1969

A Second Look at the Suez Canal Cases: Excuse for Nonperformance of Contractual Obligations

Robert Birmingham
University of Connecticut School of Law

A Second Look At The Suez Canal Cases: Excuse For Nonperformance Of Contractual Obligations In The Light Of Economic Theory

By ROBERT L. BIRMINGHAM*

Take the area of relief available in cases where impossibility or mutual mistake excuses performance by both parties. We have almost totally failed to work out a system that satisfies anyone for distributing the wide variety of losses (including lost expectations) caused by events which, by definition, are the fault of neither party. . . . [P]erhaps, the courts have managed to reach the best solutions on an individual case basis by the seat of their pants. It is at least open to doubt.

—Mueller, Contract Remedies: Business Fact and Legal Fantasy, 1967 *Wisconsin Law Review* 833, 836-37.

I. Excuse Doctrines: Rationale

EACH party to a contract normally enters it expecting benefit from the resulting relationship. Such undertakings are consensual; presumably one would not agree if gain were not anticipated. Since the future cannot be known with certainty, however, there is a possibility that loss will occur to at least one of the individuals involved. Allocation of risk, as well as division of joint benefit, is of course a function of the bargaining strengths of the parties.

The distribution of losses that no doubt appeared highly unlikely at the time of contract formation nevertheless presents a continuing legal problem. An extreme solution, requiring rigid adherence to the express terms of the agreement, is illustrated by *Paradine v. Jane*,[1] decided by the King's Bench in 1647. Here a claim for rent by a landlord was met by the assertion that "a certain German prince, by name Prince Rupert, an alien born, enemy to the King and kingdom, had invaded the realm with an hostile army of men;

* Assistant Professor of Law, Indiana University School of Law. Professor Harold J. Berman of the Harvard Law School has been of great help to me in the preparation of this paper. He is, however, in no way responsible for the views I express.

[1] 82 Eng. Rep. 897 (K.B. 1647).

and with the same force did enter upon the defendant's possession, and him expelled . . . ."[2] The court held this plea insufficient, stating that "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."[3]

An opposite approach is common in Japan. Here a party to a contract seldom seeks to enforce it if it has ceased to be mutually advantageous: "[B]usiness and social custom forbids one to terminate a harmonious social tie by selfishly insisting on one's own interests."[4] Thus there is a "tendency to use legal forms—for example, the signing of a business contract—when the parties do not contemplate the regulation of the relationship thus initiated by formal legal standards, but rather seek a pattern of continuing association in which adjustment will be responsive to considerations the law ignores."[5]

---

[2] *Id.* at 897.

[3] *Id.* American reports are not without examples of similar inflexibility. *E.g.*, Stees v. Leonard, 20 Minn. 494 (1874): "The general principle of law which underlies this case is well established. If a man bind 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." *Id.* at 503-04.

[4] Kawashima, *Dispute Resolution in Contemporary Japan*, in LAW IN JAPAN 41, 47 (A. von Mehren ed. 1963).

[5] von Mehren, *Some Reflections on Japanese Law*, 71 HARV. L. REV. 1486, 1494 (1958). "Even in the cattle contracts, which are the most developed aspect of Sebei law, one can be guilty of trying to force too closely the limits of legal demand. The Sebei themselves recognize the existence of conditions that are not enforceable, but which would be honored under the proper circumstances—a twilight zone at the edges of legal obligations. This is not merely a disagreement over details (though that occurs too), but a consensus that a person really ought to do things he is not obligated to do." W. GOLDSCHMIDT, SEBEI LAW 6 (1967). The Standard Stipulated Terms for Contracts for Work in Construction Projects, issued by the Central Construction Industry Council, include the following provisions: "(1) A [the person placing the order], in case it is necessary to do so, may alter the content of the work, or either suspend or discontinue the work. In this case, if it is necessary to alter the fees for the independent work or the time of completion, A and B [the contractor] are to *confer* and settle these matters in writing. (2) In the case of the prior paragraph, if B has sustained damage, A shall compensate him for this damage. The amount of compensation is to be determined by *conferral* between A and B." *See* Kawashima, *Dispute Resolution in Con-*

Modern Western doctrines of excuse for nonperformance of contractual obligations fall between these two boundary solutions. They seek to avoid the inflexibility of a rule requiring literal reading of agreements without adding undue uncertainty as to the extent of obligations assumed. Their common consequence is "the operation of the law in discharging a contract by reason of the occurrence of events or circumstances which were not within the contemplation of the parties when making it, and which are of such a character that to hold the parties to their contract would be to impose a new contract upon them . . . ."[6] English decisions evidence an almost uninterrupted retreat from early requirements of strict compliance with the express terms of an agreement to a present willingness to adjust rights and duties in the face of major unforeseen changes in circumstances. Most American courts, on the other hand, have been much less liberal in their use of the available doctrines.

American commentators frequently dissociate impossibility of performance, usually defined to include not only physicial impossibility but also illegality and unreasonable difficulty, from frustration of purpose: The latter is thought to occur when the counter-performance due the party seeking relief has become of little value to him. Discharge on grounds of impossibility is granted without elaborate inquiry when death or illness prevents performance of an obligation involving personal services; courts have often refused, however, to extrapolate from such cases to reach a rule authorizing intervention in other situations where performance is equally precluded by frustration of purpose rather than by "act of God." Seemingly divergent holdings can be reconciled with this conclusion and with each other through assumptions concerning implicit allocation of risk by the contracting parties.[7]

Section 288 of the Restatement of Contracts states:

> Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears.[8]

This provision, however, was not declarative of American law at the time of its formulation and has received little judicial support since. Anderson, writing in 1953, could find no decision by an American court of last resort which expressly permitted relief based on frus-

temporary Japan, in LAW IN JAPAN 41, 46-47 (A. von Mehren ed. 1963). *See generally* Wren, *The Legal System of Pre-Western Japan*, 20 HASTINGS L.J. 217, 224-26 (1968).

[6] A. MCNAIR & A. WATTS, THE LEGAL EFFECTS OF WAR 157 (4th ed. 1966).

[7] *See* 6 A. CORBIN, CONTRACTS §§ 1319-72 (rev. 1963).

[8] RESTATEMENT OF CONTRACTS § 288 (1932).

tration;[9] a more recent study reiterates claims of disuse.[10] Hay correctly asserts: "The widely-held supposition that the doctrine of frustration plays a recognized role in American contract law is primarily based not on a study of the case law, but on section 288 of the *Restatement of Contracts*. . . . [T]he doctrine . . . is almost unused in American law."[11]

McNair and Watts divide justifications of judicial interference receiving some support in English law into five categories:

> (a) the theory of an implied term which the law imputes to the parties, in order to regulate a situation which in the eye of the law the parties themselves would have regulated by agreement if the necessity had occurred to them . . .
> (b) the theory of the disappearance of the basis or foundation of the contract . . .
> (c) Lord Wright's theory to the effect that, the parties not having dealt with the matter, the Courts must determine what is just, must find a reasonable solution for them . . .
> (d) the theory of common mistake . . .
> (e) the theory of supervening impossibility.[12]

Following recent British practice they consider all five theories, including that of impossibility, to provide a basis for frustration doctrines. This approach appears warranted for most purposes since both an increase in the difficulty of the performance to be rendered by an individual and a reduction in the value of the counter-performance he is to receive create a similar disproportion in the rights and obligations of the parties. Its broader definition of frustration is used to simplify the succeeding analysis.

