in the event of death<sup>16</sup> or illness<sup>17</sup> of one party, because of destruction or deterioration of the subject-matter of the contract<sup>18</sup> or because of extensive delays involved in performance.<sup>19</sup> Merchants were excused from their promised commitments because of judicial,<sup>20</sup> executive<sup>21</sup> and administrative acts beyond their control;<sup>22</sup> on the occurrence of destructive storms, tempests, hurricanes and other acts of nature;<sup>23</sup> and in response to strikes, production bottlenecks and blockages in supply routes.<sup>24</sup>

Consistent arguments of law were employed to rationalize these conclusions. There was, according to Lord Sumner in *Bank Line, Ltd v. Arthur Capel & Co.*,<sup>25</sup> a presumed common intention of the parties to perform only so long as the commercial *object* of the contract remained intact. There was the view that the court had to imply terms granting excuses from performance in order to render agreements efficacious. There was the opinion that long delays experienced in rendering performance "destroyed the identity of the work or service".<sup>26</sup> Supervening disruptions in performance of great

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*Constantine S.S. Line Ltd v. Imperial Smelting Corp., Ltd*, [1942] A.C. 154; *Hirji Mulji v. Cheong Yue S.S. Co. Ltd*, [1926] A.C. 497 (P.C.); *Bank Line, Ltd v. Arthur Capel and Co.*, [1919] A.C. 435; *Metropolitan Water Board v. Dick, Kerr & Co. Ltd*, [1918] A.C. 119; *F.A. Tamplin S.S. Co., Ltd v. Anglo-Mexican Petroleum Products Co. Ltd*, [1916] 2 A.C. 397; *Horlock v. Beal*, [1916] 1 A.C. 486. See further McNair, *Legal Effects of War* (1940); McElroy and Williams, *Impossibility of Performance in Contract* (1941), pp. 61-63. On the American law, see Comment: *Supervening Impossibility of Performance as a Defense* (1936), 5 Ford. L. Rev. 322; Comment: *Contract—Impracticability of Performance as an Excuse for Breach of Contract* (1947), 46 Mich. L. Rev. 224; Comment: *Impossibility and the Doctrine of Frustration of the Commercial Object* (1924), 34 Yale L.J. 91; Anderson, *Frustration of Contract — A Rejected Doctrine* (1953), 3 De Paul L. Rev. 1; Note (1957), 6 De Paul L. Rev. 289. See further *supra*, footnote 5.

<sup>16</sup> *Harvey v. The Tivoli, Manchester, Ltd* (1907), 23 T.L.R. 592 (K.B.).

<sup>17</sup> *Condor v. The Barron Knights, Ltd*, [1966] 1 W.L.R. 87.

<sup>18</sup> *Ascar & Co. v. Blundell*, [1896] 1 Q.B. 123 (C.A.).

<sup>19</sup> *Jackson v. The Union Marine Insurance Co. Ltd*, [1873] L.R. 8 C.P. 572.

<sup>20</sup> *Hare v. Murphy Brothers Ltd*, [1974] 3 All E.R. 940.

<sup>21</sup> *Metropolitan Water Board v. Dick, Kerr & Co. Ltd*, *supra*, footnote 15.

<sup>22</sup> *Morgan v. Manser*, [1948] 1 K.B. 184.

<sup>23</sup> *Blyth v. Birmingham Waterworks Co.* (1856), 11 Exch. 781.

<sup>24</sup> *Davis Contractors, Ltd v. Fareham Urban District Council*, [1956] A.C. 696. On "strikes" see further Corbin, *op. cit.*, footnote 6, ss 642, 1332, 1333, 1340; Williston on Contracts (3rd ed., 1967), s. 1951A; Note: *Clauses in Contracts Excusing Default in Performance* (1920), 20 Col. L. Rev. 776; Williams, Note: *Clauses Excusing Performance in Case of Strikes or Causes Beyond Control* (1921), 6 Corn. L. Q. 189.

<sup>25</sup> [1919] A.C. 435, at p. 455.

<sup>26</sup> *Ibid.*, at p. 458, quoting Lord Dunedin. See Gutteridge, *Contract and Commercial Law* (1935), 51 L.Q. Rev. 91, at pp. 108, 110, 111. Restatement of the Law of

magnitude "destroyed the nature of agreements",<sup>27</sup> while major military events gave rise to the "disappearance of the foundation of an agreement".<sup>28</sup> Each intruding force, being devastating in character, justified a right of nonperformance in law.

Common law judges in fact used diverse rationalizations in terminating commercial contracts by operation of law. The intention of the parties remained, throughout, an important consideration in reaching this conclusion. Yet it was intention with a difference. It was the court's own construction of the intention of the parties that predominated. The design of the parties was objectivized. The judge himself determined what was a reasonable excuse in the circumstances and the judge imputed his own determinations to the parties.<sup>29</sup> For some judges, this was a power which the court exercised "... irrespective of the individuals concerned, their temperaments and failings, their interests and circumstances".<sup>30</sup> For other judges this judicial gap-filling power was a necessary function in a court of

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Contract, American Law Institute (1932), Vol. II, ch. 14, ss 454-469 (hereinafter cited as Restatement (1932)) on implied terms. But see Page, *op. cit.*, footnote 5, at p. 599 for a criticism of the "implied term" doctrine.

Justice Holmes once said of implied terms: "You can always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours [the court's] upon a matter not capable of bounding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place": Holmes, *The Path of the Law* (1897), 10 Harv. L. Rev. 457, at p. 466. On implied terms in general, see *The Moorcock* (1889), 14 P.D. 64 (Eng.); Williams, *Language and the Law*, *op. cit.*, footnote 5; Cheshire and Fifoot, *op. cit.*, footnote 6, pp. 147-152; Costigan, *Implied-In-Fact Contracts and Mutual Assent* (1920), 33 Harv. L. Rev. 376; Sturge, *The Doctrine of Implied Condition* (1925), 41 L.Q. Rev. 170; Corbin, *Conditions in the Law of Contract* (1919), 28 Yale L.J. 739, 743-744; Farnsworth, *op. cit.*, footnote 5; Rothschild, *The Doctrine of Frustration or Implied Condition in the Law of Contract* (1932), 6 Temple L.Q. 337.

<sup>27</sup> See *In re Badische Co. Ltd.*, [1921] 2 Ch. 331, at p. 379, where the judge stated: "If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain . . . a term should be implied dissolving the contract upon the happening of the event or circumstances."

<sup>28</sup> *F.A. Tamplin S.S. Co. Ltd v. Anglo-Mexican Petroleum Products Co. Ltd.*, *supra*, footnote 15, per Viscount Haldane. See further *infra*, footnote 119.

<sup>29</sup> See Williston, *The Law of Contracts* (1926), vol. III, ss 1931-1965 (hereinafter cited as Williston); S. McNair, *Legal Effects of War* (1944), ch. 6, *Frustration of Contracts*, at pp. 142-143, based on McNair, *Frustration of Contracts by War* (1940), 56 L.Q. Rev. 173; Sturge, *op. cit.*, footnote 26, at pp. 170-175. For a qualified acceptance of this judicial approach to nonperformance in contracts, see McElroy and Williams, *Impossibility of Performance* (1941); Wade, *op. cit.*, footnote 5, at pp. 519-556. See further *supra*, footnotes 5 and 26.

<sup>30</sup> *Hirji Mulji v. Cheong Yue S.S. Co. Ltd.*, *supra*, footnote 15, at p. 510.

equity.<sup>31</sup> The doctrine of frustration evolved as "... a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands".<sup>32</sup> For still others: "It would be truer to say that the court in the absence of express intention of the parties determines what is just."<sup>33</sup> In each case, the right of non-performance was granted in law on the assumption that the parties had failed to express their intention on the issue of nonperformance. The court created those remedies which the parties had omitted to create. The judge granted relief from performance on the understanding that the parties themselves would have done likewise had they anticipated the gravity of each intervening catastrophe, its nature and harmful effects upon their performance.

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<sup>31</sup> For a discussion on "gap-filling" see Corbin, *Recent Developments in the Law of Contracts* (1937), 50 Harv. L. Rev. 449, at p. 465. On the argument in favour of judicial creativity in the construction of contracts, see Farnsworth, *Some Considerations in the Drafting of Agreements: Problems in Interpretation and Gap-Filling* (1968), 23 Record of N.Y.C.B. Ass'n, 105.

For examples of courts exercising "gap-filling" powers of construction in relation to nonperformance, see *infra*, footnote 150 (supervening warfare, denials of export licences) and *infra*, footnote 62 (supervening blockage of Suez Canal). Excuses from performance are granted where the court is satisfied that the "foundation of the arrangement has disappeared" or the "basis of the contract" has altered since the formation of the agreement. Alternatively judges may conclude that the "purpose" or "object" of the venture or journey can no longer be satisfied because of severe changes in the cost of an ability to perform. For commentaries hereon see *infra*, footnote 62.

For a vigorous attack upon such an exercise of judicial "gap-filling" see Patterson, *Constructive Conditions in Contracts* (1942), 42 Col. L. Rev. 903, at p. 913 where he argues: "[T]o infer that the parties would have provided what the policy of the law now requires is an apologetic fiction which deprecates the part played by state policy and personal judgment in the administration of law." See too Berman, *op. cit.*, footnote 5, at pp. 1416-1417 and Mayers, *The Need for Law Reform—Foreward* (1918), 38 Can. L.T. 86.

<sup>32</sup> Per Lord Sumner in the *Hirji Mulji* case, *supra*, footnote 15, at p. 510.

<sup>33</sup> Per Lord Wright, *Legal Essays and Addresses* (1939), p. 258. Lords Wright and Denning are amongst the most progressive in their willingness to grant excuses from performance on grounds of justice and equity—even where the transactors themselves were silent on the issue. In *British Movietonews, Ltd. v. London and District Cinemas Ltd.*, [1951] 1 K.B. 190, Denning L.J. stated: "In these frustration cases . . . the court really exercises a qualifying power—a power to qualify the absolute, literal or wide terms of the contract—in order to do what is just and reasonable in the new situation . . .". At pp. 200-202. See too Lord Wright in *Joseph Constantine S.S. Line, Ltd v. Imperial Smelting Corp. Ltd.*, *supra*, footnote 15, at p. 184. For vehement criticisms of this "creative" judicial role, see especially Lord Sands in *Scott & Sons v. Del Sel*, [1923] S.C. 37. See too Pearson, J. in *Société Franco-Tunisienne d'Armement v. Sidemar S.P.A.*, [1961] 2 Q.B. 278. See in general Macauley, Justice Traynor and The Law of Contracts (1961), 13 Stan. L. Rev. 812, esp. at pp. 833 *et seq.*; Hurst, *Freedom of Contract in an Unstable Economy* (1976), 54 N. Carolina L. Rev. 545, at pp. 567-570; Patterson, *The Apportionment of Business Risks Through Legal Devices* (1924), 24 Col. L. Rev. 335, at pp. 348-353.

## II. *Mercantile Autonomy in International Commerce.*

The law governing nonperformance in international trade transactions followed the general developments of common law. The logic of *Paradine v. Jane* prevailed in large measure.<sup>34</sup> Judges argued that international merchants were obliged to perform their assumed obligations without relief. Various reasons were advanced in favour of this cautious interpretation of contractual duties. International merchants were, allegedly, able to regulate performance hazards themselves, in terms of their bargains, their contracts, their terms and their conditions. Disruptions of commerce, hazards of sea and forces of government were, reputedly, among those recurrent risks which businessmen necessarily appreciated at the time of contracting since such risks represented important considerations in the settlement of the contractual price. Under these circumstances, the grant of an excuse from performance by mandate of law would disregard the allocation of risks that is implicit in the agreement itself. To grant excuses from performance by judicial construction would interfere with the bargained-for-exchange concurred in by the merchants through their own voluntary acts.

Each international merchant was therefore obliged to assume the risk of nonperformance unless he excluded such a risk by agreement. Exceptions to this rule based on the law of impossibility or frustration were not to be readily implied into international business transactions by operation of law.<sup>35</sup> Since the loss caused by nonperformance had to fall somewhere, it should fall upon he who promised to perform, not upon the promisee who awaited performance to his chagrin.<sup>36</sup>

Yet this ideological faith in the sanctity of trade obligations became somewhat refined by common law courts. Judges began to grant excuses from performance based on the gravity of each disruption and its nature and effect upon contractual obligations.<sup>37</sup> They allowed nonperformance where the contractual context, the practices

<sup>34</sup> See, for instance, *Jackson v. The Union Marine Insurance Co.*, *supra*, footnote 19, at pp. 585-586, where Bovill C.J. stated: "The law has no power to make a contract different from that which a person has entered into. . . . [T]here is no principle of law that I am aware of which would excuse either party from performance of a contract, because such performance would be highly inconvenient or injurious to himself or lead to extraordinary expense." See further *infra*, footnote 150.

<sup>35</sup> See references, *supra* in footnotes 5 and 15. See too Cecil Wright's contention that contractors ". . . are themselves masters of their own . . . obligations" in *Comment on DeLaval Co. Ltd v. Bloomfield* (1939), 17 Can. Bar Rev. 208. See further, Mayers, *op. cit.*, footnote 31; Wehberg, *op. cit.*, footnote 8; Bärmann, *Pacta Sunt Servanda* (1961), 13 Rev. Int. Dr. Comp. 18; Rover, *Pacta sunt servanda en Verandering van Omstandigheden en het Privaatrecht* (1972), 14 Rechtsgeleerd Magazijn Themis.

<sup>36</sup> See *supra*, footnotes 5, 8, 9.

<sup>37</sup> Discussed, *supra* in footnotes 5 and 15.

of the parties and their usages of trade so justified.<sup>38</sup> Consequently, our judges terminated international trade obligations on the occurrence of blockades and embargoes, because of the requisition of ships and the destruction of cargoes, and in the event of strikes and lock-outs, government prohibitions and restrictions imposed on trade.<sup>39</sup> They altered contractual obligations in the face of sudden occurrence having harmful effects upon business. They implied excuses from performance into contracts on the assumption that the parties would probably have agreed to relief from their obligations in the same circumstances. A narrow line was drawn between the sanctity of promises in business and the courts' right to reconstruct such promises in relation to nonperformance. As Lord Loreburn stated in the classic case of *F.A. Tamplin S.S. Co., Ltd v. Anglo-Mexican Petroleum Products Co., Ltd*, "... no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted".<sup>40</sup> In this way common law judges extended the ambit of sanctioned nonperformance to commercial affairs.

Pronounced caution understandably arose from this reluctant progression towards judicial innovation in the arena of international trade. Common law courts recognized the need to reflect upon the

<sup>38</sup> However, there is always the risk that courts will pay only lip-service to trade usage in construing nonperformance obligations. Thus English and American courts, in effect, have overridden express contractual provisions in international transactions, while claiming only to interpret such provisions in the light of business understandings. See *The Texas Co. v. Hogarth Shipping Co.* (1921), 256 U.S. 619 (shipowners excused for nondelivery caused by foreseeable events other than those included in excuse clauses of bills of lading); *The Kronprinzessin Cecile* (1917), 244 U.S. 12 (similar facts); *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32 (H.L.) (importer permitted to cancel contract and recover down payment on ground that purpose of contract was frustrated by war despite contractual clause permitting exporter to extend time of delivery in event of war); *Bank Line, Ltd v. Arthur Capel and Co.*, *supra*, footnote 15 (charter party held frustrated when steamer was commandeered by the Government, although clause gave charterers option to cancel under such circumstances and they chose not to do so). See further Berman, *op. cit.*, footnote 5, at p. 1418.

<sup>39</sup> See *supra*, footnote 34 and *infra*, footnote 44.

<sup>40</sup> *Supra*, footnote 15, at p. 404. In German law, the doctrine of the "Geschäftsgrundlage", or foundation of the contract, first developed by Oertmann, a German scholar of the late nineteenth century, is based on the premise that every contract is conditioned upon the continued existence of those facts which, in the contemplation of the parties, are necessary for its performance. As soon as the foundation constituted by those facts is disturbed, the express provisions of the contract are no longer effective. See Oertmann, *Geschäftsgrundlage* (1927), 2 *Handwörterbuch der Rechtswissenschaft* 803. See, generally: Kegel, Rupp & Zweigert, *Die Einwirkung des Krieges auf Verträge in der Rechtsprechung Deutschlands, Frankreichs, Englands und der Vereinigten Staaten von Amerika* (1941), pp. 99-113; Larenz, *Geschäftsgrundlage und Vertragserfüllung* (2nd ed., 1957), pp. 156-157; Hay, *Frustration and its Solution in German Law* (1961), 10 *Am. J. Comp. L.* 345, at pp. 356-373.

behaviour of merchants when they constructed nonperformance obligations in international transactions. They acknowledged that the "true meaning"<sup>41</sup> of the contract lay in "effectuat[ing] . . . the intention of the parties as revealed by the language they have used".<sup>42</sup> Most importantly, they appreciated the impropriety of adding terms to contracts without appropriately restricting the courts' discretion. These guidelines therefore affected common law courts in their construction of contracts in international business. Firstly, the grant of an excuse from performance by operation of law was not to conflict with the express terms of the contract.<sup>43</sup> Secondly, a judicial right of nonperformance was only to be granted in situations where the parties failed to regulate that risk contingency expressly by their own business means.<sup>44</sup> Thirdly, the court, in determining whether or not to grant an excuse from performance, was obliged to reflect upon each contractual framework, upon the type of parties involved and upon the nature of their business transaction.

The intention of the merchants remained a key consideration in the process of judicial construction. Yet it was a distinctive type of intention. It was intention as culled from the judge's conception of the facts, not as ascertained from contractual expressions alone. The court asked whether the parties ". . . had they contemplated . . . these changed circumstances [would] have intended the contract to bind [them] . . .".<sup>45</sup> The court reconstructed the intention of the parties by presupposing that the parties would have done just as the court did, had they anticipated the disruption of their business bargain at the time of contracting.<sup>46</sup>

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<sup>41</sup> *Joseph Constantine S.S. Line Ltd v. Imperial Smelting Corp. Ltd*, *supra*, footnote 15, at p. 187, per Lord Wright.

<sup>42</sup> *Larrinaga & Co. Ltd v. Société Franco-Américaine des Phosphates de Medulla, Paris* (1923), 92 L.J. K. B. 455, 29 Com. Cas. 1 (H.L.), at pp. 11-12, per Lord Atkinson. See also *King v. Michael Faraday and Partners Ltd*, [1939] 2 K.B. 753, at p. 762, per Atkinson, J.

<sup>43</sup> In the *Constantine* case, *supra*, footnote 15, at p. 163, Viscount Simon L.C. stated: "There can be no discharge by supervening impossibility if the express terms of the contract bind the parties to performance notwithstanding that the supervening event may occur." But see *supra*, footnote 38.

