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FREEDOM OF CONTRACT IN AN
UNSTABLE ECONOMY:
JUDICIAL REALLOCATION OF CONTRACTUAL
RISKS UNDER UCC SECTION 2-615

THOMAS R. HURST†

INTRODUCTION

On September 8, 1975, Westinghouse Electric Corporation publicly announced that it would be unable to fulfill its commitments to several large electric utility companies to supply uranium under long term, fixed price contracts.¹ Several weeks later, after several of these utilities had filed suit against Westinghouse as a result of its announcement, Westinghouse commenced an interpleader action against the companies with which it had contracted, seeking a judicial determination of the rights of each to the available stockpile of uranium.² Westinghouse reportedly had on hand enough uranium to supply only nineteen percent of its total commitment under these contracts and had refused to purchase additional uranium because the market price had drastically increased during the past few years.³ Full performance of the contracts, therefore, would result in Westinghouse incurring a substantial loss. For this reason, Westinghouse is claiming that it is entitled to terminate the contracts because performance has become "commercially impracticable" under section 2-615 of the Uniform Commercial Code.⁴

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1. Barron's National Business & Financial Weekly, Sep. 15, 1975, at 7, col. 1.

2. Westinghouse Elec. Corp. v. Alabama Power Co., Civ. No. 75-1393 (W.D. Pa., filed Oct. 30, 1975).

3. Wall Street Journal, Nov. 3, 1975, at 10, col. 3.

4. Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

- (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

This type of dispute is likely to arise increasingly often since the economy of the United States has, over the past decade, been subjected to fluctuations of a magnitude not witnessed for over a generation. Beginning with the Vietnam War, we have witnessed a series of inflationary surges of increasing intensity. During 1975, the economy experienced its most serious recession since the 1930's; yet the inflation rate, while down considerably from the twelve percent rate of 1974, remains at approximately seven percent, a rate which would have been considered by most to be completely unacceptable only a decade ago.⁵

This inflation has been accompanied by the demise of the international monetary system which had prevailed since its establishment at the Bretton Woods Conference in 1947. Two devaluations of the dollar against gold have occurred,⁶ and a system of floating exchange rates has been substituted for the fixed exchange rates established at the Conference.⁷

In the fall of 1973, the oil embargo initiated by the Organization of Petroleum Exporting Countries (OPEC) led to serious shortages of gasoline, heating oil, and a variety of other petroleum based products. The embargo was followed by a quadrupling of the price of oil which further intensified the inflationary pressures already present in the economy. The embargo, coupled with a shortage of natural gas, led to the establishment of the Federal Energy Office, subsequently called the Federal Energy Administration (FEA), and the promulgation of a maze of regulations governing the pricing and allocation of various fuels.⁸

Unfortunately, none of these problems seems likely to disappear in the immediate future. Although the economy is recovering from the severe recession of 1974-75, some are already predicting a renewed

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- (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
 - (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

UNIFORM COMMERCIAL CODE § 2-615.

5. Wall Street Journal, Apr. 25, 1975, at 1, col. 6.

6. The price of gold was increased from \$35 to \$38 per troy ounce by the Par Value Modification Act, Act of Mar. 1, 1972, Pub. L. No. 92-268, 86 Stat. 116. This Act was subsequently amended to further increase the price of gold to \$42.22 per troy ounce. 31 U.S.C.A. § 449 (Supp. 1976).

7. Wall Street Journal, Aug. 25, 1975, at 8, col. 4.

8. See generally 10 C.F.R. §§ 210-12 (1975).

inflationary surge of at least as great intensity as that of 1973-74.⁹ Notwithstanding some minor reductions in the price of certain types of oil, the OPEC oil cartel shows little signs of breaking down in the immediate future.¹⁰ Even if the cartel does fail to hold the line on the price of oil, the problems of a scarcity of oil and natural gas will almost certainly remain a serious concern. Thus, the FEA will most likely continue to exist for some time. Finally, all attempts to reform the international monetary system have met with failure.¹¹

Each of these economic problems poses a great challenge to the draftsmen of contracts and to the courts charged with contract interpretation. An unforeseen increase in the price of a crucial commodity can easily transform a contract for the sale of goods that would have been profitable to the seller at the time it was signed into a losing proposition. The same result can occur in a contract in international trade due to the fluctuation of exchange rates if the seller has not provided for this contingency.

More seriously, if the seller finds that fuel or other supplies are unavailable due to embargo, governmental regulation, or simply excessive demand, he may find himself unable to perform the contract either partially or totally, thus exposing himself to substantial damages in a lawsuit for breach of contract.

There are two basic methods by which the seller may protect himself against this type of occurrence. The first is by careful drafting of the contract itself. Inflation may be guarded against by use of devices such as the "cost-plus" contract, the escalator clause tied to some sort of price index, the advance requirements contract at a fixed price for the commodities or other articles needed by the seller to manufacture the finished product, or by other methods.¹² Likewise, changes in the value of currencies may be guarded against through sales or purchases of currency futures, or, more simply, by providing for payment of the contract price in the seller's own currency. Shortages due to embargo or government regulation are more difficult to deal with unless inventory

9. Wall Street Journal, Aug. 22, 1975, at 1, col. 6; *id.*, Sep. 4, 1975, at 1, col. 6.

10. In fact, the OPEC cartel raised most crude oil prices approximately 10% as of October 1, 1975. *See id.*, Sept. 29, 1975, at 3, col. 1.

11. *Id.*, Aug. 25, 1975, at 8, col. 4.

12. A detailed discussion of this subject is beyond the scope of this article. For further information *see generally* Dawson & Coultrap, *Contracting by Reference to Price Indices*, 33 MICH. L. REV. 685 (1935); White, *Drafting Contracts in a Shortage Economy*, in PLI, BREACH OF CONTRACT IN A SHORTAGE ECONOMY REVISITED 61 (1974).

stockpiling is feasible, but at least the seller can always provide in the contract that his obligation shall be discharged or postponed if he is unable to obtain the necessary materials to perform.

Although making express provision in the contract for economic disturbances which affect the seller's ability to perform is the most satisfactory method for the seller to protect himself, situations will arise in which the seller for one reason or another has failed to provide for a contingency which has affected his ability to perform. When this occurs, the only remaining method by which the seller can avoid incurring a substantial loss is to be discharged from his contractual obligation by the courts. The doctrines allowing a promisor to be discharged from his contractual obligations if performance of such obligations have become impossible or impracticable are commonly known as "impossibility of performance" and "frustration of purpose."¹³ These doctrines have been adopted, with certain important modifications, by the Uniform Commercial Code.¹⁴

As a result of the increasing instability in the economy of the United States, it seems likely that the courts will be asked with increasing frequency to invoke the doctrines of impossibility of performance or frustration of purpose to discharge the promisor from contracts that have become impossible or unprofitable to perform. Judicial use of the doctrine of impossibility is necessary in some instances to prevent the promisor from incurring substantial liability against which he could not reasonably have protected himself and which the parties never contemplated when the contract was formed. Nonetheless, excessive utilization of the impossibility defense poses the threat that the promisor will be

13. The terms "impossibility of performance" and "frustration of purpose" have not always been used uniformly by various courts. For the purposes of this article, these terms will be used to refer to the concepts described under those names in the Restatement of Contracts. "Impossibility of performance," therefore, will be used to refer to situations in which performance of the contract by the promisor has been impossible or extremely difficult. RESTATEMENT OF CONTRACTS § 454 (1932). "Frustration of purpose" refers to situations in which performance of the contract by the promisor is literally possible but the motive or purpose for which the promisor entered into the contract will not be achieved by such performance. *Id.* § 288. To illustrate, a case in which a distributor was unable to obtain enough gasoline to satisfy his contractual obligations to supply gasoline to service stations would involve impossibility of performance. And a case in which a grain dealer had contracted to supply wheat to a bakery at a price of \$2.00 per bushel where the price of wheat reached over \$4.00 a bushel before the dealer had purchased enough wheat to fulfill the contract would involve frustration of purpose. In the latter case, performance of the contract is literally possible but the dealer's purpose in entering into the contract, *i.e.* to make a profit on the resale of wheat, has been frustrated.

14. UNIFORM COMMERCIAL CODE §§ 2-613 to -616.

relieved from liability on contracts in situations in which it was assumed that he would take steps to guard against the contingency that rendered performance impossible. Thus, the doctrine of impossibility, if not used with discretion, may be used to reallocate business risks and discourage the promisor from taking reasonable precautions to ensure that he will be able to perform the contract.

This article will examine those cases in which the impossibility defense has been raised in the context of economic disruptions to determine the extent to which the courts have been allowing the promisor to be discharged from his contractual obligation. In order to make the topic manageable, this examination will be confined to cases involving the sale of goods which are within the coverage of the Uniform Commercial Code. It is the author's position that, although the courts have thus far not made excessive utilization of the impossibility of performance provisions of the Code, these provisions, as they stand, give the courts too much discretion in deciding whether the promisor should be discharged from the contract and, as such, pose a serious threat to traditional concepts of private decisionmaking and freedom of contract. The article concludes with proposed amendments to the UCC which attempt to deal with the problems raised.

THE DEFENSES OF IMPOSSIBILITY OF PERFORMANCE
AND FRUSTRATION OF PURPOSE AT COMMON LAW AND
UNDER THE UNIFORM COMMERCIAL CODE

The doctrines of impossibility of performance and frustration of purpose are comparatively recent innovations of the common law.¹⁵ For many centuries, the so-called "rule of absolute liability" prevailed. Under this rule, the promisor was liable in damages for failure to perform his obligations under a contract even if his performance was impossible or the purpose for which he had entered into the contract was frustrated by some supervening event.

The classic case illustrating the rule of absolute liability is *Paradine v. Jane*.¹⁶ In that case, plaintiff, the lessor, sued defendant, the lessee, for unpaid rent. Defendant's plea was that a foreign army had invaded the country and occupied the land in question, thus preventing defend-

15. A complete discussion of the development of the doctrines of impossibility of performance and frustration of purpose is beyond the scope of this article. The reader interested in this matter may wish to consult G. GILMORE, *THE DEATH OF CONTRACT* (1974) and Page, *The Development of the Doctrine of Impossibility of Performance*, 18 MICH. L. REV. 589 (1920).

