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“A Hard Rain’s A-Gonna Fall”—Terrorism and Excused Contractual Performance in a Post September 11th World

*Mark B. Baker**

Our office is on the eighty-fifth floor of 1 World Trade Center. I was looking outside the window, facing the Empire State Building, when I saw the plane coming into the building. There was such a dramatic change of atmospheric pressure from the plane hitting. The building swayed from the impact, and it nearly knocked me off of my chair. Our ceiling imploded. Some of our walls began to implode. I saw people coming past the window. I don’t think these were people who jumped. I think people must have been sucked out of the windows because of the pressure.

* * *

Once there, I was almost fixated on the debris, the body parts and the blood I’m not a religious man, but I prayed to God, hoping that we would be okay. I still did not know if I was alive or dead. My eyes were wide open and I couldn’t see anything. It was blacker than black. I couldn’t even cough or breath because I had so much soot in my throat and in my mouth. And then it started to settle, and I realized I was alive.

* * *

When I finally got out, it looked like a nuclear winter. I was walking, but I was in shock. I still had no clue what was going on. I was walking down the street and looking down and seeing all the e-mails and pictures, and then seeing this white manila folder with the letter J on it from a law office or a doctor’s office. This is after 2 World Trade Center collapsed, and it didn’t even occur to me that it collapsed. I was still thinking, how did all this happen from a small plane hitting our building?¹

—*Robert Leder*

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1. MITCHELL FINK & LOIS MATHIAS, NEVER FORGET 51-53 (2002) (quoting the eyewitness account of Robert Leder, an executive at SMW Trading Company who survived the September 11, 2001 attack on the World Trade Center).

We got a call that a plane had hit the tower. Probably like so many other people, we were thinking it was a small private aircraft. But as we lifted up and came across Brooklyn, we saw that it was no small aircraft. There was a gaping hole in the North Tower and black smoke was pouring out.

It was pretty clear that people were trapped. There was nobody on the roof. About 80% of the roof was engulfed in black smoke. People were hanging out of the building, gasping for air. Some were jumping and others were accidentally being pushed by people behind them who were just trying to get out of the smoke and get to the air. Everything I've seen in my seventeen years as a police officer became miniscule. The past became insignificant. It was just so much more horrible than anything your mind could have ever conjured up.

People saw the helicopter and I'm sure many of them were thinking that we were going to be able to save them. In fact, we weren't able to do anything. We were as close as you could possibly be, and still we were helpless, totally helpless. There was no way of getting near anybody in a window. And then you're watching these people plunge to their death. We were so close.²

—*Steven Bienkowski*

I saw some pretty disturbing things as we were setting up the temporary headquarters. I was on the SWAT and Rescue team, and I've seen people jump off buildings in front of me. I've cleaned up people run over by trains. But probably one of the most disturbing things I saw that day were those people jumping from the towers. And it wasn't just one person jumping, or the sound of one person hitting. It was the sound of three and four and five of them holding hands together and jumping together. And the sight of seeing five people holding hands and jumping from a hundred stories up, and them hitting the ground and just disintegrating. These were regular, happy go-lucky-people. They weren't trying to commit suicide. They weren't psychos, or drug addicts who were so high they thought they could fly. They were people like me and you, people who worked hard every day, people from Cantor Fitzgerald and the stockbrokers making a lot of money. And whether they made a dollar a year or a million a year, they were of sound mind when they went to work that morning, and now they were jumping out of windows a hundred stories in the air.³

—*Captain Sean Crowley*

2. *Id.* at 15-16 (relating the eyewitness account of Steven Bienkowski, a New York City Policeman who attempted to rescue victims of the September 11, 2001 attack on the World Trade Center).

3. *Id.* at 89-90 (quoting the eyewitness account of Captain Sean Crowley, a New York City Policeman who attempted to rescue victims and was caught in the collapse of the September 11, 2001 attack on the World Trade Center).

I. INTRODUCTION

Many lives were changed on September 11, 2001, when terrorists hijacked two Boeing 747's, using them as weapons to destroy the World Trade Center in New York. Not since the attack on Pearl Harbor has such a devastating attack commenced on U.S. soil. This horrific event claimed the lives of approximately 3,000 people and directly affected the lives of thousands more.⁴ The indirect effects of this incident of terrorism affected the lives of everyone in the United States, as well as the distant shores throughout the world.

This occurrence, while having enormous personal consequences, also had a huge impact on business at home and abroad. At first glance, one might question the relationship between this horrific act and the world of international contract law, but the connection is far less tenuous than one might think. Unfortunately, terrorism has become a part of our daily lives, and it shows no signs of being eradicated in the near future.⁵ In addition to the tragic loss of life associated with terrorist acts, terrorism presents a variety of concerns to the world of business.⁶ "Terrorism not only destroys lives, but has a tremendous economic impact as well."⁷ As the towers collapsed, not only were lives taken and interrupted, but the flow of commerce was also similarly affected. The twin towers were not only representative of American commercial might, but contained the heart and soul

4. See American Liberty Partnership, *September 11, 2001 Victims*, <http://www.september11victims.com/september11victims/STATISTIC.asp> (updated July 3, 2003) (copy on file with *The Transnational Lawyer*) (stating that as of July 3, 2003, 2,629 victims from the World Trade Center have been reported dead). There were 87 victims on Flight 11, 59 victims on Flight 77, 40 victims on Flight 93, and 59 victims on Flight 175. *Id.* There were also 125 victims from the Pentagon. *Id.*

5. President George W. Bush, State of the Union Address, <http://www.whitehouse.gov/news/releases/2002/01/print/20020129-11.html> (Jan. 29, 2002) ("Our war on terror is well begun, but it is only begun. This campaign may not be finished on our watch—yet it must be and it will be waged on our watch.").

Let's not think that one single counter-attack will rid the world of terrorism of the kind we saw yesterday. This is going to take a multi-faceted attack along many dimensions: diplomatic, military, intelligence, law enforcement. All sorts of things will have to be done to bring this scourge under control. And it is not just one organization; it's a network of organizations. We have to make the whole world understand that this is something we all have to be involved in, and not just see it as a discreet response to a single incident. We'll do that, but we have to realize that terrorism has been around for a very long time, and it's going to take a very long time to root it out.

Interview by Katie Couric with Colin Powell, U.S. Secretary of State, Washington D.C. (Sept. 12, 2001) (copy on file with the author).

6. A variety of economic consequences, aside from the immediate clean up and rescue costs, have been attributed to the 2001 World Trade Center attack alone. Among them are: declines in consumer spending, travel, manufacturing, and construction; increases in unemployment, and security costs; and the financial burden borne by governments fighting terrorism could reach into the billions. See *Consumer Spending Plunges 1.8% in September*, USA TODAY, at <http://www.usatoday.com/money/economy/2001-11-01-spending.htm> (Nov. 1, 2001); George Hager, *Fed Finds Widespread Fallout From Attacks*, USA TODAY, at <http://www.usatoday.com/money/economy/2001-10-24-beige.htm> (Oct. 25, 2001); Tom Bogdanowicz, *Fears of Further Economic Slowdown*, CNN, at <http://www.cnn.com/2001/world/europe/09/21/gen.europe.economy/index.html> (Sept. 21, 2001).

7. Ambassador Francis Taylor, Remarks in Manila to the International Conference on Terrorism and Tourism Recovery (Nov. 8, 2002).

of a number of enormous commercial enterprises. Terrorist acts, such as the September 11th World Trade Center attack, leave behind not only destruction of lives and buildings, but also businesses unable to fulfill their contractual duties. Therefore, one can easily presume that on that fateful day contractual obligations made between persons and entities in the towers and their counterparts throughout the world were negatively affected to the highest degree. To date, the tragic events of September 11, 2001, have not resulted in any final court decisions concerning the issue of excused performance resulting from a terrorist act.⁸ Part II of this paper will attempt to define terrorism; Part III will introduce a hypothetical to exemplify the effects of terrorism on international contracts; Part IV discusses the common law development of excuse of contractual performance due to impossibility; Part V of this paper introduces the Uniform Commercial Code and evaluates our hypothetical under U.S. law; Part VI discusses the French system and compares it to the U.S. system; next, Part VII explains the different attempts which have been created to reconcile these differences in international commercial contracts. Part VII also evaluates our hypothetical under each of these international texts to show the need to adopt a common approach to streamline international business transactions. Finally, Part VIII of this paper suggests the need to proactively address terrorism and its effects on contracts to eliminate the discrepancies which arise under the different systems in which the contract may be evaluated.

II. TERRORISM DEFINED

Surprisingly perhaps, the threat and consequence of terrorist attacks has held a place in our nation's distant history, recent past, and almost certainly its future.⁹ If there is any certainty in the threat of terrorist attacks, it is that there is no effective remedy on the horizon.¹⁰ Between the years of 1980 and 1999, there were 327 recorded incidents or suspected incidents of terrorism in the United States alone.¹¹ During that same time, U.S. law enforcement prevented 130

8. One might surmise that the nature and emotional overtones of the event may have hampered litigation as one can imagine a plaintiff trying to force performance against a victim might be socially reprimanded for taking such a position. Further, one might presuppose that jurors would have little or no sympathy for plaintiffs in such circumstances. However, if and when terrorist events that directly impact commercial activity become more commonplace, a change in attitude, albeit slowly, may occur.

9. The author acknowledges that in addition to the personal accounts of terrorist activity included above, there have been a number of other domestic terrorist attacks including the 1995 bombing of the Murrah Federal Building, the 1993 bombing of the World Trade Center, and others of no less tragedy, but too numerous to mention individually. Citizens of the United States have also been victims of terrorism in numerous locations abroad such as the attack on the USS Cole in Yemen waters and the U.S. Embassy bombings in Kenya and Tanzania. At this juncture, there is no reason to believe that these attacks will cease. Instead, the Iraq "war" may only serve to exacerbate the situation.

10. See *supra* n.5.

11. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, TERRORISM IN THE UNITED STATES (1999) [hereinafter FBI], available at www.fbi.gov/publicacions/terror/terrorism.htm (last visited Mar. 2, 2004).

terrorist acts from occurring on U.S. soil.¹² Astoundingly, between 1981 and 2001, there were over 9,500 terrorist attacks recorded worldwide.¹³ In recent years, U.S. authorities have recognized two prevailing trends in terrorism at home and abroad: “while the total number of terrorist incidents has declined, the attacks that have occurred have caused greater destruction and casualties.”¹⁴ Trends and statistics aside, it is clear that terrorism has found its way into the every day affairs of individuals worldwide.¹⁵

Before one can fully examine the subject of terrorism under any context, he or she must have an adequate understanding of the meaning of the word terrorism.¹⁶ Unfortunately, a definitive, uniform definition has thus far escaped governments, law enforcement agencies, and academics alike and has led to different applications of the term terrorism in different situations.¹⁷ For example, on July 27, 1996, an unknown assailant planted a pipe bomb in Olympic Centennial Park in downtown Atlanta that killed two and wounded 110 people.¹⁸ This was classified as an act of terrorism. On August 1, 1966, Charles Whitman entered the observation deck of the University of Texas Tower with several guns and fired upon passersby for 96 minutes, killing 12 people and wounding 34.¹⁹

12. *Id.*

13. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM (2001).