<sup>44</sup> See the *Tamplin* case, *supra*, footnote 15, at p. 406, per Lord Haldane. See also Lush J. in *Geipel v. Smith* (1872), L.R. 7 Q.B. 404, at p. 414; Lord Shaw in *Horlock v. Beal*, *supra*, footnote 15, at pp. 507, 510; Viscount Simon L.C. in the *Fibrosa* case, *supra*, footnote 38, at p. 41. For the corresponding point of view under American Law, see *The Kronprinzessin Cecile*, *supra*, footnote 38, at p. 20, per Holmes J.

<sup>45</sup> *In re Badische Co., Ltd*, *supra*, footnote 27, at p. 388.

<sup>46</sup> See hereon Viscount Simon L.C. in the *Constantine* case, *supra*, footnote 15, at p. 163; Lord Parker in the *Tamplin* case, *supra*, footnote 15, at p. 422. For an American Supreme Court case to a similar effect, see *The Kronprinzessin Cecile*, *supra*, footnote 38, at p. 24; *The Texas Co. v. Hogarth Shipping Co.*, *supra*, footnote 33; *L.N. Jackson & Co. v. Lorentzen* (1949), 83 F. Supp. 489 (S.D.N.Y.).

Central to the judicial fictions employed in construing the intention of the transactors was the belief that judges were bound to impute contract terms to businessmen in the interests of efficacy in trade. The construction process was nevertheless restrained in application. Judges still evaluated the intention of the parties. They still scrutinized the express terms of business agreements. "The guiding principle . . . still [was] . . . what either party has given the other reasonable cause to expect".<sup>47</sup> Accordingly, judges considered "what the parties . . . expressly provided for . . ." when construing terms in agreements. Courts reflected upon ". . . the constant or general usage of persons engaged in like business".<sup>48</sup> However, in the final instance, common law courts who constructed nonperformance terms often drew only upon those inferences which appealed to their particular senses of judicial wisdom. The judge's own conception of contract practice established what the most reasonable intention of the parties ought to be in the circumstances. The ultimate resort of the judge still lay in ". . . the court's own sense of what is just and fair" in the circumstances.<sup>49</sup>

A paradox appeared in the common law treatment of non-performance obligations in international business agreements. Common law courts from their earliest beginnings considered themselves duty-bound to interpret, not create, contract terms to govern issues of nonperformance. Yet, with the realization that the contract was an incomplete manifestation of intention, judges demonstrated a willingness to innovate by imputing their conception of reasonableness into the expressed agreement of the contractors. The "intelligent judge" became aware that his function went beyond the express terms of agreements.<sup>50</sup> How far beyond the express terms he was to reconstruct the intention of the parties remained unclear in practice. The method of construing nonperformance duties depended upon the predilection of each judge. The judge determined what principles of frustration or impossibility should be emphasized in order to provide a just remedy

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<sup>47</sup> *Ibid.*

<sup>48</sup> "Contract" in *Encyclopedia Britannica* (14th ed., 1929), vol. 6, p. 342.

<sup>49</sup> *Ibid.* See also Wright, *Legal Essays*, *supra*, *op. cit.*, footnote 33, who added at p. 385: "A modern court should realize what is its ideal, that of doing justice according to the actual facts, though on lines of established law." See too, to a similar effect *Denny, Mott & Dickson, Ltd v. James B. Fraser and Co., Ltd*, [1944] A.C. 265, at pp. 275 *et seq.*; and in *Cricklewood Property & Investment Trust Ltd, and Others v. Leighton's Investment Trust Ltd*, [1945] A.C. 221, 61 T.L.R. 202, at pp. 206 *et seq.* For a similar American perspective see Corbin, *op. cit.*, footnote 31, at pp. 464-466.

<sup>50</sup> "The intention of the parties", Arthur Corbin once commented. "is indeed an important and frequently the decisive element; but an intelligent judge is aware that his function goes far beyond the ascertainment of such intention." Corbin, *op. cit.*, *ibid.*, at p. 466. See too Corbin, *Supervening Impossibility of Performing Conditions Precedent* (1922), 22 Col. L. Rev. 421, at pp. 423-424.

in the circumstances. He established the degree of difficulty in performance that would give rise to a right of nonperformance in law. He exercised as broad or as narrow a discretion in construing terms as he deemed to be appropriate in the business context under scrutiny. What became clear in each case was the dire need for common law judges to reconcile two opposing forces: the demand that the intention of merchants should be upheld and the court's responsibility to give justice to contractors in the face of extreme hardship and economic ruin in rendering performance.

### III. *The Common Law Function: Interpretation and Construction*

The judicial treatment of nonperformance in the common law has varied markedly between the extremes of narrow interpretation and broad construction, altering in nature from one case to the next. Each method of construing nonperformance clauses has commenced with the same underlying premise: the intention of the parties is to be upheld. No serious problems of interpretation occur where such intention is clearly and voluntarily expressed in written contracts and concurred in by both parties. However, common law judges have varied markedly in construing contracts which are not clearly and voluntarily expressed in writing. In particular, contradictory results occur when written contracts fail to deal expressly with particular nonperformance contingencies that arise subsequently and impede performance. Judges can construe such contractual silence to mean that obligations to perform remain absolute. No legal excuse from performance will be granted to the promisor. Alternatively, silence can be construed to justify a right of nonperformance in law. Various theoretical premises underlie both the grant and the denial of an excuse from performance. The silence of the contract can be interpreted strictly to mean that the promisor has agreed to perform without condition. Silence can also be construed liberally to infer that the promisor has agreed to perform only so long as he can do so with reasonable ease and without incurring undue cost or difficulty. Thus judges can justify both the grant and the denial of an excuse from performance. Judges can stress or downplay the sanctity of promises expressed without condition in writing. They can pay homage to the will of the parties or to the will of the court. They can enforce the literal letter of the contract or they can comply with the judges' own sense of equity in the context.

Common law approaches towards the nonperformance of international trade obligations therefore evolve along a spectrum, from intentionalism<sup>51</sup> to creative constructionalism.<sup>52</sup> The interpretation

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<sup>51</sup> The "intentionalist" perspective can be traced to the school of analytical positivism. Kelsen described positivism in this way: "The Pure Theory of Law is a theory of

<sup>52</sup> See next page.



of performance obligations range from a deep-seated faith in the autonomy of promises in business to a willingness to construe promises in accordance with judicial standards that transcend the literal framework of business. The question arises as to which judicial ideology along this spectrum best suits the demands of commerce. Which approach towards nonperformance obligations responds most readily to the interests of international business?

positive law. As a theory it is exclusively concerned with the accurate definition of its subject-matter. It endeavours to answer the question, what is the law? But not the question, what ought it to be? It is a science and not a politics of law. That all this is described as a pure theory of law means that it is concerned solely with that part of knowledge which deals with law, excluding from such knowledge everything which does not strictly belong to the subject-matter law. That is, it endeavours to free the science of law from all foreign elements. This is its fundamental methodological principle." (In Kelsen, *The Pure Theory of Law* (1934), 50 L.Q. Rev. 474, at pp. 474-477.) Accordingly, the court, in order to be truly scientific in terms of Kelsen's logic, was obliged to reflect *only* upon the terms of the contract itself in determining the significance of business agreements. No extraneous questions of fact were to be considered in the construction process; for social and business practices operated outside of the purview of "positive law". Most importantly, this scientific (*read: pure*) approach asserted the supremacy of the express words in the contract. The intentionalist court upheld the manifest intention of the parties, their binding agreement, their written consent. See further, Kelsen, *The Pure Theory of Law* (1935), 51 L.Q. Rev. 517; Kelsen, *General Theory of Law and State* (trans., Welberg, 1946); Kelsen, *Professor Stone and the Pure Theory of Law* (1965), 17 Stan. L. Rev. 1129. See too, Clark, *Hans Kelsen's Pure Theory of Law* (1969), 22 J. Leg. Ed. 170, at p. 177; Christie, *The Notion of Validity in Modern Jurisprudence* (1964), 48 Minn. L. Rev. 1049; Cowan, *Law Without Force* (1971), 59 Cal. L. Rev. 683; Hart, *Kelsen Visited* (1963), 10 U.C.L.A. Rev. (L.A.) 709; Ebenstein, *The Pure Theory of Law* (1945); Friedman, *Legal Theory*, (5th ed., 1967), ch. 24; Stone, *Mystery and Mystique in the Basic Norm* (1963), 26 Mod. L. Rev. 34.

<sup>52</sup> "Constructionalism" in law owes much of its inception to American legal realism. Realist thought, Llewellyn once advocated, evolved as a reflection of the following attitudes: (a) A conception of law in flux; (b) a conception of law as a means to social ends; (c) a conception of society in flux; (d) a separation of the "is" from the "ought"; (e) a distrust of traditional legal rules and concepts; (f) a distrust of giving too much importance to prescriptive rules in the decisional process; (g) a belief in the value of grouping cases in narrow categories; (h) an insistence on evaluation by reference to consequences; (i) a belief in the results which would be achieved by programmed and sustained research projects investigating the facts. (See Llewellyn, *Some Realism About Realism—Responding to Dean Pound* (1931), 44 Harv. L. Rev. 1222.) Consequently, the Realist court viewed the interpretation of contracts as a dynamic process. The judge was not restricted to the narrow legal rules, nor to the literal intention of the parties. He was entitled, indeed obliged, to reflect upon the social realities that surrounded each transaction. He was expected to evaluate the habits of communities and the attitudes of merchants in construing the ambit of contractual obligations. Commercial Law and commercial fact were mutable, not immutable forces. The construction of business obligations therefore had to change with time, adapting to new attitudes, novel practices and altered conditions of trade. For commentaries on Realism that are associated with Llewellyn, see Garlan, *Legal Realism and Justice* (1941), pp. 135-145; Llewellyn, *Jurisprudence: Realism in Theory and Practice* (1962); Llewellyn, *The Common Law Tradition, Deciding Appeals* (1960); Llewellyn, *The Bramble Bush* (1930); Llewellyn Papers (Comp. Ellinwood, U. of Chicago Law School, 1970);

#### IV. *Intentionalism: Express Terms.*

Distinct advantages flow from an absolute rule that obliges international merchants to perform their obligations without excuse, except where they themselves have provided expressly to the contrary. The international regime of business is often better able to regulate trade agreements that transcend national boundaries than are national courts of law. International businessmen have devised highly developed vehicles in which they manifest their trade usages. Their business contracts provide in detail for the market, transportation and production risks that constantly endanger global commerce. Their *force majeure* clauses define when performance is owed and when it is excused. Their price-delivery terms stipulate when price and delivery may be varied in character. Their trade practices delineate when performance obligations should prevail or terminate in the face of political-economic disruptions in the marketplace. Most importantly, their business agreements depict when the contractors are equipped to provide for nonperformance contingencies in their trade ventures and when they are entitled to excuses from performance as a matter of trade convention.<sup>53</sup>

Any attempt by courts of law to relieve merchants from assumed commitments infringes upon the expressed terms of business agreements. Any disregard of the negotiating and drafting abilities of contractors displaces the sanctity of their voluntary undertakings. The

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Llewellyn and Hoebel, *The Cheyenne Way* (1941); Llewellyn, *The Normative, the Legal and the Law-jobs: The Problem of Juristic Method* (1940), 49 *Yale L.J.* 1355; Llewellyn, *On Reading and Using the Newer Jurisprudence* (1940), 40 *Col. L. Rev.* 581; Llewellyn, *A Realistic Jurisprudence, The Next Step* (1930), 30 *Col. L. Rev.* 431; Twining, *Two Works of Karl Llewellyn* (1968), 30 *Mod. L. Rev.* 514; (1968), 31 *Mod. L. Rev.* 165.

For general studies on American Legal Realism, see Fuller, *American Legal Realism* (1934), 82 *U. of Penn. L. Rev.* 429; Pound, *Call for a Realist Jurisprudence* (1931), 44 *Harv. L. Rev.* 697; Frank, *Law and the Modern Mind* (1930); Radin, *Legal Realism* (1931), 31 *Col. L. Rev.* 824; James, *Pragmatism* (1907), pp. 50-59; 200-202; Wiener, *Evolution and the Founders of Pragmatism* (1949); Yntema, *American Legal Realism in Retrospect* (1961), 14 *Vanderbilt L. Rev.* 317.

<sup>53</sup> The author's studies into international trade reveal the sophistication of the communities of merchants. International traders have developed multiple conventions, detailed trade codes and innumerable contracts to regulate their business ventures. Thus their performance obligations are governed by contracts of sale and by bills of lading; by letters of credit and by policies of insurance. The limits of their performance duties are delineated in the conditions of their contracts, in their price-delivery terms, in lay-time and demurrage provisions, and in clauses which adjust price, quantity and quality of performance. For extensive studies into such propositions in, *inter alia*, the international oil industry, see Trakman, *Negotiating and Drafting Oil Contracts* (S.S.H.R.C., 1978); Trakman, *Nonperformance in Oil Contracts: A Field Study*, [1981] *Oil and Gas Tax Quarterly*. See in general Trakman, *The Contractual Allocation of Risks of Unusual Contingencies in International Oil Sales* (S.J.D. Dissertation, Harvard Law School, 1979).

contract represents the manifestation of their mutual will. The expressed terms of their agreement reflects their nonperformance design. To excuse merchants from performance by mandate of law in such circumstances is to "unmake their contract".<sup>54</sup> It is to impose the risk of nonperformance upon an unwitting promisee. It is to cause the "... breakdown of our faith in contract itself".<sup>55</sup>

Several recurrent contentions underlie this intentionalist method of interpretation. Merchants sometimes assume performance risks unconditionally because they believe that such risks are either unlikely to occur or are likely to have only a minimal effect upon their performance capabilities. Commercial contractors reputedly agree to perform without condition because their bargain so demands, because the promisee assumes an obligation which is equivalent to the promisor's obligations and because the division of risks decided upon by the parties is reflected in their contract price. Thus businessmen trading in high-cost industries are assumed to rely more upon the institutions of business in dividing their performance risks than in the transient ideologies of common law judges. Their contracts and usages depict their sophisticated techniques of risk allocation. These commercial instruments reflect their business needs and their performance expectations. To apply the various common law theories of impossibility and frustration too readily to agreements in such circumstances of self-regulation is to submit international merchants to the "... unconscious prejudices, tastes, and idiosyncrasies of the individual [judge] before whom the matter happens to come".<sup>56</sup> The commercial contract itself is surely a more direct test of mercantile hopes and aspirations than is the judicial imagination.

Support for the supremacy of promises in international business has been widely proclaimed—at least as a general proposition.<sup>57</sup> The

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<sup>54</sup> See for instance *Henrietta Mills, Inc. v. Commissioner of Internal Revenue* (1931), 52 F. 2d 931, at p. 934 (4th Cir.) where the judge stated: "The courts will not write contracts for the parties nor construe them other than in accordance with the plain and literal meaning of the language used." See too, Kales, *Art of Interpreting Writings* (1919), 28 Yale L.J. 33, at pp. 49-50; Corbin, *op. cit.*, footnote 6, s. 533; Farnsworth, *Meaning in the Law of Contract* (1967), 76 Yale L.J. 939; Farnsworth, *op. cit.*, footnote 31.

<sup>55</sup> Per Berman, *op. cit.*, footnote 5, at p. 1438. For an opposing view see Comment: *Supervening Impossibility of Performance as a Defence*, *op. cit.*, footnote 15, at p. 327. See too Smit, *Frustration of Contract: A comparative Attempt at Consolidation* (1958), 58 Col. L. Rev. 287.

<sup>56</sup> Mayers, *op. cit.*, footnote 31.

<sup>57</sup> See *supra*, footnotes 5 and 54 and *infra*, footnote 150. This sanctity of promises is based largely on the growth of an international legal regime in the twentieth century which, in turn, is founded on international convention, mercantile custom and trade practice. See hereon Berman and Kaufman, *The Law of International Commercial Transactions* (Lex Mercatoria) (1978), 19 Harv. Int. L.J. 221; Schmitthoff, *Commer-*

recommendations of the Buckmaster Committee for the regulation of Pre-World War I business contracts specifically endorsed the logic underlying this assumption of risk rule. In 1919 the Committee reported: "[p]rima facie if a man binds himself by contract unconditionally to do that which turns out to be impossible he will be held to his bargain, and have to pay damages for his failure to perform. . . ."<sup>58</sup> Numerous judges since have paid lip-service to the freedom of merchants to bind themselves absolutely to their obligations in their international trade relations. Lord Atkinson in *Larrinaga & Co. Ltd v. Société Franco-Américaine des Phosphates de Medulla, Paris*, observed that international trade would be impeded severely if warfare, which was disruptive of commerce, constituted an automatic ground for nonperformance. Merchants should be responsible to fulfill their contractual obligations where ". . . everything was so obviously liable to be upset . . . by changes of circumstances of all sorts".<sup>59</sup> Promisors should not be entitled to escape from their haz-

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cial Law in Action (1957), 101 Sol. J. 10; Llewellyn, *Across Sales on Horseback* (1939), 52 Harv. L. Rev. 725; Mentschikoff, *Letters of Credit: The Need for Uniform Legislation* (1956), 23 U. Chi. L. Rev. 571; Chalmers, *Sale of Goods Act* (14th ed., by Gerghart, 1963); Gilmore and Black, *The Law of Admiralty* (1957), pp. 2 *et seq.*; Hardy Ivamy, *Trade Custom and Usage*, [1959] 109 L.J. 549; Caemmerer, *The Influence of the Law of International Trade on the Development and Character of the Commercial Law in the Civil Law Countries in The Sources of The Law of International Trade* (Schmitthoff, ed., 1964), p. 88.

The continued self-sufficiency of promises in commercial transactions is evident from a study of the most recent decisions in the United States in which sellers have *not* been excused from their performance obligations by operation of law, notwithstanding shortages in supply or increase in oil prices. See, for example, *Eastern Airlines Inc. v. Gulf Oil Corp.* (1975), 19 U.C.C. 721 (U.S. D.C.), at p. 737; *Ellwood v. Nutex Oil Co.* (1941), 148 S.W. 2d 862 (Tex. Civ. App.); *Duquesne Light Co. v. Westinghouse Elec. Corp.*, No. G.D. 75-23978 (C.P. Allegheny, Pa., Mar. 30, 1977); *infra*, footnote 78.

<sup>58</sup> The full title of the committee's presentation was: Report of the Committee Appointed by the Board of Trade to consider the Position of British Manufacturers and Merchants in Respect of Pre-War Contracts (1918), Cd 8975, para. 10. But see the qualifications that follow in the report in Webber, *The Effect of War on Contracts* (2nd ed., 1946), p. 418. See too *Mackay v. Dick* (1881), 6 A.C. 251, at p. 263 where Lord Blackburn stated: ". . . where in a written contract it appears that both parties have agreed that something shall be done which cannot effectively be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing . . . ."