The third of the five categories, fairness, is arguably the foundation of all relief; the others may merely designate techniques by which relief is granted:

> [O]ne can almost detect the emergence of a concept of unjust impoverishment . . . .
> . . . .
> . . . [T]he court or arbitration tribunal must necessarily . . . make its own determination, independently of intentions manifested in the contract, of which party should in fairness suffer the loss that occurred when the unallocated risk materialized.
> . . . .
> . . . [I]t is possible to detect . . . a theory that goes beyond contract interpretation. There is a suggestion, at least, that the harshness of contractual arrangements may require the protection of an

---

[9] Anderson, *Frustration of a Contract—A Rejected Doctrine*, 3 DEPAUL L. REV. 1 (1953).

[10] Comment, *Contracts—Frustration of Purpose*, 59 MICH. L. REV. 98 (1960).

[11] Hay, *Zum Wegfall der Geschäftsgrundlage im angloamerikanischen Recht*, 164 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 231, 245, 251 (1964) (translation by author).

[12] A. MCNAIR & A. WATTS, THE LEGAL EFFECTS OF WAR 167 (4th ed. 1966).

overriding principle.[13]

Since frustration remedies can in many cases be applied or withheld with almost equal justification, they permit the judge some freedom in allocating gain or loss between contracting parties. Their primarily redistributive function should not be concealed behind bland assertions that interpretation of documents is necessarily a search for true meaning rather than an exercise of judicial discretion.[14]

Berman has urged judicial renunciation of the frustration option in limited classes of cases where the contracting parties are sufficiently experienced to protect adequately their own interests. He suggests that those involved in international trade, for instance, can best be served by increasing the certainty with which they can allocate the gains or losses associated with their transactions. Surveying the intrusion of excuse doctrines, he concludes: "Considerations of social policy have been introduced in matters that in the

---

[13] Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413, 1414, 1415-16, 1418 (1963). "Professor Arthur von Mehren . . . remarks that in English and American law there are few doctrines dealing with the harshness of a contractual arrangement and that the doctrine of frustration serves this function and therefore cannot simply be discarded." *Id.* at 1417 n.9.

[14] "There is no surer way to misread any document than to read it literally . . . ." Guiseppie v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (L. Hand, J.) (concurring opinion), *aff'd sub nom.* Gemsco, Inc. v. Walling, 324 U.S. 244 (1945). "In the Western Han Dynasty (206 B.C.—A.D. 24) there lived in the Pei Commandery a man whose property amounted to more than 200,000 strings of cash. He had one son whose mother died when he was only three years old; he also had a (married) daughter who was a wicked woman. When the man fell ill he assembled the members of his clan and made a testament leaving all the property to his daughter. (To his son) he bequeathed only a sword, saying: 'When my son shall have reached the age of fifteen, this sword must be given to him.' Long after (the old man's death, however,) as the daughter had not given that sword to her brother; he went to the Grand Administrator. The Grand Master of Works, Ho Wu, examined the testament, then turned to his assistants and remarked: 'The woman is violent and domineering, her husband is greedy and low-minded. Therefore, the old man feared that they would harm his son (if he should leave all the property to his son), and he let it be taken by his daughter. But in reality he only deposited the property with her temporarily; for the sword would be the means whereby a final decision would be reached. He surmised that after his son would have become fifteen, his intelligence would have sufficiently developed to enable him to take independent action, and if he reported to the authorities, (sooner or later some magistrate would interpret correctly the old man's real intention and) justice would be done. So far ahead (the old man) planned.' Thereupon he (Ho Wu) returned all the property to the son." Tsao, *Equity in Chinese Customary Law*, in ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND 21, 41-42 (R. Newman ed. 1962).

public interest ought to be left to determination by the parties themselves."[15]

Since risk and uncertainty have an economic cost,[16] their restriction should be a goal of contract law. A finding of frustration must be premised on the happening of an unlikely event the probability of occurrence of which cannot normally be accurately predicted. Therefore the possibility of relief through excuse may either increase or decrease the total risk and uncertainty attached to a transaction.[17] Such a possibility limits the ability of a party in a strong bargaining position to restrict the variance of his own potential gains by increasing the spread of possible outcomes of those with whom he contracts. To the extent that this restriction discourages agreement, the resulting loss must be weighed against the concomitant gain in judicial flexibility.

As currently conceived, the frustration option does not explicitly permit a graduated response to differing equities. Since performance must be either required or excused there is generally no solution other than clear victory for one contestant.[18] The cases have permitted only an arbitrary retreat from this extreme. In the early part of the twentieth century, the impetus provided by cases arising

---

[15] Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413, 1438 (1963).

[16] Risk occurs when the probability distribution over the set of possible outcomes is known. That the individual will normally prefer an unambiguous solution has been frequently demonstrated. Raiffa reports, for example, that a group of Harvard Business School students, including some experienced executives, were willing to pay an average of only $30 for an even chance to win $100. The highest price offered for the opportunity was $45; the lowest only $10. A situation is labeled uncertain when the probability distribution of possible outcomes is unknown. Here an even greater monetary discount is normally demanded. Most of Raiffa's students, when offered reward for selection of a ball of a designated color, either red or black, preferred to choose from an urn containing an equal number of balls of each color rather than from an urn containing red and black balls in unknown proportions. Typically they would pay $35 for an opportunity to draw for $100 from the first, but only $5 to choose from the second. Raiffa, *Risk, Ambiguity and the Savage Axioms: Comment*, 75 Q.J. ECON. 690, 693 (1961).

[17] *See* H. THEIL, ECONOMICS AND INFORMATION THEORY (1967).