14. FBI, *supra* note 11.

15. One may be surprised by the number of reported terrorist incidents both domestic and abroad. Certainly, not all of the terrorist incidents reported by the FBI and the U.S. Department of State would be of a description that would match the general public's perception of terrorism. The actual definition of terrorism is a convoluted subject and will be discussed further below.

16. If we are going to solve the problem of understanding terrorism as it relates to the law of contracts and excused performance, the first step is to understand what the word terrorism means. Anything less than a definitive meaning would make the inclusion of the word terrorism into a contractual problem only a stepping stone to the analysis. There would have to be a separate query into what terrorism is.

17. While many, if not all entities that deal with terrorism have formed their own working definitions to which they adhere, the myriad of definitions are to say the least not uniform, lacking with respect to the treatment of terrorist acts in its many different forms, and none provide a suitable standard to which the rest of the national or global community would subject itself. As terrorism is a global phenomenon, if one is going to use a definition with which to examine its effects on contractual relations, the definition must be one to which a broad variety of contractors would agree.

18. The bomb was detonated during a concert that was part of the festivities held during the 1996 Summer Olympic Games in Atlanta, Georgia. After exonerating an initial bombing suspect, Richard Jewel, the FBI conducted a four-year search for another suspect, Eric Rudolph. In March of 2002, the FBI announced it was scaling back its search for Rudolph, but would continue to treat him as a fugitive. On May 31, 2003, Rudolph was apprehended by police officer Jeffery Postell. He was found digging through a dumpster for food in Murphy, a small town in the mountains of western North Carolina. HENRY SCHUSTER & BRIAN CABELL, *FBI Cuts Search for Accused Olympic Bomber*, CNN.COM, at <http://www.cnn.com/2002/US/03/20/rudolph.search/> (Mar. 20, 2002); *At Least 2 Dead in Blast at Atlanta's Olympic Park*, CNN.COM, at <http://edition.cnn.com/US/9607/27/park.blast.0430/> (July 27, 1996).

19. It took Charles Whitman an hour and a half to turn the symbol of a premier university into a monument to madness and terror. With deadly efficiency he introduced America to public mass murder, and in the process forever changed our notions of safety in open spaces. Arguably, he introduced America to domestic terrorism, but it was terrorism without a cause.

GARY M. LAVERGNE, *A SNIPER IN THE TOWER: THE CHARLES WHITMAN MURDERS* x1 (1997).

Arguably, this was not classified as an act of terrorism. This lack of a clear definition prompts the following questions: What constitutes a terrorist act? What characteristics determine whether an event is an act of terrorism or only an act of violence? As can be seen below, the answers are varied and inconsistent.

Black's Law Dictionary defines terrorism as "the use or threat of violence to intimidate or cause panic, especially as a means of affecting political conduct."²⁰ This definition is lacking in its sufficiency for use in today's world.²¹ Such a definition would seem to include all acts of violence, as long as the aim was to intimidate or cause panic. Further, it makes no mention as to against whom the act is directed. Indeed, this overbroad definition, combined with its lack of specificity, might lead to actors ranging from Osama bin Laden to the neighborhood bully as being characterized as terrorists.²²

The United States has recently passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT ACT") Act of 2001.²³ The USA PATRIOT ACT amends and

20. BLACK'S LAW DICTIONARY 1484 (7th ed. 1999).

21. A legal definition must sufficiently describe and characterize the term it is attempting to define, and at the same time exclude all that it does not encompass. The Black's definition, when applied, can be both under inclusive, and over inclusive. The definition would seem to exclude a wide variety of terrorist activity such as financial attacks, cyber terrorism, and any terrorist activity not involving violence. The Black's definition also fails to sufficiently limit the activities it considers. Any act or threat of violence, if intended to intimidate, would fit under this definition.

22. The terrorist actions taken by Osama bin Laden easily fit this definition as his violent actions are definitely meant to cause intimidation and panic. His actions further meet the definition in that they are certainly meant to alter political actions. However, the "neighborhood bully's" actions could also fit into this definition. A bully could regularly engage in fisticuffs with other children in an attempt to intimidate as well. Because the Black's definition does not require that a terrorist act be aimed at political conduct, the bully's senseless acts could be considered terroristic.

23. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-156, Title VIII Strengthening The Criminal Laws Against Terrorism, § 802 (2001) (codified as amended at 18 U.S.C. §§ 2331, 3077 (2001)). The ACLU spearheaded a great deal of criticism claiming the bill would give the Attorney General and federal law enforcement powers that could violate civil liberties and that far exceed the powers necessary to fight terrorism. The ACLU feared that the new powers would be used against lawful citizens and non-citizens alike, and would stifle First Amendment activities thought to be security threats by the Attorney General. Among the provisions the ACLU found most disturbing were those that would:

Allow the Attorney General to indefinitely incarcerate or detain non-citizens based on mere suspicion, and to deny re-admission to the United States of non-citizens (including lawful permanent residents) for engaging in speech protected by the First Amendment; Minimize judicial supervision of telephone and Internet surveillance by law enforcement authorities in anti-terrorism investigations and in routine criminal investigations unrelated to terrorism; Expand the ability of the government to conduct secret searches—again in anti-terrorism investigations and in routine criminal investigations unrelated to terrorism; Give the Attorney General and the Secretary of State the power to designate domestic groups as terrorist organizations and block any non-citizen who belongs to them from entering the country. Under this provision the payment of membership dues is a deportable offense; Grant the FBI broad access to sensitive medical, financial, mental health, and educational records about individuals without having to show evidence of a crime and without a court order; Lead to large-scale investigations of American citizens for "intelligence" purposes and use of intelligence authorities to by-pass probable cause requirements in criminal cases; Put the CIA and other intelligence agencies back in the business of spying on Americans by giving the Director of Central Intelligence the authority to identify priority

adopts the definition of terrorism contained in 18 U.S.C. section 2331.²⁴ The act reads in part:

(1) the term “international terrorism” means activities that—(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.²⁵

Further, paragraph 5 of 18 U.S.C.S. section 2331 provides:

the term “domestic terrorism” means activities that (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States.²⁶

targets for intelligence surveillance in the United States; Allow searches of highly personal financial records without notice and without judicial review based on a very low standard that does not require probable cause of a crime or even relevancy to an ongoing terrorism investigation; Allow student records to be searched based on a very low standard of relevancy to an investigation; Create a broad new definition of “domestic terrorism” that could sweep in people who engage in acts of political protest and subject them to wiretapping and enhanced penalties.

Explaining the U.S.A. Patriot Act, CNN.COM, at <http://www.cnn.com/2002/LAW/08/23/patriot.act.explainer/> (last visited Aug. 23, 2002). *But see* Letter from Laura W. Murphy Director of the American Civil Liberties Union (“ACLU”), Washington Office, to United States Senate (Oct. 23, 2001) at <http://www.aclu.org/news/NewsPrint.cfm?ID=9222&c=111> (last visited Feb. 22, 2004) (copy on file with *The Transnational Lawyer*) (indicating the ACLU’s rejection of the final version of the USA PATRIOT Act). The ACLU has gone so far as to petition the Supreme Court to set boundaries as to when the government is allowed to observe people’s telephone conversations and electronic mail and then use evidence collected to prosecute them. Perhaps most interesting about this appeal is the standing used by the ACLU to bring the appeal to the Supreme Court. The ACLU petitioned on behalf of those people who do not know they are being monitored by the government. On May 24, 2003, the Supreme Court refused to hear the case. However, the issue is expected to arise again. *See Supreme Court Rejects Challenge to Spy Court*, CNN.COM, <http://www.cnn.com/2003/LAW/03/24/scotus.terrorism.ap/index.html> (May 24, 2003).

24. The USA PATRIOT Act also made a parallel amendment to 18 U.S.C. § 3077 (1) to provide that “act of terrorism means an act of domestic or international terrorism as defined in section 2331.”

25. 18 U.S.C. § 2331 (2000).

26. *Id.*

Each of these definitions requires a terrorist act to be an act of violence or an act dangerous to human life meant to influence a government or civilian population.²⁷ However, the substance of a claim reported under this section is purposely vague. It is not defined by the statute "because the fact patterns giving rise to such suits will be as varied and numerous as those found in the law of torts."²⁸ This seemingly all-encompassing definition has not, however, been adopted as a working definition by a number of states, government departments, and agencies.²⁹

The FBI adheres to the definition for terrorism set forth in the Code of Federal Regulations: "the unlawful use of force and violence against persons or property to intimidate or coerce the government, the civilian population, or any segment thereof, in furtherance of political or social objectives."³⁰ This definition has the additional requirement that the terrorist actor must be working in furtherance of some political or social objective.³¹ The definitions from the U.S. Department of State and the Central Intelligence Agency add a requirement that the terrorist act be committed against a "noncombatant" target.³² These agencies adhere to the definition set forth in 22 U.S.C.S. section 2656f(d) providing, "(2) the term 'terrorism' means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents; and (3) the term 'terrorist group' means any group practicing, or which has significant subgroups which practice, international terrorism."³³ In addition to

27. This requirement of a violent or dangerous act would rule out all non-violent forms of terrorism. One can only surmise that this language is reflective of a drafters' intent to focus on the life-threatening forms of terrorism as opposed to forms meant only to interrupt transactional relations.

28. S. Rep. No. 102-342, at 45 (1992). This bill opens the court to any U.S. national who has been a victim of international terrorism and has suffered injuries to his person, property, or business. *Id.*

29. See *infra* text accompanying note 31 (indicating that some government agencies have chosen other definitions of terrorism to which they adhere). Note that in the United States, each individual state may promulgate its own definition of terrorism as its state legislature sees fit.

30. FBI, *supra* note 11. The FBI further divides terrorist activities into three categories:

A terrorist incident is a violent act or an act dangerous to human life, in violation of the criminal laws of the U.S., or of any state, to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives. A suspected terrorist incident is a potential act of terrorism for which responsibility cannot be attributed to a known or suspected group. A terrorism prevention is a documented instance in which a violent act by a known or suspected terrorist group or individual with the means and a proven propensity for violence is successfully interdicted through investigative activity.

Id.

31. This additional requirement serves to further narrow the variety of acts that could wrongly be considered as terrorism. By adding this requirement, one can rule out a number of violent, intimidating acts that have no greater purpose, such as those of the "neighborhood bully" described above.

32. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM (2001). Arguably, this requirement would allow for attacks not only on civilians, but also military personnel who are not engaged in combat to be considered terroristic. The State Department has limited the term "noncombatant" to civilians, and military personnel who at the time of the incident, are unarmed and/or not on duty. The department does not elaborate as to whether attacks on unarmed, off duty military personnel by a rival country in a time of declared war would be considered terrorism, or simply acts of war. *Id.*

33. 22 U.S.C.S. § 2656f(d) (2003).

the above definitions, the United States is subject to a number of international treaties directed at terrorism and terrorist related acts.³⁴

The international community has also been unable to agree on a comprehensive definition of terrorism. The United Nations has offered no formal definition, but in a 1999 resolution stated that:

[C]riminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.³⁵

The United Nations has also formed and adheres to twelve conventions and protocols directed at different related acts and forms of terrorism.³⁶ One source of difficulty in providing a comprehensive U.N. definition is summed up in the classic saying, "One man's terrorist is another man's freedom fighter."³⁷ U.N. members such as Libya and Iraq continue to argue for distinction between acts of terrorism, and the justifiable acts of a people's fight for independence.³⁸ Thus, the

34. See *infra* note 36 (listing U.N. international conventions and treaties relating to terrorism). The United States is a party to the twelve major U.N. international conventions and treaties relating to terrorism listed in note 36. *Id.*

35. *Measures to Eliminate International Terrorism*, G.A. Res. 210, U.N. GAOR, 51st Sess., at <http://www.un.org/documents/ga/res/51/a51r210.htm> (1996). While no official definition has been created, the language from this resolution serves as a sufficient yardstick against which the United Nations broadly measures terrorist acts. This resolution urges member states to "strengthen international cooperation" in fighting international terrorism calling for the building of alliances and the sharing of information regarding terrorism. The resolution also calls for member states to recognize, prepare for, counteract, and investigate terrorist attacks within their boundaries, and to continue to refrain from supporting terrorist activity. *Id.*

36. UNITED NATIONS FOUNDATION, *THE TWELVE MAJOR CONVENTIONS AND PROTOCOLS*, available at <http://www.unfoundation.org/programs/pshr/terrorism/documents/actions.htm> (last visited Mar. 3, 2004). The twelve major U.N. conventions and protocols on terrorism are: The 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft; The 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft; The 1971 Montreal Convention for the Suppression of Unlawful Acts Against Safety of Civil Aviation; The 1973 Convention on the Prevention of Crimes Against Internationally Protected Persons; The 1979 International Convention Against the Taking of Hostages; The 1980 Convention on the Physical Protection of Nuclear Material; The 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation; The 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation; The 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf; The 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection; The 1997 International Convention for the Suppression of Terrorist Bombing; and The International Convention for the Suppression of the Financing of Terrorism. *Id.*

37. A recognized state would surely recognize acts of violence meant to unsettle or remove the existing government as terrorist acts. However, if a people feel they have not consented to the control of their existing government, for whatever reason, they would not treat acts of violence meant to unseat their current government as terrorism. Rather, the non-consenting people may treat such acts as justifiable, rightful attempts to assert their freedom. These conflicting views could easily be simultaneously held in one state, like the one discussed above, let alone across the 191 states represented in the United Nations.

38. See Aaron J. Noteboom, *Terrorism: I Know It When I See It*, 81 OR. L. REV. 553, 565 (2002) (discussing the merits of middle-eastern states' views on the definition of terrorism). Terrorism affects the

divergent views of Eastern and Western states on terrorism may prevent the United Nations from ever reaching an all-inclusive definition.

The European Union has adopted language requiring its member states to ensure that a laundry list of acts, committed with the goal of intimidation of a population, that influence government actions, or the destruction of the societal structures of a country "shall be deemed to be terrorist offences."³⁹ The list of acts includes acts of violence, destruction of government facilities and infrastructure, hijacking, illegal uses of weapons, release of dangerous substances, and causing fires, floods, or explosions. The European Union language also adds an offence relating to the interference with the supply of water, power, and other natural resources in an attempt to endanger human life.⁴⁰ And finally, a threat to commit any of the above listed offences would constitute an offence in itself.⁴¹

Academics and experts have also wrestled with the inherent problems in creating a suitable definition for terrorism. The criminal definition of terrorist activity has sparked endless debate and presents a common problem in criminology.⁴² Brent Smith, author of *Terrorism in America*, noted "scholars have defined, refined, and redefined terrorism to accommodate personal preferences regarding what should or should not be labeled terroristic."⁴³ Each work published on the subject of terrorism appears to compound the ambiguity of the subject rather than offer any additional clarity.⁴⁴ In his essay *Enemies of Mankind*, Burton M. Leiser describes terrorism as "designed to create an atmosphere of despair or fear, and shake the faith of citizens in their government."⁴⁵ Terrorists engage in arbitrary and selective acts of violence with a total lack of concern for legal and moral

world over and any definition reached must not favor any group of states. There are times when an oppressive governmental regime must be overthrown. To be certain, the right to self-determination is recognized in both the U.N. Charter, and the Universal Declaration of Human Rights. *Id.*

39. COUNCIL OF THE EUROPEAN UNION, COUNCIL FRAMEWORK DECISION OF JUNE 13TH 2002 ON COMBATING TERRORISM, at <http://www.sisde.it/sito/Rivista24.nsf/ServNavig/20> (last visited Feb. 22, 2004) [hereinafter EUROPEAN UNION]. The effect of this definition is to make unlawful each of the various acts in which the drafters felt that terrorism takes form. While this act sufficiently details and defines a wide variety of terrorist activities, the act, by its language, cannot be applied to any offense not specifically listed. This could leave a number of acts, not thought of by the drafters, to be unpunishable under laws of terrorism. The act also does not specify a special set of penalties or punishments for those that defy the laws it creates. Presumably, the punishment for breaking each of the laws is left to be determined by each individual member state. *Id.*

40. This is the first of the definitions encountered which specifically mentions interference with natural resources as a kind of terrorism. Of course, the interference must be brought about to endanger human life to fit the definition. Thus, we have yet to examine a definition that attempts to include forms of terrorism that present no physical danger to society.

41. EUROPEAN UNION, *supra* note 39, art. 1(1)(i).

42. BRENT L. SMITH, *TERRORISM IN AMERICA, PIPE BOMBS AND PIPE DREAMS* 5 (1994). "While many criminologists accept the government's legal definitions of crimes (as well as the statistics generated by such definitions), others contend that the study of crime must include, for example, violations of human rights, racism, and other behaviors not explicitly defined as criminal in the legal codes." *Id.*

43. *Id.*

44. *Id.*

45. Burton M. Leiser, *Enemies of Mankind, in TERRORISM: HOW THE WEST CAN WIN* 155 (1986).

norms, all the while claiming exemption from these norms.⁴⁶ Terrorists frequently engage precisely in those acts that have been declared as illegal even in wartime.⁴⁷

Walter Laqueur, Co-Chair of the International Research Council, has written two books on the subject: *Terrorism* and *The New Terrorism*. In his book *Terrorism*, Laqueur wrote, "I have commented on the difficulties involved in agreeing on a comprehensive definition of terrorism. Such a definition does not exist nor will it be found in the foreseeable future."⁴⁸ According to Laqueur, in recent times the word terrorism has become almost meaningless due to the frequency and variety of senses in which it has been used.⁴⁹ He attributes the difficulty of interpreting terrorism in its "unexpected, shocking, and outrageous character."⁵⁰ "The characteristic features of terrorism are anonymity and the violation of established norms."⁵¹ He goes on to say that the interpretation of terrorism is difficult because over the last century the character of terrorism has changed greatly in its methods, its goals, and the character of the persons engaged in it.⁵² Terrorism is not an ideology, but an "insurrectional strategy that can be used by people of very different political conventions."⁵³

In *Terrorism: How the West Can Win*, Benjamin Netanyahu writes that terrorism "is not a sporadic phenomenon born of social misery and frustration, [but] it is rooted in the political ambitions and designs of expansionist states and the groups that serve them."⁵⁴ A distinct aspect of terrorist acts is that they are targeted at persons who have no relation to the supposed grievance the terrorist seeks to address.⁵⁵ The terrorist chooses innocent targets specifically because of their innocence.⁵⁶ According to Netanyahu, terrorism is different from acts of war

46. *Id.* Terrorists are convinced that the effects their actions have upon innocent targets are justified by the cause they support.

One can thus distinguish acts which should be properly classified as terrorism from other types of violence. For example, people who blow up schoolchildren, shoppers, and worshippers, or hijack and blow up civilian airliners, or gun down tourists, moviegoers, and athletes, are clearly terrorists. In contrast, how ever much one disapproves of the objectives of a revolutionary or subversive organization, it should not be called terroristic if it confines its targets to military, police, and government personnel."

Id.

47. *Id.* at 156. During times of war, non-combatants may not be attacked, and the torture of prisoners and taking hostages is forbidden. *Id.*

48. WALTER LAQUEUR, *TERRORISM* 5 (1977).

49. *Id.* at 6. Laqueur likens the term "terrorism" to the term "guerilla," which has been used so as to cover almost any act of violence including those with no political affiliation. *Id.*

50. *Id.* at 3.

51. *Id.*

52. *Id.* at 4.

53. *Id.*

54. Benjamin Netanyahu, in *TERRORISM: HOW THE WEST CAN WIN* 7 (1986). "Without the support of such states, international terrorism would be impossible." *Id.*

55. *Id.* at 8.

56. *Id.* at 9.

in which innocent civilians are killed because terrorism involves the "willful and calculated choice of innocents as targets."⁵⁷ His formal definition is as follows: "Terrorism is the deliberate and systematic murder, maiming, and menacing of the innocent to inspire fear for political ends."⁵⁸ The key to this definition are the words deliberate, systematic, and innocent.⁵⁹

This author has written before on the inherent difficulties of formulating a legal definition of terrorism.⁶⁰ Needless to say, the above definitions are well thought out and are the result of exhaustive research of the referenced authors. However, this author would offer the following as a reference point for defining the word. Terrorism is: "Violent acts, or threats thereof, against innocents in order to further political or ideological beliefs." This definition is at its core succinct, and yet at the same time broad enough without being all-encompassing.

III. A HYPOTHETICAL

In the pre-September 11th World Trade Center, resides Tech Chef Co., an American software company. Tech Chef Co. has developed a prototype of a highly specialized cooking software, with the intent to distribute the software in the U.S. and abroad. This software product, The Tech Chef™, creates a new kitchen management system that allows orders to be transmitted to and from the kitchen more efficiently, thus increasing restaurant profitability. At this juncture, the product is virtually complete; however it is necessary to have optimizing

57. *Id.* at 9.