16. 82 Eng. Rep. 897 (K.B. 1647).

ant from taking any profits from the land as he had intended when he had taken the lease. On demurrer, defendant's plea was held to be insufficient. The court reasoned that since defendant had not conditioned his promise to pay rent on his ability to peacefully enjoy the land, he was bound to pay the rent even though he had been unable to use it. The court pointed out that the law will not protect a party to a contract beyond his own agreement and that since defendant was to have the advantage of all profits accruing from the land, it was fair that he bear the risk of casual losses.¹⁷

Thus, under the rule of absolute liability, the promisor is held strictly accountable for failure to perform his contractual obligations, regardless of the reason for nonperformance. If the promisor desires to be discharged from liability on a contract because performance becomes impossible or his purpose in entering into the contract has been frustrated, it is his responsibility to provide for such discharge in the contract.

Because the rule of absolute liability led to seemingly harsh results, the courts came to recognize certain circumstances in which a contractual obligation might be discharged even though the parties had not provided for discharge in the contract. This "rule of discharge" is illustrated in the case of *Krell v. Henry*.¹⁸ Defendant had entered into a contract with plaintiff to hire plaintiff's flat for the two days on which the coronation of Edward VII was to take place in order to view that event. When the coronation was cancelled, defendant refused to pay the balance due upon the agreement with plaintiff. Plaintiff then sued for the balance due, and defendant counterclaimed for the deposit which he had previously given plaintiff. The King's Bench affirmed a judgment for defendant on both the claim and the counterclaim, although there was nothing in the contract itself stating that its purpose was to enable defendant to view the coronation procession or discharging defendant from liability if the coronation failed to take place.¹⁹ The court quoted from *Taylor v. Caldwell*²⁰ that

17. Although some commentators have erroneously referred to *Paradine* as a case involving the impossibility defense, it is in fact a case involving frustration of purpose. Schlegel, *Of Nuts, and Ships, and Sealing Wax, Suez, and Frustrating Things—The Doctrine of Impossibility of Performance*, 23 RUTGERS L. REV. 419 (1969). In *Paradine* there was no claim that plaintiff had not been able to convey the leasehold to defendant, nor that defendant had been unable to pay plaintiff. Rather, the defense was that defendant's purpose in entering into the lease, *i.e.* to earn a profit from the land, had been frustrated as a result of its occupation by a foreign army.

18. [1903] 2 K.B. 740.

19. *Id.* at 754.

20. 122 Eng. Rep. 309 (Q.B. 1863).

where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.²¹

Most of the leading commentators have concluded that there has been a gradual trend over the past century toward adopting the so-called "rule of discharge" as opposed to the rule of absolute liability,²² although there are notable holdings to the contrary.²³ Nevertheless, the law of impossibility remains in a rather confused state, and its application to a given situation cannot be predicted in advance with much confidence.²⁴

A brief synopsis of the major provisions of the Restatement of Contracts dealing with frustration and impossibility provides a good overview of the present scope of these doctrines at common law. The Restatement devotes a full seventeen sections to the topic of impossibility.²⁵ Apparently favoring the rule of discharge, the draftsmen defined the term "impossibility" to include "not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved."²⁶ The Restatement distinguishes between "objective impossibility" and "subjective impossibility."²⁷ Objective impossibility is that which is "due to the nature of the thing to be done."²⁸ Subjective impossibility is that which is due to the inability of

21. [1903] 2 K.B. at 748.

22. 6 A. CORBIN, *CONTRACTS* § 1320, at 321-24 (2d ed. 1962); L. SIMPSON, *HANDBOOK ON THE LAW OF CONTRACTS* 359-60 (2d ed. 1965); 6 S. WILLISTON, *CONTRACTS* § 1931, at 5408-09 (rev. ed. 1938).

23. *See, e.g.,* *Portland Section of the Council of Jewish Women v. Sisters of Charity*, 266 Ore. 448, 513 P.2d 1183 (1973), in which the court refused to discharge defendant from its agreement to provide hospital care in perpetuity for one person of plaintiff's choosing in return for a contribution made by plaintiff to defendant hospital in 1927 of \$5000, despite an increase in hospital costs from several dollars per day to approximately \$140 per day. *Id.* at 455, 513 P.2d at 1187.

24. 6 A. CORBIN, *supra* note 22, § 1325, at 338-39.

25. *RESTATEMENT OF CONTRACTS* §§ 228, 454-69 (1932).

26. *Id.* § 454.

27. *Id.* § 455.

28. *Id.* Curiously, no example of pure objective impossibility is given in the comments to section 455, although several examples of subjective impossibility are given.

the *individual promisor* to perform the bargain and does not discharge the promisor's duty of performance.²⁹ Objective impossibility, if existing at the time the contract is entered into, prevents the formation of the contract³⁰ and, if arising after the formation of the contract, discharges the promisor's duty to perform provided that the promisor had no previous knowledge that the contingency would occur, was not responsible for its occurrence, and did not assume the risk of its occurrence in the contract.³¹

The Restatement then lists several specific types of occurrences that will discharge a contractual duty. These include governmental action that prevents performance or renders it illegal,³² death or serious illness of the promisor who has contracted to render personal services,³³ the destruction of things or the physical incapacity of persons necessary for performance,³⁴ and the non-existence of any other facts that the parties either expressly or impliedly agreed must be in existence at the time of performance.³⁵

Finally, there are specific sections dealing with the promisor's obligations in the event of "temporary impossibility,"³⁶ "partial impossibility,"³⁷ "impossibility of performing some but not all bargains,"³⁸ "apprehension of impossibility" by the promisor before or during performance,³⁹ "unanticipated difficulty,"⁴⁰ "rights of restitution" in the event of impossibility occurring after partial performance,⁴¹ and "impossibility in

The following example in which both subjective and objective impossibility are present is given. "A contracts that he personally will catalogue B's books during the ensuing summer. A becomes ill and remains so during the whole summer. A's duty is discharged since its [*sic*] performance is made personal by the terms of the contract, and the impossibility is objective as well as subjective." *Id.*, illustration 4.

29. *Id.* The Restatement poses the following hypothetical as one example of subjective impossibility: "A contracts to deliver goods of a certain description to B on a certain day, time being made of the essence. A becomes ill and is delirious on that day, and is unable to perform, though he has the goods on hand and could and would have delivered them had he been in possession of his faculties. His duty is not discharged." *Id.*, illustration 3.

30. *Id.* § 456.

31. *Id.* § 457.

32. *Id.* §§ 458, 461.

33. *Id.* § 459.

34. *Id.* § 460.

35. *Id.* § 461.

36. *Id.* § 462.

37. *Id.* § 463.

38. *Id.* § 464.

39. *Id.* §§ 465-66.

40. *Id.* § 467.

41. *Id.* § 468.

alternative contracts" when a contingency renders full performance of a series of similar contracts impossible.⁴²

The doctrine of frustration of purpose is dealt with in section 288 in an entirely different chapter of the Restatement. This section provides for discharge of the promisor's obligation if the purpose for which he entered into the contract will not be fulfilled due to the occurrence of a contingency, provided that both parties were aware that such purpose was a fundamental reason for the promisor's entering into the contract, the promisor was not at fault in causing the frustration, and the promisor did not assume the risk that the frustration would occur.⁴³

The Uniform Commercial Code deals with the doctrines of impossibility and frustration in a series of four sections.⁴⁴ The central provision is section 2-615, "Excuse by Failure of Presupposed Conditions." This section generally excuses the seller for "delay in delivery or non-delivery in whole or in part under a contract for sale if performance has become impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid, unless the seller has assumed a greater obligation."⁴⁵ Sections 2-613, 2-614, and 2-616 deal with specific situations which are not immediately relevant.⁴⁶

Thus, under the UCC, the promisor must establish the following elements to be discharged totally from his contractual obligation:

- (1) performance has become "impracticable";
- (2) the impracticability was due to the occurrence of some con-

42. *Id.* § 469.

43. *Id.* § 288; *see, e.g.*, *Krell v. Henry*, [1903] 2 K.B. 740.

44. UNIFORM COMMERCIAL CODE §§ 2-613 to -616. *See generally* Note, *The Uniform Commercial Code and Contract Law: Some Selected Problems*, 105 U. PA. L. REV. 836, 880-906 (1957).

45. UNIFORM COMMERCIAL CODE § 2-615(a). For the text of section 2-615 see note 4 *supra*.

46. UNIFORM COMMERCIAL CODE § 2-613 excuses the seller's duty of performance in certain cases involving the total or partial destruction of goods identified to the contract. *Id.* § 2-614(1) allows the seller to substitute a "commercially reasonable" means of delivery for the one agreed upon if it becomes unavailable or commercially impracticable. § 2-614(2) allows the buyer to modify the means or manner of payment to any "commercially substantial equivalent" if the agreed means or manner fails because of government law or regulation. And section 2-616 gives the buyer the option, upon receiving notice of a delay or allocation in delivery justified under sections 2-613, 2-614 or 2-615, either to terminate or accept a modification of the contract.

tingency which the parties expressly or impliedly agreed would discharge the promisor's duty to perform;

- (3) the promisor did not assume the risk that the contingency would occur;
- (4) the promisor seasonably notified the promisee of the delay in delivery or that delivery would not occur at all; and
- (5) the promisor is under no duty to allocate a portion of his production to the promisee if he has not been totally disabled from performing.

A comparison of the treatments of the impossibility and frustration doctrines in the Restatement and the UCC reveals several differences. First, the UCC does not use the word "impossibility" as does the Restatement. Rather, it makes the basic standard of discharge one of "impracticability."⁴⁷ While the Restatement's definition of "impossibility" does include "impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved,"⁴⁸ the use of the word "impracticable" in defining the basic standard of discharge in section 2-615 of the UCC has been interpreted by some courts to indicate that the draftsmen of the UCC intended to adopt a more lenient standard for discharge than that adopted by the Restatement.⁴⁹

Secondly, whereas the Restatement treats the doctrines of impossibility and frustration in distinct sections, the UCC abandons the distinction entirely. The official comment to section 2-615 indicates that the draftsmen intended the "impracticability" standard to encompass both the traditional concepts of impossibility and frustration.⁵⁰

Thirdly, with only a few exceptions, the UCC does not attempt to deal separately with the various types of impossibility or reasons causing the impossibility.⁵¹ Thus, the UCC leaves more room for judicial discretion in applying the general rule of section 2-615 to specific cases.

47. *Id.* § 2-615.

48. RESTATEMENT OF CONTRACTS § 454 (1932).

49. *Chemetron Corp. v. McLouth Steel Corp.*, 381 F. Supp. 245 (N.D. Ill. 1974). *Contra*, *Mishara Constr. Co. v. Transit-Mixed Concrete Corp.*, —Mass. —, 310 N.E.2d 363 (1974).