[18] "The courts have not generally matched their ingenuity in finding a wide variety of rationales for giving relief to a frustrated party with a similar inventiveness of forms of relief to be given. In all but three of the twenty-nine holdings . . . relieving the frustrated party, the court merely declared all rights and duties under the contract terminated by the frustrating event. The courts appear unable to evolve any alternative to simple discharge of the contract." Comment, *Contracts—Frustration of Purpose*, 59 MICH. L. REV. 98, 117 (1960). *But see* G. WILLIAMS, LAW REFORM (FRUSTRATED CONTRACTS) ACT 35-36 (1944); Comment, *Apportioning Loss After Discharge of a Burdensome Contract: A Statutory Solution*, 69 YALE L.J. 1054, 1060-69 (1960).

from the postponement of the coronation of Edward VII because of his illness led English courts to develop the rule that application of frustration doctrines terminated all contract rights unaccrued at the time of occurrence of the event warranting relief, leaving the parties in their respective positions as of that date. Although *Krell v. Henry*[19] excused the hirer of rooms above the procession path from the duty to pay the agreed rent, *Blakely v. Muller*[20] and *Chandler v. Webster*[21] determined that advance payments could not be recovered and that unpaid money due before the change in circumstances could be claimed by the prospective recipient. Defenses of these outcomes were less than convincing:

> The rule adopted . . . is . . . to some extent an arbitrary one, the reason for its adoption being that it is really impossible in such cases to work out with any certainty what the rights of the parties in the event which has happened should be. Time has elapsed, and the position of both parties may have been more or less altered, and it is impossible to adjust or ascertain the rights of the parties with exactitude. That being so, the law treats everything that has already been done in pursuance of the contract as validly done, but relieves the parties of further responsibility under it.[22]

The judiciary did not appear unduly disturbed by such a result:

> [T]he rule, admitted to be arbitrary, is adopted because of the difficulty, nay, apparent difficulty, of reaching a solution of perfection. Therefore, leave things alone: *potior est conditio possidentis.* That maxim works well enough among tricksters, gamblers, and thieves; let it be applied to circumstances of supervenient mishap arising from causes outside the volition of the parties: under this application innocent loss may and must be endured by the one party, and unearned aggrandisement may and must be secured at his expense to the other party. That is part of the law of England.[23]

Others were less tolerant: "Nothing is more startling for a lawyer trained in a foreign system of law than the rule of English law that in cases of supervening impossibility or 'frustration of the adventure' the 'loss lies where it falls.' "[24] The doctrine, restricted by the House of Lords in 1942,[25] was finally overturned by statute the following year.[26] Its use, however, demonstrates the purposelessness of frustration doctrines without acceptance of their essentially redistributive function.

If excuse from performance is to be guided by principles of fairness rather than by arid legal conceptualism, the economic impact on

---

19 [1903] 2 K.B. 740 (C.A.).

20 88 L.T.R. (N.S.) 90 (K.B. 1903).

21 [1904] 1 K.B. 493 (C.A.).

22 *Id.* at 499-500.

23 Cantiare San Rocco v. Clyde Shipbuilding & Eng'r Co., [1924] A.C. 226, 259.

24 R. GOTTSHALK, IMPOSSIBILITY OF PERFORMANCE IN CONTRACT 18 (1938).

25 Akcyjna v. Fairbairn Lawson Combe Barbout, Ltd., [1943] A.C. 32.

26 Law Reform (Frustrated Contracts) Act, 6 & 7 Geo. 6, c. 40 (1943).

the contracting parties of unexpected events which raise the issue of frustration should be closely scrutinized. While value judgments basic to determination of the justice of possible outcomes largely elude objective analysis, the adequacy of factual premises on which such subjective processes operate may certainly be tested. The normal approach, that "the loss, whether great or small, must generally fall on one party or the other,"[27] is unduly simplistic. What appears to be injury when inquiry is narrowly confined may be revealed as disguised gain to one or both parties if viewed from a broader economic perspective. This article attempts to show that in cases where frustration of contract is at issue, unnecessarily inadequate economic analysis frequently leads courts to inaccurate conclusions concerning the equity of possible solutions.

II. The Suez Canal Cases

The closing of the Suez Canal from November 2, 1956, to April 9, 1957, a result of war in the Middle East, motivated a number of English and American decisions involving claims of frustration of contract.[28] This section will briefly describe one dispute between a buyer and a seller of goods which would normally have moved through the Canal if this route had been available and one dispute between a shipowner and a charterer who had contemplated a voyage through the Canal.

A. Dispute Between Buyer and Seller

Albert D. Gaon & Company v. Société Interprofessionelle des Oléagineux Fluides Alimentaires[29] concerned two contracts dated October 12, 1956, and October 31, 1956, under which Gaon agreed to sell about 2,500 tons of unshelled Sudan groundnuts to the Société c.i.f. Nice and Marseilles, shipment to be no later than November 1956. Prices were £49 10s. and £54 5s. per ton under the first and second agreements respectively. Form No. 38 of the Incorporated Oil Seed Association Forms of Contract was employed in both transactions. Clause 8 of this form states:

> In case of prohibition of import or export, blockade or war, epidemic

[27] Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413, 1419 (1963).

[28] In addition to the two cases discussed in this section, see Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966); Glidden Co. v. Hellenic Lines, Ltd., 275 F.2d 253 (2d Cir. 1960); Ocean Tramp Tankers Corp. v. V/O Sovfracht, [1963] 2 Lloyd's List L.R. 155 (Q.B.), *rev'd sub nom.* The Eugenia, [1964] 2 Q.B. 226 (C.A.); Tsakiroglou & Co. v. Noblee Thorl, G.m.b.H., [1960] 2 Q.B. 318 (1958), *aff'd*, [1960] 2 Q.B. 348 (C.A.), *aff'd*, [1962] A.C. 93 (H.L. 1961); Carapanayoti & Co. v. E.T. Green, Ltd., [1959] 1 Q.B. 131 (1958).

[29] [1960] 2 Q.B. 334 (1959), *aff'd*, [1960] 2 Q.B. 348 (C.A.).

> or strike, and in all cases of force majeure preventing the shipment within the time fixed, or the delivery, the period allowed for shipment or delivery shall be extended by not exceeding two months. After that, if the case of force majeure be still operating, the contract shall be cancelled.[30]

Because of the Suez crisis no shipment was made under either contract. A dispute between the parties as to the legal consequences of nonperformance led to arbitration in accordance with the rules of the Incorporated Oil Seed Association. On October 23, 1957, an umpire, appointed after the arbitrators chosen by the parties failed to agree, ruled that the sellers, in default under both contracts, should pay the buyers the difference between the stipulated prices and £62 5s. per ton, with interest at five per cent from the date of the awards.

The sellers appealed to the Board of Appeal of the Association, which affirmed the conclusions of the umpire. The Board of Appeal found that closure of the Canal increased the length of the voyage necessary for delivery from 2,300 miles to 10,500 miles. The cost of shipment was raised from about £6 per ton to between £27 9s. and £29 per ton.

The sellers remaining unsatisfied, the matter was taken before the Queen's Bench in the form of a special case stated by the Board of Appeal. The appellants argued that "shipment" as employed in the agreements meant shipment by Suez, the usual or customary route. Asserting the existence of an implied term that this route would be available, they urged that enforcement of the contract after closure of the Canal would be enforcement of a different contract.