58. *Id.* (emphasis added).

59. *Id.* "The word 'deliberate' distinguishes terrorist victims from the accidental civilian casualties in every war; the word 'systematic' indicates that terrorism is not an aberration but a methodical campaign of repeated outrages." *Id.*

60. See Mark B. Baker, *The Western European Legal Response to Terrorism*, 13 BROOK. J. INT'L L. 1 (1987). There this author wrote, "if the responsive legal machinery is to be triggered by terrorist activity, the parameters of that activity must be drawn as clearly as possible. While most scholars share perceptions of what the term 'terrorism' represents, they also disagree as to its scope and meaning." The author found one useful definition formulated by Frielander: "Terrorism can be defined as the use of force or the threat of force directed against innocent third parties for primarily ideological, financial, or psychological purposes." 3 R. FRIEDLANDER, *TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL* 1 (1981). This definition emphasizes the most common and important factors of terrorism: indiscriminate nature and violent means. See also Mark B. Baker, *The South American Legal Response to Terrorism*, 3 B.U. INT'L L.J. 69 (1984). There this author explained: "There are a number of technical barriers impeding the formulation of a useful definition of terrorism. Indeed, the concept itself has been criticized as being imprecise, ambiguous and serving "no operative legal purpose." The author found the following description as a relating, but not an adequate starting point:

International terrorism involves the threat or use of violence for political purposes. Such violence may be directed against governments or against innocent individuals having no connection to the grievance motivating act[s] of violence. International terrorism operations are often launched by relatively small groups, transcend national boundaries in many instances and are targeted against a wider group than the immediate victims. In a larger sense, international terrorism is directed against the existing system of international order.

Id.

algorithms imbedded by its inventor Bob Smith, the CTO of Tech Chef Co. It is widely known that French chefs are among the best in the world, however, they lack the business acumen to produce food efficiently. Due to these factors, Tech Chef Co. feels that their new software is a perfect fit for French kitchens. Franco Tex S.A., a public corporation based in Vichy, France, has contracted with Tech Chef Co. to distribute the new software in France. As a distributor, Franco Tex S.A. will order, pay for, and take title of the goods it distributes.⁶¹ As the news of the new software quickly spread, Franco Tex S.A. has already taken 800 orders for The Tech Chef™. These orders, along with arrangements for payment, have been passed along to Tech Chef Co. to be filled and shipped by September 20, 2001.

The day is September 11, 2001. An unexpected terrorist attack is launched against the United States. As the planes strike the World Trade Center towers, Tech Chef Co.'s offices are destroyed along with its entire inventory. A number of employees are missing and presumed dead. The software will have to be completely rebuilt, along with the rest of the company. In the late afternoon of September 11th, while having an aperitif in a local bistro and watching CNN worldwide, Mr. Piastra, CEO of Franco Tex S.A., is horrified by the unfolding events. As his emotions subside, he becomes aware of the effect the attack could have on his business and his customers. The next day, Mr. Piastra e-mails Tech Chef Co. hoping to get answers regarding their functionability. A week later, Mr. Piastra receives the following response:

Sept. 19, 2001

My Dear Monsieur Piastra,

Please excuse my delay in responding to your e-mail dated September 12, 2002. As you are aware, the tragic events of September 11th have caused great turmoil for this company and this country. I am sorry to report we lost approximately half of our staff and most of our hardware and software in the attack. Bob Smith, our CTO whom you have worked with for the last eight months, was one of the victims. On the business front, I regret to report that our product has been completely wiped out and therefore none of the goods that you have ordered for the September 20th delivery can be shipped. In fact, as we assess our losses, it is apparent that we may have to recreate The Tech Chef™ software from scratch. I have, as you can understand, virtually no idea how long this will take, and therefore would not speculate as to a future delivery date. I

61. In general, as stated in the text, a distributor takes title to the goods and may not bind its principal. However, a sales agent would not take title and could conceivably bind its principal. Although not the subject of this paper, the author urges the reader to be cognizant of these differences as they may be enormously important. Further, distributors especially may be impacted by a well developed set of laws, especially in Europe. This often comes at great surprise to U.S. entities.

know this will affect your company and your customers greatly, especially since The Tech Chef™ software is the only product that can fulfill the needs of your clientele. I sincerely wish that I could reimburse your company for any financial losses caused by our inability to deliver, but unfortunately, the disaster has crippled Tech Chef Co. not only emotionally and physically, but also financially. Truthfully Sir, I am at a complete loss and await your reply.

Mr. Hamilton Berger, CEO Chef Tech Co.

The legal questions which are posed herein are cogent and worthy of inquiry. What are the rights and responsibilities of parties when an unanticipated terrorist attack occurs which prevents performance? More specifically, what will happen if Franco Tex S.A. sues Tech Chef Co. for breach of contract? What are the legal consequences under principles of common law, the American Uniform Commercial Code and International law?

IV. THE COMMON LAW HISTORY OF IMPOSSIBILITY

The common law courts have been slow to accept the doctrine of impossibility as an argument for excuse from a contractual obligation.⁶² The time-honored doctrine of "absolute contract" provides that the undertaking in a contract is total and an inevitable accident will not release the debtor because he could have guarded against the contingency in the contract.⁶³ For example, in *Paradine v. Jane*, a court refused to excuse a lessee from paying rent even though he had been forced off the land he had rented.⁶⁴ The court ruled that his being ousted from the land in question had no effect on his ability to pay his rent.⁶⁵ Although the common law courts had treated parties arguing impossibility harshly, they had allowed for three exceptions to the ruling that impossibility will not excuse contractual obligations. The courts recognized supervening illegality, death or disability, and destruction as situations in which a party could be discharged.⁶⁶

62. See HUGH BEALE, ARTHUR HARTKAMP, HEIN KOTZ & DENIS TALLON, CASEBOOKS ON THE COMMON LAW OF EUROPE: CASES, MATERIALS AND TEXT ON CONTRACTS 608 (Hart Publishing 2002) (explaining that prior to *Taylor v. Caldwell*, 3 Best & Smith, 826 (1863), the courts were unwilling to excuse performance if there was any possibility the parties could have provided for that unexpected contingency). *Taylor v. Caldwell* mitigated the harshness of this rule. *Id.*

63. *Id.* "The undertaking by the contractual debtor is total and an 'accident by inevitable necessity' cannot release him because he could have guarded against it in the contract." *Id.*

64. *Paradine v. Jane*, 82 ENG. REP. 897, 897 (1647). "[W]hen the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." *Id.*

65. *See id.*

66. Restatement (Second) of Contracts § 262 (1978). Death or Incapacity of Person Necessary for Performance. *Id.* at § 262. Destruction, Deterioration or Failure to Come into Existence of Thing Necessary for Performance. *Id.* at § 263. Prevention by Governmental Regulation or Order. *Id.* at § 264.

In *Abbot of Westminster v. Clerke*, the Court of King's Bench ruled that if a seller is to deliver wheat on a given day in another country, and prior to the date of delivery such performance is made statutorily illegal, the seller is excused from his contractual obligation.⁶⁷ Later, the Supreme Court of the United States held that if contractual performance is prohibited or made impossible by governmental authority, a party may be excused from the contract.⁶⁸ "The fact that the party can still perform if willing to break the law and take the consequences does not prevent discharge . . . as long as the party that claims discharge acts in good faith"⁶⁹ It is not sufficient that the government act makes performance more difficult, the act must affect the contractual performance in a way the party cannot both comply with the act, and perform the contract.⁷⁰

The second exception to the strict common law view was that no action for breach of contract may arise if a promisor dies prior to performing. It was later held that when performance of a contract is contingent upon a certain person's being, and that person dies or suffers incapacity before performance is complete, the contractual duty is excused.⁷¹ A court should look to the language of the contract to determine if a specific person is a necessity. If the contract is silent on the issue, a court must look to the circumstances surrounding the contract to determine if performance was contingent upon the work of a certain individual.⁷² If it is found that a breaching party could delegate the contractual duty to another, the party's death (or the death of another party who was to perform) will not be grounds for discharge.⁷³

67. *Abbot of Westminster v. Clerke*, 73 Eng. Rep. 59, 63 (K.B. 1536).

68. *Louisville & Nat'l R.R. Co. v. Mottley*, 219 U.S. 467 (1911) (holding that an agreement by the defendant to issue plaintiffs free railroad passes for life was excused when the act of June 29, 1906, regulating commerce and enlarging the powers of the Interstate Commerce Commission, took effect making performance of the agreement illegal).

69. 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACT § 9.5 (2d ed. 1998). Also, it is important to note that the invalidity of the governmental action which prohibits performance does not prevent excuse so long as the breaching party acts in good faith upon the action.

70. *Id.*

71. *Arlington Hotel Co. v. Rector*, 186 S.W. 622, 627 (1916).

It is a well settled principle in the interpretation of contracts that where parties contract for a service that is purely personal, or with reference to the continued existence of some particular thing constituting the subject matter of the contract, if the person dies or the thing ceases to exist, then the performance of the contract will be excused because it is impossible.

Id. See also *O'Neal v. Colton Consol. School Dist.*, 557 P.2d 11 (1976) (holding that a teacher's deteriorating eyesight rendered him incapable of performing the requirements of his employment contract, and thus discharged the contract due to impossibility of performance).

72. *Cazares v. Saenz*, 208 Cal. App. 3d 279 (1989) (discharging the contractual duties of a law firm where it was contemplated by the parties that a certain attorney, who was later rendered incapable of performing, would perform substantial services in fulfilling the contract).

73. FARNSWORTH, *supra* note 69, at 598.

The third common law exception for excuse of the contract due to impossibility was the doctrine of destruction. In *Williams v. Lloyd*, a bailee of a horse was excused from his duty to return when the horse died at no fault of the bailee.⁷⁴ In another case, *Taylor v. Caldwell*, the owner of a music hall (Caldwell) had contracted to rent its use for four days of performances.⁷⁵ Prior to the commencement of the contract, the music hall burned down. The court held that the parties had contracted on the assumption that the music hall would be in existence at the time for performance.⁷⁶ Caldwell was discharged from his contractual duties with no damages awarded for breach.⁷⁷ If the performance of a contract is contingent upon the existence of a certain thing, the destruction of that thing will excuse a party's performance.⁷⁸

V. THE UNIFORM COMMERCIAL CODE

The doctrine of impossibility has been expanded over the years to include a broader spectrum of intervening circumstances that could give rise to contractual discharge. One expansion of the doctrine includes commercial impracticability which first came into existence in 1916.⁷⁹ Governing bodies have set out statutory guidelines concerning such cases that codify and expand on existing common law, and provide tests for the validity of impossibility-like defenses.

