Michigan Law Review

Volume 48 | Issue 3

1950

CONTRACTS - MUTUALITY- CONSIDERATION IN A "REQUIREMENTS" CONTRACT

Robert W. Shadd S. Ed.
University of Michigan Law School

CONTRACTS — MUTUALITY — CONSIDERATION IN A "REQUIREMENTS" CONTRACT—Plaintiff, a wholesale liquor distributor, and defendant entered into a contract under which plaintiff agreed to place orders with defendant from time to time for all such wines as it might require under labels bearing plaintiff's own brand or trade name. Defendant agreed to fill these orders for a period of sixteen months, as well as orders for other wines bottled under labels not the exclusive property of plaintiff. As to the latter types of wine, however, plaintiff was expressly left free to purchase from others. When defendant refused to complete orders pursuant to this agreement, plaintiff brought an action to recover for loss of profits. *Held,* because plaintiff was embarking on a new business venture, with very indefinite needs, the contract lacked mutuality and was unenforceable. *G. Loewus & Co., Inc. v. Vischia,* (N.J. 1949) 65 A. (2d) 604.

The word "requirements," when used in a contract of this nature, is often ambiguous. It may mean that the buyer will take from this seller so much as he orders, reserving full rights to purchase elsewhere, in which case the courts universally agree that the promise is illusory and the agreement unenforceable by either party.[1] On the other hand, a fair construction of the entire contract may show, as in the principal case, that the buyer has limited himself to purchases of

[12] In the principal case an effort was made by the dissenters to distinguish Central Greyhound on the basis that the latter case only decided a prolonged controversy over the taxability of the proceeds of interstate commerce. If this distinction is perpetuated, we may expect that taxes levied on the gross receipts from interstate commerce will be permitted, but taxes on interstate commerce, measured by the gross receipts, will be forbidden. Such regressive and unrealistic doctrine completely ignores the economic incidence of the tax.

[13] One might reasonably infer from the concurrence of Justice Burton in the Memphis Natural Gas Co. case that he would be included in this group.

[1] GRISMORE, CONTRACTS §57 (1947).

a certain commodity from this particular seller and no other. Even so, many courts are willing to call the promise sufficient consideration only if the future requirements of the buyer are reasonably ascertainable at the time the contract is executed.[2] The usual statement is that established need supplies "mutuality."[3] Again, unfortunately, the term "mutuality" does not lend itself to precise definition. If taken to mean, as is the usual case, that a promise not legally obligatory cannot be a sufficient consideration, the position is clearly incorrect. Valid unilateral or option contracts are in common business usage.[4] If taken to mean there must be a mutuality of undertaking or adequacy of consideration, the theory is likewise untenable. The seller enters a "requirements" contract with full knowledge that the buyer may never place an order. If he is willing to take this risk, there is no reason why he should not be free to do so. He will be somewhat protected by the modern doctrine of constructive conditions.[5] It is submitted that the better reasoned authorities hold a "requirements" contract valid whenever, as in the principal case, the buyer agrees to take all of certain goods from the seller.[6] There should be no added necessity of established need. The buyer's option is a limited one, between buying of this particular seller and not buying at all. Either alternative is detrimental, the buyer having circumscribed his freedom of action. This is the usual test of consideration in common law countries and leads to certainty in business transactions.[7]

Robert W. Shadd, S.Ed.

[2] This is sometimes called the "New York Rule." See Ferenczi v. The Natural Sulphur Co., 11 N.J. Misc. 262, 166 A. 477 (1933), and cases therein cited. But, cf. Edison Elec. Ill. Co. v. Thacher, 229 N.Y. 172, 128 N.E. 124 (1920).

[3] A further distinction is often drawn between manufacturers and jobbers, it being said that the latter's requirements are very seldom definite. ANSON, CONTRACTS, Turck ed., §139 (1929).

[4] The theory that any promise subject to the "will" of one of the contracting parties is illusory has been termed an application of civil law doctrines which are contrary to the Anglo-American idea of consideration. Patterson, "Illusory Promises and Promisors' Options," 6 IOWA L. BUL. 129 and 209 (1921). See also Pound, "Mechanical Jurisprudence," 8 COL. L. REV. 605 (1908) and GRISMORE, CONTRACTS §68 (1947). But, cf. Harrison v. Cage, 5 Mod. 411, 87 Eng. Rep. 736 (1698) and 1 WILLISTON, CONTRACTS §103(e) (1931).

[5] Patterson, "Illusory Promises and Promisors' Options," 6 IOWA L. BUL. 129 and 209 at 225 (1921); GRISMORE, CONTRACTS §68 (1947).

[6] Corbin, "The Effect of Options on Consideration," 34 YALE L. J. 571 (1925); 1 PAGE, CONTRACTS, 2nd ed., §§580-582 (1920); GRISMORE, CONTRACTS §57 (1947). For an interesting application see E. G. Dailey Co. v. Clark Can Co., 128 Mich. 591, 87 N.W. 761 (1901), where it was held that the seller must continue to sell pursuant to the contract even though the buyer had greatly increased his plant and his original requirements were infinitesimal when compared with his present requirements.

[7] An annotation in 14 A.L.R. 1300 (1921) categorically states that in declaring on a "requirements" contract, it is always necessary to allege (1) the business of the buyer, (2) that such business is permanent, and (3) that the seller can predict the buyer's requirements at the time the agreement is executed. That this position has been liberalized over the years, if not altogether overthrown by a majority of courts, is clearly shown by the later supplementary annotations in 24 A.L.R. 1352 (1923) and 74 A.L.R. 476 (1931).