Justice Ashworth affirmed the decision of the Board. Although he agreed that the parties contemplated shipment through the Canal, he stated:

> In the present case an unexpected event occurred, namely, the closure of the Suez Canal, and no doubt it may be said to have involved both inconvenience and material loss. But I am not satisfied that there was also involved such a change in the significance of the obligation as would call the principle of frustration into play.[31]

In support of his conclusion he asserted:

> [A]lthough the performance of the sellers' obligation after the closure of the Suez Canal would have involved them in greater expense, they would not have been performing something radically different from that which they had undertaken to do. . . .
>
> . . . [T]he continued availability of the Suez Canal was not the basis on which the parties "must have made" their bargain.[32]

This decision was affirmed by the Court of Appeal. Lord Justice

[30] [1960] 2 Q.B. 334, 335 (1959).

[31] *Id.* at 346.

[32] *Id.* at 347.

Sellers first dismissed a claim for relief under clause 8: "[N]either war nor force majeure prevented shipment of the contract goods. Shipment means physically putting the goods on board a vessel, and, if there was a duty on the sellers to put the contractual goods on board a vessel for a voyage round the Cape . . . there was nothing to prevent them doing so . . . ."[33] To the argument for the sellers that if they "had shipped the contract goods via the Cape of Good Hope whilst the Suez Canal was an available route it would have been a breach of contract,"[34] he responded:

> I think the answer is that the changed circumstances gave rise to a change in the performance of the contracts by the sellers, but it is not so fundamental a change that it can be said to be commercially different or of such a character that the parties at the time of the making of the contract, if they had considered the position, would have said with one voice that in those circumstances their bargain would be at an end.[35]

Lord Justices Ormerod and Harman concurred. The former asserted:

> [S]hipment by the Cape route would not be a performance radically different from that undertaken by the contract. It is true that the distance is much greater, and the expense would be increased, particularly if shipment was delayed, as we were told that freights were increased as time went on, but these matters of themselves are not necessarily sufficient, in my judgment, to transform the nature of the undertaking . . . .[36]

The latter added: "Hardship or unexpected expense falling on one of the parties to a commercial adventure can never excuse him from it so long as the adventure remains recognizably that upon which the parties embarked."[37]

B. Dispute Between Shipowner and Charterer

In *Société Franco Tunisienne d'Armement v. Sidermar*,[38] the plaintiff shipowners chartered a vessel to the defendants for carriage of iron ore from Masulipatan, on the east coast of India, to Genoa. The charter party was dated October 18, 1956. The customary shipment route at that time, through the Suez Canal, was about half the distance of the shortest alternative route, around the Cape of Good Hope. The captain of the chartered vessel was to telegraph Genoa on passing the Canal.

The ship reached Masulipatan on November 9, 1956, approximately one week after the blocking of the Canal. A cargo of iron

---

33 [1960] 2 Q.B. 348, 359 (C.A.).
34 *Id.* at 362.
35 *Id.*
36 *Id.* at 367.
37 *Id.* at 371.
38 [1961] 2 Q.B. 278 (1960).

ore, tendered by the charterers, was loaded with the permission of the captain between November 13 and 18. A bill of lading was issued on November 18, and the vessel sailed the following day. On November 20 the shipowners, asserting that closure of the Canal terminated their contract, claimed an increase in freight charges from 134 to 209 shillings per long ton as compensation for the required longer journey. Since the charterers considered the shipowners still bound by their original agreement, it was decided on December 5 that freight should be paid at the contract rate and the dispute submitted to arbitration in London. The vessel reached Genoa on February 16, 1957.

The arbitrator found that the charter party was not frustrated, ruling that the continued availability of the Canal route was not a basic assumption of the contract and that the voyage around the Cape of Good Hope was not commercially or fundamentally different from shipment via Suez. He ruled, however, that if closure had excused performance, the claim of the shipowners was timely and was not negated by an implied agreement to transport the cargo by the longer route at the contract price. The charterers would then be required to pay the shipowners the reasonable value of their services, held to be 195 shillings per long ton.

Stated questions of law were reviewed by the Queen's Bench. Justice Pearson, after a thorough examination of the authorities, held the contract frustrated. That the captain was to telegraph Genoa on passing the Canal was interpreted to imply an obligation to travel via Suez: "[H]aving regard to the express provisions of the contract and the surrounding circumstances, the proper view is that it was a term of the contract (whether express or implied) that the vessel was to go by the Suez Canal route."[39] This requirement was deemed almost determinative.

The decision was supported by a number of subordinate considerations which appear to have motivated the hardly inevitable conclusions concerning "the true construction of the contract":[40]

> [T]here is the simple geography of the matter. The route by way of the Suez Canal is a fairly direct route. . . . But the route via the Cape is a highly circuitous route . . . . It is a route which no sensible person would take . . . . [I]t is an unnatural route.
>
> . . . There was the extra expense of going via the Cape. There was the extra journey in distance; the extra time; and the different climatic conditions, which would not affect a cargo of iron ore, but might have some effect on the vessel's crew.
>
> . . . .
>
> . . . [H]aving regard to the express provisions of the contract and the surrounding circumstances, the proper view is that it was a term of the contract (whether express or implied) that the vessel was to go

[39] *Id.* at 306.

[40] *Id.*

by the Suez Canal route.

. . . .

. . . [I]t would be a fundamentally different voyage.[41]

Although there was no relevant express finding by the arbitrator, Justice Pearson commented: "I am rather inclined to infer that the rate of 134s. per long ton was the appropriate rate for the Suez Canal voyage . . . ."[42]

Gaon was distinguished:

> One may say shortly that it is obvious that the position is very different in a contract for the sale of goods. . . . The seller would put the goods on board the ship at the port of loading as contemplated by the contract, and the buyer would receive the goods at the port of discharge as contemplated by the contract. The only differences would be that the seller would pay more than he expected for the freight and the buyer would have to wait longer than he expected to receive the goods. It was considered by the Court of Appeal that these were not fundamental differences, and there was no frustration in the case of a c.i.f. contract.[43]

Since the court found that the actions of the shipowners did not preclude their assertion of frustration, it ruled that they were entitled on the basis of *quantum meruit* to reasonable freight for the extended voyage, as previously fixed by arbitration. Arguments of equity were summarily dismissed: "[I]f there was hardship on the charterers, it arose really from the frustrating event and not from any fault of the shipowners . . . ."[44]

C. Criticism

Controlling authority hardly dictated the conclusions of *Gaon* and *Sidermar*. The rules of law applied appear to be less guides for decision than rationalizations of outcomes determined on other grounds. Certainly in each case the court could easily have found for the losing party. In *Gaon*, the Queen's Bench was confronted with *Carapanayoti & Company v. E. T. Green, Ltd.*,[45] in which Justice McNair had ruled a contract frustrated under similar circumstances. The *Gaon* court stated:

> In reaching this conclusion I am regretfully conscious that I am differing from that reached by McNair, J., and although the facts found in the present case are not precisely the same as those before him, I doubt whether on this point the differences are such as to afford any firm basis for distinguishing his case from this.[46]

---

[41] *Id.* at 304-05, 306-07.

[42] *Id.* at 305.