74. *Williams v. Lloyd*, (1629) Sir Wm. Jones, 179; 82 Eng. Rep. 95 (K.B. 1629).

75. *Taylor v. Caldwell*, 3 Best & Smith, 826, 839 (K.B. 1863).

This case "mitigates the rigour of the old principle by establishing the rule that, in contracts whose performance depends on the continued existence of a person (contracts *intuitu personae*) or of a thing, there is an implied condition that the impossibility of performance resulting from the disappearance of the person or thing releases the debtor.

Beale, *supra* note 62, at 611.

76. *Taylor*, 3 Best & Smith at 826.

77. *Id.*

78. "If the existence of a specific thing is necessary for the performance of a duty, its failure to come into existence, destruction, or such deterioration as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made." Restatement (Second) of Contracts § 263 (1978).

79. See *Mineral Park Land Co. v. Howard*, 156 P. 458, 460 (Cal. 1916) (holding that "a thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost").

As our hypothetical contract involves the sale of goods, the Uniform Commercial Code (“UCC”) may apply.⁸⁰ UCC section 2-615 states in part:

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:⁸¹ (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.⁸²

Courts have said that “[t]hree conditions must be present before a seller is excused from performance under the UCC: (1) a contingency must occur, (2) performance must thereby be made ‘impracticable’ and (3) the nonoccurrence of the contingency must have been a basic assumption on which the contract was made.”⁸³ A party asserting an impracticability defense has the burden of proof on

80. In contract disputes not involving the sale of goods, a test similar to the UCC for the defense of impracticability has arisen. *See* Restatement (Second) of Contracts § 261 (1978):

Where after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Cases in which impracticability is argued are decided on several factors including:

[T]he degree of hardship caused by the supervening event, the foreseeability of the event, the language of the contract possibly allocating such risks, the relative fault of the parties in causing the event or failing to anticipate it, and any other circumstances indicating that one party should suffer the loss rather than the other.

See 14 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 74.2 (Joseph M. Perillo ed., Matthew Bender rev. ed., 2001).

81. U.C.C. § 2-614 (2001). “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.” *Id.*

82. *Id.* at § 2-615. Excuse by Failure of Presupposed Conditions. *Id.*

(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 no then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable. *Id.*

(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 to the buyer. *Id.*

83. *Luria Bros. & Co., Inc. v. Piolet Bros. Scrap Iron & Metal, Inc.*, 600 F.2d 103, 111 (7th Cir. 1979). *Luria Brothers* involved a dispute over a contract arranging for the sale of scrap metal. The seller (Piolet) breached the contract when his supplier of scrap metal failed to deliver. Seller asserted a U.C.C. § 2-615 defense arguing that both parties to the contract had assumed the failed supplier of scrap metal would be the sole supplier. The court held that the defendant’s contractual performance would not be excused due to a number of factors. There was no offer of direct evidence that the contingency (the failure of delivery) occurred.

these three requirements.⁸⁴ However, the UCC does not provide a comprehensive list of contingencies that would warrant excuse due to commercial impracticability.⁸⁵ Instead, a court should look to the specific circumstances surrounding the frustrating occurrence in each case.

The text of the UCC sets out two requirements that must be fulfilled in order to assert an impracticability defense pursuant to section 2-615. First, the defaulting party must not have assumed any greater obligation than imposed by section 2-615 which would allocate the risk of the contingency's occurrence to her. To determine whether a party assumed obligations additional to those in section 2-615, a court will look to both the language of the contract, and the circumstances surrounding contractual negotiations.⁸⁶ For example, in *Gold Kist, Inc. v. Stokes*, a farmer contracted with a corporation to sell specified amounts of soybeans. The contract included a clause providing that the producer would pay a sum of liquidated damages in the event "the producer is unable to deliver all or any part of the above quantity as contracted solely because of reasons beyond the producer's control, including an Act of God."⁸⁷ Before delivery, a fire destroyed the farmer's storage bin holding his soybean harvest, leaving him unable to deliver the goods on time. The court ruled that a fire destroying goods to be delivered may very well be a contingency, the non-occurrence of which was assumed by the parties when the contract was made.⁸⁸ However, "[a]n affirmative provision in the contract that the seller agrees to pay stipulated damages upon the occurrence of an event making performance impossible necessarily implies that a breach of contract under those conditions is conceded, and places upon the seller a greater obligation than might otherwise exist."⁸⁹

The court also cited to the Official Comment to the U.C.C. which stated that no excuse under U.C.C. § 2-615 would be available unless the seller had taken "all due measures to ensure that his source would not fail." Also, the defendant failed to deliver substitute goods, and showed no evidence of a lack of sufficient substitute scrap metal to fulfill the contract. *Id.*

84. *Id.* at 111, 112. (finding defendant Piolet "failed to introduce evidence sufficient to justify a jury instruction on commercial impracticability").

85. U.C.C. § 2-615 (2004). Official Comment 2 states that the section "deliberately refrains" from creating an exhaustive list of contingencies which would give rise to a commercial impracticability defense.

86. *Freidco of Wilmington, Ltd. v. Farmers Bank of Del.*, 529 F. Supp. 822 (D. Del. 1981).

Finally, the party claiming discharge must show that it did not expressly or impliedly agree to perform in spite of impracticability that would otherwise justify his nonperformance. Both the U.C.C. and the Restatement provide that contracting parties may override or control the application of the "discharge by supervening impracticability" rule if they agree to do so. Thus, a court in a case of alleged commercial impracticability must examine the agreement of the parties and the circumstances surrounding their negotiations in order to determine if they contemplated that the commercial risk involved would be borne by the party claiming discharge, despite the impracticability of performance.

Id.

87. *Gold Kist*, 226 S.E.2d 268 (Ga. Ct. App. 1976).

88. *Id.* at 270.

89. *Id.*

Courts may also look at a seller's conduct that implies a greater obligation has been assumed.⁹⁰ In *United States v. Wegematic Corp.*, an electronics manufacturer contracted with the government to create a general computing system.⁹¹ In winning the bid for the contract, Wegematic advertised their system as "a truly revolutionary system utilizing all of the latest technical advances."⁹² Wegematic delayed the nine-month delivery deadline twice before finally communicating to the government that engineering difficulties had made it impracticable to create and deliver the computing system. The court ruled that there was "no basis for thinking that when an electronics system is promoted by its manufacturer as a revolutionary breakthrough, the risk of the revolution's occurrence falls on the purchaser; the reasonable supposition is that it has already occurred or, at least, that the manufacturer is assuring the purchaser that it will be found to have when the machine is assembled."⁹³ The court went on to say that ruling for the seller would make a manufacturer "free to express what are only aspirations and gamble on mere probabilities of fulfillment without any risk of liability."⁹⁴

The second requirement included in the text of section 2-615 is a condition that the seller must seasonably notify the buyer if there will be a delay of, or failure to, deliver.⁹⁵ Seasonable notification has been construed differently on the basis of the specific facts of each case.⁹⁶ "Whether a seller's communication to a buyer constitutes seasonable notification will depend upon various factors, including whether the buyer had actual notice, the specific content of the transmission, and whether notice was delivered in a timely fashion allowing the buyer opportunity to make other arrangements."⁹⁷

90. U.C.C. § 2-615 (2004) (Official Comment 8).

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 and usage alike. 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 circumstances.

Id.

91. *United States v. Wegematic Corp.*, 360 F.2d 674 (2d Cir. 1966).

92. *Id.* at 675.

93. *Id.* at 676.

94. *Id.* at 676-677.

95. U.C.C. § 2-615(c) (2004). "The seller must notify the buyer seasonably that there will be delay or non-delivery . . ." *Id.*

96. *Bunge Corp. v. Miller*, 381 F. Supp. 176 (W.D. Tenn. 1974) (holding that where seller did not notify buyer of delay or non-delivery for a contract due on November 30, 1972, until February 20, 1973, the seller could not assert a §2-615 defense as he had not given the buyer seasonable notification); *Cliffstar Corp. v. Riverbend Products, Inc.*, 750 F. Supp. 81 (W.D.N.Y. 1990) A seller of tomato paste faced a shortage in shipments from its suppliers. The court held that a final allocation notice sent on November 21, 1988, following an initial shortage notice sent on September 27, 1988, constituted seasonable notification. *Id.*

97. CORBIN, *supra* note 80, at 60.

As described above, section 2-615 does not include an exhaustive list of contingencies that would bring about a commercial impracticability defense. A commonality of contingencies that has given rise to a section 2-615 defense is their relative unforeseeability at the time the contractual negotiations took place.⁹⁸ If the contingency was foreseeable, parties may provide for it in the contract. Thus, if a party agrees to perform despite this contingency, impracticability may not be used as a defense for non-performance. However, a strict requirement of unforeseeability to support a commercial impracticability defense would serve to nullify the doctrine as anything and everything could conceivably be foreseen.⁹⁹ As stated succinctly by the Second Circuit, to require absolute unforeseeability would:

practically destroy the doctrine of supervening impossibility, notwithstanding its present wide and apparently growing popularity. Certainly, the death of a promisor, the burning of a ship, the requisitioning of a merchant marine on the outbreak of a war could and perhaps should, be foreseen. In fact, the more common expression of the rule appears to be in terms which tend to state the burden the other way, e.g., that "the duty of the promisor is discharged, unless a contrary intention has been manifested" or "in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty."¹⁰⁰

Returning to our hypothetical, given the text of UCC section 2-615, and the surrounding case law, it appears that if decided under U.S. law Tech Chef Co. should be excused from its contractual obligations to Franco Tex S. A. The three conditions for a section 2-615 commercial impracticability defense are present. First, a contingency has occurred with the attack on the World Trade Center. Second, performance of the contract has been made impracticable due to the contingency because Tech Chef Co. has lost half of its workforce including its CTO, its principle place of business, all equipment, and virtually all existing inventory, including the software on which the contract was based.¹⁰¹ Third, the nonoccurrence of the contingency was a basic assumption on which the contract

98. See *Alimenta (U.S.A.), Inc. v. Cargill, Inc.*, 861 F.2d 650 (11th Cir. 1988) (holding that an unprecedented shortage in the peanut crop due to drought was unforeseeable); see also *Interpetrol Bermuda, Ltd. v. Kaiser Aluminum Int'l Corp.*, 719 F.2d 992 (9th Cir. 1983) (holding section 2-615 applies only when the events that made the performance of the contract impracticable were unforeseen at the time the contract was executed); see also *Sabine Corp. v. ONG W., Inc.*, 725 F. Supp. 1157 (W.D. Okla. 1989) (stating, "A judicially-required third element for relief on the basis of commercial impracticability is that the occurrence making performance impracticable must have been unforeseeable."); see also *Mitchell Canneries, Inc. v. United States*, 111 Ct. Cl. 228 (1948) (holding the principal question in this case is whether or not the failure to complete the performance of the contract was due to an unforeseeable cause without fault or negligence of the contractor).