50. UNIFORM COMMERCIAL CODE § 2-615, Comments 1 & 4. Although the doctrines of impossibility of performance and frustration of purpose are not identical, the policy considerations underlying them are similar. For this reason, they will be discussed together throughout the remainder of this paper and, for convenience, the term "impossibility" will be used to refer to both the doctrine of impossibility and the doctrine of frustration of purpose, unless expressly indicated otherwise.

51. *See* text accompanying notes 44-46 *supra*.

Finally, the UCC deals only with situations in which the *seller's* obligation will be discharged although courts might well, by analogy, apply its provisions to buyers in appropriate circumstances.⁵²

The adoption of the "impracticability" standard in section 2-615 represents a potentially serious erosion of the right of the buyer and seller to contract freely on whatever terms and conditions they wish. The use of such a vague standard enables courts to discharge the seller from virtually any contractual obligation subject to Article Two of the UCC in a variety of situations in which economic conditions have changed between the time the bargain was entered into and the date of performance.⁵³ Indeed, it appears that it was the intent of the draftsmen of section 2-615 to give the courts this type of latitude.⁵⁴

One reason why the draftsmen of the UCC and, to a lesser extent, of the Restatement may have resorted to such nebulous standards for defining the impossibility and frustration doctrines is that a precise definition of the boundaries of both of these doctrines is almost impossible. As Professor Corbin has concluded:

We can not lay down one simple and all-controlling rule for these various kinds of frustration and impossibility. Many varying factors must be considered in each case that arises. . . . The problem is that of allocating in the most generally satisfactory way, the risks of harm and disappointment that result from supervening events.⁵⁵

In order to determine whether courts have, in fact, utilized the vague standards of section 2-615 to expand the scope of the impossibili-

52. UNIFORM COMMERCIAL CODE §§ 2-613 to -616.

53. The precise remedy that will be granted by courts when the impossibility doctrine has been successfully invoked by the promisor will depend on whether the contract is executory or has been partially performed. In the case of a contract which is fully executory the court can simply declare the contract void and discharge both parties from their obligations thereunder. If one party has paid all or part of the contract price, or has rendered other part performance which can be returned to him, the court can order that the contract be rescinded with restitution made to the party who has partially performed. The most difficult situation is that in which part performance has taken place and it is of a nature such that restitution cannot be made. In this situation, the fairest solution may be for courts to modify the contract, yet this is difficult to rationalize under existing doctrine in the United States. See Comment, *Apportioning Loss After Discharge of a Burdensome Contract: A Statutory Solution*, 69 YALE L.J. 1054 (1960). For a discussion of the treatment of the impossibility situation in other countries see Smit, *Frustration of Contract, A Comparative Attempt at Consolidation*, 58 COLUM. L. REV. 287 (1958).

54. See UNIFORM COMMERCIAL CODE § 2-615, Comment 2, which provides: "The present section deliberately refrains from any effort at an exhaustive expression of contingencies and is to be interpreted in all cases sought to be brought within its scope in terms of its underlying reason and purpose."

55. 6 A. CORBIN, *supra* note 22, § 1322, at 327.

ty and frustration doctrines, an examination of the factors which the courts have traditionally considered in determining whether these doctrines are applicable will be made.⁵⁶ It should be kept in mind that the following analysis has reference to contracts for the sale of goods and may not necessarily be applicable to situations involving other types of contracts.

SUBJECTIVE VERSUS OBJECTIVE IMPOSSIBILITY

One factor that some courts have historically deemed significant in analyzing an impossibility defense is whether the impossibility is due to the nature of the performance itself ("objective impossibility") or to the inability of the particular promisor to perform ("subjective impossibility").⁵⁷ The Restatement of Contracts characterizes the distinction as "between 'the thing cannot be done' and 'I cannot do it.'"⁵⁸ The Restatement takes the position that objective impossibility discharges the promisor but that subjective impossibility does not.⁵⁹

The principle is illustrated by the well known case of *Canadian Industrial Alcohol Co. v. Dunbar Molasses Co.*,⁶⁰ an action by the buyer against the seller for breach of an executory contract for the sale of molasses. Defendant, a wholesaler, was unable to provide the agreed quantity of molasses to plaintiff because of the failure of his supplier to produce an adequate quantity. The court rejected the defendant-seller's defense of impossibility because "[t]here is nothing to show that the defendant would have been unable by a timely contract with the refinery to have assured itself of a supply sufficient for its needs."⁶¹ However, the court indicated in dictum that the impossibility defense would have been sustained if the refinery of defendant's supplier had been destroyed or output had been curtailed because of failure of the sugar crop, a

56. The reader will note that there is a considerable amount of overlap among these factors. Furthermore, they are not all of the same nature. Some have to do with the cause of the impossibility while others focus on the expectations of the parties or their probable intent. The reader may find that other commentators have included categories in addition to, or different than, those used here. By dividing the discussion of the impossibility doctrine into these categories, the author does not intend to endorse them but rather to indicate those factors which the courts have purported to consider in analyzing the defense of impossibility of performance.

57. See text accompanying notes 27-30 *supra*.

58. RESTATEMENT OF CONTRACTS, § 455, comment *a* at 845 (1932).

59. *Id.* § 455.

60. 258 N.Y. 194, 179 N.E. 383 (1932).

61. *Id.* at 199, 179 N.E. at 384.

strike, or if defendant's supplier had breached its contract with defendant for the supply of molasses.⁶²

Section 2-615 of the UCC does not deal specifically with the subjective-objective distinction. It is apparent from the comments, though, that the draftsmen did not intend to overrule prior case law which developed it.⁶³ Rather, it would appear that the draftsmen felt that other methods of analysis would be more helpful. As a result, no recent cases decided under section 2-615 involving contract disruptions caused by economic instabilities have been found that have relied on the subjective-objective method of analysis.

In general, it would appear that the UCC's abandonment of the subjective-objective distinction is sound since it is of questionable value in analyzing an impossibility defense. One problem with the distinction is that there are certain types of situations in which the two categories coincide. These are mainly cases in which the performance promised is to be done personally by the promisor.⁶⁴ Thus, if an opera singer becomes ill and is unable to fulfill a contract requiring her personal performance, then performance is subjectively impossible in that the promisor is unable to perform. However, performance is also objectively impossible since by the terms of the contract no one else is able to perform it.⁶⁵

Secondly, and more importantly, there is no logical reason to distinguish between an event that makes performance impossible to a given promisor and an event that makes performance impossible to everyone in deciding whether the promisor should be discharged. This is because the subjective-objective distinction bears only indirectly on the allocation of the risk of nonperformance made by the parties in the contract.⁶⁶ In many cases, the courts will be correct in assuming that the parties intended the promisor to assume the risk of contingencies that affect only his individual ability to perform, but this will not be true in every case.

Finally, it is often difficult to determine whether the contingency that renders performance impossible in a particular case is "subjective" or "objective." For example, in *Levy Plumbing Co. v. Standard Sani-*

62. *Id.* at 199-200, 179 N.E. at 384-85.

63. UNIFORM COMMERCIAL CODE § 2-615, Comment 4.

64. 6 S. WILLISTON, *supra* note 22, § 1932, at 5412-13.

65. *See* note 28 *supra*.

66. For an excellent discussion of the shortcomings of the subjective-objective distinction in analyzing impossibility cases see Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 COLUM. L. REV. 335, 348-52 (1924).

*tary Manufacturing Co.*⁶⁷ the court held that defendant was not discharged from his contractual obligation to pay plaintiff the sum of 1,750 dollars in cash by reason of the "Bank Holiday" of 1933 which prevented him from withdrawing the funds necessary to pay for the land.⁶⁸ The court reasoned that this was a case of subjective impossibility since others who might have had the foresight to withdraw funds before the "Bank Holiday" would have been able to perform.⁶⁹ However, the court just as easily could have taken the position that performance here was objectively impossible since all persons who had funds on deposit in a bank would have been unable to perform, and, given the large sum involved, it is reasonable to assume that both plaintiff and defendant contemplated that the money would be deposited in a bank until the closing day.⁷⁰

ILLEGALITY

One of the first contingencies recognized as constituting an excuse for nonperformance of a contract was the illegality of performance of the contract due to supervening law or regulation.⁷¹ The main rationale given for this rule was that it would have been improper for the courts, through the award of contractual damages, to have encouraged the promisor to flout the law.⁷² Most cases, however, distinguished between performance which violated domestic law and that which violated foreign law, the latter not constituting an excuse. The reason commonly given for this was that the court had no interest, other than considerations of comity, in encouraging the observance of the law of a foreign jurisdiction.⁷³

67. 68 S.W.2d 273 (Tex. Civ. App. 1933).

68. The problem of temporary impossibility raises issues which are beyond the scope of this article. See generally Patterson, *Temporary Impossibility of Performance of Contract*, 47 VA. L. REV. 798 (1961).

69. 68 S.W.2d at 275.

70. See also *Littell v. Webster County*, 152 Iowa 206, 131 N.W. 691 (1911); *Zimmerman v. Rice County*, 202 Minn. 54, 277 N.W. 360 (1938).

71. RESTATEMENT OF CONTRACTS § 458 (1932).

72. The "Gold Clause" decisions of the Supreme Court holding that private obligors were discharged from contractual obligations to make payment in gold by the Congressional Joint Resolution approved by President Roosevelt on June 5, 1933 prohibiting the public from holding or dealing in gold are among the most notable examples of impossibility due to illegality. *Perry v. United States*, 294 U.S. 330 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); *Norman v. Baltimore & O.R.R.*, 294 U.S. 240 (1935). See generally Dawson, *The Gold Clause Decisions*, 33 MICH. L. REV. 647 (1935).

73. *Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft*, 15 F. Supp. 927 (S.D.N.Y.), *aff'd*, 84 F.2d 993 (2d Cir. 1936) (German corporation not discharged from obligation on bonds issued and sold in the United States and payable in

While the promisor was excused from his obligation of performance because of the passage of a law that had rendered performance illegal, he was not excused because he had been unable to obtain a permit necessary, under existing law, to render his performance legal. The theory here was that the promisor ordinarily intends to undertake the obligation to comply with all legal requirements necessary to perform his part of the bargain and should not be excused unless he has expressly conditioned his duty to perform on successfully obtaining all necessary licenses or other authorizations.⁷⁴

The UCC has continued prior law with respect to illegality and, in addition, has expanded it to include illegality under foreign law.⁷⁵ This change seems desirable since it makes little difference to the seller whether he will be subjected to foreign or domestic sanctions for performing a contract. Subsection (a) of section 2-615 also makes the seller's good faith *belief* that performance will violate a law or regulation sufficient to excuse performance; thus, he need not await final adjudication in order to determine if he is excused.