[43] *Id.* at 308.

[44] *Id.* at 312.

[45] [1959] 1 Q.B. 131 (1958).

[46] Albert D. Gaon & Co. v. Société Interprofessionelle des Oléagineux Fluides Alimentaires, [1960] 2 Q.B. 334, 347 (1959).

The Court of Appeal has likewise found *Green* unreconcilable[47] and has expressly disapproved *Sidermar* in its reversal of a similar decision.[48] In the latter case, Lord Denning, Master of the Rolls, said:

> The only hestitation I have had about this case is because of the views expressed by Pearson J. in *The Massalia* [*Sidermar*]. That case can be distinguished because there was a sentence in the charter which read "Captain also to telegraph to 'Maritsider Genoa' on passing Suez Canal." Pearson J. held that that meant there was actually an obligation to pass the Suez Canal, and hence the contract was frustrated by impossibility. I think he attached too much significance to the clause. I think that there, as here, there was no obligation to go through the Suez Canal, but only to go by the route which was customary at the time of performance . . . . Pearson J. held that the route via the Cape was fundamentally different from the route via the Suez Canal and that the charter was frustrated on that ground also. I am afraid I cannot take that view. . . .
>
> I come, therefore, to the conclusion that the decision of Pearson J. in *The Massalia* was wrong and should be overruled.[49]

The manifest inconclusiveness of doctrinal considerations should have freed the courts to seek other grounds for decision. Inquiry into the equities of the contesting parties was stifled, however, by judicial unwillingness to view broadly the economic consequences of closure of the Suez Canal. It was obvious that the law could have little impact on the magnitude of the social costs associated with the disruption of normal trade routes. The judges were thus correct in viewing their function as primarily allocative. They were wrong, however, in believing that the loss resulting from nonshipment or an extended voyage must inevitably fall on the contracting parties. This unwarranted assumption, together with the lack of precedent supporting a division of the presumed loss, led them to conclude that one or the other of the equally innocent parties, selected almost arbitrarily, must suffer substantial injury. It is not surprising that the desire for justice did not evoke enthusiasm for any outcome.

That closure of the Canal imposed a cost on society cannot be disputed. This does not mean, however, that the parties directly affected necessarily bear the total loss. In both *Gaon* and *Sidermar*,

---

[47] Lord Justice Sellers declared: "I agree with the view of Ashworth, J. and regret that it is contrary to the view taken by a very experienced commercial judge, McNair J., in very similar circumstances in *Green's* case." Tsakiroglou & Co. v. Noblee Thorl, G.m.b.H., [1960] 2 Q.B. 348, 363 (C.A.). Lord Justice Harman concurred: "I must face the fact that this involves disagree with the decision of McNair J. in *Green's* case, for I cannot see any distinction between that case and this. Both arise out of the same events; both concern c.i.f. contracts, and, though the form of the contracts and their dates differ to some extent, I do not think the differences are relevant." *Id.* at 371-72.

[48] The Eugenia, [1964] 2 Q.B. 238 (C.A.).

[49] *Id.* at 40-41.

for example, the contracting parties may have been able to shift part or all of the economic loss initially falling on them to groups not before the court. In the latter case, one cannot exclude the possibility of an overshift of the injury to the owner and the charterer which would have permitted them to secure joint advantages in spite of the injury to society as a whole. Given this spectrum of potential outcomes, judicial resolution of these disputes cannot correctly be viewed as simply determining which of the contestants must suffer loss. It is conceivable, for example, that the court through skillful exploitation of the flexibility provided by the issue of frustration could have approximately satisfied the expectations held by the contracting parties prior to the unanticipated disruption of their ventures. At the very least, therefore, the decisions under consideration were inadequately supported.

III. Analysis

A. General Equilibrium Model

The impact on world commerce and markets of an unanticipated closing of the Suez Canal may be rapidly summarized. The transportation sector of the world economy will experience alterations in patterns of ship demand, freight rates per ton-mile, and total transportation costs per unit of goods shipped. Ship demand will be determined by interaction between the matrix of trip distances, which has received the initial shock of Canal closure, and matrices of product supply and demand functions. Changes in freight rates per ton-mile will be induced by interplay between ship supply functions and altered ship demand. Total transportation costs will reflect the effects of changed freight rates per ton-mile and trip distance increases, if any.

These consequences can be represented symbolically.[50]

Data:

Q_1 = matrix of trip distances
Q_2 = matrix of world producer supply functions
Q_3 = matrix of world consumer demand
Q_4 = matrix of ship supply functions

Variables:

X_1 = ship demand matrix
X_2 = matrix of freight rates per ton-mile
X_3 = matrix of transportation costs per unit of product

[50] *See* R. KUENNE, THE THEORY OF GENERAL ECONOMIC EQUILIBRIUM (1963); Simon, *Causal Ordering and Identifiability*, in A. ANDO, F. FISHER & H. SIMON, ESSAYS ON THE STRUCTURE OF SOCIAL SCIENCE MODELS 5 (1963).

We have posited three functional relationships:

$$X_1 = F_1(Q_1, Q_2, Q_3)$$
$$X_2 = F_2(X_1; Q_4)$$
$$X_3 = F_3(X_2; Q_1)$$

If we assume these equations are continuous and differentiable, we may derive the changes in the variables resulting from the shock to Q_1 of the closing of the Canal from the following system:

$$\begin{bmatrix} 1 & 0 & 0 \\ -\frac{\partial F_2}{\partial X_1} & 1 & 0 \\ 0 & -\frac{\partial F_3}{\partial X_2} & 1 \end{bmatrix} \begin{bmatrix} \frac{\partial X_1}{\partial Q_1} \\ \frac{\partial X_2}{\partial Q_1} \\ \frac{\partial X_3}{\partial Q_1} \end{bmatrix} = \begin{bmatrix} \frac{\partial F_1}{\partial Q_1} \\ 0 \\ \frac{\partial F_3}{\partial Q_1} \end{bmatrix}$$

Similar techniques may be used to compute the change in profitability of individual transactions as a result of closure of the Canal. The restructured matrix of transportation costs per unit of product may for this purpose be taken as data. Supply price and demand price matrices depend on producer supply and consumer demand functions and transportation charges. Profit or loss from trade in any goods between any two points is in turn determined by the schedules of supply and demand prices and transportation charges.

Several additional definitions are now required.