<sup>59</sup> Dissenting opinion, *supra*, footnote 42, at p. 464 (L.J.K.B.). The sanctity of obligations is often stressed, not always because of an unfaltering belief in the utility of "honour" among merchants, but rather because of a disbelief as to the utility of law as a force which excuses obligations in business. Criticism of law "mandating" the course of business affairs also encompasses a basic mistrust of the actual functionings of detailed rules of law. There is the view that legal rules relieving performance will often be unsuitable as a source of regulation due to their inflexibility in operation and their inability to alter with the speed necessary to respond to a changing business environment. For instance, the German Pandectist, von Jhering, is but one authority who depicted the law as ". . . too awkward, too clumsy to support all the requirements that

ardous responsibilities after entering into "speculative contracts".<sup>60</sup> As Bovill C.J. observed in *Jackson v. Union Marine Insurance Co., Ltd.*: "... a man [who] chooses to enter into a contract to do a particular act . . . is bound to answer for it . . . because he might and ought to have provided [for relief] . . . by his contract".<sup>61</sup>

This reliance upon the will of the merchants to regulate rights of nonperformance duties by express means has also subsisted in more recent common law decisions. Our judges have been reluctant to interfere with the sanctity of international trade agreements in numerous cases. For instance, they have repeatedly declined to excuse obligations to ship goods between continents, despite the blockage of the Suez Canal in 1956. English judges have so held even where the performance of such obligations had been impeded by causes beyond the control of the merchants arising out of the action of governments.<sup>62</sup>

society deems necessary." In von Jhering, *Law as a Means to an End* (trans. Husak, 1924), pp. 220-221. More recently the "legal" as opposed to the "business" process has been criticized for involving merchants in conflict situations which are "... time-consuming, expensive and what is worse, tend[ing] . . . to rupture ongoing relationships". In Friedman, *The Impact of Large Scale Business Enterprise on Contract* (1973), 7 Int. Encycl. of Comp. Law 3, p. 9. See further, Friedman, *Contract Law in America, A Social and Economic Case Study* (Madison, 1965), p. 198; Havighurst, *The Nature of Private Contract* (1961), p. 67; Speidel, *Contract Law: Some Reflections upon Commercial Context and the Judicial Process*, [1967] Wis. L. Rev. 822; Mueller, *Contract Remedies: Business Fact and Legal Fantasy*, [1967] Wis. L. Rev. 833; Sharp, *The Relevance of Contract Theory: A Symposium, Introduction*, [1967] Wis. L. Rev. 803; Beale and Dugdale, *Contracts Between Businessmen: Planning and the Use of Contractual Remedies* (1975), 2 J. Law and Soc. 45. See too *supra*, footnote 54.

<sup>60</sup> *Larrinaga & Co. Ltd v. Société Franco-Américaine des Phosphates de Médulla, Paris*, *supra*, footnote 42, at p. 465 (L.J.K.B.).

<sup>61</sup> *Supra*, footnote 19, at pp. 585-586.

<sup>62</sup> In the English cases which deal with the blockage of the Suez Canal in 1956, the courts examined whether the extended trip around the Cape of Good Hope, instead of through Suez, rendered the arrangement into a "radically different" obligation to that originally agreed upon by the parties. With very few exceptions, the English courts declined to grant any relief from performance by law, save where the contract itself provided expressly for a right of nonperformance by consent. For an example of a Suez decision in which an English court granted relief from performance by operation of law, see *Carapanayoti & Co. Ltd v. E.T. Green, Ltd*, [1959] 1 Q.B. 131, at p. 148. There McNair J. stated that an obligation to perform a contract of sale following the blockage constituted "an obligation of . . . a different kind which the agreement did not contemplate". For other Suez cases, involving charter parties or sales of goods, where tests of nonperformance were utilized although no excuse from performance was actually granted by law, see *Tsakiroglou & Co., Ltd v. Noble Thorl G.m.b.H. and Alberti B. Gaon & Co. v. Société Interprofessionnelle des Oléagineux Fluides Alimentaires*, [1960] 2 Q.B. 318; [1959] 1 All E.R. 45; [1959] 2 All E.R. 693; [1960] 2 All E.R. 160 (C.A.); [1962] A.C. 93; [1961] 2 All E.R. 179 (H.L.). See esp. in (1960) 2 Q.B. 318, per Diplock J. at p. 326, Asquith L.J., at p. 346; Sellers L.J., at pp. 361-362. See too, *Société Franco-Tunisienne D'Armement v. Sidermar S.P.A.*, *supra*, footnote 33; *Ocean Tramp Tankers Corporation v. V/O Sovfracht, (The Eugenia)*, [1964] 2 Q.B. 226

In the Suez Canal case of *Albert D. Gaon and Co. v. Société Interprofessionnelle des Oléagineux Fluides Alimentaires*,<sup>63</sup> both Asquith J. and Sellers L.J. gave two explicit warnings. The mere increase in the cost of performance and the mere added difficulty in performing via the longer Cape of Good Hope sea route were both insufficient grounds to warrant excuses from performance by operation of law.<sup>64</sup> Shipment risks were precisely those contingencies which merchants allocated in their international contracts of sale. Common law courts were not wantonly to disregard the silence of such contracts in relation to nonperformance. Contract obligations were to remain binding.<sup>65</sup> To a similar effect, in the House of Lords case of *Tsakiroglou and Co. v. Noble Thorl G.m.b.H.* Viscount Simonds added: “. . . I venture to say what I have said myself before and others more authoritatively have said before me, that the doctrine of frustration must be applied within very narrow limits.”<sup>66</sup> Accordingly, in the Suez cases involving the sale of goods<sup>67</sup> before

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(C.A.), per Denning J.A., at p. 239; Donovan J.A. at p. 244. For a detailed analysis of the Suez Canal Cases, see the Queen's Bench decision in *Palmco Shipping Inc. v. Continental Ore Corporation (The Captain George K)*, [1970] 2 Ll. L. Rep. 21 (Q.B.), per Macotta J.

<sup>63</sup> [1960] 2 Q.B. 334, at p. 342, aff'd [1960] 2 Q.B. 348 (C.A.).

<sup>64</sup> *Ibid.*, at p. 347. As a general rule, “mere difficulty” of performance or “mere increases in the cost of performance” do not lead to excuses from performance. In common and in civil law systems alike the promisor is not entitled to an excuse unless he is able to establish “extreme difficulty” or a very “substantial increase in costs”. In international trade, even such “extremities” generally will not lead to relief from performance (see hereon *supra*, footnote 15). What precisely constitutes sufficient “difficulty” or “cost” to warrant an excuse from performance is ultimately a matter of juridical construction which varies not only among legal systems, but also from one judge to the next. See hereon esp. Smit, *op. cit.*, footnote 55. See further *supra*, footnotes 5 and 150.

<sup>65</sup> Pearson J. adhered to somewhat analogous reasoning in the *Société Franco-Tunisienne D'Armement v. Sidermar S.P.A.*, *supra*, footnote 33. The case involved a charter party, not a contract of sale. This difference in the nature of the contract became a central justification for distinguishing the *Sidermar* from related Suez cases. See *infra*, footnote 67.

<sup>66</sup> [1961] 2 All E.R. 179, at p. 184 (H.L.). “Frustration” has developed as an English law doctrine giving rise to performance. “Frustration” includes “frustration of the purpose (object, basis, etc.)”, “frustration of the adventure” or simply “frustration of the voyage”. See hereon Gow, *op. cit.*, footnote 5; Webber, *op. cit.*, footnote 5; McNair, *op. cit.*, footnote 29; cf. Corbin, *op. cit.*, footnote 5.

<sup>67</sup> Note that in a contract of affreightment via Suez (the *Sidermar*, *supra*, footnote 33), the English courts reached a fundamentally contrary conclusion. Performance relief was granted by operation of law. It is questionable whether there is sufficient difference in substance between contracts of affreightment and contracts of sale to warrant such an excuse from performance in the former case and the denial of relief in the latter case. On the nature of this distinction in general see the *Captain George K*, *supra*, footnote 62, at pp. 28, 30, 31; *Transatlantic Financial Corp. v. United States* (1966), 363 F. 2d 312 (U.S.C.A.D.C.), at p. 312, the *Gaon* case, *supra*, footnote 62, at p. 361, per Seller L.J. and at p. 369, per Harman L.J.; the *Eugenia*, *supra*, footnote 62,

English courts, the balance of judicial opinion favoured the strict enforcement of contractual obligations. The closure of the Suez Canal did not constitute a sufficient ground for nonperformance by operation of law. The seller retained his obligation to deliver the goods by an alternative, albeit longer and more costly, route around the Cape of Good Hope. No radical change in the conditions of performance had occurred since the date of contracting that was sufficient to warrant the termination of sales obligations expressly assumed by contract.

The thrust of strict intentionalism in the interpretation of contracts has also had considerable influence upon American law. The *Restatement on Contracts*, in section 467, emphasized the need for courts of law to consider the terms of the contract in determining the legal limits of performance obligations.<sup>68</sup> Under the *Restatement*, only "extreme and unreasonable" expense warranted interference with the contractual design of the parties. The Uniform Commercial Code affirmed this reliance upon the autonomy of obligations in commercial transactions. Only changes in cost which "... alter[ed] the essential nature of performance"<sup>69</sup> justified the judicial construction of excuses from performance.

American cases have reinforced this legislative respect for the binding force of business agreements. The American Suez Canal decision, *Transatlantic Financing Corp. v. United States*<sup>70</sup> asserted that a fourteen percent increase in the contract price caused by the Suez blockage was insufficient reason to grant an excuse from performance by operation of law.<sup>71</sup> The promisor was obliged to deliver the goods by an alternate route in the event of a canal blockage.

*Eastern Air Lines, Inc. v. Gulf Oil Corp.* provides a further illustration of the sanctification of obligations before American

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at pp. 234-236, per Denning L.J. For a critical appraisal of this distinction between contracts of affreightment and contracts of sale, see Berman, *op. cit.*, footnote 5, at pp. 1422, 1429-1430; the *Eugenia*, at p. 241, and the *Transatlantic*, at p. 315 which effectively rejected the distinction.

<sup>68</sup> *Op. cit.*, footnote 26.

<sup>69</sup> Comment 4, 2-615. The doctrine of "economic impracticability" has evolved as a ground for nonperformance in terms of the American Uniform Commercial Code, s. 2-615. On the law of nonperformance in the United States see, *inter alia*, 6 Corbin on Contracts (1951), ss 1320-1372; 6 Williston on Contracts (rev. ed. 1938), ss 1931-1979; Conlen, *op. cit.*, footnote 5; Corbin, *op. cit.*, footnote 5; Page, *op. cit.*, footnote 5; Patterson, Constructive Conditions in Contracts (1942), 42 Col. L. Rev. 903, at p. 943; Woodward, *op. cit.*, footnote 5; Note: The Fetish of Impossibility in the Law of Contracts (1953), 53 Col. L. Rev. 94.

<sup>70</sup> *Supra*, footnote 67, at p. 319.

<sup>71</sup> Note: this court also referred with approval to the English *Eugenia* and *Tsakiroglou* cases, *supra*, footnote 62.

courts. In that case, the court held that a very substantial increase of 400 per cent in the market price of crude oil between September, 1973 and January 15th, 1974 was an insufficient reason to grant an excuse from performance by operation of law. The court maintained that the sale of oil had been "... subject to substantial ... seasonal variations ... [t]hroughout the history of commercial aviation ...".<sup>72</sup> Increases in fuel oil costs were viewed as hazards "inherent in the nature of the business". Moreover, a court should "not allow a party to escape from a bad bargain merely because it is burdensome".<sup>73</sup> Performance responsibilities, once assumed, were therefore binding upon the promisor. As oil seller, Gulf had reason to foresee disruptions in oil supply. Indeed, "the record [was] ... replete with evidence as to the volatility of the Middle East situation, the arbitrary power of host governments ... and repeated interruptions ... with the normal commercial trade in crude oil".<sup>74</sup> Gulf, as oil seller, also had the capacity to devise and bargain over the nonperformance terms of the contract. Gulf itself had drafted the contract after substantial arm's length negotiations in which the parties agreed to "... reflect changes in the price" in their agreement.<sup>75</sup> Most importantly, the increase in the market price of crude oil did not, in and of itself, warrant a finding of "commercial impracticability".<sup>76</sup>

The intentionalist approach of the common law towards non-performance obligations has significantly reaffirmed the supremacy of the international commercial usage. Intentionalism establishes the dominance of the mercantile regime in relation to the nonperformance of contractual obligations. Intentionalist values assert the role of legal rules over the mandate of commerce in the regulation of business. The legal design underlying this approach is clear. Merchants engaged in world trade are responsible for their own action or inaction in respect of nonperformance. Common law courts are obliged to respect the *mores* of the business community. The law of nonperformance is bound to respond to the well developed habits of merchants, their uniform usages and their established customs.

Consequently, intentionalist values force merchants engaged in international trade to rely upon their own business capabilities rather than on judicial creativity in the realm of nonperformance. Intentionalist courts entrenched the sanctity of undertakings in business by declining to grant excuse from performance where to do so would

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<sup>72</sup> (1975), 19 U.C.C. Reporting Service, pp. 721, 730 (U.S. D.C.). See, too, *Ellwood v. Nutax Oil Co.*, *supra*, footnote 57.

<sup>73</sup> *Eastern Airlines Inc. v. Gulf Oil Corp.*, *ibid.*, at p. 733. See further *supra*, footnote 57.

<sup>74</sup> *Ibid.*, at p. 738.

<sup>75</sup> *Ibid.*, at pp. 723-724.

<sup>76</sup> *Ibid.*, at p. 735.



undermine the sanctity of the business bargain, displacing its terms and its conditions.

### V. *The Limitations of Mercantile Autonomy.*

Strict intentionalism has a number of failings when used as an irrebuttable test in matters of nonperformance. The sanctity of business obligations is only truly meaningful when merchants are completely free to determine the limits of their own performance obligations. Honour among merchants is only effective as a regulator of performance where merchants have solid reason to remain honourable in their commercial ventures. Any limitation in their capacity or willingness to agree upon the parameters of nonperformance undermines the sufficiency of intentionalism as a measure of self-regulation in business.

These realizations have created doubts as to the efficacy of nonperformance clauses in business contracts. Common law authorities have questioned the clarity of excuses from performance in trade agreements. They have challenged the consistency of mercantile usages as regulators of nonperformance. They have attacked the general assumption that merchants are always able to regulate their own obligations without the need for peremptory law.

The mistrust of *laissez faire*<sup>77</sup> in the formulation of obligations has historical roots in the common law system. Businessmen do not always display equal ability or knowledge in the conduct of their business affairs. They do not invariably have perfect abilities to bargain over nonperformance contingencies. Performance hazards are sometimes unsuspected. Business agreements regulating nonperformance are sometimes incomplete in their terms. Contractors are not always willing or able to deal fairly with one another where legal controls over performance are absent.<sup>78</sup>

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<sup>77</sup> For an analysis of "laissez-faire" as a political-economic influence upon the practices of contractors in business, see *supra*, footnote 1.

<sup>78</sup> With the growth of urbanization and industrialization in the twentieth century, the principle of freedom of contract has become increasingly suspect as a general maxim of law. Real "freedom", for example, is absent when one contractor is presented with a standardized contract which is either incomprehensible to him, or whose terms he is unable to influence. In such cases, he is only free to avoid the arrangement completely since the actual terms of the agreement are beyond his bargaining power and conceivably, beyond his comprehension. See in general hereon, Pound, *Liberty of Contract* (1908-1909), 18 *Yale L.J.* 454; Williston, *Freedom of Contract* (1921), 6 *Cornell L.Q.* 365; Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract* (1943), 43 *Col. L. Rev.* 629; Parry, *The Sanctity of Contracts in English Law* (1959); Wilson, *Freedom of Contract and Adhesion Contracts* (1965), 14 *Int. & Comp. L.Q.* 172; Baker, *The Freedom to Contract Without Liability* (1970), 24 *Curr. Leg. Prob.* 53;

Consequently, problems in bargaining and drafting nonperformance clauses in contracts represent a very real threat to the sanctity of business bargains. Nonperformance clauses are not always formulated in precise detail. They are not invariably comprehensive in their terms. Businessmen sometimes “. . . trust in luck and good faith of the opposite party” without justification rather than in an all-encompassing contract.<sup>79</sup> Their business relationships are often formulated in the expectation, somewhat optimistically, of complete performance rather than nonperformance. “Planning for . . . defective performance”, unlike planning for fruitful performance, is often studiously avoided.<sup>80</sup>

The self-sufficiency of the contract cannot always be maintained in conventional business. Barriers to trade disrupt commercial dealings across national boundaries. Trade agreements are complicated by incomplete contract terms which fail to cover all pertinent attributes of nonperformance. Contractors do not always foresee every risk contingency that might arise in the future. They do not invariably

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Dauer, *Contracts of Adhesion in Light of the Bargain Hypothesis: An Introduction* (1972), 5 Akron L. Rev. 1; Dewey, *Freedom of Contract: Is It Still Relevant?* (1970), 31 Ohio State L.J. 724; Hamilton, *Freedom of Contract*, *Encyclopedia of the Social Sciences* (ed. Seligman, 1931), Vol. 6, pp. 450-455.

<sup>79</sup> Per Lord Atkin in *Phoenix Insurance Company of Hartford v. DeMonchy*, *supra*, footnote 5, at p. 445. The logical limit of amicable and conflict-free relationships among merchants is attested to in commercial relations. Trust among businessmen is only tenable where the businessmen are able to select their trade partners and understand one another's needs and interests. The respect which they give to their undertakings will subsist only so long as they have reason to retain an unflinching confidence in their mutual compatibility. An alteration in this compatibility will challenge the trust basis of their relationship. Amicability is therefore least resilient where “[e]vil men, without conscience and not responsive to any relevant social pressures, succeed in entering the circle of the trusted”. (Havighurst, *op. cit.*, footnote 59, at pp. 75-76). So too, the capacity of mercantile “freedom” loses its viability where the “debtor is subject to little competitive pressure . . .” or where significant “controversy develops . . .” among merchants. (Havighurst, *ibid.*). Amicable relations may well grow suspect as a lasting remedy in the event of performance difficulties. Bargaining disparities between the parties, competitive forces in the market, and government controls do undermine the self-sufficiency of agreements. Businessmen are *not* always able to rely upon foolproof strategies in an unstable market. Nor do they always know exactly what market conditions, government restraints or forces of nature might subsequently arise to disturb the natural balance between supply and demand in terms of their oral undertakings. Sudden mishaps may therefore destroy apparently amicable arrangements. Informally concluded agreements may fail to take account of novel circumstances, unanticipated at the time of the agreement. In short, the vagaries of the interdisciplinary environment introduce the most extensive threat to the merchant community, a threat which warrants some minimum restraint in the interests of business itself. See further *supra*, footnotes 1 and 59.

<sup>80</sup> See Macauley, *Non-Contractual Relations in Business: A Preliminary Study* (1963), 28 Am. Soc. Rev. 55, and Friedman, *The Impact of Large Scale Business Enterprise on Contract* (1973), 7 Intern. Encycl. Comp. Law 3, pp. 3-17; see also *infra*, footnote 83.

provide for every disruption of their performance. Sometimes they erroneously avoid providing for nonperformance by express means for fear of antagonizing a customer or jeopardizing a business deal. Sometimes they place false hopes in their own and their partners' ability to perform in the face of the impossible.