In general, the position taken by the Code is sound. It would be unfair and unwise to hold the promisor liable for damages if his failure to perform is due to compliance with a law or regulation adopted after the contract was formed. In this situation, holding the promisor liable cannot serve to encourage him to take all possible steps to ensure that he will be able to perform since, unlike many contingencies that render performance impossible, illegality cannot be guarded against. In the typical contract of sale, the parties will normally intend that the promisor take all reasonable steps to guard against avoidable contingencies, but they will not intend that the promisor be an insurer and guard the promisee against the chance that the law may be changed before performance is completed. Therefore, excusing performance in the case of illegality seems to be the fairest alternative unless it is clear that the promisor did, in fact, assume this risk.

Ordinarily, new laws or regulations will apply only to contracts entered into *in futuro* so that the problem of supervening illegality will seldom arise. Occasionally, though, it is necessary to adopt legislation or regulations that do affect executory contractual commitments. For

New York by decree issued by German government declaring such obligations payable to the German government).

74. *Security Sewage Equip. Co. v. McFerren*, 14 Ohio St. 2d 251, 237 N.E.2d 898 (1968) (contractor not discharged from duty under contract because of failure to obtain permit from government approving construction of sewage treatment plant).

75. UNIFORM COMMERCIAL CODE § 2-615(a).

example, during the OPEC oil embargo the government found it essential to adopt regulations to ensure that what oil was available was distributed to the most essential uses.⁷⁶ This necessarily interfered with pre-existing contractual obligations between various oil companies and their customers. Similarly, the natural gas shortage, which was generally not foreseen at the time when many long term supply contracts were entered into between pipeline companies and producers, has necessitated the promulgation of allocation regulations by the FEA that have required the modification or abrogation of existing contracts in some instances.⁷⁷ In both of these cases there seems to be no equitable reason why the promisor should be required to bear the loss.⁷⁸

The mortgage foreclosure cases of the 1930's indicate that when a true emergency exists and the legislature does not go beyond what is reasonably necessary to meet the situation, legislation which has the effect of abrogating or modifying pre-existing contractual obligations will not violate the parties' rights under the contract clause or due process clause of the Constitution.⁷⁹ Thus, in cases in which such legislation meets these requirements and is constitutional, the courts must excuse the promisor under section 2-615. If, on the other hand, the legislation or regulations are unconstitutional, the courts cannot excuse the promisor under section 2-615 unless he can establish that he believed in good faith that they were constitutional. The point is that, in either case, judicial discretion under the illegality clause of section 2-615 is limited; thus, it poses no serious threat to freedom of contract.

IMPLIED CONDITIONS

One of the earliest means by which the English courts avoided the rule of absolute liability and allowed the distressed promisor to escape a

76. 10 C.F.R. §§ 210-12 (1975).

77. 18 C.F.R. part 2 (1975).

78. The Federal Power Commission has taken the position that natural gas pipeline companies that curtail deliveries pursuant to its orders are immune from suits for specific performance or damages by customers affected by such curtailments. *United Gas Pipeline Co.*, No. 71-120 (F.P.C. Op. No. 606, Oct. 5, 1971). However, at least one court has indicated that a customer affected by such curtailments might be entitled to recover damages from the pipeline company, although probably not specific performance. *Monsanto Co. v. FPC*, 463 F.2d 799 (D.C. Cir. 1972); see Note, *The Liability of Natural Gas Pipeline Companies for Breach of Contract Due to FPC-Ordered Curtailment*, 1973 DUKE L.J. 867 (1973).

79. In the 1930's, many state legislatures passed statutes suspending or modifying the right of the mortgagee to foreclose a mortgage in the normal manner. While some of these statutes were held unconstitutional, many others were held to be a valid exercise of the police power. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). See generally Skilton, *Mortgage Moratoria Since 1933*, 92 U. PA. L. REV. 53 (1943).

contractual obligation was by finding an implied condition in the contract excusing the promisor if his performance became impossible. While formally adhering to the adage that a contract must be strictly performed according to its terms, the courts nevertheless might find it to be an implied condition of the contract that the parties had intended that the promisor's obligation should be discharged in the event performance became impossible.⁸⁰ Through the use of the implied condition doctrine, the courts could avoid the charge that they were rewriting the contract for the parties by utilizing the theory that they were merely deferring to the parties' intent, albeit that such intent was not actually expressed in the contract.

The text of section 2-615 does not speak of implied conditions. The comments, however, seem to leave room for the courts to continue using the doctrine of implied conditions. Comment 8 provides:

The provisions of this section are made subject to assumption of greater liability by agreement and such agreement is to be found not only in the expressed terms of the contract but in the circumstances surrounding the contracting, in trade usage and the like. Thus, the exemptions of this section do not apply when the contingency in question is sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as part of the dickered terms, either consciously or as a matter of reasonable commercial interpretation from the circumstances⁸¹

Since the doctrine of impossibility has become well established in American common law and now in the UCC, the initial reason for the use of the implied or constructive condition rationale no longer exists. The main problem with the implied condition rationale is that it does not assist the courts in identifying the underlying policy considerations which should be examined in determining whether the promisor should be discharged. As Mr. Justice Holmes has said: "You always can imply a condition in a contract. But why do you imply it?"⁸² Thus, when the court finds that the promisor is discharged because of an "implied condition," it is resorting to a conclusory form of analysis. The real question is not whether there is an implied condition, but *why* there should be one. In all cases in which the implied condition method of

80. *Taylor v. Caldwell*, 122 Eng. Rep. 309 (K.B. 1863); *Hyde v. Dean & Canons*, 78 Eng. Rep. 798 (K.B. 1653) (dictum). See generally Farnsworth, *Disputes Over Omissions in Contracts*, 68 COLUM. L. REV. 860 (1968).

81. UNIFORM COMMERCIAL CODE § 2-615, Comment 8 (emphasis added).

82. O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 181 (1920).

analysis has been utilized, it will be found that the court has actually relied implicitly on one of the other factors discussed herein, such as foreseeability, assumption of risk, subjective-objective impossibility, or illegality, in determining whether the promisor should have been discharged.⁸³

Extensive use of the implied condition mode of analysis, without any consideration of the policy considerations on which the impossibility defense is based, could result in a rather haphazard application of the impossibility defense. Fortunately, the courts have come to recognize that the implied condition method of analysis is not illuminating and few, if any, recent cases arising under section 2-615 have used it as the rationale for the decision.⁸⁴

INCREASED COST

The courts have historically been reluctant to discharge the promisor from his obligation merely because the cost of performance has increased.⁸⁵ There are sound reasons for this. First, one of the major purposes for which a businessman enters into a fixed price contract for the purchase of goods is to protect himself against future price rises; thus, it would frustrate *his* purpose in entering into the contract if the promisor was discharged merely because the contract became unprofitable to him because of an increase in the market price of the goods or of some component part thereof to be purchased. To take an extreme example, it would seem improper to discharge a promisor who had sold wheat futures short in 1972 merely because the Russian wheat deal had resulted in a sharp rise in the price of wheat because this is the very type of risk which a commodities speculator assumes when he enters the market. Secondly, if mere increased cost allowed the promisor to escape his duty to perform, the courts would be deluged with cases involving promisors who, through bad luck or incompetence, had entered into contracts which had become unprofitable to perform.

83. See, e.g., *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 317 (D.C. Cir. 1966); *Low's Ezy-Fry Potato Co. v. J.A. Wood Co.*, 26 Agri. Dec. 583 (U.S. Dep't Agri. 1967).

84. Those cases arising under section 2-615 which do speak in terms of an implied condition have used such language only to express their conclusion after utilizing an analysis based on assumption of risk or foreseeability. *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 317 (D.C. Cir. 1966); *Low's Ezy-Fry Potato Co. v. J.A. Wood Co.*, 26 Agri. Dec. 583 (U.S. Dep't Agri. 1967).

85. *Jessup & Moore Paper Co. v. Piper*, 133 F. 108 (E.D. Pa. 1902); *Wilson & Co. v. Fremont Cake & Metal Co.*, 153 Neb. 160, 43 N.W.2d 657 (1950).

Section 2-615 appears to carry forward without change the prevailing common-law rule. While it could be argued that performance of a contract becomes "impracticable" under section 2-615(a) if unforeseen increases in cost would make performance unprofitable to the promisor, the comments indicate that the draftsmen had no such intention.⁸⁶

The cases arising under section 2-615 have generally agreed with the comment. In *Transatlantic Financing Corp. v. United States*⁸⁷ the operator of a ship sought to recover the additional costs of a sea voyage which resulted from the closing of the Suez Canal in 1956, thus necessitating the diversion of the ship to a route around the Cape of Good Hope. The court found that performance had not been rendered "commercially impracticable" although the cost of performance had been increased by 43,972 dollars above the contract price of 305,842.92 dollars because of the diversion. Judge Wright, in rejecting plaintiff's claim, stated:

While it may be an overstatement to say that increased cost and difficulty of performance never constitute impracticability, to justify relief there must be more of a variation between expected cost and the cost of performing by an available alternative than is present in this case, where the promisor can legitimately be presumed to have accepted some degree of abnormal risk, and where impracticability is urged on the basis of added expense alone.⁸⁸

Transatlantic Financing involved an unanticipated cost increase of approximately fourteen percent. *American Trading & Production Corp. v. Shell International Marine Ltd.*⁸⁹ was another Suez Canal case with facts similar to *Transatlantic Financing* involving an unanticipated

86. UNIFORM COMMERCIAL CODE § 2-615, Comment 4, provides:

Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. But a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section

87. 363 F.2d 312 (D.C. Cir. 1966).

88. *Id.* at 319. The court cited section 2-615, Comment 4 in support of its position. Curiously, this case has become one of the leading precedents under section 2-615, although it would seem that the UCC is not strictly applicable, since the case involved a contract for carriage and not a contract for the sale of goods. See UNIFORM COMMERCIAL CODE §§ 2-102, -106(1). Nevertheless, because of the court's discussion of section 2-615, it has been cited often in support of decisions in which section 2-615 is squarely applicable.