Data:

$Q_5 = X_3$ = matrix of transportation costs per unit of product

Variables:

X_4 = matrix of producer supply prices
X_5 = matrix of consumer demand prices
X_6 = trade profitability matrix

Three more relationships may now be described:

$$X_4 = F_4(Q_5, Q_2, Q_3)$$
$$X_5 = F_5(Q_5, Q_2, Q_3)$$
$$X_6 = F_6(X_4, X_5; Q_5)$$

Again assuming that the functions are continuous and differentiable, we may as above obtain the changes in the variables caused by the change in Q_5, itself a product of Canal closure:

$$\begin{bmatrix} 1 & 0 & 0 \\ 0 & 1 & 0 \\ -\frac{\partial F_6}{\partial X_4} & -\frac{\partial F_6}{\partial X_5} & 1 \end{bmatrix} \begin{bmatrix} \frac{\partial X_4}{\partial Q_5} \\ \frac{\partial X_5}{\partial Q_5} \\ \frac{\partial X_6}{\partial Q_5} \end{bmatrix} = \begin{bmatrix} \frac{\partial F_4}{\partial Q_5} \\ \frac{\partial F_5}{\partial Q_5} \\ \frac{\partial F_6}{\partial Q_5} \end{bmatrix}$$

We may combine the two systems already developed into a single comprehensive system simultaneously determining changes in ship demand, transportation costs, product prices, and trade profitability resulting from shifts in the matrix of trip distances:

$$\begin{bmatrix} 1 & 0 & 0 & 0 & 0 & 0 \\ -\frac{\partial F_2}{\partial X_1} & 1 & 0 & 0 & 0 & 0 \\ 0 & -\frac{\partial F_3}{\partial X_2} & 1 & 0 & 0 & 0 \\ 0 & 0 & -\frac{\partial F_4}{\partial X_3} & 1 & 0 & 0 \\ 0 & 0 & -\frac{\partial F_5}{\partial X_3} & 0 & 1 & 0 \\ 0 & 0 & -\frac{\partial F_6}{\partial X_3} & -\frac{\partial F_6}{\partial X_4} & -\frac{\partial F_6}{\partial X_5} & 1 \end{bmatrix} \begin{bmatrix} \frac{\partial X_1}{\partial Q_1} \\ \frac{\partial X_2}{\partial Q_1} \\ \frac{\partial X_3}{\partial Q_1} \\ \frac{\partial X_4}{\partial Q_1} \\ \frac{\partial X_5}{\partial Q_1} \\ \frac{\partial X_6}{\partial Q_1} \end{bmatrix} = \begin{bmatrix} \frac{\partial F_1}{\partial Q_1} \\ 0 \\ \frac{\partial F_3}{\partial Q_1} \\ 0 \\ 0 \\ 0 \end{bmatrix}$$

B. Interpretation

Given the pattern of interactions, it is possible to estimate the economic consequences of closure of the Canal. While lack of data precludes precise determination of the rates of change of the variables involved, we may with little danger of error establish the qualitative impact of the posited shock. Our conclusions, supported by empirical evidence, will provide a basis for later, more thorough examination of *Gaon* and *Sidermar*.

It is clear that after the shock each element in the trip distance matrix Q_1 will be either unchanged or greater than before: Blocking of the Canal can affect a voyage only by making it longer. It does not necessarily follow, however, that ship demand schedules will shift outward. The need for transportation services, X_1, is a function not only of the length of trade routes but also of the amount of commerce along these routes; the parameter sets Q_2 and Q_3 also play a role. If the demand for goods which would formerly have been shipped via Suez is quite elastic, perhaps because a slight increase in their prices in consuming nations will evoke substantial response by domestic or other nearby suppliers, it is possible that the stimulus to ship demand resulting from the necessity of travel around Africa will be more than offset by a reduction in the quantity of goods required from supply sources from which such shipment has become necessary. Such a consequence is nevertheless highly unlikely; we may in general expect the changes in trip distances to produce a

dramatic increase in the demand for ships at given levels of freight rates.

The revised ship demand schedules will interact with Q_4, the ship supply schedules, to determine X_2, the matrix of freight rates per ton-mile. Especially in the short run, which is of primary interest for our purposes, the matrix Q_4 will remain essentially uninfluenced by Canal closure. Over periods of a year or less, ship supply should be relatively inelastic: Although some retired tonnage can be pressed into service, a significant interval is required to plan and build new vessels. Therefore, assuming that decision units are free to respond to market forces,[51] it is likely that the posited outward shift of the demand functions will lead to substantial increases in freight rates per ton-mile. Given the magnitude of this increase and the new matrix of trip distances, we may easily compute X_3, the matrix of charges for shipping various goods between different points. Such costs will rise for most goods transported by water whether or not formerly routed via Suez. The expense of shipping goods which once would have been carried through the Canal, however, will increase not only because of higher freight rates but also because of the greater distances now involved.

Consumers will pay more for most products as a result of Canal closure if, as seems almost inevitable, demand schedules are not perfectly elastic. The prices of goods which would have been shipped

[51] *But see* Note, *Rate Regulation in Ocean Shipping*, 78 HARV. L. REV. 635 (1965). Apparent deviations from the norm are frequent: "[T]he freight rate for lumber shipped from Mexico to Venezuela was $24 per ton in 1963 as compared to $11 from Finland to Venezuela, even though the distance is three times greater. From Buenos Aires to Tampico, Mexico, the ocean freight rate for chemicals was $54 per ton for direct shipment; but if the goods were trans-shipped in New Orleans the rate was only $46, while trans-shipment in Southampton brought down the rate further to $40, despite the tremendous increase in distances involved." S. DELL, A LATIN AMERICAN COMMON MARKET? 101 (1966).

Difficulties are not confined to cost disparities: "Goods shipped from Porto Alegre in Brazil to Montevideo actually reach their destination more quickly if sent via Hamburg, Western Germany. In fact Uruguayan wool is shipped to the United States by way of Hamburg even when there are ships available going directly to New York." *Id.* Such seeming distortions of market processes have venerable antecedents: "Buenos Aires, on an estuary leading immediately to the Atlantic, and facing Spain across the ocean without any intervening obstacles, was forced to conduct all its trade *via* Lima, the vice-regal capital of Peru, so that Lima would derive the exclusive benefits; this meant that goods had to be shipped by mule across the Andes to Lima, all the way from the Atlantic to the Pacific and in the precisely wrong direction, then up the Pacific coast by sea to Panama, then across the isthmus by land, then by sea once more to Spain. It was as if—today—Chicago had to trade with New York via San Francisco and Alaska." J. GUNTHER, INSIDE SOUTH AMERICA 115 (1966).

via Suez and which are without close substitutes or adequate alternative sources of supply will increase most substantially. Since the cost of transportation by water will rise, however, imports normally sent by routes not utilizing the Canal will in general also become more expensive. Resulting shifts in demand should induce price increases in many goods produced for domestic consumption. Stimulated demand for certain products—primarily those not directly affected by higher transportation charges—will raise the prices paid to some suppliers. Since demand may be expected to fall for most of the goods made more expensive by increased freight costs, however, we should expect declines in the prices paid to producers of imports, Positive changes will predominate in the matrix X_4; the elements of X_5 can vary in either direction. Trade profitability, X_6, can be determined by comparing the revised schedules of transportation costs with the differences between the new equilibrium consumer demand and producer supply prices. In general, shipowners will make large gains at the expense of suppliers and especially consumers.