99. *Opera Co. of Boston, Inc. v. Wolf Trap Found. for Performing Arts*, 817 F.2d 1094, 1100-1101 (4th Cir. 1987) (holding that the occurrence giving rise to an impracticability defense must be unexpected, but doesn't necessarily have to have been unforeseeable).

100. *L.N. Jackson & Co. v. Royal Norwegian Gov't*, 177 F.2d 694, 699 (2d Cir. 1949).

101. See also U.C.C. § 2-613 (2004) (covering loss to identified goods).

was made because presumably, neither Tech Chef Co., nor Franco Tex S.A. would have entered the contract if they assumed otherwise.

Additionally, Tech Chef Co. has met the two textual requirements of section 2-615. Tech Chef Co. has not expressly or impliedly taken on any additional obligations not imposed by section 2-615. Based on the severity of the attack, and the relatively prompt response which arrived prior to the agreed upon delivery date, Tech Chef Co. has probably given Franco Tex S.A. seasonable notification of its non-delivery. As to the foreseeability of the attack, an area to which many courts look, Tech Chef Co. might fail a strict requirement of unforeseeability. In a world in which terrorist threats have become a global and real threat to governments, businesses, and individuals alike, one might say that contracting parties could very easily foresee the possibility of a terrorist attack affecting their infrastructure, employees, suppliers, and means of delivery. However, as noted above, a strict requirement of unforeseeability would drive a stake through the heart of the doctrine of commercial impracticability. Although terrorist attacks have become increasingly commonplace, their frequency and predictability have not risen to a level at which they could be reasonably and accurately foreseen. It is arguably unreasonable to impose hardship on contracting parties who have not expressly or impliedly negotiated on the subject of terrorist attacks.

VI. THE FRENCH SYSTEM AND THE CODE CIVIL

The French system interprets the concept of impossibility narrowly. If the impossibility is total, the debtor is relieved of all contractual duties and any damages resulting from non-performance.¹⁰² This system is in line with the common law of England and most of the United States in holding that an accidental destruction of a thing, caused by something other than the fault of the obligor, excuses the obligation to convey that thing in an executory contract.¹⁰³ Anything less than total impossibility however, does not excuse the debtor from the contract.¹⁰⁴ The parties are expected to perform their duties under the contract even when performance would be ruinous to them.¹⁰⁵ The French system refuses to give the judge any power to alter the contract upon equitable consideration.¹⁰⁶ If the hypothetical were to be based on French law, the *Code Civil* would apply.

102. BEALE, *supra* note 62, at 592.

103. *Viterbo v. Friedlander*, 120 U.S. 707, 712 (1887).

104. BEALE, *supra* note 62, at 592.

105. *Id.*

106. *Id.* In France, a contract is seen as binding "law" between the parties. It is not for the courts to intervene, but for the parties to guard against risks which make performance impracticable by inserting a *force majeure* clause into the contract. *Id.*

The applicable articles of the *Code Civil* are articles 1147 and 1148 which provide:

Article 1147: The debtor is liable, where appropriate, to pay damages, either because he has not performed an obligation or he was late in performing, in all cases in which cannot prove the non-performance resulted from a *cause étrangère* for which he was not responsible and also that there is no bad faith on his part.

Article 1148: There will be no damages when as a result of *force majeure* or *cas fortuit*¹⁰⁷ the debtor has been prevented from delivering or doing that which he was obliged to deliver or do or has done that which is forbidden.

For an event to constitute *force majeure* in France, case law has traditionally required it to be irresistible, unforeseeable, and external to the party seeking excuse from the contract.¹⁰⁸ The foreseeability of a contingency is not a substantive requirement, but instead becomes a condition of admissibility. An event cannot be avoided if it was not foreseen. However, some foreseeable events may constitute *force majeure* if the event is inevitable or impossible to resist. If a party foresees an inevitable event, he must take precautions "necessitated by its foreseeability."¹⁰⁹

In the hypothetical, Franco Tex S.A. may have a stronger claim in France than in the United States. First, since the software is not completely destroyed, Franco Tex S.A. may argue that it is not impossible for Tech Chef Co. to replace it.¹¹⁰ While forcing the company to rebuild the software from scratch may be ruinous for a small company, this would not excuse performance under French law.¹¹¹ Second, Franco Tex S.A. may be able to argue that the terrorist event was foreseeable and therefore, cannot constitute *force majeure*. Again, we are confronted with the foreseeability question. Was a terrorist attack on the World Trade Center foreseeable to this small company? One would most probably find such foreseeability doubtful. Even if Tech Chef Co. cannot prove that the event

107. See *Viterbo*, 120 U.S. at 727 (defining *cas fortuits* as events which are caused by a force that one cannot resist, or an unforeseen event or accident).

108. BEALE, *supra* note 62, at 594.

109. See *The Saint-Tropez Robbery*, Cass. civ. 1re, 9 March 1994 (holding that "although impossibility to resist the event constitutes in itself a case of *force majeure* where to foresee it does not enable its effects to be averted, the defendant must still have taken all the precautions necessary in order to avoid the event . . ."). While typically, armed robbery would constitute *force majeure* since it is impossible to resist, the armed robbery in this case did not because the *hôtelier* did not carry out all possible precautions to mitigate the chances of robbery. Had he taken all possible precautions, this would have been a case of *force majeure*, even though the event was foreseeable. *Id.*

110. BEALE, *supra* note 62, at 592.

111. *Id.*

was unforeseeable, it can try to show that the attack was inevitable.¹¹² In this scenario, Franco Tex S.A. may be able to assert that while Tech Chef Co. could not have taken precautions to avoid terrorism, the company could have taken precautions to guard against the destruction of the software. In response, Tech Chef Co. can show that the terrorist attack was not resistible¹¹³ by showing that the attack was unavoidable by the ordinary person exercising reasonable care. A normal person in Tech Chef Co.'s position would not be able to resist a terrorist attack. Tech Chef Co. can also show that the attack was external because it had no control over the attack.

Franco Tex S.A. would have a stronger case under the first approach, rather than the second; by showing a court that, while the terrorist attack may have resulted in problematical performance for Tech Chef Co., it is still less than total impossibility.¹¹⁴ The French system has rejected the theory of *imprévision* in civil law.¹¹⁵ As a result, the terrorist attack would not constitute an event excusing Tech Chef Co. from delivering the software.

VII. INTERNATIONAL LAW, EUROPEAN LAW, AND THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS.

The laws regarding impossibility of contractual performance vary greatly from nation to nation.¹¹⁶ Obviously, this creates a situation of uncertainty which is exacerbated by the realities of modern-day international trade and commerce. There have been several efforts to create a uniform set of substantive laws in an attempt to establish legal uniformity among nations. The European Union has created a Commission on European Contract Law to promulgate The Principles of European Contract Law ("PECL").¹¹⁷ These rules are likened to the Restatements written by the American Law Institute in that they are non-binding summarizations of European contract law.¹¹⁸ The PECL address impossibility in

112. *Id.* at 594.

113. *Id.* "Impossibility of resisting the event in itself constitutes *force majeure* where to foresee it does not enable its effects to be averted." *Id.*

114. *Id.* at 591.

115. *Id.* While an *imprévision* is an unforeseen event making performance possible, but under more problematic conditions, *force majeure* prevents any performance. *Imprévision* does excuse performance administrative jurisprudence in France. *Id.*

116. For example, while France takes an all or nothing approach, Germany takes a more flexible interpretation of impossibility, allowing contingencies such as economic impracticability and frustration to excuse performance. The English system falls in the middle. Impossibility is interpreted less narrowly than in France, but English law does not allow courts to change the contract upon a showing of frustration.

117. While these Principles apply to all types of contracts, they are limited to the member states of the European Union.

118. Application of the PECL mainly relies on the parties specifying so in the contract, either implicitly or explicitly. These Principles generally operate as *lex mercatoria* in Europe and serve as the governing law in the European Union in the absence of national contract law. Dionysios P. Flambouras, *The Doctrines of*

two articles. Article 6.111 addresses change in circumstances after the contract is made.¹¹⁹ When a contract becomes arduous due to a change in circumstances, article 6.111 mandates that the parties must either enter into negotiations to amend the contract or terminate it.¹²⁰ The parties may only do this however, if the change of circumstances occurred after the contract was made, if the circumstances could not reasonably be foreseen, and if neither party contracted to bear the risk of the circumstances.¹²¹ Article 6.111 also gives the court the power to amend or terminate the contract if the parties are unable to reach agreement.¹²²

Article 8.108 of the PECL addresses excuse from contractual obligations due to an impediment to performance.¹²³ The article provides an excuse from performance if an impediment existed that was beyond the party's control, could not have been reasonably foreseen at the time the contract was made, and could not have been avoided or overcome.¹²⁴ Temporary impediments will only excuse performance for the duration of the impediment.¹²⁵ Article 8.108 also requires a timely notification to the non-breaching party in the event of an excusable impediment.¹²⁶ However, both articles 6.111 and 8.108 create guidelines (very

Impossibility of Performance and Clausula Rebus Sic Stantibus in the 1980 Convention on Contracts For the International Sale of Goods and the Principles of European Contract Law—A Comparative Analysis, 13 PACE INTL. L. REV. 261, 263 (2001).

119. PRINCIPLES OF EUROPEAN CONTRACT LAW art. 6.111. Change of Circumstances.

120. *Id.* art. 6.111(2).

(2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that: (a) the change of circumstances occurred after the time of conclusion of the contract, (b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, (c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear. *Id.*

121. *Id.* art. 6.111(2) (a), (b), and (c).

122. *Id.* art. 6.111(3).

(3) If the parties fail to reach agreement within a reasonable period, the court may: (a) end the contract at a date and on terms to be determined by the court; or (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances. *Id.*

In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.

123. *Id.* art. 8.108. Excuse Due to an Impediment.

124. *Id.* art. 8.108(1).

(1) A party's non-performance is excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences. *Id.*

125. *Id.* art. 8.108(2).

