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ON CHANGE AND THE LAW OF CONTRACTS: A TRIBUTE TO JOE PERILLO

*Richard E. Speidel**

I.

It is an honor to be included in the Festschrift for Joe Perillo.

Joe and I are professional rather than personal acquaintances. We have talked at the occasional meeting or conference, corresponded, and exchanged articles. Regrettably, I have never been his colleague at the same law school or worked with him on a project. But there is a link between us. We were born in the same year (1933), attended law school in the 1950s, started teaching law in the early 1960s, and have taught and written about contracts for the last forty years!¹ We have a common subject matter and are the intellectual heirs of the so-called “realists,” especially Arthur L. Corbin and Karl N. Llewellyn.

When we started teaching, change was in the air. Article 2 of the Uniform Commercial Code had attacked the foundations of classical contract in the First Restatement of Contracts, and the planning for the “neo-classical” Second Restatement of Contracts was already underway. At the same time, we tried to weather and adapt to the storms of social and theoretical change that arose over the next thirty years, including economic analysis of law, consumerism, the critical legal studies movements, relational contracting,² and now the “new formalism.”³ Moreover, we have participated in and benefited from the enormous growth of legal education and have witnessed the technological innovations, commercial treaties, and other developments that have facilitated the globalization of commercial law. These have been interesting and heady times.

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1. Also, we have both participated in the Fulbright Program and experienced the joy and pain of being a law school dean.

2. For an admirable analysis and application of these theories, see Robert A. Hillman, *The Richness of Contract Law: An Analysis and Critique of Contemporary Theories of Contract Law* (1997).

3. See, e.g., Symposium: Formalism Revisited, 66 U. Chi. L. Rev. 527 (1999).

II.

By every objective standard, Joe Perillo has had a highly successful career. He is the author of several influential articles about contracts⁴ and the co-author with the late John D. Calamari of a contracts casebook⁵ and an important treatise on the law of contracts, now in its fourth edition.⁶ Moreover, he is the driving force behind the ongoing and highly successful project to revise Arthur L. Corbin's great treatise on contracts.⁷ If this were not enough, he is a skilled comparativist and has taught and influenced in immeasurable ways thousands of students, attorneys, and judges over the years. So it might suffice simply to say, "Congratulations, Joe. Well done. Enjoy a healthy and happy retirement."

Yet there is a remarkable thing about the Treatise. According to Westlaw, the Treatise has been cited (since 1981) 747 times in the legal periodicals.⁸ That alone would be noteworthy. But the Treatise has also been cited 306 times by the state courts and 221 times by the federal courts. This is unique for a one-volume treatise on contracts,⁹ and the consistent citation by courts is unheard of for articles or university press books on contracts.¹⁰ Joe, your Treatise has cracked through the wall of resistance between the academy and the real world and is actually read and used by lawyers who try contract cases and judges who decide them.¹¹

4. Some of these articles include Joseph M. Perillo, *Exchange, Contract and Law in the Stone Age*, 31 *Ariz. L. Rev.* 17 (1989); *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 *Fordham L. Rev.* 1085 (2000); *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 *Fordham L. Rev.* 427 (2000); *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation* (with John D. Calamari), 42 *Ind. L.J.* 333 (1967); *Restitution in a Contractual Context*, 73 *Colum. L. Rev.* 1208 (1973); *The Statute of Frauds in Light of the Functions and Dysfunctions of Form*, 43 *Fordham L. Rev.* 39 (1974).

5. See John D. Calamari, Joseph M. Perillo & Helen Hadjiyannakis Bender, *Cases and Problems on Contracts* (3d ed. 2000).

6. John D. Calamari & Joseph M. Perillo, *The Law of Contracts* (4th ed. 1998).

7. Perillo's admiration of Corbin shines through in Joseph M. Perillo, Jr., *Twelve Letters from Arthur L. Corbin to Robert Braucher*, 50 *Wash. & Lee L. Rev.* 755 (1993).

8. All of the citation figures listed in this article are approximate. Results may vary considerably, depending on the electronic database used, and the search criteria provided. See also *infra* notes 9, 10, 12.

9. By contrast, Farnsworth on Contracts (3d ed. 1999) has been cited 1890 times by the periodicals and 1410 times by the courts, and Murray on Contracts (4th ed. 2001) has been cited 333 times by the periodicals and 194 times by the courts. The all-time leader (apparently) is the White and Summers treatise on the Uniform Commercial Code (5th ed. 2000), which has been cited 2576 times in the periodicals and 3502 times by the courts.