Common law thought has echoed each of these sentiments over the last century. The belief in the freedom of merchants to contract over performance without restraint has become increasingly suspect in the modern era. Realist sentiment has suggested that the freedom of contract doctrine is a hollow principle of law which perpetuates the rigidities of a bygone era. To Roscoe Pound, the notion of "equal rights" underlying freedom of contract represented a "fallacy".<sup>81</sup> For Samuel Williston there was the realization that:

In recent years the tide has set strongly in the other direction [against freedom of contract]. Observation of results has proved that unlimited freedom of contract, like unlimited freedom in other directions, does not necessarily lead to public or individual welfare.<sup>82</sup>

Common lawyers have therefore found a fatal dichotomy in the very sanctification of contracts as the determinant of contractual obligations. A contractor might be free to enter into a contract that regulates nonperformance and yet he may be completely without freedom to influence the terms of that arrangement. With this percep-

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<sup>81</sup> Pound, *op. cit.*, footnote 78. For further references on the evolution of "laissez-faire", see *supra*, footnote 1.

<sup>82</sup> Williston, *op. cit.*, footnote 78, at p. 374. Llewellyn's criticisms of the freedom to transact in business involves a two-tier argument. Firstly, the effectiveness of business sanctions imposed upon a promisor who fails to perform his obligations "presupposes . . . either permanence of dealings involving long-run mutual dependence, or an ingrained traditional morality covering the point, or dealing within a face-to-face community in which severe group pressure on delinquent promisors is available". Secondly, "these types of sanction fail in a society mobile as to institutions, mobile as to residence, mobile as to occupation; they fail increasingly as the market expands spatially and in complexity". (In Llewellyn, *What Price Contract? An Essay in Perspective* (1931), 40 *Yale L.J.* 704, at p. 720). Following Llewellyn's suggestions to their logical conclusions, international business dealings sometimes need more than the mere "face to face" commitments of businessmen in order to achieve the fulfillment of promises; for the international market has indeed expanded "spatially and in complexity" over the decades in response to technological and socio-political pressures. Often the business contract, itself a "legal document", is the instrument whereby promises are rendered enforceable in law as opposed to being binding in morality alone. However, sometimes the force of mandatory law cannot be avoided in the realm of trade. On the nature and limits of moral as opposed to legal obligations, see Dworkin, Lord Devlin and the Enforcement of Morals (1966), 75 *Yale L. Rev.* 986; Fuller, *The Morality of Law* (1964); MacKinnon, *Study of Ethical Theory* (1957); Paton, *The Moral Law* (1949); Goodhart, *English Law and Moral Law* (1953); Toulmin, *Reason in Ethics* (1950), p. 204; Hart, *The Concept of Law*, (1961), ch. 5; Hart, *Positivism and the Separation of Law and Morals* (1958), 71 *Harv. L. Rev.* 593; Northrop, *The Complexity of Legal and Ethical Experience: Studies in the Method of Normative Subjects* (1959), ch. 21.

tion in mind, in 1941 Friedrich Kessler in his pioneering work on *Adhesion Contracts*,<sup>83</sup> described the need for the common law to distinguish between the theoretical freedom to agree and the substantive freedom to influence the terms of one's own bargain. Kessler contended that a legal system which refused to oversee agreements through peremptory rules of law would sponsor, indeed procreate, potential abuses of freedom by promoting one-sided arrangements. The absence of mandatory legal controls over agreements would leave dominating contractors free to frame the terms of the arrangement entirely in their favour to which their co-contractor would be forced to adhere by compulsion of law.<sup>84</sup>

Under these pressures, the principle of "assumption of risk" in relation to the nonperformance of agreements has sustained severe criticism.<sup>85</sup> There is the argument that performance risks, rather than being assumed, will be imposed by dominant contractors upon their co-contractors. A contractor will be required to perform because the dominant party has so stipulated for performance. A contractor will be obliged to forego performance because the agreement to which he was a party was drafted and perfected in the interests of another. The adhering party will lack the freedom to decide upon the terms of performance. He will not be free to influence the parameters of his own rights to nonperformance. He will be denied the freedom to determine how absolutely he should commit himself to his undertaking by agreement.<sup>86</sup>

Consequently, common law courts have cast doubts upon one-sided arrangements where the obligation to perform or the right not to perform is dictated rather than freely accepted. In the interests of fairness, judges have imposed standards of equal treatment upon contractors. They have construed contracts against the dominant party. They have excused contractors from commitments onerous to

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<sup>83</sup> Kessler, *op. cit.*, footnote 78.

<sup>84</sup> For comments on the influence of "superior bargaining" upon the nonperformance of contractual obligations, see *supra*, footnote 78.

<sup>85</sup> For a discussion of the reasons why promisors are held to have "assumed the risk" of nonperformance see *supra*, footnote 8.

<sup>86</sup> For an analysis of adhesion contracts see *supra*, footnote 83. But see, in contrast, the references to freedom of contract, *supra*, in footnote 78. On the realm of "conflict" in international trade transactions, in general, see Aubert, *Competition and Dissensus: Two Types of Conflict and Conflict Resolution* (1963), 7 *J. Conflict Resolution* 26; Cyert, Dill and March, *The Role of Expectations in Business Decision Making* (1958), 3 *Admin. Sc. Q.* 307; Krauss and Deutsch, *Communication and Interpersonal Bargaining* (1966), 4 *J. Personality and Soc. Change* 572; Randolph, *A Suggested Model of International Negotiation* (1966), 10 *J. Conflict Resolution* 344; Robinson, *Conflicting Interests in International Business Investment* (1960), 3 *Boston U. Bus. Rev.* 3; Zinnes, *Hostility in International Decision-Making* (1962), 6 *J. Conflict Resolution* 236; Kapoor, *Planning for International Business Negotiation* (1975).

perform. Eminent common lawyers have contended that "... the court must supply the gap and allocate the risk in accordance with reason. . .".<sup>87</sup> Judges have sought to remedy bad bargains by adding terms into agreements. They have exercised judicial valour in favour of the weaker party by construing excuses from performance by operation of law.<sup>88</sup> The law of frustration has therefore evolved as a device "... by which the rules as to absolute contracts are reconciled with a special exception which justice demands".<sup>89</sup> Doctrines of nonperformance, developed by juridical methodology, have sought to remedy the inadequacy of the bargain.

The late nineteenth century also heralded another reason for mistrusting the capacity of merchants to contract over performance without restraint. The search for the intention of merchants has uncovered communication barriers among people and a resulting suspicion of planned thought in business dealings. The traditional belief that businessmen develop articulate thinking patterns gave way to modern principles of psychology which stress the inadequacies of conventional forms of communication in human interaction. As William James had already pointed out in 1890:

... such "rehearsed" or "planned" communication [among people] is not very common. The celebrated injunction of the governess 'Think before you speak' is not very often obeyed. . . .<sup>90</sup>

Similar suspicions have arisen regarding the alleged difficulties in the interpretation of contractual and related documents. Conventional lawyers have alluded to the ambiguities that must be faced in construing what contractors mean in their oral and written undertakings. There is the sentiment that businessmen do not always reflect their contractual intention clearly at the time of contracting. Language usage in business agreements is sometimes imperfectly expressed. Phrases in nonperformance clauses are sometimes capable

<sup>87</sup> Corbin, *op. cit.*, footnote 31, at p. 465.

<sup>88</sup> On the judge's sense of equity in the construction of nonperformance obligations, see *supra*, footnote 52.

<sup>89</sup> Per Lord Sumner, in the *Hirji* case, *supra*, footnote 15, at p. 510. The right of courts to "fill gaps" in contracts in the interests of justice also prevails in civil law systems. On the use of this approach in French law, see Aubry and Rau, *Cours de droit civil français* (6th ed., 1942, par Martin), ss 340-343, 347; 1 Demogue, *Traité des obligations en général* (1923), Nos 27-32, 158, 173; 2 Ripert and Boulanger, *Traité de droit civil d'après le traité de Planiol* (1957), Nos 32-63, 130-43, 450-67; 2 Josserand, *Cours de droit civil positif français* (1938-40), Nos 13-16, 41-51, 238-242. On the adoption of such a discretionary approach in German Law, see 1 Denecke and Oegg, *Das Bürgerliche Gesetzbuch* (10th ed., 1955), ss 116-57; Lehmann, *Allgemeiner Teil Des Bürgerlichen Gesetzbuches* (7th ed., 1952), s. 24; Soergel, *Bürgerliches Gesetzbuch* (8th ed., 1952), ss 116-157; 1 Staudinger, *Commentar zum Bürgerlichen Gesetzbuch* (11th ed., 1957 by Brandl and Goings), ss 116-157. See in general Smit, *op. cit.*, footnote 5.

<sup>90</sup> James, *op. cit.*, footnote 5.

of more than a single meaning. A consistent design in respect of nonperformance does not always exist in the minds of businessmen.

Undoubtedly, business agreements are not necessarily founded upon a framework of incontestible clarity. Nonperformance provisions do not invariably reflect a unified method of draftsmanship. Contractors may well display different types of intention in formulating their agreements. Their intentions may be succinctly expressed in written form, or they may remain patently unexpressed. Their intentions may be easily ascertained from an examination of the contract as a whole; or they may be subject to inconsistencies of construction. Thus expressed intentions may be dubious in form, incompletely articulated or simply absent from the agreement.<sup>91</sup> Multiple or unitary manifestations of intention may be presented. Distinctions may become evident between "literal and ulterior intentions". Variations may exist between "intended, comprehended and ordinary meanings". Conflicts may arise between "meaningful and meaningless intentions".<sup>92</sup>

Nor does the absence of an expressed right of nonperformance necessarily indicate that the promisor has assumed the risk of nonperformance without condition. The silence of the contract in respect of nonperformance may have many implications.<sup>93</sup> Silence does not always mean that the promisor intends to be bound to all his obligations without any qualification whatsoever. Silence may well suggest the opposite. The promisor may not have contemplated the issue of nonperformance. He may not have developed any intent whatsoever in regard to the nonperformance. Alternatively, contractors may re-

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<sup>91</sup> Per Williams, *op. cit.*, footnote 5, at p. 384. See too Farnsworth, *op. cit.*, footnote 5. On the problems faced by business transactors in communicating their intentions in a legally cognizable manner, see Macauley, *op. cit.*, footnote 80.

<sup>92</sup> Williams, *op. cit.*, *ibid.*, esp. at pp. 392 *et seq.* Communication in international business is further complicated by legal, cultural and linguistic barriers to trade. See hereon Jean-Flavien Lalive in his article *International Commercial Contracts* (1966), 12 *Prac. Law* (No. 7) 71, at pp. 83-84; Brundo, *Negotiations With Foreign Lawyers—An American Lawyer's View*, *Negotiating and Drafting*; Clark, *Doing Business Abroad*, [1973] *Oil & Gas Inst.* 24, 283; de Vries, *Civil Law and the Anglo-American Lawyer* (1976). It should be noted that, barriers or not, international businessmen do have their own "ways" of overcoming such difficulties through contract and by recourse to trade convention. On the methods used by international contractors to resolve linguistic and legal barriers to international trade, see Lawson, *A Common Lawyer Looks at the Civil Law* (1953); de Vries, *Civil Law and the Anglo-American Lawyer* (1973), p. 42; Donner, *The Role of the Lawyer in the European Communities* (1968), ch. 2; Mellink-off, *The Language of the Law* (1963). See especially Moses, *International Legal Practice* (1935), 4 *Ford L. Rev.* 244.

<sup>93</sup> For studies into the significance of silence of, *inter alia*, to nonperformance clauses, see Price, *op. cit.*, footnote 5, at pp. 155 *et seq.*; James, *op. cit.*, footnote 5, at pp. 252-255; Macauley, *op. cit.*, footnote 80; Llewellyn, *op. cit.*, footnote 82; Williams, *op. cit.*, footnote 5.

main silent with respect to nonperformance for sound economic reasons.<sup>94</sup> They may avoid any express reference to nonperformance because they fear a breakdown in their relationship, because they desire to "clinch" their business deals, or because they wish to avoid needless reference to the detracting possibility of nonperformance. Businessmen will therefore understate the negative features of non-performance, not because the promisor wishes to assume every performance risk without condition, but because both parties wish to discourage disruptive negotiations over nonperformance at the time of envisaged performance.

Consequently, sociological studies have revealed that the motivations of businessmen in matters of nonperformance diverge significantly from bargain to bargain, from market to market and from time to time.<sup>95</sup> The assumption of a nonperformance risk may be one

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<sup>94</sup> See *supra*, footnotes 5 and 53.

<sup>95</sup> See *supra*, footnotes 31 and 80. For example, studies into American business have resulted in a number of assumptions about attitudes (*e.g.*, among Wisconsin manufacturers) towards business and law as systems of control. See Macauley, *op. cit.*, footnote 80. This study demonstrates the high degree to which Wisconsin manufacturers have developed their own culture, their own ethnicity, in regulating their business affairs. Law has, allegedly, played a minimal role in their interactions, since it would otherwise interfere with their internal sense of co-operation, stultifying their business prospects and wasting their time. As a result, Wisconsin manufacturers have reputedly preferred a functional approach towards business in which business sanctions are preferred to legal restraints. Thus we are told of "American (Wisconsin)" businessmen: "[I]t is in the interests of everyone to perform agreements . . . [There is] an incentive to get along in a continuing relationship." (per Macauley, *ibid.*, at pp. 60-61.)

A study of the general social-cultural mentality prevailing among stereotyped Japanese businessmen, in contrast, introduces these general behavioural phenomena. Japanese businessmen have a cultural heritage in which "good faith" and "honour" are intrinsic elements. To live in honour, according to Japanese folklore, is to help one's fellowman in times of need. Mutual kindness has an extensive history in Japanese society. The famed epic saga, *nanawashi*, connotes the virtue of "good faith" in all walks of life, ingraining a standard of mutual reliance into the mainstream of Japanese life. Kindness to a fellow merchant is considered a requisite to survival in business. A favour provided in times of need (storms, earthquakes, floods, *etc.*) has practical value; for who knows when the donor himself might need such a kindness in the future? For a discussion on such Japanese approaches towards contracting see Sawada, *Subsequent Conduct and Supervening Events: A Study of Two Selected Problems in Contract Jurisprudence* (1968); Kawashima, *Dispute Resolution in Contemporary Japan in Law in Japan: The Legal Order in a Changing Society* (ed. von Mehren, 1963), pp. 46 *et seq.*; von Mehren, *Some Reflections on Japanese Law* (1958), 71 *Harv. L. Rev.* 1486; Wren, *The Legal System of Pre-Western Japan* (1968), 20 *Hast. L.J.* 217; Henderson, *Conciliation and Japanese Law*, Tokagawa and Modern (1964), vol. I, p. 173; Ballou, *Doing Business in Japan* (1967).

Consequently, an American or a Japanese businessman involved in international dealings cannot rely upon the prevalence of identical ethnic attitudes among his trade partners, since international businessmen emanate from dissimilar political and cultural traditions. Nor can he rely upon a common set of economic values which will be appreciated by all international merchants alike, independently of their particular

possible motive underlying the silence of the business contract in respect of nonperformance. However, it is by no means the exclusive motive for the silence of business agreements. The failure of such contracts to regulate nonperformance contingencies is sometimes the product of a lack of genuine agreement between the parties *ab initio*.<sup>96</sup> Silence in respect of nonperformance is also a consequence of a failure of the parties to comprehend the nature and extent of performance risks. Alternatively, silence may mean that the parties wish to avoid having to draft complex nonperformance clauses.<sup>97</sup> For instance, merchants will avoid negotiating over nonperformance where time commitments and high costs associated with negotiation threaten the success of their business ventures. They will rely upon courts of law to resolve their nonperformance controversies when they have the "... comfortable assurance that adverse litigation will be attributed to the hairsplitting of lawyers and [to] the uncertainty of law", rather than to the inadequacy of their contracts in relation to nonperformance.<sup>98</sup> They will avoid making nonperformance issues clear for fear of making them unclear.

Thus, deliberate intent, barriers to communication and trade practice are all important reasons why business contractors omit to regulate nonperformance contingencies expressly in their contracts. They omit to act thus because their business priorities do not justify tedious negotiations and complex drafting over nonperformance in the face of barriers to trade.

The inherent ambiguity of language gives rise to further practical problems in the interpretation of nonperformance obligations. Clarity of expression is not invariably assured in relation to business contracts. The so-called plain meaning of words is only realistic where a single plain meaning is, in fact, apparent on the face of each

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environments. Within international markets, carefully written contracts therefore grow into necessary devices in reaching *consensus ad idem* among diverse merchants. Codes of acceptable business practice serve as the fulcrum of business transactions. Merchants are forced to rely more upon the sanctity of their carefully bargained and drafted agreements than in the amiability of a distant partner in trade. Indeed, so long as trade perceptions, business practices and legal rules differ among communities, international traders will institutionalize their business arrangements in trade convention and failing that, they will have recourse to arbitration or adjudication before courts of law. See hereon Ayre, *Negotiating Commercial Contracts with the Soviets* (1975), 61 A.B.A.J. 835; Lowden, *The Negotiation and Drafting of Commercial Sales Agreements in East Europe* (1974), 29 The Bus. Lawyer 845; Narcisi, *Advising Japanese Corporations Doing Business with Americans* (1974), 29 The Bus. Lawyer 835. See further *supra*, footnotes 53 and 54.

<sup>96</sup> *Per* Cohen, *The Basis of Contract* (1933), 46 Harv. L. Rev. 553.

<sup>97</sup> See *supra*, footnote 93.

<sup>98</sup> *Per* Lord Atkin in *Phoenix Insurance Company of Hartford*, *supra*, footnote 5, at p. 445.



agreement.<sup>99</sup> Such a literal meaning may well be absent from the agreement; for words differ in meaning from agreement to agreement and from trade to trade.<sup>100</sup> Words differ in meaning in international transactions where contractors emanate from different geographical environments, where they speak different languages and where they are exposed to different legal systems.<sup>101</sup> For example, the word "delivery" in English law has a distinctly dissimilar meaning when compared to the word *deliverance* in French law.<sup>102</sup> The phrases *vis major* (superior force), *cas fortuit* (events of chance) and Act of God diverge in meaning among civil and common law systems.<sup>103</sup> Yet each phrase is used repeatedly in international trade. Each term is habitually employed in the nonperformance clauses of business contracts.

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<sup>99</sup> On methods of interpreting the language used in contracts and statutes, see in general Willis, *Statute Interpretation in a Nutshell* (1938), 16 Can. Bar Rev. 1; Radin, *Statutory Interpretation* (1930), 43 Harv. L. Rev. 863; Maxwell, *Interpretation of Statutes* (1969); Holmes, *The Theory of Legal Interpretation* (1899), 12 Harv. L. Rev. 417; Landis, *A Note on Statutory Interpretation* (1930), 43 Harv. L. Rev. 886; Lord Evershed, *The Changing Role of the Judiciary in Development of the Law* (1961), 61 Col. L. Rev. 761; Friedmann, *Law and Social Change in Contemporary Britain* (1951), p. 239. While there are distinct differences between "statutes" and "contracts" and therefore between the interpretation of "statutes" and the interpretation of "contracts", both methods of construction are similarly employed in order to establish the plain or the contextual meaning of language.