C. Confirmation

Many of the conclusions of this analysis are supported by the economic impact on the petroleum industry of the disruption of Canal traffic caused by conflict between Israel and the Arab states in 1967. Western Europe normally receives 4.4 million barrels of oil per day, 52 percent of its requirements, from countries of the Middle East. While pipelines carry some of this output directly to ports at the eastern end of the Mediterranean Sea, most must be transported by tanker either via Suez or around the Cape of Good Hope. Opening of fields in Libya and Algeria, now together supplying an additional 2.1 million barrels per day, has reduced but not eliminated this dependence. The Canal itself, which cannot accommodate loaded tankers above 80,000 deadweight tons,[52] has become, however, a less important artery even for shipment of Middle East petroleum: The expense of carriage of a ton of crude from Kuwait to Rotterdam can presently be reduced 34 percent below the lowest cost via Suez by the use of 200,000 ton vessels rounding Africa when loaded but going through the Canal on ballasted return voyages. The projected employment of 300,000 ton tankers routed around the Cape both outbound and inbound will cut costs to half those via Suez, and construction of much larger ships is contemplated.

Closing of the Canal nevertheless greatly increased the demand

[52] "Deadweight tonnage expresses a ship's total carrying capacity, including crew, provisions, and bunker fuel. Actual cargo capacity is slightly less than that—e.g., a 50,000-deadweight-ton tanker can lift about 47,000 tons of crude." FORTUNE, Sept. 1, 1967, at 80, 85.

for tankers:

> The reason for the squeeze is simple. Western Europe's supplies traditionally come by tanker through Suez from the Mideast—where crude prices are the cheapest—in a standard Persian Gulf-to-Rotterdam round trip of 42 days. The route around the Cape of Good Hope is 50 per cent longer, averaging 65 or more days round-trip. Thus . . . the need for tanker capacity on the European run has been increased by exactly one-half.[53]

Although supply was relatively responsive,[54] prices rose dramatically:

> Short-term charter rates quickly shot up by a factor of six, climbing to their highest levels since the last Suez crisis in 1956. . . . Not long before the Middle East fighting broke out, the spot-charter rate for lifting a ton of crude from ports in the Persian Gulf to northern Europe (e.g., Rotterdam) stood at a rock-bottom low of about $2.90—or 70 percent below Intascale, the international standard that is used as a yardstick for quoting charter rates. But within two weeks it shot up to Intascale *plus* 70 percent, or about $18.60 for a Persian Gulf-Northern Europe voyage around the cape. Worse, from the standpoint of the oil companies, shipowners were not chartering for one voyage, but held out for two or more consecutive runs.[55]

Gains to shipowners were enormous:

> [S]hipping Tycoons . . . stood to harvest $250 million in extra profits on ship charters signed since the canal was closed. . . .
>
> [T]he charter by Standard Oil of New Jersey of Stavros Niarchos's modern 90,000-ton S.S. Philip S. Niarchos for two round trips to Europe is typical. The charter price, for roughly four months' work, was $3.2 million. After payment of all costs, fully $2.5 million of that will be net profit, according to brokers.[56]

The loss to oil companies, acting as both suppliers and marketers, was expected to be substantial:

> Just about every major international oil company took a violent financial buffeting, which is certain to be reflected in their earnings.

---

[53] NEWSWEEK, July 17, 1967, at 70.

[54] "This immense upsurge, luckily, came at a time when a good deal of the world's fleet of 5,453 tankers, capable of carrying 110 million tons of oil, was not being used. About 1.3 million tons of tankers were laid up and hundreds of other vessels were being employed to carry ore, grain and other bulk dry cargoes just to keep going." *Id.* "All together, about 200 tankers, totaling some five million deadweight tons, returned to the newly lucrative oil trade." FORTUNE, Sept. 1, 1967, at 80, 85. Nevertheless only about 10 percent of total tanker capacity was available for charter on the open market. *Id.* at 80.

[55] *Id.* Rates above this level have been recorded. "The highest known rate was a charter by Soponata, a Spanish refinery, of a 28,000-ton tanker at $28 a ton." NEWSWEEK, July 17, 1967, at 70.

[56] NEWSWEEK, July 17, 1967, at 70, 73; *see* FORTUNE, Sept. 1, 1967, at 80: "[I]t takes no computer to figure the dimensions of their windfall. A reasonably efficient 80,000-deadweight-ton tanker chartered at Intascale plus 70 percent nets about $1 million for each voyage around the cape. At the prewar rate of Intascale minus 70 percent, the same vessel could barely break even."

> Worst hit of them all was British Petroleum. . . . [S]hipping experts estimate the crisis will cost the company at least $280 million. For the oil industry as a whole, they place the cost in the vicinity of $1 billion.[57]

Much of the burden, however, appears to have been shifted to the consumer. An August 1967 report asserted: "Price increases for motor gasoline and light fuel oils in Western Europe are expected to cover the added costs now being incurred because of higher transportation outlays due to the closing of the Suez Canal."[58] The retail price of gasoline rose 2½ cents per gallon in Britain, 1 cent per gallon in France, and from 2 to 3 cents per gallon in Holland, and Sweden.[59] "In Germany, gasoline prices had been raised five times by mid-August—about a penny a gallon each time."[60] Earnings during 1967 of the five international oil companies based in the United States were an average of 7.6 percent above 1966 levels.[61]

D. Application

The economic framework introduced in the preceding sections permits consideration of the *Gaon* and *Sidermar* cases from a fresh perspective. Although we remain unable to derive unassailable criteria for resolution of the disputes involved, we can at least outline the probable consequences of alternative holdings and designate those questions important for decision which were neither asked nor answered. Our primary goal is to focus attention on a dimension of the typical frustration problem which has received inadequate treatment because lawyers are not trained to recognize its existence.

In *Gaon*, the plaintiffs sold unshelled groundnuts to the defendants c.i.f. Nice and Marseilles for £49 10s. and £54 5s. per ton under contracts of October 12, 1956, and October 31, 1956, respectively. Presumably the risk of closing of the Canal was not consciously allocated by the parties, although the higher price in the second agreement, made after fighting had broken out in the Middle East, may reflect a realization of the possibility of disruption of normal trade

---

[57] FORTUNE, Sept. 1, 1967, at 80.

[58] FINANCIAL WORLD, Aug. 16, 1967, at 9. Albert L. Nickerson, Chairman of the Mobil Oil Company, stated: "Now, in the Eastern Hemisphere it is true that we've had tremendous supply problems that have been brought about by the Middle East war. But as far as Mobil is concerned, we really have gone a very long way to compensate for those additional costs through increased prices abroad." FORBES, Jan. 1, 1968, at 156.

[59] NEWSWEEK, July 17, 1967, at 70.

[60] FORTUNE, Sept. 15, 1967, at 31, 38.