(2) Where the impediment is only temporary the excuse provided by this Article has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the creditor may treat it as such. *Id.*

126. *Id.* art. 8.108(3).

similar to those in the United States) to follow, but they are not authoritative, nor widely followed.¹²⁷

Perhaps the most universally followed doctrine of contractual impossibility emanates from the United Nations. The United Nations Convention on Contracts for the International Sale of Goods (“CISG”)¹²⁸ was adopted at a 1980 United Nations Diplomatic Conference in Vienna.¹²⁹ Over fifty countries, including the United States, have adopted the CISG since the time of its creation.¹³⁰ The CISG is a multilateral treaty that governs international contractual obligations, and it seems to constitute the international equivalent to the UCC.¹³¹ The CISG will apply to a contract, in the absence of a choice of law provision, when both principle places of business for the contracting parties are in different nations and those nations have adopted the convention.¹³² The CISG also provides conflict of law regulations, which would also allow it to apply to some contracts when only one of the contracting parties is from an adopting CISG nation.¹³³ The United States has taken exception to the conflict of law regulations. Contractual impossibility is addressed in Section IV of CISG article 79. Article 79 provides in part:

- (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
- (2) If the party’s failure is due to the failure by a third person whom he has engaged to perform the whole or part of the contract, that party is exempt from liability if

(3) The non-performing party must ensure that notice of the impediment and of its effect on its ability to perform is received by the other party within a reasonable time after the non-performing party knew or ought to have known of these circumstances. The other party is entitled to damages for any loss resulting from the non-receipt of such notice.

127. The scope of the PECL was intended to be limited to the European Union, so it is unlikely that a non-European court would use the PECL to interpret the contract, especially if the parties have not expressed this to be their intention. Also, as the PECL is not a code, it is not binding on parties unless they have incorporated it into the contract. Flambouras, *supra* note 118, at 288.

128. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/Conf. 97/18 Annex 1 (1980).

129. CORBIN, *supra* note 80, at 74. The United Nations Commission on International Trade Law formed the CISG and participating countries signed it in 1980.

130. *Id.*

131. Tom McNamara, *U.N. Sale of Goods Convention: Finally Coming of Age?*, 32 *COLO. LAW.* 11 (2003).

132. Henry D. Gabriel, *A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code*, 7 *IND. INTL. & COMP. L. REV.* 279 (1997).

133. In the event that the governing conflict of law rules would prefer a country that has adopted the Convention, the CISG would apply. Due to a United States reservation to the conflict of law rules, the CISG may only apply to American businesses when the other contracting party is from a CISG nation as well. Otherwise, courts will apply the UCC. CORBIN, *supra* note 80, at 75.

- (a) he is exempt under the preceding paragraph;
- (b) and the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
- (3) The exemption provided by this article has effect for the period during which the impediment exists.
- (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages.
- (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this CISG.

It is worth noting that the UCC section 2-615 and CISG article 79 differ in several important respects.¹³⁴ Most notably, article 79 provides an excuse for impossibility while the UCC has adopted the less stringent test of commercial impracticability.¹³⁵ The degree of this difference is very much dependent upon the court's interpretation of impracticability. If, for example, a court defines impracticability objectively, where no one would be able to perform the contract, then the degree of difference is minimal. However, if a court defines impracticability as the occurrence of a contingency, the non-occurrence of which is a basic assumption of the contract, more events will fit into the definition, excusing performance in more contracts. The second difference is to whom the defense applies. The CISG applies to both parties whereas the language of section 2-615 would indicate that it is only applicable to sellers of goods.¹³⁶ Third, the instances that could give rise to a CISG article 79 defense are much broader than those of the UCC. The CISG applies to all aspects impeding contractual performance, while the UCC limits its defense to situations involving delay, or non-delivery.¹³⁷ Also, importantly, the CISG allows excuse for "impediments beyond [the

134. Many of these differences arise as a result of countries' differing views on the sanctity of contract. Courts and legislators in all countries enforce the principle that a party shall keep his contract. Contracts are entered into freely and the parties should be able to rely on the expectations which the contract provides. In most European countries, this theory prevails even when performance becomes more burdensome for one of the parties. As mentioned above, many of these countries, such as France, only grant relief when the performance has become impossible. However, this rule is seen as severe and inflexible in many business contexts. As an answer to this, countries such as the United States have adopted a more forgiving standard of impracticability. When the CISG was drafted, compromises between the contracting members' political and legal systems resulted in an impossibility doctrine which is not like any one country's and has arguable gaps. *See generally*, Ole Lando, *Salient Features of the Principles of European Contract Law: A Comparison with the UCC*, 13 PACE INTL. L. REV. 339 (2001).

135. *See* CISG, *supra* note 128, art. 79; U.C.C. § 2-615.

136. *See* CISG, *supra* note 128, art. 79; U.C.C. § 2-615.

137. *See* CISG, *supra* note 128, art. 79; U.C.C. § 2-615.

contracting party's] control."¹³⁸ This seems to be a much more lenient standard than section 2-615's requirement that the "non-occurrence of the event that occurs be a basic assumption on which the contract is based to excuse performance."¹³⁹

To assert an impossibility defense under the CISG, a party must show three things: (1) failure was due to an external impediment beyond the party's control; (2) the impediment was not reasonably foreseeable at the time the contract was made; and (3) both the impediment and its effects were unavoidable.¹⁴⁰ Further, a party seeking a CISG discharge must also have notified the non-breaching party within a reasonable time after learning of the impediment.¹⁴¹

The choice of the word impediment is deliberate and denotes an obstacle to the performance of a contract, as opposed to a mere occurrence making performance impracticable.¹⁴² The impediment may not be solely financial because financial risk is a basic assumption underlying all contracts.¹⁴³ The argued impediment must also be shown to be outside the control of the party seeking CISG relief under article 79. Whether an impediment is outside a party's control should be determined objectively from a reasonable party's view at the time the contract is to be performed.¹⁴⁴ The impediment must also have been unforeseeable to the breaching party at the time the contract was made.¹⁴⁵ This should also be determined from an objective view considering the contract terms, the contract as a whole, and any trade practices.¹⁴⁶ The impediment and its effects must also be shown to have been unavoidable by the party seeking discharge.¹⁴⁷ For good reason, this will necessarily exclude discharge for parties who are culpable for the impediment to their performance.

Whether CISG provides a remedy for anything less than total impossibility is unsettled.¹⁴⁸ CISG provides no express clause governing the effects of hardship

138. See CISG, *supra* note 128, art. 79 (1).

139. See U.C.C. § 2-615 (c).

140. Todd Weitzman, *Validity and Excuse in the U.N. Sales Convention*, 16 J.L. & COM. 265, 283 (1997).

141. CISG, *supra* note 128, art. 79(4).

142. In earlier CISG drafting stages, the majority pushed for the word "circumstances" to be used rather than the word "obstacle" for fear that the latter might apply only to supervening and external events, ignoring situations such as drastic change in economic climate. Later at the Vienna convention "circumstances" was changed to "impediment," which denotes a barrier to contractual performance. "Thus, under the Convention, excuse should apply only to 'impediments' that prevent performance—not to the more wide-ranging 'circumstances' that might make performance merely difficult or unprofitable." See Weitzman, *supra* note 140, at 284 (discussing the adoption of the word "impediment" in CISG article 79 (1)).

143. See Joseph M. Perillo, *Force Majeure and Hardship Under the UNIDROIT Principles of International Commercial Contracts*, 5 TUL. J. INT'L. & COMP. L. 5, 16 (1997) (discussing when an impediment is beyond the party's control under American Law).

144. *Id.*

145. Weitzman, *supra* note 140, at 283.

146. *Id.* at 284-285.

147. *Id.* at 283.

148. See Scott D. Slater, *Overcome By Hardship: The Inapplicability of the UNIDROIT Principles' Hardship Provisions to CISG*, 12 FLA. J. INT'L. L. 231, 254 (1998) (discussing whether or not impediment as discussed in article 79 extends to encompass hardship).

on an international contract. Because of this lack of express clause and since the term "impediment," as used in CISG does not encompass hardship, many courts and scholars feel that this does result in a gap in the Convention.¹⁴⁹

There is dispute, however, on how this gap should be filled. Article 7 of CISG provides:

- (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
- (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity of the law applicable by virtue of the rules of private international law.

Many civil law nations interpret this article as meaning that gaps should be filled using other international principles or guidelines before resorting to national law.¹⁵⁰ Courts, on the other hand, have looked to domestic law when presented with an issue or gap which cannot be resolved using CISG.¹⁵¹ In the case of hardship, however, it is arguable that the gap can be filled by looking at the context of the Convention itself. One general principle on which the Convention is based is the principle favoring performance of a contract when possible.¹⁵² Since by definition, hardship is less than total impossibility, then performance of the contract is still possible when a party is faced with hardship. If a court finds this general principle insufficient, the court is required by article 7 (2) to look to the applicable domestic law.¹⁵³ In most cases, the domestic law will excuse a party facing hardship from its executory performance of the contract.¹⁵⁴ This author contends that only if it is impossible to determine the applicable national law should the interpreter look to other international instruments.

Principles of International Commercial Contracts drafted by the International Institute for the Unification of Private Law ("UNIDROIT") is one such instrument which tries to unify international contract law. UNIDROIT is a set of non-binding principles shared among different legal systems drafted in an effort to reduce uncertainty surrounding contract law.¹⁵⁵ It was prepared by representatives from all of the major legal systems to create a body of general law which is independent of the legal, economic, and political origins of the person involved

149. *Id.* at 255.

150. *Id.* at 248.

151. *Id.* at 251.

152. *Id.* at 257.

153. *Id.* at 258.

154. Such as the U.S.'s law for impracticability. *See generally supra* text accompanying notes 79-102.

155. Dr. Perales Viscasillas, *UNIDROIT Principles of International Commercial Contracts: Sphere of Application and General Provisions*, 13 ARIZ. J. INT'L. & COMP. L. 381, 391 (1996).

in the international transaction.¹⁵⁶ The principles are intended to be applied globally and to meet the needs of international trade relationships, including relationships between less developed countries. Because CISG is binding, it usually takes precedence over the UNIDROIT Principles when the requirements of its application exist. However, parties may express their desire to have the UNIDROIT apply instead.¹⁵⁷ Since these principles are not binding, they are more flexible than CISG and can be revised easily as international trade changes.¹⁵⁸ Also, UNIDROIT may be applied as an alternative set of international rules in a contract between parties not situated in contracting states. Although, there has been general, worldwide acceptance of the Convention, not every country has adopted it. Further, a contract may apply UNIDROIT because the parties have specified as such or because the parties reference to “general principles of law” or the “*lex mercatoria*” in the contract.¹⁵⁹

In sum, many courts will apply the UNIDROIT to a contract when the CISG does not apply and the parties have not specified another body of law in the contract. Resorting to an international body of law is preferable to resorting to the applicable national law due to the many complications presented by differing national laws.¹⁶⁰

Returning to the hypothetical, CISG article 79 would apply to the case, as the contract in question is a sale of goods between parties whose principle places of business are in different states which are parties to the Convention. It will probably render the same result as that under UCC section 2-615. The three showings required by the convention are present in Tech Chef Co.’s case. The terrorist attack on the World Trade Center will most definitely be considered an external impediment to Tech Chef Co.’s performance as it has completely devastated the company. Furthermore, it would be very difficult for a court to find that Tech Chef Co., a small software company, could have had any control over the occurrence or non-occurrence of the attack. With regard to the foreseeability requirement, it is arguable that Tech Chef Co. could have foreseen the possibility of the attack, but it would not be reasonable to assume that such a

156. *Id.* at 392.