89. 453 F.2d 939 (2d Cir. 1972).

cost increase of approximately thirty-two percent. Although the unanticipated cost increase was more than double that in *Transatlantic Financing*, the court again found no "commercial impracticability," citing Restatement of Contracts section 454 and UCC section 2-615, comment 4.⁹⁰

In a case which arose directly under section 2-615, *Maple Farms, Inc. v. City School District of the City of Elmira, New York*,⁹¹ plaintiff requested a declaratory judgment determining that it had the right to terminate its contract to supply milk to defendant school district on grounds of impossibility because the price of raw milk had increased twenty-three percent between the time the contract was signed and the date suit was brought. The court found that the increase in cost was not of sufficient magnitude to render performance "commercially impracticable."⁹² The court found the fact that the price of milk had been increasing during the period immediately preceding the time the contract was signed constituted evidence that plaintiff knew of and had assumed the risk of a rise in price and concluded:

Where the circumstances reveal a willingness on the part of the seller to accept abnormal rises in costs, the question of impracticability of performance should be judged by stricter terms than where the contingency is totally unforeseen. . . . There is no precise point, though such could conceivably be reached, at which an increase in price of raw goods above the norm would be so disproportionate to the risk assumed as to amount to impracticability in a commercial sense. However, we cannot say on these facts that the increase here has reached the point of impracticability in performance of this contract in light of the risks that we find were assumed by the plaintiff.⁹³

In short, the courts in interpreting section 2-615 appear to be continuing the traditional reluctance of the common law to excuse the

90. *Id.* at 942. Not all of the "Suez Canal cases" have reached the conclusion that the promisor should be held liable, although the more recent cases arising under section 2-615 have refused to discharge the promisor. In particular, the English cases arising out of the closure of the canal during the 1956 war are hopelessly divided. Compare *Société Franco-Tunisienne D'Armement v. Sidermar S.P.A. (The Messalia)*, [1961] 2 Q.B. 278, *overruled*, *Ocean Tramp Tankers Corp. v. V/O Sovfracht (The Eugenia)*, [1964] 2 Q.B. 226 (C.A.), with *Tsakiroglou & Co. Ltd. v. Noble & Thorl G.m.b.H.*, [1961] 2 All E.R. 179 (H.L.). There has been a considerable amount of commentary on the Suez Canal cases. See, e.g., Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413 (1963); Birmingham, *A Second Look at the Suez Canal Cases*, 20 HAST. L.J. 1393 (1969); Schlegel, *supra* note 17.

91. 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974).

92. *Id.* at 1085, 352 N.Y.S.2d at 790.

93. *Id.*

promisor merely because of a moderate increase in the cost of performance, even if the increase results in a loss to the promisor. This position is sound on many grounds. First, as Comment 4 to section 2-615 points out, absent any explicit provision to the contrary, it is reasonable to assume that the parties to a contract intend that the promisor assume the risk that the contract will become unprofitable since one of the motivating factors which ordinarily induces the promisee to enter into a fixed price contract for future delivery is his desire to avoid the vagueries of the market and to "lock in" a price.⁹⁴

Secondly, there are strong functional reasons supporting a restrictive rule. If the promisor believes that he has a reasonable chance of being discharged from the performance of a contract because an unprovided for increase in costs will result in his losing ten percent instead of making a profit of ten percent on a contract, the rule would tend to encourage litigation and to discourage timely performance of contracts. Such a liberal rule of discharge would result in a significant erosion of the parties' right to contract freely on whatever terms they wish. In the absence of fraud, coercion, duress, gross disparity in bargaining power, or some other circumstance that would justify discharging the promisor under the unconscionability clause of the UCC,⁹⁵ it seems highly improper for a court to relieve a party from his obligation to perform merely because performance had become unprofitable to him. This is particularly true today, when the unstable economy of the nineteen-seventies should make any manufacturer or producer wary of entering into a fixed price contract calling for performance over an extended period of time. Additionally, since there are a variety of ways in which the promisor may protect himself against increased costs, such as the use of "cost-plus" contracts, indexing and escalator clauses, there appears to be no great need for a lenient judicial attitude in this area.

Concededly, a different question would be presented in the event of true runaway inflation where, for example, the consequences of enforcing a contract might be not a mere loss but insolvency for the unfortunate seller. In such a situation, the normal rules of contract law break

94. For the text of Comment 4 see note 86 *supra*.

95. "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." UNIFORM COMMERCIAL CODE § 2-302(1).

down, and the courts might properly discharge a party from performance of the contract although he had not expressly provided for the contingency.⁹⁶ The last sentence of Comment 4 to section 2-615, although not specifically referring to inflation, indicates that any factor resulting in an extreme increase in cost might justify discharging the promisor.⁹⁷

This distinction was drawn by the German courts during the severe inflation experienced in the post-World War I era. At first, when inflation was serious but not of a runaway nature, the courts generally refused to discharge the promisor from his duty to perform even though enforcement of the contract in many cases caused significant losses to be incurred by many individual promisors. In 1921 and 1922, however, when price levels were doubling almost daily, the courts finally relented and granted discharge from obligations or required renegotiation of them by the parties.⁹⁸ Similarly, the runaway inflation in both the North and the South in the post-Civil War era caused some courts to void or modify contractual obligations.⁹⁹

The practical problem in the case of increased cost is in delineating the boundary between that level of inflation which justifies judicial relief and that which does not. There might be general agreement that an increase in the cost of performance of one percent between the time the contract was formed and the date of performance would not justify relief, while a tenfold increase would justify such relief. In any less extreme cases, however, it would be difficult to arrive at a consensus of opinion. In general, judicial intervention in such situations should be limited to cases in which it would be truly unconscionable to enforce the

96. An analogy can be made here to the "pre-existing duty" line of consideration cases in which courts have recognized as binding a second promise by the promisor to perform a pre-existing duty in exchange for a promise by the promisee to perform additional services beyond his original promise if circumstances have rendered the value of the original promise by the promisee valueless. *Goebel v. Linn*, 47 Mich. 489, 11 N.W. 284 (1882). Similarly, in the case of runaway inflation, there may be a total frustration of purpose which, as in the pre-existing duty cases, can be considered to result in a failure of consideration rendering the contract voidable.

97. "But a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a *marked increase in cost* or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section." UNIFORM COMMERCIAL CODE § 2-615, Comment 4 (emphasis added).

98. An excellent discussion of the problems resulting from the inflation in Germany following World War I can be found in Dawson, *Effects of Inflation on Private Contracts: Germany, 1914-1924*, 33 MICH. L. REV. 171 (1934).

99. Dawson, *The Effect of Inflation on Private Contracts: United States, 1861-1879*, 33 MICH. L. REV. 706 (1935).

contract as written in light of such factors as the foreseeability of the level of increased cost and the expectations of the parties at the time the contract was entered into. Any less stringent rule would result in excessive uncertainty being introduced into the contracting process. This would inevitably be accompanied by an excessive amount of costly and time-consuming litigation as disappointed sellers attempted to secure judicial relief from imprudent bargains.¹⁰⁰

FORESEEABILITY OF THE CONTINGENCY

Another factor which has been considered highly significant in analyzing impossibility cases is the foreseeability of the contingency that has allegedly rendered performance impossible. Generally, courts have taken the position that if the contingency adversely affecting the promisor's performance was foreseeable at the time the contract was signed, the fact that the contract contained no provision discharging the promisor's duties under the contract indicated that the promisor implicitly agreed to assume the consequences of nonperformance in the event the contingency occurred.¹⁰¹ If, on the other hand, the contingency was not foreseeable at the time the contract was signed, there could be no presumption that the promisor intended to assume the risk of that particular contingency, and the promisor was discharged.¹⁰²

The foreseeability test, however, is subject to criticism on several grounds.¹⁰³ First, the fact that the risk is foreseeable does not necessarily compel the inference that the promisor intended to assume the risk merely because he did not provide for it. While the promisor will normally insist on an express clause excusing him from performance for contingencies within the ordinary course of his business, such as strikes and the unavailability of supplies, he may be less likely to exempt himself from occurrences which, though foreseeable, relate only *indirectly* to his business, *e.g.*, the closing of the Suez Canal.¹⁰⁴

100. See A. Schwartz, Sales Law and Inflation (unpublished manuscript presented at Association of American Law Schools Meeting in Washington, D.C., Dec. 28, 1975).

101. *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.*, 147 F.2d 399 (2d Cir. 1945); *Nebaco, Inc. v. Riverview Realty Co.*, 87 Nev. 55, 482 P.2d 305 (1971).

102. RESTATEMENT OF CONTRACTS § 457 (1932). The comments to the Restatement provide: "It is only where the promisor has no reason to know of the facts to which the impossibility is due, and where he does not agree to bear the risk of their existence that the formation of a contract is prevented." *Id.* § 456, comment c at 847-48 (1932).

103. For an excellent discussion of the deficiencies of the foreseeability test see Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812, 833-38 (1961).

104. See, *e.g.*, *Ocean Tramp Tankers Corp. v. V/O Sovfracht (The Eugenia)*, [1964]

Secondly, there is the danger that, once a contingency has occurred, it will appear in retrospect to have been reasonably foreseeable although prior to its occurrence it was in fact foreseen by few, if any, persons.¹⁰⁵ For example, economists today have readily explained the 1973-74 inflationary surge as resulting from factors such as excessive growth of the money supply, excessive federal budget deficits, and the devaluation of the dollar. Nevertheless, few economists had predicted this virulent inflation prior to its onset despite the fact that all of the above mentioned factors could have been ascertained before it commenced.¹⁰⁶ Therefore, because its causes are so clear in retrospect, a court today considering an impossibility case which resulted from this inflation could easily forget that it was not actually foreseen by most people.¹⁰⁷

Thirdly, the burden of showing that a particular risk was not foreseeable in any given case may be difficult to discharge.¹⁰⁸ In some cases, this may be due to the hindsight effect discussed above. More significant, though, is the well-recognized difficulty of proving a negative.¹⁰⁹

Finally, in applying the foreseeability test, courts generally have focused on the *particular contingency* that rendered performance impossible, and, if it did not appear to have been reasonably foreseeable at the time the contract was signed, the promisor was excused. In so doing, however, the courts have ignored the fact that while the particular contingency that occurred was not foreseeable, the parties could have foreseen that contingencies of the type that occurred were possible and could affect performance of the promisor's obligations. Therefore, in many cases a general *force majeure* clause could have been included

2 Q.B. 226 (C.A.) (parties considered possibility of closure of Suez Canal during performance but made no provision for it in the contract; held: promisor not discharged).

105. Although none of the impossibility cases discusses the issue in detail, it would appear that the foreseeability test that has been applied by most courts is what should have been reasonably foreseeable to a man of ordinary prudence and intelligence who was in the position of the contracting parties at the time the contract was formed. *E.g.*, *Transatlantic Financing Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966).

106. *Cf.* *Wall Street Journal*, May 9, 1975, at 1, col. 6.

107. *Cf.* *Patterson*, *supra* note 66.

108. The party seeking to establish his discharge from the contract by reason of impossibility bears the burden of proof of showing that the contingency that rendered performance impossible was not foreseeable at the time the contract was entered into. *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.*, 147 F.2d 399 (2d Cir. 1945).