10. For example, the articles and books on contracts by Professor Melvin A. Eisenberg have been cited 1351 times in the periodicals and 23 times in the courts, and the excellent work of Professor Richard Craswell, focusing on the economic analysis of contracts, has been cited 696 times in the periodicals and only 7 times in the courts.

11. See Joseph M. Perillo, *The Law of Lawyers' Contracts Is Different*, 67

So maybe I should stop here in awe of the result¹² and expand the adjectives needed to celebrate your accomplishment. But there is a bit more to say. Why, do you suppose, has the Treatise cracked through to the courts? An elitist might say that treatises are not scholarship because they focus on doctrine rather than theory, and a cynic might argue that treatises are usually cited to confirm or bolster a conclusion reached from other sources. In other words, a treatise, even if cited by the courts, is really a semi-scholarly afterthought.

III.

A full scale effort to confirm or deny these assertions would require an inquiry into the nature and forms of legal scholarship and a systematic examination of the cases to see how the Treatise has been used. This examination will not be undertaken here. Suffice it to say that productive legal scholarship takes many forms, and that the recurring judicial citations of the Treatise to support or confirm a decision made from primary sources are still a high compliment to the author. Moreover, a Treatise like Joe's that is well-written, analytical, and takes account of relevant doctrinal developments is a welcome addition on anyone's shelf. There is a quality there that instills confidence.

But let us employ a familiar hypothetical to venture one step farther. Suppose that Seller and Buyer enter into a ten-year contract for the supply of equipment to be manufactured by *S* from specifications supplied by *B*. *S* agrees to supply *B*'s annual requirements within a stated maximum and minimum range, and *B* agrees to pay *S* \$1000 per unit, subject to an annual escalation up or down under a formula worked out in the negotiations. After four years of performance, the industry is suddenly hit by an energy crisis, coupled with a sharp increase in market demand for the equipment. *S* discovers that the escalation clause, drafted to track various anticipated cost increases and decreases, does not track the increase in energy costs. Thus, it will now cost *S* \$2500 to make each unit, for which it will be paid \$1200 under the contract. Also, *B* has begun to order the maximum amount under the contract, realizing that it can now resell the units it does not consume to third parties for \$3000 a unit. *S* refuses to perform, claiming that it is entitled to relief from the changed circumstances, either through discharge from the contract or by an order enforcing the contract with an adjusted price term.¹³

Fordham L. Rev. 443 (1998).

12. My arbitration treatise with Ian Macneil and Tom Stipanowich, published in 1994 and out of print since 1999, has been cited around 240 times in the periodicals and 39 times by the state and federal courts. See Ian R. Macneil, Richard E. Speidel, & Thomas Stipanowich, *Federal Arbitration Law: Agreements, Awards, and Remedies under the Federal Arbitration Act* (1994, supp. 1999).

13. The facts are loosely drawn from *Aluminum Co. of America v. Essex Group*,

Suppose that all the court had to work with was the Treatise, particularly chapter thirteen (in the fourth edition) dealing with "Impossibility or impracticability of performance, frustration of the venture." How might the case be decided?

Initially, we are told that relief in cases of changed circumstances depends upon three conditions: (1) the contract did not allocate the risk; (2) the changed circumstances were not expected (not foreseeable); and (3) the changed circumstances must have made performance "commercially impracticable."¹⁴ We also learn that the traditional cases for "almost automatic excuse" are not present here—no essential person has died, the subject matter of the contract was not destroyed, and no supervening government act made performance illegal or impracticable.¹⁵ Nevertheless,

[Beyond these traditional cases] relief is most justified if unexpected events inflict a loss on one party and provide a windfall gain for the other or where the excuse would save one party from an unexpected loss while leaving the other party in a position no worse than it would have without the contract.¹⁶

In these cases, the Treatise suggests that the presence of an imbalance produced by unanticipated changed circumstances is something "that the impossibility doctrine may redress."¹⁷

This is our case, right? The seller will incur substantial, unexpected increased costs (the escalator clause did not work), and the buyer seems to have a windfall. Even so, the buyer will not be worse off (a *pareto* optimal move) if some relief is granted.¹⁸

This imbalance theory, however, will not work if the contract allocated the risk to S. For example, an escalator clause, like a fixed-price, contract can be viewed as an allocation to S of the risk of price or cost increases. Similarly, a requirements contract with a maximum quantity provision puts a ceiling on B's incentive to order more in a rising market. Section 2-306(1) of the U.C.C., with its requirement that actual requirements be in good faith and not "unreasonably disproportionate," provides a further limitation. The Treatise

Inc., 499 F. Supp. 53 (W.D. Pa. 1980).