<sup>100</sup> On the different methods of interpreting agreements, their characteristics, strengths and weaknesses, see *supra*, footnotes 91 and 99.

<sup>101</sup> See in particular, Willis, *op. cit.*, footnote 99; Landis, *op. cit.*, footnote 99; Radin, *op. cit.*, footnote 99. On methods of interpretation in civilian legal systems, see O. Ekelöf, *Teleological Construction of Statutes* (1958), 2 Scan. St. in Law 77; Schmidt, *Construction of Statutes* (1957), 1 Scan. St. in Law 157, at p. 170.

<sup>102</sup> The problems encountered in the construction of words and phrases in international transactions are aptly highlighted in Honnold, *A Comparison of National and Regional Unifications of the Law of Sales and Avenues Toward Their Harmonization: Prospects and Problems in Unification of the Law Governing International Sales of Goods: The Comparison and Possible Harmonization of National and Regional Unification* (ed. Honnold, 1966), pp. 21 *et seq.* On the attempts to overcome these linguistic and legal barriers to communication in international business agreements, see *supra*, footnotes 86 and 92.

<sup>103</sup> For example, the phrase *cas fortuit* has different historical roots to the common law concept "Act of God". "Cas fortuit" or a "chance occurrence" has its origins and continuing influence in French law. See hereon Josserand, *Force majeure et cas fortuit* (1934); Padiorant, *Cas fortuit* (1920); Bourgoïn, *Essai sur la distinction du cas fortuit et de force majeure* (1902). See also Tunc and Mazeaud, *2 Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle* (5th ed., 1958), pp. 557-567. On the general position in French law in respect of nonperformance, see von Mehren, *The Civil Law System* (1957), p. 710; David, *Frustration of Contracts in French Law* (1946), 28 J. Comp. Leg. & Int'l. L.; 6 Planiol and Ripert, *Traité pratique de droit civil français* (2nd ed., 1963), pp. 526-539. Contrast the French law with the common law of nonperformance, *supra*, footnote 5 and *infra*, footnote 150.

The words *force majeure* (superior force) found in nonperformance clauses exemplify the predicament of interpretation that is experienced by common law courts. Originating in French law, "the precise meaning of this term, [*force majeure*] if it has one, has eluded lawyers for years".<sup>104</sup> What are, in fact, superior forces will differ according to each court's view of "superior". Superior forces can be restricted to severe and devastating forces, to forces leading to extreme difficulty or only to forces leading to the physical or legal impossibility of performance. So too, the words superior force can be limited to Acts of God or extended to encompass Acts of Government. They can include contingencies which cause performance difficulty; or they may be extended to encompass contingencies which both cause and have the effect of preventing performance. *Force majeure* therefore diverges in meaning from forum to forum, from judge to judge, and from environment to environment.<sup>105</sup>

Words used in performance clauses also diverge in meaning according to the business context in which they are employed. A contract which requires "prompt shipment" of the goods by the seller raises the fundamental question: how prompt? Unless qualified by extraneous circumstances, prompt can mean immediately. It can mean within a specified amount of time; or it may have no consistent meaning whatever.<sup>106</sup> Similarly confusing is the inconsistent meaning attached to standards of weight and measure. For example, agreements among international merchants to perform in tons of goods raises the question: What is a ton? Canadians and Americans traditionally have thought of tons as 2,000 lbs., while English traders have viewed tons as 2,240 lbs. Latin-Americans, in further discord,

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<sup>104</sup> Per Donaldson, J. in *Thomas Borthwick (Glasgow), Ltd v. Faure Fiarclough, Ltd*, [1968] 1 Ll. L. Rep. 16, at p. 28.

<sup>105</sup> The notion of a devastating "force" (*force majeure*) is variously referred to in the common law system as *force majeure* in *Fogg v. Van Saun Coal Co.* (1934), 174 A. 419; *fuerza mayor* in *American Sur. Co. v. Batangau* (1911), 19 Phillippine 110; *vis majeure* in *Pacific Vegetable Oil Corp. v. C.S.T. Ltd* (1946), 174 P. 2d 441. On "force majeure" as a ground for nonperformance in French law, see Code civil, arts 1147, 1148 (61st ed., Dalloz, 1962); cf. Tunc & Mazeaud, *op. cit.*, footnote 103, pp. 558-567.

It should be noted that the phrase (*force majeure*) does have some legal meaning in the common law system although less clearly defined than in French law. For example, although some common law judges have clearly limited *force majeure* to Acts of God (e.g., *Losecco v. Gregory* (1901), 32 So. 985, 108 La. 648), others have extended it far beyond to include such things as strikes and breakdowns in machinery (e.g., *Matsoukis v. Priestman & Co.*, [1915] 1 K.B. 681). In *Pacific Vegetable Oil Corp. v. C.S.T. Ltd*, *ibid.*, "force majeure" was said not to be limited to Acts of God, the test being whether, under the particular circumstances, there is such insuperable interference occurring without the party's intervention as could not have been prevented by prudence, diligence and care.

<sup>106</sup> For references to such problems of construction, see *supra*, footnotes 86 and 92.

have perceived of tons as consisting of 2,204.6 lbs., that is, as metric tons.<sup>107</sup> Even merchants within the same industry differ in their interpretation of the term tons: For instance, the hundred weight (cwt.) is measured in terms of tons. Yet long tons differ from short tons as measures of the cwt. If long tons are intended, 112 pounds constitutes a cwt. If short tons are intended, 100 pounds equals a cwt.<sup>108</sup>

To a similar effect, the precise meaning of trade term labels as a measure of nonperformance have troubled common lawyers for centuries.<sup>109</sup> The price delivery term "f.o.b.", known as free on board, gives rise to some confusion of meaning. The extent of f.o.b. duties diverge significantly from one trade context to another. The parameters of f.o.b. duties vary according to the type of merchants and industries involved.<sup>110</sup> F.o.b. duties also differ in meaning from f.o.b. Additional Services.<sup>111</sup> So too, c.i.f. (cost, insurance and freight) terms are distinguishable from c. and f. (cost and freight) terms. Pre-shipment terms governing price and delivery are dissimilar from shipment terms. Price-delivery terms in destination contracts vary from price-delivery terms in shipment contracts. Each price-delivery term therefore acquires its significance from the business context under study and each price-delivery term alters in meaning over both time and space.

Accordingly, agreements must sometimes be reconstructed so as to clarify seemingly ambiguous provisions in nonperformance

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<sup>107</sup> See hereon, Lomax, Does Your Firm Offer Mean What It Says, in *Understanding Export*, (The Canadian Manufacturer's Association, pub. 1972).

<sup>108</sup> *Ibid.*

<sup>109</sup> See Kennedy, *Contracts of Sale, C.I.F. Contracts* (1924); Sassoon, *C.I.F. and F.O.B. Contracts* (2nd ed., 1975). But see, Schmitthoff, *The Export Trade* (6th ed., 1975).

<sup>110</sup> See hereon Halsbury, *Laws of England* (Simonds ed., 1960) vol. 34, at p. 178; *The Institute of Export*, 14 *Export* (1951), pp. 211 *et seq.*; Sassoon, *op. cit.*, *ibid.*, p. 295. The difference in the construction of price-delivery terms is attributable, at least in part, to the diverse codifications of such terms in international documents. For example, *The Revised American Foreign Trade Definitions* (adopted in 1941 by the U.S. Chamber of Commerce and the National Council of American Importers, Inc.) differs somewhat in its definitions of price-delivery terms from the INCOTERMS (drafted in 1953 by the International Chamber of Commerce). See further Schmitthoff, *op. cit.*, *ibid.*; Eisemann, *Die Incoterms in Handel und Verkehr* (Vienna, 1963); Eisemann, *Die Incoterms Im Internationalen Warenkaufsrecht* (Stuttgart, 1967).

<sup>111</sup> Discussed in Sassoon, *op. cit.*, *ibid.*, pp. 294-298. Lord Caldecote C.J. did contend in *J. Raymond Wilson & Co. Ltd v. N. Scratchard Ltd* (1944), 77 L1. L. Rep. 373, at p. 374 (K.B.) that the f.o.b. term has "for a long time, certainly more than one hundred years, had a well known meaning". But cf. Brett M.R. in *Stock v. Inglis* (1884), 12 Q.B.D. 564, at p. 573. See further, Mentschikoff, *Commercial Transactions, Cases and Materials* (1970), pp. 198-212, 260-264; *The Uniform Commercial Code*, *op. cit.*, footnote 69, s. 2-319; *International Chamber of Commerce, International Rules for the Interpretation of Trade Terms*, I.C.C. Brochure No. 166 (1953).

clauses. Often such clarity arises from the trade context that surrounds the business agreement, from the practices of merchants and from their usages of trade. However, sometimes even trade practices fail to clarify the scope of nonperformance clauses in contracts; while commercial usages are not always clear in their scope of operation. Business contracts must then be construed in terms of legal doctrine. Judges must clarify that which is apparently unclear in both the contract and the usage of trade. They must oversee nonperformance terms, giving meaning to seemingly ambiguous and incomplete phrases. They must clarify the unclear in the interests of order and justice in business affairs.

### VI. *Constructing Terms in Contracts.*

Creativity in the construction of nonperformance clauses has today grown into a salient activity before common law courts. A contractor who promises to perform without qualification is not invariably presumed to have assumed responsibility for nonperformance. Courts of law increasingly examine the business context surrounding the agreement in order to determine whether to excuse performance by operation of law. They repeatedly employ constructive techniques in interpreting the language of nonperformance clauses. They undoubtedly recognize a wider sphere of meaning than the plain meaning of the written contract.

Ever since *Heydon's* case in 1584,<sup>112</sup> common law judges have questioned whether their function is to assess what was expressly said by the parties, as is revealed by the literal language of their contracts, or whether they have a wider function of construction. As a result, common law judges have assessed the design of contractors from their conduct, not merely from the literal language of their contracts. They have examined the nonperformance perceptions of contractors on the basis of business usage, not just in terms of abstract doctrines of law. They have synthesized the relationship between nonperformance and the business bargain on the basis of commercial reality, not in terms of legal fiction alone.<sup>113</sup>

Logic has motivated such developments in interpretation. Legal philosophers have emphasized that words in contracts are a reflection of language usage and that the meaning of words change as the linguistic framework surrounding words change.<sup>114</sup> Legal scholars

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<sup>112</sup> (1584), 3 Co. Rep. bb-7a, 76 E.R. (K.B.) 637.

<sup>113</sup> Note: The *Heydon* case, *ibid.*, dealt with statutory rather than contractual interpretation. However, insofar as that court questioned the immutability of words in documents—whether they be statutory or contractual documents—the implications arising from the case should apply in large measure also to the interpretation of contracts. See hereon *supra*, footnote 99.

<sup>114</sup> See in particular the philosophical writings of Wittgenstein, including, *inter*

have highlighted that the methods of construing nonperformance obligations vary according to the language of nonperformance clauses. They have stressed that the extent of nonperformance alters as the words that are used to describe nonperformance alter.<sup>115</sup> In summary, the "pseudo-logical or textbook approach" of interpretation reflects the plain and literal meaning of the words used in nonperformance clauses.<sup>116</sup> The "social policy construction" of words highlights the need to interpret words in accordance with the sociological context that surrounds those words.<sup>117</sup> The "free intuitive approach" emphasizes the need for judges to interpret language according to their own intuitive method of construction.<sup>118</sup> Each method of interpretation is distinctive in nature. Each technique gives rise to a dissimilar perception of nonperformance. Each approach leads to a potentially different result in law.

An example of the various methods of interpreting business contracts occurs in relation to the word "war". A contract which excuses a merchant from performance in the event of a war raises infinite questions of construction. War can be given its "pseudo-logical or textbook" interpretation, in which case only formally declared war will lead to an excuse from performance. However, war can also be given a broader "social policy" construction, encompassing not only declared war, but also undeclared war. Finally, judges utilizing a "free intuitive approach" can extend the meaning of war to include major armed confrontations, civil wars, rebellions or even insurrections and mere civil strife. Indeed, for the "intuitive" interpreter any military conflict which threatens the continuity of business transactions can conceivably constitute a ground for nonperformance in law.<sup>119</sup>

The scope of the construction process is endless. It is replete with examples of judicial rigidity and flexibility in the interpretation of

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*alia*, Philosophical Investigations (2nd ed., 1958); *Tractatus Logico-Philosophicus* (1963); *The Blue and Brown Books* (1958). For further reflections upon the "inherent ambiguity of language", see *supra*, footnotes 5 and 91.

<sup>115</sup> See especially Friedmann, *op. cit.*, footnote 99.

<sup>116</sup> *Ibid.*, pp. 239 *et seq.*

<sup>117</sup> *Ibid.*, pp. 246-248.

<sup>118</sup> *Ibid.*, pp. 249-250.

<sup>119</sup> For an analysis of "war" as a ground for relief from performance in international trade agreements, see McNair, *op. cit.*, footnote 29; Webber, *Effect of War on Contract* (2nd ed., 1946); Page, *Impossibility of Performance Due to War* (1926), 3 *Wis. L. Rev.* 210; McNair, *Frustration of Contracts By War* (1940), 56 *L.Q. Rev.* 173; Hall, *The Effect of War on Contracts* (1918), 18 *Col. L. Rev.* 325; Dodd, *Impossibility of Performance Due to War-Time Regulations* (1919), 32 *Harv. L. Rev.* 789; Scrutton, *The War and the Law* (1918), 34 *L.Q. Rev.* 116; Pedrick and Springfield, *War Measures and Contract Liability* (1942), 20 *Tex. L. Rev.* 710.

nonperformance obligations. Rigid methods of construction permit excuses from performance in law only where the court is able to cull such relief from the explicit words of the written contract itself. Flexible methods of construction lead to excuses from performance even though no such relief is provided for in terms of the literal letter of the contract. Each approach towards interpretation is influenced by the variable ideologies of common law judges. Some judges hold that a contractor should be strictly bound to his expressed intention.<sup>120</sup> He should be held responsible for his own contractual omissions. For other judges, excuses from performance should be permitted in the face of deficient language used in contracts. Nonperformance should be allowed on the occurrence of unexpected and devastating events, unavoidable and irreversible consequences. "It is not within human powers", Lord Denning once proposed for man "to foresee the manifold sets of facts which may arise. . . . The English language is not an instrument of mathematical precision".<sup>121</sup> The law of non-performance is closely linked to the philosophical values of the judge, to his methods of construing agreements and to his sense of equity in the circumstances.

Various techniques can be used to construe nonperformance clauses broadly in business agreements. In Corbin's opinion, the court is duty-bound to ". . . supply the gap and allocate the risk of loss in accordance with reason" in the event of an ambiguity.<sup>122</sup> The judge is responsible for completing the incomplete, clarifying the unclear and rendering the unreasonable, reasonable. Thus the legal implication of "what is reasonable . . . runs throughout the whole of modern English law in relation to business contracts".<sup>123</sup> The "ideal

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<sup>120</sup> For example, Lord Simonds in *Magor & St. Mellons R.D.C. v. Newport Corporation*, [1952] A.C. 189, at pp. 190-191.

<sup>121</sup> In *Seaford Court Estates Ltd. v. Asher*, [1949] 2 K.B. 481 (C.A.), at p. 498. But see Lord Simonds, in *Magor*, *ibid.* The "foresight" of the parties is relevant as a criterion in determining whether a contractor should be excused from his performance duties. In other words, a lack of foresight, judicially established, may serve to excuse, but need not actually release, the promisor from his performance obligations. On the lack of "foresight" as a ground for relief from performance in international trade, see Delaume, *Transnational Contracts: Applicable Law and Settlement of Disputes* (A study in Conflict Avoidance) (1975); Squillante and Congalton, *Force Majeure* (1975), 80 Comm. L.J. 4, where it is argued that nonperformance clauses should always be included in business contracts to cover unforeseen contingencies, despite the provisions of U.C.C., s. 2-615. For a broad construction of performance relief in the event of "unforeseen" occurrences see *infra*, footnote 150.

<sup>122</sup> Per Corbin *op. cit.*, footnote 31.

<sup>123</sup> Per Lord Wright in *Hillas v. Arcos* (1932), 38 Com. Cas. 23 (H.L.), at pp. 43-44. See too Wilfrid Greene M.R., in an address to the Holdsworth Club (1938) on "The Judicial Office". Related sources include Wright, *op. cit.*, footnote 33, p. 385; Williston, *op. cit.*, footnote 29, s. 1937; Farnsworth, *op. cit.*, footnote 5, esp. his "conclusion".

. . . of doing justice according to the facts''<sup>124</sup> pervades the entire law of nonperformance.

Yet our judges still disagree upon the desirable manner of filling gaps in contracts. They remain inconsistent in their way of doing justice between contractors. Judges can grant excuses from performance on the basis of legal doctrine or in terms of judicial discretion. They can do so as a matter of equity inherent in courts of law or in response to defined laws of impossibility.

Where a broad discretion is vested in the judge, his sense of "reasonableness" serves as an appropriate guideline for judicial construction. He decides what is fair and just in the circumstances. He exercises his own discretion in determining the limits of nonperformance. The discretionary method is distinctly flexible in character. Indeed, as an eminent scholar once remarked, it would be mischievous "to attempt to make reasonable[ness] a precisely exact term . . . for a good deal of injustice would result from trying to mechanize the law where a certain amount of pliability in its application is essential".<sup>125</sup>

Other judges feel that justice is served only along ". . . the lines of established law".<sup>126</sup> Courts are bound to grant rights of nonperformance in terms of established doctrines and principles of law. Judges are required to incorporate flexibility into their perceptions of justifiable nonperformance. Various judicial methodologies have been employed to achieve these doctrinal ends. Merchants have obtained relief from performance on the doctrinal grounds that the basis of their agreement has disappeared or the object or purpose of their arrangement has failed. Jurists have inferred that merchants who "reasonably" intend to grant relief from performance should receive such excuses because of their "implied intentions".<sup>127</sup> In each case, the law of nonperformance has evolved out of legal doctrine and has

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<sup>124</sup> Lord Wright, *op. cit.*, *ibid.*, p. 385.

<sup>125</sup> Stated by Winfield in Pollock on Contracts (11th ed., 1942), p. 235. See too Winfield, *Review* (1942), 58 L.Q. Rev. 280.

<sup>126</sup> For statements to this effect, see Lord Wright, *Legal Essays*, *op. cit.*, footnote 33, p. 385.