109. 9 J. WIGMORE, *EVIDENCE* § 2486 (3d ed. 1940).

which would have discharged the promisor even though the particular contingency that occurred was not foreseeable.¹¹⁰ Thus, to the extent that the foreseeability test is based on the unfairness of holding the promisor liable for contingencies that he could not have anticipated, it is unfounded in many cases.

In short, application of the foreseeability test has led to mistaken results in many cases. The first three factors mentioned have tended to place a high burden on the promisor seeking discharge, while the fourth tends to favor the promisor. Thus, while the foreseeability test cannot be characterized as overly harsh or overly lenient from the promisor's viewpoint, it is apparent that its application can lead to incorrect decisions.

The UCC does not refer specifically to the foreseeability factor in the text of section 2-615. The comments to section 2-615, however, indicate that the draftsmen contemplated that courts would consider the foreseeability factor in applying section 2-615. Comment 1 provides that "[t]his section excuses a seller from timely delivery of goods contracted for, where his performance has become commercially impracticable because of *unforeseen* supervening circumstances *not within the contemplation* of the parties at the time of contracting."¹¹¹ Additionally, Comment 4 provides in part, that "[i]ncreased cost alone does not excuse performance unless the rise in cost is due to some *unforeseen* contingency which alters the essential nature of the performance."¹¹²

Fortunately, courts have not seized upon the language in the comments as an excuse to perpetuate the foreseeability test. In *Transatlantic Financing* for example, Judge Skelly Wright held that even though the parties should have foreseen that the Suez Canal might be closed due to war at the time they entered into the contract, this alone was insufficient to defeat the impossibility defense.¹¹³ In analyzing the impossibility issue, the court followed a three stage method of analysis which subsequently has become widely accepted. "First, a contingency—something unexpected—must have occurred. Second, the risk

110. Cf. Berman, *supra* note 90, at 1428-39.

111. UNIFORM COMMERCIAL CODE § 2-615, Comment 1.

112. *Id.*, Comment 4. Although the Code and the cases do not discuss the issue, it would appear that the standard to be applied in determining whether a contingency was foreseeable should be an objective one, *i.e.* whether the event is such that the ordinary prudent man could reasonably have been expected to foresee it. Cf. *Transatlantic Financing Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966); *Maple Farms, Inc. v. City School Dist.*, 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974).

113. 363 F.2d 312, 318 (D.C. Cir. 1966).

of the unexpected occurrence must not have been allocated either by agreement or by custom. Finally, occurrence of the contingency must have rendered performance commercially impracticable."¹¹⁴

In discussing the second element of the test, assumption of risk, the court attempted to determine the foreseeability of the canal's closing but did not consider the factor alone to be dispositive of the issue. In the court's words:

Foreseeability or even recognition of a risk does not necessarily prove its allocation. . . . Parties to a contract are not always able to provide for all the possibilities of which they are aware, sometimes because they can not agree, often simply because they are too busy. Moreover, that some abnormal risk was contemplated is probative but does not necessarily establish an allocation of the risk of the contingency which actually occurs.¹¹⁵

The *Transatlantic Financing* opinion has set the tone for subsequent cases arising under section 2-615, and most courts, while considering foreseeability in determining whether section 2-615 is applicable to a given case, have not allowed this element to be controlling.¹¹⁶ This rejection of the foreseeability test is a constructive development in the evolution of the impossibility defense. As the court pointed out in *Transatlantic Financing*, the allocation of the risk of the contingency affecting performance should be the central factor in determining whether section 2-615 should operate to discharge the promisor.¹¹⁷ While the foreseeability of the contingency has significant probative value in determining its allocation, it is not the only factor which needs to be examined to determine whether the promisor assumed the risk of its occurrence. Thus, as with any other test that does not directly focus on determining the intent of the parties, use of the foreseeability factor by itself can lead to a result which contravenes the intent of the parties.

ASSUMPTION OF RISK

When the promisor raises the defense of impossibility, a court utilizing the assumption of risk mode of analysis attempts to determine

114. *Id.* at 315 (footnote omitted).

115. *Id.* at 318 (footnote omitted).

116. See *American Trading & Production Corp. v. Shell Int'l Marine, Ltd.*, 453 F.2d 939 (2d Cir. 1972); *Natus Corp. v. United States*, 371 F.2d 450 (Ct. Cl. 1967); *Mishara Constr. Co. v. Transit-Mixed Concrete Corp.*, — Mass. —, 310 N.E.2d 363 (1974); *Maple Farms, Inc. v. City School Dist.*, 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974).

117. See 363 F.2d at 315-19.

if the parties, at the time the contract was entered into, intended that the promisor assume the risk of the occurrence of the contingency which the promisor now claims should discharge his obligation of performance. If the promisor is found to have assumed the risk, he will not be discharged. If, however, the court determines that the risk was not allocated to the promisor by the parties, the defense of impossibility will apply and the promisor will be discharged.

The use of assumption of risk analysis can be found in many common law cases and is approved by the Restatement.¹¹⁸ In the well-known case of *Madeirense Do Brasil, S/A v. Stulman-Emrick Lumber Co.*¹¹⁹ the Second Circuit refused to discharge defendant from his contractual obligation to deliver lumber to New York. The promisor had been unable to obtain a ship because of a shortage caused by the war. The court found that "the lack of ships in January, 1941 was a foreseeable risk which plaintiff willingly took upon itself; and it cannot under such circumstances plead the defense of 'force majeure.'"¹²⁰ On the other hand, in *Housing Authority of City of Bristol v. East Tennessee Light & Power Co.*¹²¹ the court sustained the defense of impossibility in an action brought against the power company for failure to supply natural gas to buildings owned by plaintiff. The court found that both parties had contemplated the continued existence of a particular source of gas as a condition of defendant's obligation to supply gas under the contract. Thus defendant had not assumed the risk that this source of gas would cease during the term of the contract, and, when it did, his duty to supply gas under the contract was discharged.¹²² In addition, many cases involving construction contracts in which the contractor is seeking to be discharged because of an unexpected contingency have been decided on an assumption of risk analysis.¹²³

UCC section 2-615(a) is a codification, in rather obscure language, of the assumption of risk test of impossibility. Although section 2-615(a) establishes a basic test of "impracticability," such impracticability only provides an excuse if it results from the "occurrence of a

118. RESTATEMENT OF CONTRACTS § 457 (1932).

119. 147 F.2d 399 (2d Cir. 1945).

120. *Id.* at 403.

121. 183 Va. 64, 31 S.E.2d 273 (1944).

122. *Id.* at 75, 31 S.E.2d at 278.

123. *City of Albertville v. United States Fidelity & Guar. Co.*, 272 F.2d 594 (5th Cir. 1960); *Northern Corp. v. Chugach Elec. Ass'n*, 518 P.2d 76 (Alas. 1974); *Security Sewage Equip. Co. v. McFerren*, 14 Ohio St. 2d 251, 237 N.E.2d 898 (1968).

contingency, the non-occurrence of which was a basic assumption on which the contract was made." The impracticability test is also qualified by the introductory phrase to section 2-615: "[e]xcept so far as a seller may have assumed a greater obligation" In other words, section 2-615 only discharges the seller if the impracticability results from an event, the risk of which the seller neither expressly nor impliedly agreed to assume.

The cases arising under section 2-615 involving economic instability almost without exception follow the assumption of risk type of analysis suggested by the statutory language. Judge Wright's opinion in *Transatlantic Financing*¹²⁴ has been influential in establishing a pattern of analysis which has been followed by many courts in section 2-615 cases. The second step in the three part analysis established by Judge Wright, it will be recalled, requires the court to find that "the risk of the unexpected occurrence . . . [has] been allocated either by agreement or by custom."¹²⁵ Other recent cases have also followed the assumption of risk form of analysis.¹²⁶

The fact that many recent cases have utilized the assumption of risk analysis is a most constructive development. Contract is a consensual medium of doing business. In resolving any contractual dispute, the primary task of the court should be determining how the parties intended to deal with the contingency that led to the dispute. Thus, in a case in which the defense of impossibility is raised the court should first attempt to determine whether the parties themselves contemplated the contingency and, if so, how the risk of its occurrence was allocated between them.¹²⁷ The policy reasons underlying the assumption of risk form of analysis were well stated by Judge Reardon in *Mishara Construction Co. v. Transit-Mixed Concrete Corp.*:¹²⁸

124. 363 F.2d 312 (D.C. Cir. 1966).

125. See text accompanying note 114 *supra*.

126. *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974); *Natus Corp. v. United States*, 371 F.2d 450 (Ct. Cl. 1967); *United States v. Wegematic Corp.*, 360 F.2d 674 (2d Cir. 1966); *Mishara Constr. Co. v. Transit-Mixed Concrete Corp.*, — Mass. —, 310 N.E.2d 363 (1974); *Maple Farms, Inc. v. City School Dist.*, 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974).

127. This still leaves the problem of deciding what to do in those cases in which it is found that the parties did contemplate the contingency but did not allocate it in the contract. *Ocean Tramp Tankers Corp. v. V/O Sovfracht (The Eugenia)*, [1964] 2 Q.B. 226 (C.A.). The author's proposed amendment of section 2-615, which would establish a presumption that the seller assumed the risk of all contingencies not expressly allocated by the parties, would ease the burden of the courts in this situation considerably. See text accompanying notes 135-49 *infra*.

128. — Mass. —, 310 N.E.2d 363 (1974).

It is, of course, the very essence of contract that it is directed at the elimination of some risks for each party in exchange for others. Each receives the certainty of price, quantity, and time, and assumes the risk of changing market prices, superior opportunity, or added costs. It is implicit in the doctrine of impossibility (and companion rule of "frustration of purpose") that certain risks are so unusual and have such severe consequences that they must have been beyond the scope of the assignment of risks inherent in the contract, that is, beyond the agreement made by the parties. To require performance in that case would be to grant the promisee an advantage for which he could not be said to have bargained in making the contract.¹²⁹

Virtually all other factors that have been discussed previously, including foreseeability, subjective impossibility, increased cost, and illegality, are of probative value in tending to establish whether the promisor assumed the risk of the occurrence of the contingency on which he bases his defense of impossibility. Yet any analysis of these factors that views each of them as conclusive in itself and not merely bearing on the assumption of risk issue runs the risk of reaching a result that contravenes the original intent of the parties in allocating the risk of its occurrence.