14. The Treatise draws a careful and proper distinction between risk allocated by the contract and risk allocation supplied or imposed by law. Calamari & Perillo, *supra* note 6, § 13.2.

15. *Id.* § 13.1, at 496. Five categories of excuse for impracticability are stated at section 13.2, at 498. Another category of excuse not involved in our case is the so-called "frustration of purpose" doctrine. *See id.* § 13.12.

16. *Id.* § 13.1, at 496.

17. *Id.*

18. In addition to an efficient result, the relief has some moral force in that the nonperformance was excused by law. *See* Gil Lahav, *A Principle of Justified Promise-Breaking and its Application in Contract Law*, 57 N.Y.U. Ann. Surv. L. 163 (2000) (discussing breaches that are economically and morally efficient).

recognizes this first principle of agreed risk allocation and leaves the contract interpretation issue to the courts.¹⁹

Let us assume that the price escalation clause, which apparently failed the purpose for which it was intended, is held not to allocate to S the risk in this case.²⁰ What else does the Treatise say about whether a court should correct the imbalance caused by changed circumstances?

In all probability, a court would probably ask whether the risk, as a matter of policy, should still be imposed on the seller, and answer the question in the negative if both parties assumed that changed circumstances would not cause the escalation clause to fail and the changed circumstances made the agreed performance impracticable.

On the impracticability issue, the Treatise reports, correctly I believe, that impracticability is rarely found where the defense was based “solely on the basis of increased costs,”²¹ although other legal systems “impose price adjustments in cases of unforeseen drastic variations in prices.”²² If, however, the cost of performance is significantly increased because changed circumstances require “performing in a manner radically different from what was originally contemplated,” impracticability may be found.²³

On the legal assumption of risk issue (basic assumption), the Treatise notes that the fundamental issue “is one of equitable allocation.” As Cardozo put it, the court must balance the community’s interest in having contracts performed against “the commercial senselessness of requiring performance.”²⁴ According to the Treatise, a primary method for striking the balance (assuming that performance as agreed has become impracticable) is through the concept of foreseeability applied with an eye to the “larger consequences” of the determination.²⁵ The Treatise suggests a working definition of foreseeability that focuses on the probability that an event that is foreseeable is likely to occur:

A sensible approach is to define the unforeseeable in the following way: an event so unlikely to occur that reasonable parties see no need explicitly to allocate the risk of its occurrence, although the impact it might have would be of such magnitude that the parties would have negotiated over it, had the event been more likely.²⁶

19. Calamari & Perillo, *supra* note 6, § 13.1, at 496, 498, 522-24.

20. See U.C.C. § 2-719(2) (1987) (agreed remedy “fail[s] of its essential purpose”).

21. Calamari & Perillo, *supra* note 6, § 13.9, at 512.

22. *Id.* § 13.9, at 513.

23. *Id.* § 13.9, at 512-13.

24. *Id.* § 13.16, at 522.

25. *Id.* § 13.18, at 526.

26. *Id.* See Specialty Tires of America, Inc. v. CIT Group/Equip. Fin., Inc., 82 F. Supp. 2d 434 (W.D. Pa. 2000) (citing the Treatise and adopting this approach).

Thus, if the changed circumstance and its effect are unforeseeable under the probability test, a court should grant some relief if performance as agreed was made impracticable. But, again, increased costs alone might not be enough (even though B seems to be reaping a windfall within the terms of the contract). Nevertheless, assuming that they are, the Treatise suggests that the preferred rationale for granting some relief is both the concerns of injustice produced by an unbargained-for imbalance and the ability of a court to supply a term that will do justice in cases where the parties did not intend to cover the situation at hand.²⁷

But what relief is available if the court decides to do justice? The normal relief is to discharge the contract as to future performance and try to restore the balance through restitution or, in some cases, protecting reliance.²⁸ But can a court preserve the contract through equitable orders and adjust the terms to restore some balance? The Treatise suggests that there are ways to “reshape the contract so that the duties of the parties will continue.”²⁹ These techniques, however, are limited or partial. There is no suggestion that the common law gives a court broad power to preserve and adjust as a method of relief, and, despite the grant of such power in the UNIDROIT Principles of International Commercial Contracts,³⁰ there is no argument that such power should be available. Such an argument would require a detailed excursion past the existing case law into various theories about contract (beyond rudimentary efficiency notions)³¹ that the Treatise does not (and perhaps should not) undertake.³²

27. Calamari & Perillo, *supra* note 6, § 13.21, at 531.

28. *Id.* § 13.23.