[61] FORBES, Jan. 1, 1968, at 156: "War in the Middle East, where the world's largest oil reserves are located, affected the oil business last year. Surprisingly, however, earnings were up sharply in the wake of the disruption, and the benefits following the crisis far outweighed the disadvantages."

routes. Loss to the parties jointly in the first instance can be measured by the change in transportation charges, which rose from about £6 per ton to between £27 9s. and £29 per ton. The increase of between £21 9s. and £23, apparently conservatively estimated, should have been a product both of extension of the required voyage from 2,300 miles to 10,500 miles and of higher freight rates per ton-mile.

Let us assume that the buyer had planned resale but had made no unavoidable commitment to a purchaser. Damages of £12 15s. and £8 per ton were awarded under the first and second contracts respectively. If nonspeculative return to the buyer is disregarded, and if the indicated increase in the market price of groundnuts is assumed a result of the Suez crisis, it would appear that a substantial part of the burden of additional transportation costs, in the first case more than 50 percent, had been shifted from the parties to the consumer.[62] If the price in the first contract, £49 10s., represented the worth of groundnuts in Southern France before uncertainty as to the availability of the Canal route, shipment as agreed in it would have resulted in an unanticipated joint loss of between £8 14s. and £10 5s. per ton: The cost of higher freight rates would have been partially offset by the concomitant rise in the market price of groundnuts. A finding of frustration after performance, leading to reimbursement of the seller for the increased transportation charges, would have thrust all of this loss on the buyer. On the other hand, if performance were not excused, canal closure would have damaged the seller by the amount of the change in freight costs while yielding an unexpected gain to the buyer equal to the consequent adjustment in the price of groundnuts.

The goods, however, were never shipped. If the contracts had been deemed frustrated, the loss to the seller would have been the reduction in value of the groundnuts in the Sudan, an amount which could not have exceeded £10 5s. per ton if the first agreement is used as a base. It appears unlikely that markets not normally supplied by water were sufficiently extensive to reduce significantly the level of injury.[63] By refusing to excuse performance the courts added to this loss of the seller the increase in the European value of the groundnuts, the unanticipated profit which the buyer would have

---

[62] During 1958-1960 Nigeria and Senegal respectively supplied 37 percent and 23 percent of world groundnut exports. Three other West African states accounted for an added 11 percent. ECONOMIST INTELLIGENCE UNIT, OXFORD ECONOMIC ATLAS OF THE WORLD 43 (3d ed. 1965). Canal closure would thus affect European groundnut prices largely by increasing freight rates per ton-mile.

[63] Nine European countries purchased 82 percent of all groundnuts internationally traded in 1958-1960. France alone received 35 percent of world imports. *Id.*

made had the contract been performed. Since the sum of the absolute values of the Sudanese and European price changes should equal the increase in transportation charges, nonshipment alters the result only by imposing the joint loss on the seller rather than on the buyer when frustration is found.

In either situation resolution of the frustration issue does more than allocate the unanticipated loss: Alternative outcomes also yield different distributions of the expected joint return from agreement. If closure was not within the contemplation of the parties at the time of contracting and the buyer could resell at the new market price, the damages awarded need not be considered a loss which must be suffered by one party or the other, but can be viewed as evidence of a shifting of part of their joint injury to the consumer. Thus, if because of the unforeseen event the price of the goods at the point of delivery had risen exactly enough to offset the resulting increase in transportation charges, a finding of frustration after performance would have allowed exact fulfillment of the expectations of both buyer and seller. The transfer payment from consumer to carrier would have had no impact on the parties before the court. In *Gaon* the refusal to hold the agreement frustrated dictated an award of damages measured essentially by the extent to which the parties were able to shift their loss forward. Such a result is nonsensical. Even if lost profit is here deemed injury, however, the judges, through excusing performance and thereby thrusting the burden on the buyer, could have divided the total injury almost equally.

In *Sidermar*, Justice Pearson found a charter party for carriage of iron ore from India to Italy frustrated by closure of the Canal. He thus awarded the shipowners, who, having transported the ore around the Cape of Good Hope, sought the reasonable value of their services, freight at 195s. per long ton, 61s. per long ton more than the compensation stipulated by contract. The modest difference between the contract rate and 209s. per long ton, the sum claimed to be the reasonable value for a voyage about twice as long as originally contemplated, probably reflects restraint on the part of the plaintiff; it is possible but unlikely that blocking of the Canal did not substantially alter demand for the type of ship chartered or that the rate initially agreed upon reflected uncertainty as to the future availability of the customary route.

In this case only a relatively small portion of the loss incurred by the parties through the necessity of a longer voyage could have been shifted forward to the consumer: Since Europe itself produced substantial quantities of iron ore,[64] elimination of the Suez route

[64] Iron ore exports by France and Sweden during 1958-1960 were 16 percent and 13 percent of world totals respectively. *Id.* at 77.

should not have caused a very great increase in price. Thus faced with what he considered the unpleasant task of thrusting the injury on one of two equally blameless parties, Justice Pearson, by excusing performance, elected to favor the shipowners over the charterers. Within the narrow framework of the dispute before the court, his decision appears as rational as its alternative.

If the transaction in question is for the moment disregarded, however, it seems likely that closing of the Canal, while causing some loss to the defendants, significantly benefited the plaintiffs. We have seen that strengthened demand for transportation services greatly increased both freight rates and shipowner profits. The plaintiffs perhaps owned more than one ship. Moreover, since the chartered vessel reached Genoa on February 16, 1957, almost two months before the Canal was reopened, it presumably could have been rechartered at a high rate. The court therefore chose to save free of loss, with respect to the transaction before it, a party which overall might well have received windfall gain from the happening of an event deemed so unexpected as to warrant a finding of frustration. Although expansion of the scope of inquiry to include such considerations is arguably inexpedient, the formulae the court invoked do not alone justify its decision.

IV. Conclusion

Cases involving the problem of excuse for nonperformance of contractual obligations are generally viewed as requiring the allocation of an indisputable loss due to an unanticipated event to one of two innocent parties. Since principles of justice hardly dictate the outcome when the issue is framed in this manner, courts support their seemingly almost fortuitous conclusions primarily by appealing to the pretended inevitability of legal logic. Although situations conforming to the prototype of course arise, the facts underlying disputes concerning frustration are typically much more complex than judges normally realize.

This article seeks to demonstrate that a deeper probing of the economic consequences of the unexpected occurrence forming the basis of claims of frustration will frequently lead to revised calculations concerning the amount of resulting gain or loss and offer new guidelines for its distribution. In *Gaon*, for example, the evidence of price rises, employed simply to compute the damages which the buyer was required to pay for breach of his agreement, could more fruitfully have served to show that loss from increased transportation charges initially falling on the buyer and the seller had been in part shifted forward to the consumer. In *Sidermar*, on

the other hand, the court, by finding frustration of a charter party, absolved from loss, with respect to the transaction before it, shipowners who possibly reaped substantial overall gain from the unexpected event which excused their performance.