Perhaps the major difficulty with an assumption of risk analysis is that in many situations it is not clear from the face of the contract how the parties intended to allocate the risk of the occurrence of the contingency which led to the impossibility of performance.¹³⁰ Indeed, in many cases, the contingency that occurred may not have been contemplated by the parties at all, or the parties deliberately may have failed to allocate the risk because they could not agree as to which party should assume it. In many cases, then, the courts must examine the factual background of the contract to determine what the parties intended or what they would have intended had the contingency been anticipated.

Thus, even an assumption of risk test is not totally immune from the danger that courts will reach a result that contravenes the true intent of the parties. However, at least the difficulty with the assumption of risk test is evidentiary and not indigenous to the nature of the test itself. A court attempting to apply assumption of risk analysis to impossibility cases should reach a correct result more often than one applying a straight foreseeability analysis.

129. *Id.* at —, 310 N.E.2d at 367.

130. *Cf. Ocean Tramp Tankers Corp. v. V/O Sovfracht (The Eugenia)*, [1964] 2 Q.B. 226 (C.A.).

SYNTHESIS

Section 2-615 on its face appears to give courts a great deal of discretion in determining whether the promisor should be discharged from his contractual obligation when the defense of impossibility is raised. The use of the standard of "commercial impracticability" gives courts the power to void a contractual obligation in many situations in which a strict standard of "impossibility" would not allow the promisor to be discharged. The language of section 2-615, which requires the courts to make a determination whether the risk of the occurrence of the contingency which rendered performance impracticable was allocated to the promisee or to the promisor, gives courts considerable leeway since the contingency causing the impossibility will seldom have been allocated expressly by the contract.

Those few cases decided to date indicate that the courts have not utilized the discretion given them by section 2-615 to modify drastically the contractual obligations of the parties; the courts, thus far, have been adhering to the old common-law standards of impossibility in interpreting section 2-615. In particular, they have not seized upon vague language to excuse the promisor-seller in cases in which the increased cost of performance has rendered performance unprofitable. Furthermore, the courts have generally tended to take the position that the promisor in a contract for the sale of goods assumes the risk of those contingencies that were reasonably foreseeable at the time the contract was entered into. In short, although the language of section 2-615 does not follow any traditional common-law test, the courts have generally adhered to common-law standards in interpreting the section in cases arising from economic and political disturbances that are covered by Article Two.

There is, however, substantial reason to fear that during the next few years courts will be under increasing pressure to excuse the promisor because his performance has become unprofitable or otherwise impracticable due to changing economic conditions. The few "economic disturbance" type cases that have arisen thus far under the UCC may well prove to be merely the prelude to a deluge of litigation under section 2-615 if economic disturbances continue, as seems likely.¹³¹ The experience of Germany in the years following World War I and of

131. The Westinghouse Electric litigation with several electric utility companies concerning long term contracts to supply uranium, discussed in the text accompanying notes 1-4 *supra*, is an example.

the United States in the decade immediately following the Civil War indicates that severe inflationary periods are likely to lead to a significant increase in litigation involving promisors seeking relief from unprofitable contractual obligations or by disappointed promisees suing promisors who have failed to perform unprofitable obligations.¹³²

Such a flood of litigation would be unfortunate in several respects. First, it would add significantly to what is in many courts an already burdensome caseload. Secondly, if the parties to contracts in a significant number of cases must await the outcome of what may be lengthy litigation to determine what the respective rights and liabilities of each may be, uncertainty in business dealings will increase. Thirdly, such litigation may lead in many cases to a judicial reallocation of risks of nonperformance that had been fixed by the parties at the time the contract was formed, thus impinging on the parties' freedom of contract. While there are undoubtedly a few cases in which for reasons of public policy or equity the courts should make such a determination, this will not be true in the vast majority of contracts involving the sale of goods between businessmen which fall within the scope of Article Two of the UCC.¹³³

One distinguished commentator has characterized the law of contracts as the delegation of the lawmaking function by the government to private individuals.¹³⁴ To the extent that the ground rules for such private lawmaking remain vague and uncertain, the private law decisions of the parties—contracts—will be thrown back upon an agency of the government—the courts. This shift will remove many of the benefits of delegation of the lawmaking power to private parties.

PROPOSED AMENDMENT TO UCC SECTION 2-615

For the reasons mentioned above, it would be desirable to amend UCC section 2-615 to read as follows:

Unless the parties have agreed otherwise, and subject to the provisions of sections 2-613 and 2-614:

- (a) Delay in delivery or non-delivery in whole or in part resulting from the occurrence of any contingency that makes it impos-

132. See Dawson, *supra* notes 98 & 99.

133. Some courts have adhered to a strict rule by requiring that there be total frustration of purpose or total impossibility of performance to excuse the promisor. See *Lloyd v. Murphy*, 25 Cal. 2d 48, 153 P.2d 47 (1944); *Levy Plumbing Co. v. Standard Sanitary Mfg. Co.*, 68 S.W.2d 273 (Tex. Civ. App. 1933).

134. See Jones, *The Jurisprudence of Contracts*, 44 U. CIN. L. REV. 43 (1975).

sible for the seller to perform his obligations shall be presumed to be a breach of the seller's duty of performance under the contract, unless the seller establishes that the parties intended that the seller be discharged from his obligation by the occurrence of such contingency, or unless such breach results from compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

- (b) When the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, unless the contract provides otherwise, he must allocate production and deliveries among his customers under contract in a manner that is fair and reasonable.
- (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

1. Establishment of Presumption that Seller Assumed the Risk of All Contingencies Affecting Performance.

The proposed amendment would establish a rebuttable presumption that the seller assumed the risk of the occurrence of any contingency rendering performance impossible. Furthermore, the language of that section has been reworded to indicate more clearly that an assumption of risk analysis is called for. Finally, the word "impracticable" has been replaced by "impossible" to indicate that the section comes into play only in extreme cases and not in those in which performance has merely been rendered inconvenient or unprofitable.

This test would have several advantages over the present provision. First, it should provide a more workable standard than presently exists. The fact that few courts have followed the statutory language closely in analyzing an impossibility defense under section 2-615 results largely from the fact that the present language provides little or no guidance in determining how the court should decide whether the promisor should be discharged from his obligation. The proposed language should serve to clarify the test that courts should apply and therefore lead to a more uniform application of the section.¹³⁵

135. For a complete discussion of the opposite viewpoint, that the courts should be left with a considerable amount of discretion in handling impossibility cases, see Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 NW. U.L. REV. 750 (1964).

Secondly, the presumption appears to comport with the normal understanding or expectation of the parties to the typical contract for the sale of goods. Ordinarily, the parties to such a contract take it for granted that the seller will protect himself or at least assume responsibility for all risks within his control with the exception of those that he has specifically excluded in the contract. Thus, the fact that the particular contingency that occurred and made the contract impracticable to perform may not have been foreseeable is irrelevant since it is foreseeable that events of some type may occur that will render performance impossible or impracticable. For example, in the much discussed "Suez Canal cases"¹³⁶ arising out of the closure of the Suez Canal in 1956 and again in 1973, the parties to a contract for shipment of goods through the canal may not have foreseen or considered the possibility that the canal would be closed, but surely it must have occurred to them that some type of occurrence, such as a war, a longshoremen's strike, or bad weather might intervene and affect the shipper's ability to perform. In the absence of any exclusionary clause, it would therefore seem reasonable to place the liability on the shipper.¹³⁷

Thirdly, the establishment of such a presumption should increase certainty in business dealings. In most business contexts, it is of little importance in the long run whether the promisor or the promisee assumes the risk of nonperformance as long as a definite rule exists so that the parties can accurately predict in advance which party must bear the risk of nonperformance. If one party is aware that he bears the risk of nonperformance he can either specifically exclude that risk from the contract,¹³⁸ adjust his price to compensate for the fact that he will be bearing that risk, or, in some circumstances, insure himself against the risk of liability associated with nonperformance. Thus, in the long run

136. See note 90 *supra*.

137. See Berman, *supra* note 90, at 1420-24.

138. Comment 8 to section 2-615 provides, however, that "this section itself sets up the commercial standard for normal and reasonable interpretation and provides a minimum beyond which agreement may not go." If the purpose of this comment is to suggest that there are limits to the extent to which the seller may provide in the contract for his discharge by reason of impossibility, the comment does not seem to be supported by the language of the statute itself, which indicates that the buyer and seller are always free to provide for the seller's discharge in the event of any specified contingency. See UNIFORM COMMERCIAL Code § 2-615. To the extent that this comment indicates a draftsman's concern that powerful sellers may force extremely liberal *force majeure* clauses upon weaker buyers, it would not appear to be justified. First, in a commercial context, it seems equally as probable that the buyer will have greater bargaining power than the seller. Secondly, if a *force majeure* clause is so sweeping as to be unconscionable, it can always be stricken from the contract under the "unconscionable" provisions of section 2-302.

it is inconsequential whether the promisor or the promisee bears the risk.¹³⁹ If the promisor bears the risk, he will pass on the costs such risk entails to the promisee through higher product prices. If the promisor is excused, either contractually or through a liberal application of the doctrine of impossibility, then the buyer will bear the cost directly through insurance premiums or through increased costs associated with arranging substitute contracts in the event the original promisor is excused. The point is that if the parties to the contract are reasonably certain who bears the risk of nonperformance, they can factor that risk into the negotiations surrounding the contract. Under the existing vague impracticability standard, however, the decision whether section 2-615 will discharge the promisor is basically a question of fact to be resolved by the court, and the parties will be uncertain as to which party will bear the loss until actual judicial resolution of each case.

Fourthly, the proposed standard would still allow the seller to modify the statutory presumption and shift the risk of the occurrence of any or all contingencies to the buyer through appropriate language in the contract.¹⁴⁰ With respect to contracts for the sale of goods covered by section 2-615, it is relatively easy to draft a clause excusing the seller's duty of performance in the event of the occurrence of any contingencies beyond his control that result in inability to perform. It is not necessary that each contingency be specified. Thus through a simple clause it is easy for the parties to overcome the statutory presumption if that is what they wish to do.¹⁴¹

Finally, the establishment of such a presumption is at least as fair and equitable as the present rule of section 2-615. Although it has been asserted that the rule of absolute liability (which the proposed amendment comes close to establishing) is harsh and the rule of discharge is "fair," it might well be asked, "fair to whom?" If the promisor is freed from his obligation to perform a contract that has become unprofitable, the loss which the promisor would have incurred had he not been excused must be borne by the promisee who will have

139. Cf. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 49-50 (1972).

140. UNIFORM COMMERCIAL CODE § 2-303 makes it clear that the seller does have the right to modify contractually the impossibility provisions of section 2-615. *But see* note 138. *See also* Patterson, *supra* note 66 (concerning the ability of the seller to contract out of a strict impossibility rule).