<sup>127</sup> Discussed in McNair, *op. cit.*, footnote 29; McElroy & Williams, *op. cit.*, footnote 30; Wade, *op. cit.*, footnote 5. On the origins in English law of the "objects", "basis" or "purpose" approach, see *Krell v. Henry*, *supra*, footnote 13. On the "objects" technique see *inter alia* Gutteridge, *Contract: Commercial Law*, vol. 2 (13th ed., 1929), pp. 614 *et seq.*, McElroy & Williams and Wade *ibid.* For the use of the "objects" or "purpose" approach in American law, see *Restatement on Contracts*, I, 288 which states that the ". . . desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it. See hereon Corbin, *op. cit.*, footnote 5, at p. 4. See too *supra*, footnote 69.

been applied to business contracts in terms of the developed methodologies of the common law.

Common law courts have also combined discretionary and doctrinal methods of construing nonperformance provisions in business contracts. They have responded to both the principles of the law of impossibility and to their own senses of judicial discretion in reaching decisions. Thus they have granted excuses from performance in terms of the specific laws of frustration and by recourse to their perceptions of equity. They have reached decisions by reflecting upon the laws of impossibility and upon the economic-political climate that surrounds each contract. In reaching their decisions, they have considered "... custom, business practice, common feeling, [and the] . . . mores of the community".<sup>128</sup> In imputing a "reasonable intention" to contractors, they have linked their judicial discretion to the framework of business itself.

The construction of contracts has grown into a significant tool in the hands of common law courts. Each method of construction has caused an expansion of the law governing the nonperformance of commercial agreements. Each method has had a distinctive effect upon the autonomy of business contracts. However, the utility of constructive approaches towards the interpretation of contracts can only be determined when each method of interpretation is assessed as a functional device. The most suitable method of regulating nonperformance obligations in the common law can only be established through the deliberate analysis of justice oriented, doctrine oriented and combined approaches towards nonperformance. The most appropriate laws of nonperformance can only be truly developed after the peculiar characteristics, the merits and demerits of each methodology have been purposefully synthesized.<sup>129</sup>

#### VII. *Judicial Construction: a Recourse to Equity.*

The justice-oriented approach towards construction is founded upon a particular philosophical perception about contractors engaged in trade. There is the view that contractors are not always able to express themselves clearly in their business agreements. "It is the incurable habit of commercial men", Lord Wright once postulated, "... not to anticipate expressly or to provide for all that may happen".<sup>130</sup> The judge therefore dispenses justice by doing for businessmen what they

<sup>128</sup> In Corbin, *op. cit.*, footnote 31.

<sup>129</sup> For a critical reflection upon such constructive techniques in relation to the nonperformance of international sales obligations, see Berman, *op. cit.*, footnote 5, at p. 1436.

<sup>130</sup> Lord Wright, *op. cit.*, footnote 33, p. 258. See too McNair, *op. cit.*, footnote 29, p. 150.



failed to do for themselves. The justice approach presupposes that courts must exercise a discretion in the interests of fairness to parties who are faced with unduly onerous performance obligations. Thus courts of law use the justice approach to excuse performance obligations where the promisor is unable to provide for or mitigate against the effects of intervening disruptions and where he is likely to suffer significant economic loss as a result. In exercising this discretion, common law courts rely upon their residuary powers in equity to do justice in the circumstances.<sup>131</sup> They place faith in their perceptions of equity and in their senses of reasonableness and fairness. Stated simply, "... because the court thinks it fair to qualify the promise, it does so, and quite rightly . . .".<sup>132</sup>

Yet uncertainty arises as to when the justice approach should be employed in the construction of contracts and what effect it should have upon the process of decision-making. What is just is a matter of personal perception. What is equitable is the product of subjective assessment. What is fair differs in nature from judge to judge and from contract to contract. As Justice Holmes aptly remarked, the court may decide that an excuse from performance is fair for various reasons:

... because of some belief as to the practice of the community or of a class, . . . because of some opinion as to policy, or, in short, because of some attitude of . . . [the court's] upon a matter not capable of exact quantitative measurement and therefore not capable of founding exact logical conclusions.<sup>133</sup>

Clearly, there can be no absolute standard of justice. Justice is a relative force. The business environment, the type of parties and the character of their business transactions will determine what is just. In some courts, justice is identified with discretion. The judge, rather than invoke extraneous rules of law to rationalize his decision, exercises a discretion to "... modify contracts or dispense with their performance, simply because justice requires it".<sup>134</sup> His justice discretion serves as a blanket authorization to tether what he considers to be contractual abuses or unfair results. His perception of fairness and reasonableness predominates above all else.

Other courts have treated the judge's sense of justice as a residuary force in the construction of nonperformance obligations in con-

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<sup>131</sup> For an evaluation of this equity discretion in Anglo-American jurisprudence, see Keeton, *Venturing to do Justice* (1969); Jaffe, *English and American Judges as Lawmakers* (1969); Bickel, *The Supreme Court and the Idea of Progress* (1970); Karlen, *Judicial Administration—The American Experience* (1970); Diplock L.J., *The Courts as Legislators* (Holdsworth Club Lectures, 1965); Denning, *The Need for a New Equity* (1952), 5 *Curr. Leg. Prob.* 1.

<sup>132</sup> Contended in Williston, *op. cit.*, footnote 29, s. 1937.

<sup>133</sup> Stated by Holmes, *The Path of the Law*, in *Collected Legal Papers* (1921), pp. 167, 181. See too Patterson, *op. cit.*, footnote 5.

<sup>134</sup> In Williston, *op. cit.*, footnote 29, s. 1931.

tracts. Here judges utilize an equitable discretion to excuse performance only because the insufficiencies of the contract so dictate.<sup>135</sup> The court only does so because "the balance [between the goods and price terms] is violently disturbed", because the contract "... confer[s] no benefit. . ." or because the contract "... impose[s] enormous burdens on the party performing . . .".<sup>136</sup> The rationalization is clear. Freedom of contract must prevail. The court cannot interfere wantonly with business bargains which are freely and voluntarily concluded. Only obvious injustices will justify nonperformance granted by way of judicial discretion. Only gross inequities will justify judicial interference with contracts. Wheresoever practicable, the express terms of the contract predominate. The parties still determine the ambit of their own bargain. They still choose the terms of their business undertakings. The court merely alters or rectifies that which the parties were unable to alter or rectify for themselves.<sup>137</sup>

The justice concept does give rise to problems of construction in respect of nonperformance. As an unqualified test, the justice approach opens the door to unbridled judicial caprice; for the court, not the parties, becomes the contract-maker or the contract-breaker. The judge dispenses justice as a reflection of his own inner sense of conscience alone. Fairness and reasonableness hinge upon what he, in his eternal wisdom, considers to be a fair and reasonable result. The realities of the commercial transaction grow insignificant, except where the judge is willing to incorporate commercial considerations into his own notions of equity.<sup>138</sup> Stretched to its limits thus, the justice concept renders the contractors into "disembodied spirits". In their place there rises the figure of the fair and reasonable man, "... the anthropomorphic conception of justice".<sup>139</sup> Here, the justice concept introduces an uncertain standard of measurement into the construction of contracts. Equity is determined by an indeterminate standard. Fairness is based on an elevated perception of reasonableness. Reasonableness, in turn, depends upon the judge's own perception of equity, his perception of the facts, and his sense of ethics and civil responsibility in the circumstances. Accordingly, there is no assurance that the judge will appreciate how merchants themselves allocate risks of nonperformance in their trade ventures. Nor is it clear how the court will construe the negotiations of the parties, their express contracts and their commercial usages.

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<sup>135</sup> See hereon Patterson, *op. cit.*, footnote 5, at p. 949.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.* See too *supra*, footnote 53.

<sup>138</sup> For a critical reflection upon the application of equity to nonperformance obligations, see *infra*, footnote 141.

<sup>139</sup> In *Davis Contractors, Ltd v. Fareham Urban District Council*, *supra*, footnote 24, at pp. 728-729.

Under these conditions, judicial discretion represents the greatest threat to the sanctity of free trade. Merchants are no longer able to plan their business affairs according to predictable rules of law. They are thrust upon the mercy of judicial "valour" in the construction of their performance obligations.<sup>140</sup> Unless the justice concept is tethered by structures, by prescribed procedures and by functional rules, merchants will lose their freedom to regulate their own nonperformance obligations by binding accord. They will be forced to endure the unbridled freedom of judges to manipulate their performance obligations on vague grounds of fairness and reasonableness. Just as "... [r]ules and forms ... protect the individual against ... the arbitrary caprice of other individuals",<sup>141</sup> so too rules and forms are needed to protect the individual against the unrestrained discretion of judges.

The justice concept must constantly evolve to meet the advancing commercial and political needs of trade, just as it evolved to meet the demands of trade in Medieval Europe.<sup>142</sup> Justice must ensure that the laws of impossibility adapt in response to the laws of human behaviour. Justice must allow courts of law to modify contracts in response to the dynamic evolution of the business community.<sup>143</sup>

Common law courts should consider the *mores* of merchants in determining the limits of commercial obligations. They are obliged to assess the reasonable practices of merchants if they are to apply realistic standards of equity to business transactions.<sup>144</sup> A result which is just in the abstract may be totally unjust in the commercial setting. A remedy which is fair to a consumer may be unfair to a producer. An excuse which is equitable in the abstract may be inequitable where merchant practice suggests to the contrary. Consequently, reasonable results are inextricably interdependent with reasonableness in the commercial context. Just solutions include that which businessmen consider to be just. Fairness in turn hinges upon what is fair in the industrial environment under review. Ultimately, the utility of the justice concept is established by the practices and customs of merchants. The value of fairness is prescribed by that which merchants have, do and need in relation to nonperformance.

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<sup>140</sup> See hereon Pollock, *op. cit.*, footnote 125.

<sup>141</sup> Per Mayers, *op. cit.*, footnote 31.

<sup>142</sup> See hereon, Mitchell, *An Essay on the Early History of the Law Merchant* (1904); Scrutton, *General Survey of the History of the Law Merchant*, in 3 *Select Essays in Anglo-American Legal History* (1909), p. 7; Jones, *An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States* (1958), 25 U. Chi. L. Rev. 445; Milsom, *Historical Foundations of the Common Law* (1969), ch. 4; Denning, *op. cit.*, footnote 131; Trakman, *op. cit.*, footnote 4.

<sup>143</sup> Discussed *supra*, footnote 131.

<sup>144</sup> See Corbin, *op. cit.*, footnote 31; Berman, *op. cit.*, footnote 5.

The following guidelines are suggested in determining the relevance of a justice concept in the construction of nonperformance obligations. Firstly, suspicion should always be cast upon the use of a justice standard in the abstract. Intuitive approaches, the judge's instinct for fairness, are only acceptable where the court's conclusion reflects "right reasoning",<sup>145</sup> in the form of a systematic exposition of logical argumentation. Secondly, the justice concept should be devised with a clear perception of the commercial context under study, the type of parties, commercial transaction and industry involved. The court should inevitably appreciate that commercial characteristics underlie trade relationships. Trade contracts that embody nonperformance terms reflect established business practices. Businessmen who devise nonperformance practices to meet their needs should not be subject to the blanket exercise of judicial discretion in disregard of the express terms of their commercial agreements.<sup>146</sup> Similarly, the justice concept should not be invoked to remedy apparent ambiguities in contracts where an analysis of the trade environment gives meaning to seeming uncertainties in contract phraseology.<sup>147</sup> In the final analysis, the justice concept is most valuable in respect of nonperformance where its use is premised upon the combined forces of mercantile need, fairness between the parties *themselves*, and benefit to the community.<sup>148</sup>

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<sup>145</sup> The phrase "right reason" was coined by the American legal realist, Llewellyn. See his *Jurisprudence: Realism in Theory and Practice* (1962). For other writings by Llewellyn, see *op. cit.*, footnote 52.

<sup>146</sup> See in particular hereon Mayers, *op. cit.*, footnote 31, at pp. 86 *et seq.*; Berman, *op. cit.*, footnote 5, at pp. 1435-1439.

<sup>147</sup> The meaning of price-delivery terms is often established by scrutinizing the trade conventions that surround each business agreement, especially where the literal meaning of such terms, standing alone, are inadequate sources of clarification. Thus trade codes, uniform laws and party practices appropriately delineate the meaning of such terms as c.i.f. and f.o.b. They specify the duties of buyer and seller, carrier and bailee. See hereon *supra*, footnotes 110 and 111. A court that gives a meaning to c.i.f. or f.o.b. on the basis of judicial discretion alone ignores the trade environment against which businessmen, by necessity, inevitably formulate their agreements. Surely in such cases judicial discretion should be restricted by the need for judges to incorporate trade practice into their construction of price-delivery terms that, in turn, regulate rights to nonperformance. See further *supra*, footnote 53 and *infra*, footnote 207.

<sup>148</sup> See Corbin *op. cit.*, footnote 31; Patterson, *op. cit.*, footnote 5. The "reasonable" practices of merchants consist of variable yet interacting criteria. Thus "reasonable" behaviour is linked to market realities, to seller and buyer demands and to social-political forces. "Reasonable" grounds for nonperformance in international business are determined only after a scrutiny of the commercial regime itself, encompassing *A. Market Variables*: (1) the degree of disruption in supply, (2) the rate of price increase, (3) the suddenness of the disruption in performance, (4) the extent of the disruption, (5) the effect of the disruption upon buyers, sellers, governments and consumers in general. *B. Seller Variables*: (1) the prevailing market structure, (2) the availability of substitute means of performance, (3) the economic consequences flowing from a loss of a particular customer, (4) the feasibility of performing at increased prices

VIII. *Judicial Construction: the Rule Oriented Approach.*

Doctrines of law and rules of construction have significantly influenced the evolution of the common law of nonperformance. Both the obligation to perform and the right to nonperformance have been based on the theoretical underpinnings in the common law system. The law of impossibility has developed into a rule-oriented system under the influence of reasoning devices that are peculiar to our Anglo-American tradition of decision-making. Pre-eminent doctrines of law have arisen as a means of justifying excuses from performance. Just as the doctrine of *pacta sunt servanda* asserted the binding force of obligations,<sup>149</sup> the "changed circumstances" or *rebus sic stantibus* doctrine has attested to the non-binding force of obligations where political-economic circumstances have changed significantly between the date of contracting and the date of performance.<sup>150</sup> Other

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and in reduced quantities, (5) the risks of antagonizing importer and/or exporter governments by altering the nature of performance. *C. Buyer Variables*: (1) the size of the purchaser's order, (2) his potential future purchasing capacity, (3) his ability to sustain delays in delivery and price changes, (4) his propensity to sue the seller, (5) his potential influence upon the reputation of the seller in the marketplace. *D. General Variables*: (1) the past relationship between the merchants, (2) the nature of their transaction, (3) the presence or absence of a buyer's or seller's market, (4) the existence of competition among sellers in the market, (5) the risk of a permanent loss of customers, (6) the potential loss of repute flowing from non-delivery of the goods or non-payment of the purchase price. See further, Trakman, *op. cit.*, footnote 53, at pp. 149-150 and generally, *supra*, footnote 53.

<sup>149</sup> See *supra*, footnotes 8 and 9.

<sup>150</sup> On the historical evolution and comparative significance of the *rebus sic stantibus* or changed circumstances doctrine, see: Kruchmann, Clausula Rebus Sic Stantibus (1918), 116 Arch. Ziv. Pr. 122; Colagrosso (1943), 11 Libro Delle Obbligazioni—Commento al Nuovo Codici Civile Italiano 492; Knut Rodhe, Adjustment of Contracts on Account of Changed Conditions (1959), 3 Scan. St. in Law 152; Schwelb, Fundamental Change of Circumstances (1969), 29 Zao RV 39; Oertmann, Die Geschäftsgrundlage in (1927), 2 Handwörterbuch der Rechtswissenschaft 803; Larenz, Geschäftsgrundlage und Vertragserfüllung (3 Aufl., 1963); Cohn, Civil Law, in 1 Great Britain Office Manual of German Law (1950), pp. 30, 77-78; But see too von Mehren, *op. cit.*, footnote 103, p. 725.

For detailed discussions on the various legal effects of nonperformance in international trade law, see Delaume, Excuse for Nonperformance and Force Majeure in Economic Development Agreements (1971), 10 Col. J. Transnational L. 242; Schmitt-hoff, Frustration of International Contracts of Sale in English and Comparative Law, in Some Problems of Nonperformance and Force Majeure in International Contracts of Sale (Int'l Ass'n of Legal Science, Helsinki, 1961), at p. 127; Geiger, The Unilateral Change of Economic Development Agreements (1974), 23 Int. & Comp. L.Q. 73; Some Problems of Nonperformance and Force Majeure in International Contracts of Sale (Int'l Ass'n Legal Science, Helsinki, 1961); Smit, *op. cit.*, footnote 55; Drachler, Frustration of Contract: Comparative Law Aspects of Remedies in Cases of Supervening Illegality (1957), 3 N.Y.L.F. 50; Aubrey, Frustration Reconsidered—Some Comparative Aspects (1963), 12 Int. & Comp. L.Q. 1165.

On the denial of an export licence as a ground for relief from obligations in international trade, see Berman, Force Majeure and the Denial of an Export Licence

doctrines have also led to excuses from performance where the object or purpose of the contract has been frustrated, where the foundation or basis of the contract has disappeared and where performance has grown radically different in nature since the date of contracting.<sup>151</sup>

A wide range of theories have further reinforced the judicial reconstruction of obligations in contract. Sir Arnold McNair identified "five principal theories" of nonperformance in English law:

- (a) The theory of the implied term, which the law imputes to the parties . . . .
- (b) The theory of the disappearance of the basis or foundation of the contract theory: *non haec in foedera veni* . . . .
- (c) Lord Wright's theory . . . that, the parties not having dealt with the matter, the courts must determine what is just . . . .
- (d) The theory of common mistake . . . .
- (e) The theory of supervening impossibility.<sup>152</sup>

Other English jurists have extended these theories of nonperformance even further.<sup>153</sup> Professor P.H. Winfield contended that courts can grant excuses from performance because of a failure of consideration, or alternatively, on the basis of quasi-contract.<sup>154</sup>

American scholars have also devised theoretical rationalizations for the right of nonperformance in law. Arthur Corbin proposed that nonperformance arises out of the "supervening impossibility of performing conditions precedent".<sup>155</sup> William Page suggested that "implied conditions" are major sources of the law of nonperformance before American courts.<sup>156</sup> Edwin Patterson intimated that common law courts were bound to explain "what the parties would have done . . . as reasonable men" on the basis of the "conditions of frustration".<sup>157</sup> Finally, Samuel Williston, in his famous work, *A*

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Under Soviet Law: *A Comment on Jordan Investments Ltd v. Souiznefteksport* (1960), 73 Harv. L. Rev. 1128; Sassoon, *The Soviet-Israel Oil Arbitration*, [1959] J. Bus. L. 132; Domke, *The Israeli-Soviet Oil Arbitration* (1959), 53 Am. J. Int'l. L. 787. On "strikes" and other "labour disturbances" as grounds for nonperformance in law, see Berman, *op. cit.*, footnote 5, at p. 1434; *S.A. Ghuneim & Co. Inc. v. Southwestern Shipping Corp.* (1953), 124 N.Y.S. 2d 303 (Sup. Ct). See further *supra*, footnote 5 and *infra*, footnotes 203 and 204. For an analysis of "war" as a ground for an excuse from performance in international trade agreements, see *supra*, footnote 119.