29. *Id.* § 13.23, at 535.

30. Professor Perillo is fully aware of the “imbalance, restoration” theory advanced in the UNIDROIT Principles and other comparative law perspectives that support broader relief. See Joseph M. Perillo, *Force Majeure and Hardship Under the UNIDROIT Principles of International Commercial Contracts*, 5 Tul. J. Int'l & Comp. L. 5 (1997); see also Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 Fordham L. Rev. 281 (1994).

31. See Calamari & Perillo, *supra* note 6, § 13.2, at 498, where the Treatise seems to embrace Richard Posner's superior risk bearer test, with its *ex ante* focus. The embrace, which lingers throughout, is not fully developed.

32. It is thought by some that relational theory, with its emphasis upon preserving the contract and expanded duties of good faith, offers more support for the readjustment remedy. See Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 Nw. U. L. Rev. 823, 837-46 (2000). The possibility is noted and quickly dismissed in Farnsworth on Contracts § 9.9, at 666-67 (3d ed. 1998) (courts express “reluctance to do more than allow a generous measure of restitution”). The possibility is not discussed in Murray on Contracts § 115 (4th ed. 2001).

IV.

When all is said and done, the contract principles of excuse for changed circumstances in Anglo-American law have changed very little in the last 100 years. Cosmetic changes aside, the modern law of contract excuse closely follows the patterns developed in the late nineteenth century in England and the United States.³³ Despite wars, recessions, inflation, and the traumatic force majeure events of September 11, 2001,³⁴ contract doctrine (and the Treatise) state that unless an event not foreseen as likely to occur creates an extreme imbalance, the promisor assumes the risk unless it is otherwise provided in the contract.³⁵ Even if some relief is available, that relief is limited to discharge and restitution rather than the preservation and adjustment of the contract.³⁶

In sum, Joe Perillo the Treatise writer accurately reports the developments in Anglo-American law and takes no firm position on the expansion of excuse doctrine or the relief available. The stability of contract, therefore, is preserved where the audience is American attorneys, judges, and students. Joe Perillo the comparative law scholar, writing in another medium, however, discusses (and perhaps approves) of the different positions taken in civil law and in the UNIDROIT Principles of International Commercial Contracts. Recognizing that these differences between U.S. law and civil or "international" law may not be justified, he suggests (timidly, perhaps) that the developments in continental and "international" contract law may "show the direction of the law (in the United States) of the next century."³⁷

So my question, Joe, is this. Why don't you develop and support your position in the Treatise, which is widely read, rather than burying it in a relatively obscure journal with a limited audience? The wearing of two scholarly hats when dealing with a common problem might be explained if you were a young faculty member seeking tenure at a law

33. See, e.g., *Kinzer Const. Co. v. State*, 125 N.Y.S. 46, 54-55 (Ct. Cl. 1910); W.H. Page, *Development of the Doctrine of Impossibility of Performance*, 18 Mich. L. Rev. 589 (1920); John D. Wladis, *Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law*, 75 Geo. L.J. 1575 (1987).

34. There is also the increased risk of retrospective government legislation in the risk of "homeland" security. See Richard E. Speidel, *Contract Excuse Doctrine and Retrospective Legislation: The Winstar Case*, 2001 Wis. L. Rev. 795.

35. Calamari & Perillo, *supra* note 6, § 13.20.

36. *Id.* § 13.23.

37. Joseph M. Perillo, *Force Majeure and Hardship Under the UNIDROIT Principles of International Commercial Contracts*, 5 Tul. J. Int'l Comp. L. 5, 28 (1997). In the process, I am identified as a prophet without honor in this country in that my approach to adjustment for changed circumstances has been adopted by the UNIDROIT Principles but rejected by courts and commentators in the United States. See Richard E. Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 Nw. U. L. Rev. 369 (1981).

school that looked down on treatises. But it makes less sense for a senior and respected scholar like yourself to be so cautious, especially in an era when the distinctions between domestic and international commercial law and between common law and civil law are increasingly blurred. So my recommendation for a revised chapter thirteen in the fifth edition of the Treatise is simple: You have the audience, you are respected, so go for it!