141. A clause providing that "seller shall not be liable for delays in delivery or non-delivery caused by strikes, fines, riots, war, embargoes, shortages, economic disturbances nor any other causes beyond seller's control" would be sufficient to shift the risk of virtually every contingency that might affect performance back to the buyer in a contract for the sale of goods.

to enter into a new contract in place of the one with the promisor. Thus, since the rule of discharge merely shifts the loss from the promisor to the promisee, it is not any fairer than the rule of absolute liability. Whichever rule is followed, a loss will be borne by one party or the other. The fairest solution in this situation is voluntary renegotiation of the agreement between the promisor and the promisee.

Perhaps the most serious objection to the proposed rule is that it might prove too harsh in application when applied to transactions involving inexperienced sellers and, in particular, to sellers who are not merchants. It is conceivable that such sellers might not be aware of, or appreciate the legal consequences of, the proposed rule. Thus, they might neglect to protect themselves, either by insurance or by appropriate exculpatory language, from the consequences of their inability to perform.

There are several answers to this problem. One is that the proposed rule merely establishes a *rebuttable presumption*; the major reason for making the presumption rebuttable is to allow the introduction of evidence that would indicate that because of the status of the particular seller it is improper to assume that the seller intended to assume the risk of nonperformance. A second answer is that if it appeared that a knowledgeable buyer had taken advantage of an ignorant seller in a particular situation, UCC section 2-302 would allow the court to declare the bargain void and excuse the seller on the ground that the contract was "unconscionable."¹⁴² Another possible response to this objection would be to limit the application of the presumption that the seller assumed the risk of all contingencies affecting performance to transactions "between merchants" as defined in section 2-104(1). This step has been taken with several other sections in Article Two of the UCC for reasons similar to those present here with no apparent problems resulting.¹⁴³

2. *Elimination of Duty to Allocate to Regular Customers Not Under Contract.*

Section 2-615(b), in its present form, imposes upon a seller whose capacity to perform is only partially affected the duty to allocate his output among customers. The seller is given the right, at his option, to include in such allocations not only those customers with whom he has

142. See note 95 *supra*.

143. See UNIFORM COMMERCIAL CODE §§ 2-201, -205, -207, -209.

contracts but also "regular customers not then under contract as well as his own requirements for further manufacture."¹⁴⁴ The Code does not specify the manner in which such allocations should be made but gives the right to the seller to allocate "in any manner which is fair and reasonable."¹⁴⁵

This provision constitutes a serious and unjustifiable infringement on the contractual rights of those customers who are under contract with the seller. Since subsection (b) authorizes the seller to treat buyers not under contract equally with buyers under contract, it removes one of the main incentives for a buyer to commit himself contractually to the seller. Ordinarily, the chief reason a buyer is willing to commit himself to the future purchase of goods is that he thus obtains a prior claim to those goods ahead of those who are not under contract; yet section 2-615(b) undercuts this expectation.¹⁴⁶

Furthermore, in a situation in which prices have advanced, the seller will have every incentive to allocate as much of his production as

144. *Id.* § 2-615(b).

145. *Id.* At least one court has held that the provisions of section 2-615(b) can be modified contractually. *Mansfield Propane Gas Co. v. Folger Gas Co.*, 231 Ga. 868, 204 S.E.2d 625 (1974). See also *Hawkland, The Energy Crisis and Section 2-615 of the Uniform Commercial Code*, 79 *COM. L.J.* 75 (1974). Thus, a seller could commit himself to deliver all of his output to one customer although absent such a contractual provision he would be under a duty to allocate output among all of his customers. *Intermar, Inc. v. Atlantic Richfield Co.*, 364 F. Supp. 82 (E.D. Pa. 1973); *North Penn Oil & Tire Co. v. Phillips Petroleum Co.*, 358 F. Supp. 908 (E.D. Pa. 1973).

146. Furthermore, the section leads to an anomalous situation which can best be illustrated as follows: Suppose seller *S* has ten contracts with buyers *I* through *10* to deliver to each 100 bushels of wheat. In addition, *S*, who usually has more than 1000 bushels of wheat available will sell one hundred bushels of wheat each to buyers *11* through *20*. Suppose that, due to a partial crop failure, in a given year *S* has only 1000 bushels of wheat to sell. In this case, subsection (b) would not appear to allow the seller to allocate production among buyers *I* through *10* (under contract) and buyers *11* through *20* (not under contract) since subsection (b) only applies when performance on contracts with buyers under contract has become "impracticable" under subsection (a). Since there is precisely enough grain, and no more, available to fulfill *S*'s contractual commitments, subsection (a) does not apply and therefore *S* has no right to allocate under subsection (b).

But now suppose that instead of exactly 1000 bushels *S* only produces 900 bushels. This produces a partial impossibility under (a) and thus gives *S* the right to allocate under (b), which right may include not only customers *I* through *10* but also customers *11* through *20*. Thus, the shortfall in production necessary to fulfill *S*'s contractual commitments, although amounting to only ten percent, gives *S* the right to allocate among noncontractual customers. This in turn may reduce the allocation to contractual customers much more than ten percent. Indeed, if equal allocation is made to all customers, each would receive 450 bushels so that a ten percent shortfall in the amount needed to fulfill seller's contractual commitments gives *S* the right to curtail sales to contractual customers by fifty-five percent. Such a result is illogical and illustrates the fallacy in allowing the inclusion of noncontractual customers in an allocation by the seller.

possible to those customers not under contract whom he can charge a higher price. Comment 11 recognizes this problem and provides that in cases of doubt customers under contract should be favored, but such an expectation may be more hopeful than realistic.¹⁴⁷ Thus, in times of acute shortages, especially if such shortage is accompanied by rising prices, the present language seems certain to lead to a considerable amount of litigation by disgruntled buyers under contract who find that a portion of the seller's production has gone at a higher price to buyers not under contract.

The rationale for the right to include customers not under contract in any allocation is stated in comment 11 as permitting "a fair and reasonable attention to the needs of regular customers who are probably relying on spot orders for supplies."¹⁴⁸ The simple answer to this is that customers with a strong need for the seller's products should enter into futures contracts with the seller. To allow them to share in the seller's scarce output with buyers under contract is to allow them one of the major benefits of having a contract with seller while escaping the burden of it.¹⁴⁹

Perhaps the major justification for this provision is that there may be regular, noncontractual customers of the seller whose needs are more urgent than those of customers under contract and that public policy should allow the seller to include such customers in any allocation that he may make. However, granting the fact that there may be times when the contractual rights of buyers should be subordinated to those of other parties, it does not seem wise to allow the seller to make such a judgment concerning public policy himself. First, since almost any shortage situation will be accompanied by rising prices in the absence of wage-price controls, the seller is not likely to be wholly impartial in making a judgment regarding the relative priorities of various customers' needs. Secondly, the seller is not likely to be in the best position to make any judgment of conflicting social priorities. Such decision,

147. UNIFORM COMMERCIAL CODE § 2-615, Comment 11 provides, in relevant part: "However, good faith requires, when prices have advanced, that the seller exercise real care in making his allocations, and in case of doubt his contract customers should be favored and supplies prorated evenly among them regardless of price." In addition, it provides that "any allocation [to customers not under contract] which exceeds normal past requirements will not be reasonable." Thus, even Comment 11 could be interpreted as allowing the seller to make delivery of the amounts normally supplied to regular customers not under contract while delivering less than normal requirements to customers under contract.

148. *Id.*

149. *Id.*

which must balance the contractual rights of the buyer against the public interest in having others receive scarce resources, is best made by the legislature or by an administrative agency that can examine all of the facts. The speedy development of fuel allocation regulations following the Arab Oil Embargo of 1973-74 indicates that Congress can move quickly when a shortage of some vital commodity threatens to disrupt the functioning of society.

In summary, it would be wise to delete the language from subsection (b) giving the seller the right to include customers not under contract in any allocation that might be made. In addition, it would seem wise to add language to (b) giving the seller the right to modify his duty to allocate contractually. The present language of section 2-615 and the comments is silent on whether the seller can modify contractually the allocation provisions of this section. Since we have concluded that it is wiser to leave it to the legislature to intervene in situations in which public policy requires an allocation, there would seem to be no reason why the parties, in the absence of such legislative direction, should not be allowed to provide that a particular buyer shall or shall not be allowed to share in an allocation.¹⁵⁰

3. Retention of Sections 2-613, 2-614 and the Illegality Exemption of Section 2-615.

Since sections 2-613, 2-614 and the illegality exemption of section 2-615 have the effect of reversing the presumption that would be established by the revisions to section 2-615, a word is in order concerning the reasons for their retention. Section 2-613, which generally excuses the seller when specific goods under contract have been destroyed without his fault, codifies a well-recognized common-law rule.

150. Several courts have indicated that the parties to a contract are free to modify contractually the allocation provisions of section 2-615(b). *Intermar, Inc. v. Atlantic Richfield Co.*, 364 F. Supp. 82 (E.D. Pa. 1973) (seller under no duty to allocate when contract contains provision expressly excusing seller from duty of performance because of impossibility); *North Penn Oil & Tire Co. v. Phillips Petroleum Co.*, 358 F. Supp. 908 (E.D. Pa. 1973) (same); *Mansfield Propane Gas Co. v. Folger Gas Co.*, 231 Ga. 868, 204 S.E.2d 625 (1974) (seller can contractually commit himself to deliver all of his output to one of several buyers when in the absence of such a commitment he would be under a duty to allocate).

Any amendment to the UCC raises the practical difficulty that its adoption must be secured, one by one, in all of the jurisdictions which have adopted the UCC if it is to remain "uniform." For this reason, it would seem desirable for this amendment to be submitted to state legislatures for adoption as part of a general package of revisions to Article Two of the Code at such time in the future as a general reexamination of Article Two is made.

Ordinarily, the parties to a contract expect the seller to take all reasonable steps to insure performance. However, the parties do not ordinarily expect the seller to be the buyer's insurer. Therefore, the reversal of the presumption established by revised section 2-615 seems desirable in this situation.

Section 2-614, which deals with substitute means of delivery and payment, is not directly relevant to the problems that the revisions to section 2-615 are designed to resolve. Since this section is not directly affected by the proposed amendments to section 2-615, it should be retained in its existing form.

Finally, the language in original section 2-615, excusing the seller if performance has been made "impracticable because of compliance in good faith with any applicable foreign or domestic governmental regulation or order," has been retained. This language has the effect of reversing the presumption of section 2-615. For the reasons discussed in the section on illegality it seems reasonable to retain this exemption.¹⁵¹

151. See text accompanying notes 71-78 *supra*.