<sup>151</sup> For reference to the doctrinal evolution of the law of nonperformance, see *supra*, footnote 5 (common law) and footnote 150 (international and comparative law).

<sup>152</sup> Per McNair, *op. cit.*, footnote 29, pp. 182 *et seq.* For various further comments on the diverse theories that are invoked in order to justify relief from performance in the common law, see Review, (1945), 8 Mod. L. Rev. 86; and *supra*, footnotes 5 and 150 in general.

<sup>153</sup> For a discussion of the theories of nonperformance in civil law systems, see *supra*, footnote 150.

<sup>154</sup> Winfield in Pollock *op. cit.*, footnote 125, at pp. 232-235.

<sup>155</sup> Corbin, *op. cit.*, footnote 50, esp. at p. 423.

<sup>156</sup> Page, *op. cit.*, footnote 5, esp. at p. 599.

<sup>157</sup> Patterson, *op. cit.*, footnote 5, at pp. 943-954.

*Treatise on the Law of Contracts*, identified "objective impossibility" as the key reason for excusing performance in law and "subjective impossibility" as a primary reason for the denial of such an excuse in law.<sup>158</sup>

Codifications of the common law have entrenched these judicial theories of nonperformance even further. The American *Restatement of the Law of Contracts*<sup>159</sup> defined impossibility to mean "... not only strict impossibility but [also] impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved".<sup>160</sup> The *Restatement* added that nonperformance is permitted in the event of existing,<sup>161</sup> supervening<sup>162</sup> and objective impossibility<sup>163</sup> and to a lesser extent, on the occurrence of partial<sup>164</sup> and temporary<sup>165</sup> impossibility. No duty to perform would arise in law in the face of either the "non-existence or injury of a specific thing or person"<sup>166</sup> or the "non-existence of essential facts".<sup>167</sup> The *Restatement* also granted excuses from performance where "some but not all bargains" were impossible to perform;<sup>168</sup> and on occasions where the impossibility was "apprehended" by the promisor.<sup>169</sup> Finally, as a residuary catch-all category, the *Restatement* acknowledged that relief from performance accrued where the "object or effect of the contract was frustrated".<sup>170</sup>

The American Uniform Commercial Code (U.C.C.) has continued this doctrinal codification of the common law of nonperformance. In particular, the U.C.C. has extended the scope of excuses from performance in commercial transactions beyond the traditional arena of impossibility. The Code provides for nonperformance in the event of "commercial impracticability", not merely on the occurrence of commercial impossibility. In addition, merchants are relieved from their obligations in the face of "a contingency the non-occurrence of which was a basic assumption [of] . . . the contract".<sup>171</sup>

<sup>158</sup> *Op. cit.*, footnote 29, s. 1932.

<sup>159</sup> *Op. cit.*, footnote 26, (1932).

<sup>160</sup> *Restatement* (1932), s. 454; *Williston*, s. 1932.

<sup>161</sup> *Restatement* (1932), s. 456.

<sup>162</sup> *Restatement* (1932), s. 457; *Williston*, s. 1933.

<sup>163</sup> *Restatement* (1932), s. 455; *Williston*, s. 1932.

<sup>164</sup> *Restatement* (1932), s. 463; *Williston*, s. 1956.

<sup>165</sup> *Restatement* (1932), s. 462; *Williston*, s. 1957-1958.

<sup>166</sup> *Restatement* (1932), s. 460; *Williston*, ss. 1946-1950.

<sup>167</sup> *Restatement* (1932), s. 461; *Williston*, s. 1951.

<sup>168</sup> *Restatement* (1932), s. 464; *Williston*, s. 1962.

<sup>169</sup> *Restatement* (1932), s. 465(1) and (2).

<sup>170</sup> *Restatement* (1932), vol. I, ch. 10, s. 288.

<sup>171</sup> Art. 2, §615(a).

Even more recently, the *casus omissus* or gap-filling<sup>172</sup> approach has evolved in the common law system. Under this approach, judges are required to fill in the omissions or gaps<sup>173</sup> in contracts by inference, by analogy and through discretion.<sup>174</sup>

The benefits of rule-orientation in relation to nonperformance are intrinsic to the growth of the common law as a system. Doctrines of nonperformance provide a solid substratum upon which judges can base their decisions. Courts are not forced to bind merchants to their contracts without exception. Yet rule-orientation still limits the freedom of judges in the exercise of their discretion. Doctrines of law prescribe the parameters of judicial decisions. Rules of law delineate standards of performance which must be met and techniques which are required in assessing the limits of nonperformance.<sup>175</sup>

Consequently, rule-orientation displaces the overriding discretion that prevails under the justice approach. Judges who adopt rule-oriented approaches are bound to apply rules of law in their construction of performance obligations.<sup>176</sup> They are required to fill gaps in contracts in response to the dictates of law and to some degree, by reflecting upon the market dynamics that surround such commercial transactions. They are expected to consider the intention of the parties in constructing the parameters of nonperformance. Properly employed, they are encouraged to consider "... custom, business

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<sup>172</sup> On the origins of this approach see Corbin, *op. cit.*, footnote 31, at pp. 465 *et seq.*

<sup>173</sup> For arguments in favour of "gap-filling" in contracts, see Smit, *op. cit.*, footnote 55; Farnsworth, *op. cit.*, footnote 5. For contrary views, see *supra*, footnotes 129 and 146. See too *supra*, footnotes 31 and 150 in general.

<sup>174</sup> A detailed analysis of the interrelationship among inference, analogy and discretion in the construction of nonperformance obligations is contained in Farnsworth, *op. cit.*, *ibid.*, footnote 5.

<sup>175</sup> This statement is premised upon the realization that the law of nonperformance is a mirror of society, an instrument towards satisfying the needs of society. Nonperformance doctrines should therefore not prevail in an abstract framework, unlinked to social progress and unaffected by political change. Principles of nonperformance should reflect real not artificial conditions in business. See Fuller, *Legal Fictions* (1930), 25 Ill. L. Rev. 363; Isaacs, *The Law and the Facts* (1922), 22 Col. L. Rev. 1; Pound, *Mechanical Jurisprudence* (1908), 8 Col. L. Rev. 605.

<sup>176</sup> Most importantly, judges are obliged to recognize the types of performance risks that are encountered by businessmen in their trade venture. This includes an awareness of how such risks affect trade relations and what trade (as distinct from legal) devices may be employed to regulate such risks. On business risks experienced in international business, their nature and variety, see Freehill, *Mutually Expected Perils* (1975), 49 Tul. L. Rev. 899; *Negotiating and Drafting: International Commercial contracts* (Sw. Leg. Fdn., 1965); *Breach of Contract in a Shortage Economy* (108 Prac. Law Inst., N.Y. 1974); Hurst, *Drafting Contracts in an Inflationary Era* (1976), 28 Un. Fla L. Rev. 879; Williams, *Coping with Acts of God, Strikes, and other Delights—The Use of Force Majeure Provisions in Mining Contracts* (1976), 22 Rocky Mt. Min. L. Inst. 433; Butte, *New Contracts Through Old Eyes* (1977), 13 Texas Int'l L. Forum 1.



practice . . . and the *mores* of the community”<sup>177</sup> in determining whether the foundation or basis of the agreement has failed. Rule orientation should motivate the judge to reflect upon the business agreement itself, upon its terms and conditions, in deciding whether to grant or deny an excuse from performance.<sup>178</sup> “When the court holds a contract to be thus terminated, it is simply giving appropriate effect to the circumstances of the case, including the actual contract and its meaning as applied the event.”<sup>179</sup>

The rule-oriented approach in its ideal form conforms to the most valued tenets of analytical positivism. Legal rules that govern performance are useful insofar as they are certain in their scope of application and predictable in the results that they attain. Through this positivist approach, the principles underlying rule orientation are translated into defined methods of construction. The laws that regulate nonperformance are construed to be all-encompassing in nature. They are expected to define exhaustively their own scope of operation. As a result, the common law judge becomes an instrument of the law. He applies rules of nonperformance within confined boundaries. He limits his discretion according to parameters that are entrenched in law.<sup>180</sup>

<sup>177</sup> Corbin, *op. cit.*, footnote 31, at p. 465.

<sup>178</sup> On the need for courts to adapt the rules of nonperformance to the facts of business, to the type of parties, the nature of their transactions and the extent of their competition, see *supra*, footnotes 53 and 147.

<sup>179</sup> Per Lord Wright in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, *supra*, footnote 38, at pp. 70-71.

<sup>180</sup> On analytical positivism and its influence upon the construction of contracts, see *supra*, footnotes 31 and 51. The origins of Analytical Positivism can be traced to the English scholarship of John Austin. Austin maintained that positive law found its authoritative basis in the “command” of the “sovereign”. The populace rendered “habitual obedience” to this supreme command. A failure to obey resulted in legal “sanctions” imposed upon the offender. For Austin, situations falling outside of this definition of law would, at most, constitute “positive morality”, falling short of law proper. Consequently, Austin identifies a positive law of business. This law emanates from a sovereign and regulates commercial relations absolutely and immutably. The practices of businessmen, unless they are actually embodied in this positive law of business, pervade in the realm of morality only. As moral forces, they lack enforceability in law. They are not legally binding upon merchants; they operate outside of the framework of the sovereign’s command. For Austin’s vivid writings hereon, see Austin, *Lectures of Jurisprudence* (5th ed., by R. Campbell, 1885), pp. 1-25; Austin, *The Province of Jurisprudence Determined* (ed. by Hart, Library of Ideas, 1954); Holdsworth, *Some Makers of English Law* (1938), pp. 256 *et seq.*; Keeton, *The Austinian Theories of Law and Sovereignty* (1929). See too Bryce, *Studies in History and Jurisprudence*, Vol. 2 (1901); Rees, *The Theory of Sovereignty Restated* (ed. by Laslett, Philosophy, Politics and Society, 1950).

On the relationship between positive law and positive morality including business practice, see Devlin, *The Enforcement of Morals*, esp. *Morals and the Law of Contract*, ch. 3 (1965); Hart, *Social Solidarity and the Enforcement of Morality* (1967), 35 U. Chi. L. Rev. 1; Paton, *The Moral Law* (1949); Toulmin, *Reason in Ethics* (1950), p. 204;

Yet certainty in method and predictability of result are not always present in the rule-oriented approach towards nonperformance. Standards governing contractual obligations are often imprecise in scope of application. Rules governing impossibility and impracticability are often unpredictable in fact. Gap-filling is frequently variable as a judicial technique. As a result, rule-oriented methods seldom represent awe-inspiring symbols of juridical conciseness. The doctrines that underlie the law of nonperformance are often mere means of judicial manipulation. Judges employ them in order to attain desired results. They use them as convenient ". . . euphemisms for the power which the courts have usurped . . . from the bargain which the parties have made".<sup>181</sup> In such instances, the judge controls the law. The law does not control the judge. Contrived devices and pretended techniques prevail.

Various tests illustrate the manipulative characteristics in the laws of nonperformance. The implied terms test shows how courts impose their conceptions of performance upon contractors. The judge implies what ". . . is reasonable in the opinion of the Court", not what ". . . the actual parties as hard bargainers would have agreed. . . ".<sup>182</sup> In many respects, the implication of terms into contracts constitutes an "artificial and misleading" device used by the court to justify interference with the sanctity of contracts.<sup>183</sup> "By implying provisions into contracts the judge achieves a convenient explanation of the result which is actually reached . . . by the Court".<sup>184</sup> By implying that the parties would have concluded likewise, the court employs an "apologetic fiction which deprecates the part played by state policy and personal judgment in the administration of law".<sup>185</sup>

Undoubtedly, what contractors would or might have decided in the circumstances is often a matter of "conjecture".<sup>186</sup> Usually, the court has no way whatever of knowing *ex post facto* what the parties would have done had they anticipated the disruption of their perform-

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Dworkin, *The Model of Rules* (1967), 35 U. Chi. L. Rev. 14; Hughes, *Rules, Policy and Decision-Making* (1968), 77 Yale L.J. 411. For further references, see *supra*, footnote 82.

<sup>181</sup> In Mayers, *op. cit.*, footnote 31, at p. 92. See also *supra*, footnotes 147 and 175.

<sup>182</sup> Lord Wright, *Pollock on Contracts* (1943), 59 L.Q. Rev. 122, at p. 124.

<sup>183</sup> *Ibid.*

<sup>184</sup> Page, *op. cit.*, footnote 5, at p. 599.

<sup>185</sup> Per Patterson, *op. cit.*, footnote 5, at p. 91. See also Berman, *op. cit.*, footnote 5, at pp. 1416-1417.

<sup>186</sup> Lord Wright aptly noted that what the parties "would have decided . . . [is] a difficult psychological inquiry and purely conjectural." See Wright, *op. cit.*, footnote 182, at p. 124.

ance. The court can merely guess. Judges are also on precarious ground when they imply that the parties would *not* have entered into the contract had they anticipated severe difficulty in rendering performance. Rather than automatically terminate their relationship, the parties may well have agreed to contract subject to appropriate reservations, qualifications or compensations in the terms of their arrangement. In addition, the implication of terms into contracts by operation of law generally gives rise to the absolute result of either mandating or excusing performance. These results disregard the fact that merchants often agree to adjust their performance obligations through price increases and supply reductions without absolutely terminating the contract. Consequently, doctrines of law which govern performance often lack flexibility. They recognize no middle ground: the obligation to perform either stands or falls. Performance duties generally do not alter in kind or in degree.<sup>187</sup>

However, the greatest difficulty with the implied terms approach lies in its uncertainty as a method of construction. The judge decides upon the limits of the actual intent of the parties. He determines when to imply terms into contracts and he establishes the criteria upon which he will base his implication of terms into contracts. Thus he may imply a right of nonperformance "... because of some belief as to the practice of the community, ... because of some opinion as to policy, or, ... because of some attitude ... [which is] not capable of bounding exact logical conclusion ...".<sup>188</sup> Precisely with what motivation he will imply terms into contracts ultimately rests in his

<sup>187</sup> This risk and/or loss sharing process in relation to nonperformance is, as a general statement, somewhat better developed in civilian systems than in common law systems. Besides the Frustrated Contracts Act (discussed *supra*, footnote 141), applicable in the United Kingdom and in parts of the British Commonwealth (a little-used piece of legislation), common law courts have preferred *not* to apportion responsibility for loss arising from nonperformance between contractors in business. Comments in learned journals plead for a greater willingness by American and Canadian courts and legislatures to apportion losses among contractors rather than apply an absolute excuse doctrine which achieves only absolute and inflexible results. See hereon, Comment (1951), 18 U. Chi. L. Rev. 153; Comment (1948), 46 Mich. L. Rev. 401; Weiss, Apportioning Loss After Discharge of a Burdensome Contract: A Statutory Solution (1960), 69 Yale L.J. 1054. See too Fuller and Perdue, The Reliance Interest in Contract Damages (1936), 46 Yale L.J. 52. On the Canadian position, see references *supra*, footnote 141. On the adjustment of contracts before specific common law courts, see Atkin L.J. in *Russkoe Obschestvo D'lia Izgostovleniya Snariadov i' Voennick Pripassov v. Stirk and Sons Ltd* (1922), 10 Ll.L. Rep. 214, at pp. 216-217. Lord Wright in *Denny, Mott & Dickson, Ltd. v. James B. Fraser & Co. Ltd.*, *supra*, footnote 49, at p. 275; Lord Wright, *op. cit.*, footnote 182, at p. 198. See especially, Patterson, *op. cit.*, footnote 5; and Corbin, *op. cit.*, footnote 50, at pp. 423-424. On the process of "loss division" in continental legal systems, see Drachsler, *op. cit.*, footnote 150; Rodhe, Adjustment of Contracts on Account of Changed Conditions in (1959), 3 Scan. St. in Law 153; Smit, *op. cit.*, footnote 55. See in general, von Mehren, *op. cit.*, footnote 103, pp. 716 *et seq.*

<sup>188</sup> Holmes, *op. cit.*, footnote 26, at p. 466. See too footnote 26 in general.

own hands. He decides upon the limits of the actual intention of the merchants. He determines the relationship between the law of impossibility and the terms business contracts.

The essential fiction of the implied term approach lies in the assumption that courts can ascertain the intention of the parties even though no such intention was actually manifest at the time of contracting. The fiction is extended further by the artificial assumption that the court can infer, reasonably, how the parties would have transacted had they anticipated what actually occurred at the time of performance.<sup>189</sup> Through the implied-terms approach the judge pays "... homage to a very sacred legal principle, the sanctity of contract . . .".<sup>190</sup> In fact, he frequently subverts the very intention which he purports to uphold.<sup>191</sup>

Other rule-oriented theories of nonperformance are similarly suspect in character. Doubts arise as to credibility of the objects or purposes tests.<sup>192</sup> In fact, it is questionable whether merchants do actually have common objects in concluding their business contracts. More likely, they have multiple objects. They certainly have different motives for entering into business agreements. They also have different expectations of themselves and of one another, including dissimilar views as to the permissibility of nonperformance.<sup>193</sup> Thus, an increase in the promisor's costs of performance, while destroying his profit object, may advance the promisee's profit object; for the promisee now stands to receive more valuable performance from the

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<sup>189</sup> For a discussion on judicial fictions in the interpretation of nonperformance obligations, see *supra*, footnotes 26, 31 and 175.

<sup>190</sup> Per Lord Sands in *James Scot and Sons, Ltd v. Del Sel*, [1922] S.C. 592, 596-597.

<sup>191</sup> For comments to this effect in the context of domestic and international trade, see *supra*, footnotes 146 and 147.

<sup>192</sup> On the origins of the "objects" or "purposes" approach in the common law of nonperformance, see *Krell v. Henry*, *supra*, footnote 13, where the court held that the "purpose" of a rental contract to view a coronation had failed due to the cancellation of the procession. In truth, the "object" of the contract there was more akin to the "motive" by which the parties entered into the agreement. In fact, only the tenant's "object" (motive) had failed (the procession had been cancelled). The "object" of the promisee landlord, in contrast, had not failed (A profitable lease was still possible). Through judicial construction only, had the "object" (motive) of *both* parties in fact failed. On the coronation cases, see Gutteridge, *Contract, Commercial Law*, vol. 2 (13th ed., 1929), pp. 614 *et seq.* McElroy & Williams, *op. cit.*, footnote 29; Wade, *op. cit.*, footnote 5. For the use of this "objects" or "purposes" approach in American law, see Restatement on Contracts, I, s. 288 which states that the "... desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it". See further, Corbin, *Frustration of Contract in the United States* (1946), 29 J. Comp. Legis. 1, at p. 4.

<sup>193</sup> See footnote 192 *supra* on the different objects (motives) of the landlord and tenant in *Krell v. Henry*. See too *supra*, footnote 5.

promisor than had originally been expected. As Arthur Corbin once remarked of the object or basis approach:

When the parties themselves say nothing whatever about the matter, a court can find that it was the "basis" only by looking into its own mind and conscience . . . .<sup>194</sup>

Equally suspect is the inference that a fundamental or a radical change in circumstances has occurred since the date of contracting.<sup>195</sup> What constitutes a radical or a fundamental change in an obligation is not premised upon what the parties actually intended at the time of contracting.<sup>196</sup> Such changes are rather questions which courts themselves decide after the date of contracting. Judges determine when the foundation of contracts have been violated.<sup>197</sup> They decide what reasonable merchants ought to intend in such circumstances.<sup>198</sup> The actual intention of the parties is nowhere to be found, save as the judge sees it. In each case, the judge decides when an increase in market price or delay in supply should lead to an excuse from performance. The judge establishes the nature of the performance difficulty. The judge prescribes the effects of nonperformance upon business obligations. Ultimately, the credibility of the judge's findings depend upon his ability to translate business usage into a legal form, without at the same time offending the doctrinal foundation of the law of impossibility.<sup>199</sup>

The final method of construction, namely, the gap-filling approach, suffers from a defect in its very conception. Firstly, its mode of operation is unclear. The court can determine when a gap exists in various different ways. The judge can fill gaps in contracts by reference to the literal words of the contract, by recourse to trade

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<sup>194</sup> Corbin, *op. cit.*, footnote 192, at pp. 4-5.

<sup>195</sup> On the "radically different" concept in the common law governing nonperformance, see in particular, the Suez Canal decisions, *supra*, footnotes 52 and 62. For references to related doctrines or concepts in the law of nonperformance, see *supra*, footnotes 5 and 150.

<sup>196</sup> *Ibid.*, see too Restatement (1932), *op. cit.*, footnote 26.

<sup>197</sup> For the growth of the "foundation of the contract" conception in the common law system, see Viscount Haldane in the *Tamplin* case, *supra*, footnote 45, at pp. 406-407.

<sup>198</sup> On common law decisions in which such constructive techniques are employed, see for instance *supra*, footnote 67.

<sup>199</sup> No doubt, combining established doctrine and flexible constructions in the interpretation of obligations in business introduces problems of a further dimension. The judges must still determine the nature of each doctrine, its characteristics and effects upon business transactions. He must still delineate those circumstances in which flexibility in the interpretation of promises is necessary in the interests of both order and justice. The solution in the construction of nonperformance obligations, it is suggested, lies in appreciating the nature of each business transaction, the needs and the interests both of the parties and of the trade community at large.

practices or by relying upon his own sense of justice. He can decide to fill gaps in contracts by way of artificial analogies and dubious inferences of fact. Precisely what facts are relevant and what analogies should be drawn rest in judicial hands throughout. The judge decides how far to extend or restrict the design of the contractors. His valour prescribes what is fair and reasonable in the context. His choices are infinite. He can fill gaps by way of rigid or flexible methods of construction. He can fill gaps by inferences drawn from the circumstances, by reference to analogous circumstances and by recourse to equity. Accordingly, the gap-filling method is only as credible as is both the technique used and the judge who invokes that technique.<sup>200</sup>

### IX. *Potential for Reform.*

Employed without specific tethers, constructed excuses from performance can undermine the stability of commercial relations. Applied by way of judicial whim, they displace the economic foundations of business. Utilized thus, the commercial desires of contractors are displaced by the legal desires of courts of law. The "foundations" of business agreements are determined by courts of law, not by merchants. The "objects" of commercial transactions are established by the conjuring capacities of judges, not by the commercial realities of business. Such a misuse of rule-oriented methodologies threatens the credibility of construction itself. The laws of frustration grow into manipulative devices. They pretend, rather than provide, certainty of approach. They obscure, rather than facilitate, predictability of result.<sup>201</sup>

In order to avoid these undesirable manipulations of contracts by operation of law, merchants must perfect their own agreements. They are bound to delineate the extent of nonperformance in precise terms in their written contracts. They are compelled to regulate their own arrangement with cautious deliberation, rather than risk the injudicious speculation of courts of law.

If constructive techniques are to be properly employed in contracts, a judge cannot reach his conclusions as a matter of self-illumination alone. He must adhere to a specific set of guidelines. As a primary rule, his construction should flow, not from a naked conception of law, but from his balanced reflection upon the factual circumference of each business transaction. The limits of non-performance should be responsive, not simply to his internalized

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<sup>200</sup> For an elaborate discussion on "gap-filling" techniques see the various articles cited *supra*, in footnotes 5 and 31.

<sup>201</sup> See further *supra*, footnotes 147 and 175.

sense of fairness, but to the dynamics of business usages themselves. Thus judges are duty bound to consider the understandings of businessmen in establishing the link between what businessmen do and what they ought to do. Courts are obliged to evaluate how merchants plan their affairs in order to implement the designs of businessmen. Judges are compelled to synthesize how merchants think and act if the common law is to progress as commerce progresses.<sup>202</sup>

These subsidiary rules are advanced as ways of promoting a viable rule-oriented approach towards the construction of non-performance obligations. Fictions in the laws governing nonperformance should be replaced by realistic rules of construction which reflect real, rather than artificial, intentions. Judges who imply terms into contracts should be guided by the commercial facts that surround the agreements. Gap-filling should correspond with the needs of the parties, their business concerns and their commercial values. The intention of contractors should not be abused by rule-oriented contentions of judges. Our judges should appreciate when they are implying terms on the facts and when they are doing so in response to presumed facts. They need to acknowledge when they are interpreting non-

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<sup>202</sup> For discussion on this Realist-Constructionalist approach towards the interpretation of nonperformance obligations, see *supra*, footnotes 52 and 150. The tendency of courts to examine the "business environment" in construing the parameters of nonperformance obligations reflects the ascendancy of sociological study as a legal tool. For many sociological-legal exponents, the operation of law is viewed primarily as a mirror of society; it is a suppletive process which alters as society alters. Man is under law primarily insofar as "law" is a meaningful gauge of man's own needs. Intrinsic to this whole approach is the view that businessmen are "law-makers", since they determine their own conduct vis-à-vis their fellow-merchants. The contract is a self-created device, the businessman's own instrument of self-ordering. The law merely provides the outer framework, the general circumference of the businessman's activities. Accordingly, for Eugene Ehrlich, the "law" would only advance if it scrutinized "concrete usages, . . . legal relations, contracts, articles of association". (In Ehrlich, *Principles of the Sociology of Law* (Trans. Moll, 1936), p. 501). To Roscoe Pound the effectiveness of "law", depended on the ability of adjudicators to indulge in empirical syntheses, balancing together the wants of merchants and the interests of society in the process of law-making. See, for instance, Pound, *A Theory of Social Interests* in (1921), 15 *Papers and Proc. of the Am. Soc. Soc.* 16; Pound, *An Introduction to the Philosophy of Law* (1954), p. 155. On social behaviorism in general, see *Sociology Today* (eds Merton, Broom and Cottrell, 1959); Stone, *Law and the Social Sciences, The Second Half Century* (1966); Pound, *Jurisprudence* (1959); Ehrlich, *Fundamental Principles of the Sociology of Law* (trans. Moll, 1936); Weber, *On Law in Economy and Society* (ed. Rheinstein, 1954); Gurvitch, *Sociology of Law* (1973); Aubert, *Sociology of Law* (1966); Sawyer, *Law in Society* (1965); Podgorecki, *Law and Society* (1974); Selznick, *Sociology of Law* (Int'l Encyc. of Soc. Sc., N.Y. 1968); Timasheff, *An Introduction to the Sociology of Law* (1939). See further, Clark, *Social Control of Business* (1926), pp. 1, 221-223; MacIver, *Society—Its Structure and Changes* (1933), pp. 248-253, 514-524. For critical studies hereon, see Unger, *Law in Modern Society: Towards a Criticism of Social Theory* (1976), p. 66.

performance clauses in actual contracts and when they are creating excuses from performance by way of judicial imagination.<sup>203</sup>

Most importantly, common law courts should develop a balance between the literal and the broad interpretation of business contracts. Judges should have resort to the strict interpretation of non-performance clauses *before* having recourse to flexible techniques of construction. Only where the literal construction of the contract produces an injustice or ambiguity of terms, should courts adopt liberal methods of interpretation.

In construing the limits of performance courts need to evaluate the past dealings of the parties, both in their mutual dealings and in their relations with other merchants. Judges should scrutinize the usages of merchants engaged in both indigenous and international trade. Only within such a framework will the construction of business agreements comply with the realities of commerce. Only within such a commercial context will our courts avoid needless recourse to judicial supposition, inventiveness and creativity in the construction of agreements. Most significantly, it is only where abstract rules of law are deliberately avoided by our judiciary that legal pragmatism will evolve on the basis of an intermeshing between legal practice and business demand.<sup>204</sup>

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<sup>203</sup> See hereon Devlin, *The Relation Between Commercial Law and Commercial Practice* (1951), 14 Mod. L. Rev. 249; Sassoon, *op. cit.*, footnote 109; Kennedy, *op. cit.*, footnote 109; Honnold, *The Influence of the Law of International Trade on the Development and Character of English and American Commercial Law in Colloquium on the Sources of the Law of International Trade* (Schmitthoff, ed., 1964), p. 70; Trakman, *op. cit.*, footnote 4.

In evaluating the business cycle in international business, it is especially necessary that judicial attention be given to the negotiating strategies that are associated with nonperformance obligations in trade relations. The "rules of the game" have traditionally bound businessmen, like military strategists, to indulge in a complex "games play" in which they balance together their common interests (*e.g.*, profit motives) and their conflicting interests (*e.g.*, price level) in order to maximize upon the productive aspects of their relationships, while minimizing upon needless conflict *inter se*. A refined form of reciprocity dominates their "game". Neither merchant wishes the deal to disintegrate; yet each merchant wishes to secure advantage from the transaction. This refined adherence of international contractors to a "sense of strategy" hinges, not upon instinct alone, but upon a careful weighing of the trade circumstances which affect their "bargain". In reaching a solution they evaluate the degree to which amicability can be extended, *i.e.*, they decide at what point in their relationship an attempt to secure an advantage over a co-contractor will lead to a breakdown in productive interactions. On the origins of "games theory" as a military maneuver, see von Neumann and Morgenstern, *Theory of Games and Economic Behavior* (1947). For a classical study of "games play" as it affects commerce, see Schelling, *The Strategy of Conflict* (1960). See too *Negotiating and Drafting International Commercial Transactions*, Sw. Leg. Foundation (Int'l Comp. Law Center, 1965); Randolph, *A Suggested Model of International Negotiation* (1960), 10 J. Conflict Res. 344.

<sup>204</sup> Indeed, it is precisely this need for construction according to fact not fiction, that has founded our commercial heritage. On this evolving Law Merchant, see *supra*,



No one approach towards the law of nonperformance can satisfy every business situation. In truth, there is no single law of contract regulating nonperformance. There are rather laws and there are contracts.<sup>205</sup> Contractual undertakings differ in nature according to each commercial context under study. The law regulating nonperformance in turn depends upon the nature of the contract, the type of parties involved, their mutual dealings and their commercial practices.<sup>206</sup>

The judicial techniques that impose either absolute performance obligations or a right to perform only conflict with one another in the abstract perspective. In factual terms, they represent two extreme conceptions of responsibility which are suited to two extreme factual frameworks. Judicial methodologies are mutually exclusive only where the business contract so suggests. In combined form, each methodology depicts the growing potential of the common law to develop judicial processes in response to the demands of commerce. Using both methodologies together, judges are able to reach legal solutions which satisfy competing business interests and which echo the concerns of the parties. By responding to commercial interests, judges are the means towards enhancing, not retarding, the business cycle.<sup>207</sup>

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footnote 4. Implicit in this linkage between legal practice and business demand is an understanding of the contractual process itself *viz* techniques that are used in negotiating and drafting business contracts. See White, *Drafting Contracts in a Shortage Economy* in *Practicing Law Institute, Breach of Contract in a Shortage Economy Revisited* (1974), p. 61; Note, *Requirements Contracts: Problems of Drafting and Construction* (1965), 78 *Harv. L. Rev.* 1213; Amot, *Escalator Price Adjustment Clauses* (1959), 63 *A.L. Rev.* 2d 1337; Lowden, *The Negotiation and Drafting of Commercial Sales Agreements in Eastern Europe* (1974), 29 *Bus. Lawyer* 845; Hurst, *Drafting Contracts in an Inflationary Era* (1976), 28 *U. Fla L. Rev.* 879; Hoya and Stein, *Drafting Contracts in U.S.-Soviet Trade*, [1975] *Law and Pol. in Int'l Bus.* 1057.

<sup>205</sup> See, hereon *supra*, footnote 53. For commentary on the complexity of the contract in the conventional era, see *supra*, footnote 78. See too, Gilmore, *The Death of Contract* (1974).

<sup>206</sup> Discussed in footnote 53.

<sup>207</sup> The judicial weighing or balancing of interests has germinated primarily in the area of conflict of laws. However, this approach towards judicial decision-making has a potentially wider application to commercial transactions. Thus political, social and economic interest can advantageously be balanced in trade ventures in order to determine the relative bargaining power and competitive ability, the foresight and market sophistication of the contracting parties. Relief from performance can be granted because of the disparity in bargaining powers between the parties or because of their relative incapacity to anticipate nonperformance risks. In contrast, excuse from performance can be refused because of the comparative market sophistication of both parties, because alternative performance is still economically feasible and because a right of nonperformance would likely harm the promisee more than it would benefit the promisor. The business context therefore determines the appropriate ambit of the law of nonperformance in respect of commerce. On the development of this balancing approach in relation to the conflict of laws, see Cavers, *A Critique of the Choice of Law*

Yet this judicial process is complex in nature. Judges must weigh competing interests. They need to balance fairness against economic expediency. They should compare the interests of the parties with the needs of international trade. They need to weigh the intensity of political-economic interests against the effect of nonperformance upon those interests in the environment of trade. Ultimately, each legal method of construction is a mere judicial tool. Each technique of interpretation hinges upon the ability of the judge to identify the commercial goals and propensities of the parties. The sufficiency of each method of construction depends upon the court's ability to devise legal approaches which promote commercial goals in the most efficacious manner.<sup>208</sup>

In interpreting nonperformance clauses, judges must recognize that contractual patterns vary from transaction to transaction, from party to party and from market to market. Judges are obliged to inquire into contractual facts. They are bound to consider the interaction between the nature of such facts and their effects upon performance. Thus, in ascertaining the scope of nonperformance, they need to acknowledge the interdependence between sudden upheavals in trade and the effect of those upheavals upon performance. They are expected to draw a distinction between nonperformance which is expressly provided for in the contract and nonperformance which is provided for by inference drawn from the surrounding trade context. Especially pertinent, our judges should realize that a promisor who fails to provide for nonperformance explicitly in terms of his contract may, but need not, have assumed the risk of nonperformance. An assumption of risk may be the product of a deliberate or a mistaken omission, an actual or a contrived act.<sup>209</sup>

Throughout the process of judicial construction, "social policies" are relevant concerns. The judge cannot divorce his assessment of fairness and equity from his own peculiar perspective of society as a whole. Yet fairness in respect of nonperformance should reflect other intrinsic concerns, such as economic efficiency, mercantile stability and the national interest. Absolute conceptions of fairness should subserve to the relative perceptions of fairness. What is a right and proper remedy in some situations may well be wrong and improper in other contexts. What is equitable will range from one

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Problem (1933). 47 Harv. L. Rev. 173; Ehrenzweig, *American Conflicts Law in Its Historical Perspective: Should The Restatement be "Continued"?* (1954), 103 U. Pa. L. Rev. 133; Traynor, *Is This Conflict Really Necessary?* (1959), 37 Tex. L. Rev. 657.

<sup>208</sup> Construction in accordance with commercial "fact" requires that courts of law appreciate the socio-economic basis of the business bargain itself, how businessmen transact, how they formulate their agreements, and how they alter the nature of their performance duties by agreement. See hereon *supra*, esp. footnote 148.

<sup>209</sup> See hereon *supra*, footnote 207.

contract to the next, from one trade to another. Reasonableness, as a balancing variable, will hinge on how courts contrast broad policy goals with the functional means of attaining those goals in specific business environments.<sup>210</sup>

The impact of equity upon the law of nonperformance therefore depends upon the commercial contract itself. A judicial sense of equity is an unjustifiable ground for nonperformance where the contractual framework suggests that performance should be required. A promisor in a dominant bargaining position is a less likely candidate for equitable relief from performance than a promisor who is in a dependent position. A promisor who has anticipated the harm produced by a disruption of his performance is less eligible for an excuse on the equities than a promisor who suffers from an unsuspected impediment to performance. Each judicial method of constructing a right of nonperformance acquires a meaning in direct response to the economic-legal framework. Common law courts are obliged to analyze the design of the merchants in terms of the express commercial agreements of merchants. Judges are required to establish the dynamics of trade and the demands of businessmen as consequences of trade patterns and business attitudes. Consequently, reasonableness as a criterion is most firmly supported where the reasonable contractor is a realistic man of commerce rather than an aloof instinct of judicial creation. The common law is most effective where the rules of law that curtail performance reflect the demands of actuality rather than the dictates of a legal imagination.

### *Conclusion*

The process of judicial investigation progresses from an analysis of the literal terms of nonperformance clauses to a synthesis of the negotiations between the parties, their past and present business understandings and their performance expectations. Construction ought to include consideration of the type of trade practices which businessmen employ, their market habits and their industry usages. What merchants reasonably intend from a judge's perspective relates directly back to what they actually intend. The probable behaviour of merchants blends in with the actual behaviour of merchants. The likely attitude of businessmen is reflected in the actual practices of businessmen.

Implied terms are only supportable as methods of construction where the fictional basis of implied terms conforms to credible values prevailing among specific merchants within identifiable environments. The "foundations" or "objects" of agreements are only viable concepts where courts are aware of the dynamic features of business,

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<sup>210</sup> See *supra*, footnotes 49 and 173.

the profit and market goals that underlie trade, the give and take that evolves in buying and selling in the marketplace.

The utility of judicial valour or caution is a relative, not a constant, phenomenon. The manner of construction by courts alters as parties, markets and trade practices alter. The form of construction serves as a means towards a functional end, not an end in itself. Ultimately, the "life of the law" lies in experience itself.<sup>211</sup> It does not lie in wishful thinking; nor in dubious dreams of judicial fancy.

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<sup>211</sup> These words are credited to Justice Holmes, a founder of modern pragmatism in the common law. See Wiener, *Evolution and the Founders of Pragmatism* (1949), ch. 8, where he discusses what Holmes meant by "experience". Holmes contended that judges had to perceive of the law "... as a business"; as a practical system in which scientific tools were important instruments in attaining functional ends. See Holmes-Laski Letters, I, (1963), p. 579; Holmes, *Collected Legal Papers* (1920), pp. 170-171; Holmes, *The Path of the Law* (1897), 10 Harv. L. Rev. 457.