157. If the parties state that UNIDROIT applies and say nothing about the Convention, both texts will govern if the Convention applies. However, the UNIDROIT Principles will prevail in the case of any departures from the CISG. If the parties agree to apply both texts in the contract, the rules of the CISG will prevail in the case of any departures due to the principle of *lex specialis*. Also, if the CISG applies, then it has been adopted by that country as national law. *See id.* at 398-99 (explaining the application of UNIDROIT to the contract as “*lex mercatoria*”).

158. *Id.*

159. The UNIDROIT Principles have been referred to as a general body of law by international arbitral tribunals. MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 74 (1997).

160. These national laws may not only vary considerably in content, but are often ill-suited for the special needs of international trade. With respect to some domestic laws it may even be impossible to find out what solution they provide for the issue at stake, because of the rudimentary character of the legal sources and the difficulty of access to them.

Id. at 9.

small company *should* have foreseen the possibility of the attack. Indeed, for Tech Chef Co. to forgo entering the contract with Franco Tex S.A. due to the remote possibility of a terrorist attack would be thought to be unreasonable. Finally, there is nothing that Tech Chef Co. could do to avoid the attack or its consequences. It would be irrational to think that a small software company could avoid this terrorist attack when the United States' and world's intelligence community was unable to prevent it. Tech Chef Co. was also left with no way to avoid breaching its contract as its place of business was destroyed, it had lost key employees, and the goods it contracted to sell were destroyed and not easily replaceable. Further, Tech Chef Co. notified Franco Tex S.A. within seven days of the attack; a very reasonable amount of time given the severity of the damage caused. As Tech Chef Co.'s predicament meets the three requirements for discharge, and the company seasonably notified Franco Tex S.A. of its inability to perform, Tech Chef Co. arguably should be discharged from its contractual duties under CISG Article 79.

Notwithstanding the arguments presented above, it is important to note that a court may not find this situation to constitute one of total impossibility. Franco Tex S.A. may argue that while the terrorist attack was external, it was not an impediment making performance totally impossible. Mr. Berger has stated that Tech Chef Co. may have to rebuild the product from scratch and that he does not know how long this will take. He has not said that it would be impossible to rebuild the product. Surely, in time a substitute product can be created. This may be seen as a temporary impediment, excusing performance for the duration of the impediment, or it may be seen as hardship. If a court finds the latter, Tech Chef Co. would be required to perform the contract regardless of how impracticable. As mentioned above, Tech Chef Co. may have much difficulty in replacing the software or finding a company who can, but this difficulty is less than total impossibility. If a court finds the impediment to be temporary the company's performance is excused the length of time to rebuild the software, but ultimately Tech Chef Co. must still deliver the product.

More difficulty arises, when determining the result of our hypothetical, if the contract was between entities of two non-contracting states. CISG has been incorporated as national law in a variety of states, including developing countries and countries with centralized market economies.¹⁶¹ There have been some instances when tribunals have applied CISG even when neither party had their principle place of business in a contracting state.¹⁶² These tribunals have the understanding that the rules in CISG may be applied to non-contracting states by analogy because they represent the "general character of the sale of goods law in all legal systems."¹⁶³ It is up to the adjudicator to determine if CISG applies and

161. *Id.* at 63.

162. Viscasillas, *supra* note 155, at 399.

163. *Id.*

to make a special effort to find a solution using the CISG.¹⁶⁴ These tribunals are of the opinion that only when it is impossible to find an answer in CISG, may they look to the Principles of UNIDROIT.¹⁶⁵ Other courts, on the other hand, have applied the UNIDROIT Principles for states who have not adopted the CISG.¹⁶⁶ The Principles have also been used to supplement and help interpret international law.¹⁶⁷ The Preamble of UNIDROIT states, “[The Principles] may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law.”¹⁶⁸ If the contract is between two non-contracting states, and there is no choice of law provision in the contract, the Principles or CISG may be used as a general guide to govern the contract.

If the court applied CISG to the hypothetical between non-contracting states, the result would be the same as the result achieved between France and the United States. If the court applied UNIDROIT, the result would differ. UNIDROIT has a hardship provision that is absent from CISG. A party whose performance has become more onerous is still bound to perform subject to these provisions on hardship.¹⁶⁹ UNIDROIT defines hardship as:

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished, and

- (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
- (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
- (c) the events are beyond the control of the disadvantaged party; and
- (d) the risk of the events was not assumed by the disadvantaged party.¹⁷⁰

Tech Chef Co. would definitely be able to meet UNIDROIT’s definition of hardship. While rebuilding The Tech Chef™ may be possible, it will surely increase the cost of the company’s performance to the point it “fundamentally alters the equilibrium of the contract.” Tech Chef Co. will have to rebuild its entire business, find someone who can recreate the software, and it has lost most

164. *Id.* at 404.

165. *Id.*

166. BONELL, *supra* note 159, at 248-54.

167. *Id.* at 246.

168. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994) [hereinafter UNIDROIT Principles].

169. *Id.* art. 6.2.1. “Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.” *Id.*

170. *See id.* art. 6.2.2 (defining hardship).

of the investment already sunk into the design. If the contract is not excused, then Franco Tex S.A. may also claim damages for the delays affecting its' 800 clients. Tech Chef Co. would also meet the remaining requirements defining hardship. The terrorist attack was not known until it happened and could not have reasonably been taken into account at the time the parties agreed to the contract. The attack was also beyond Tech Chef Co.'s control as there was nothing the small software company could have done to prevent this terrorist event. Arguably, Tech Chef Co. bore the risk of an increase in its cost of performance however, there is something different about this risk. This risk is not one normally assumed in business transactions. As a result, one would argue that a court would likely find that Tech Chef Co. did not assume the risk of a terrorist attack ruining its business and the contracted product.

In the event of hardship, a contract is not automatically excused.¹⁷¹ The party claiming hardship may request renegotiations without undue delay.¹⁷² This request, however, does not necessarily allow the party to withhold performance, but if the parties cannot reach a new agreement, they may resort to the court.¹⁷³ After finding hardship, the court may either terminate the contract or adapt the contract to restore equilibrium.¹⁷⁴ It is difficult to ascertain what a court may decide, but given the facts of the hypothetical, it is likely the contract would be terminated, or at least delayed substantially.

As a result of the above analysis, one might propose the following: Parties should provide for the choice of law they wish to govern the contract when operating outside of the CISG to avoid the indefiniteness that results when the choice is left to the court. There are inconsistencies between national laws with regard to impossibility and other aspects of contract.¹⁷⁵ While there have been attempts to create international instruments to minimize these discrepancies, it is questionable as to whether these attempts have been successful.¹⁷⁶ UNIDROIT is much more forgiving than CISG in the occurrence of anything less than total impossibility. The indefiniteness involved in not knowing which text applies affects both parties. Franco Tex S.A. may continue to expect performance thinking the rules of CISG apply and not look for substitute goods, or Tech Chef Co. may assume its performance is excused under UNIDROIT or its domestic law and incur additional delays and damages by not finding a way to complete performance. Parties should specify which set of laws applies to their transaction and ideally, should include a *force majeure* clause in the contract to further limit ambiguities caused by leaving the decision to the courts.

171. See *id.* art. 6.2.3 (noting effects of hardship).

172. *Id.* art. 6.2.3(1).

173. *Id.* art. 6.2.3(2)–(3).

174. *Id.* art. 6.2.3(4). The hardship the court finds must be reasonable. If the court terminates the contract, it must do so at a date and on terms to be fixed. *Id.*

175. BEALE, *supra* note 63, at 626.

176. *Id.*

VII. PROACTIVELY ADDRESSING TERRORISM AND ITS EFFECTS

Terrorist attacks pose a viable threat to the flow of business both at home and abroad. Terrorism is no longer an issue that may be ignored, but instead, must be taken into account as a possibility in every business transaction. The contractual guidelines both in the United States, and in Europe, arguably provide shelter for parties unable to perform their contractual obligations due to instances of terrorism. However, contracting parties should not leave their positions to the whim of the courts. The most certain way for parties to shelter their interests is to address risks involved with terrorism expressly in their contractual agreements. This may be done by adding a *force majeure* clause, including excuse of performance for terrorist acts and activity, to a contract which would relieve a party of its obligation in the instance of a supervening event.¹⁷⁷ “Careful drafting of a *force majeure* clause with specific regard to the type of contract in which it is placed, the parties involved, and the commercial context in which they are dealing can minimize the potential for dispute and litigation.”¹⁷⁸

In drafting a *force majeure* clause, care must be taken to use specificity when attempting to expand the defenses under the impracticability doctrine.¹⁷⁹ For example, the official comment to UCC section 2-615 places some restrictions on the breadth of exculpatory clauses.¹⁸⁰ The comment reads in part, “Generally, express agreements as to exemptions designed to enlarge upon or supplant the provisions of this section are to be read in the light of mercantile sense and reason, for this section itself sets up the commercial standard for formal and reasonable interpretation and provides a minimum beyond which the agreement may not go.”¹⁸¹ However, if the excusable contingencies are unforeseeable, *force majeure* clauses may be phrased very generally.¹⁸² When drafting generally, drafters must be aware of a rule of interpretation known as *ejusdem generis*, which could lead to broad general terms of a clause being narrowed in meaning by following specific language.¹⁸³ Generally, a *force majeure* clause will be upheld if it is not merely a contract of adhesion, does not contravene public

177. See BLACK'S LAW DICTIONARY, *supra* note 20, at 657. (defining a *force majeure* clause as “[a] contractual provision allocating the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled”).

178. Joni R. Paulus & Dirk J. Meeuwig, *Force Majeure—Beyond Boilerplate*, 37 ALBERTA L. REV. 302, 302 (1999).

179. *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 991 (5th Cir. 1976).

180. U.C.C. § 2-615 Official Comment 8.

181. *Id.*

182. CORBIN, *supra* note 80, at 114.

183. *Id.* An example of an exculpatory clause that could be subject to such interpretation is as follows: “Neither party shall be liable for its failure to perform hereunder if said performance is made impracticable due to any occurrence beyond its reasonable control, including acts of God, fires, floods, wars, sabotage, accidents, labor disputes or shortages, governmental laws, ordinances, rules and regulations.” Such a clause could be construed under the doctrine of *ejusdem generis* as being limited to the specifically delineated instances listed after the broad introductory language. *Id.*

policy, the contract is made between persons involving only their private affairs, and the parties are free bargaining agents.¹⁸⁴ *Force majeure* clauses may also be used to protect parties under the CISG. "In general, force majeure clauses that parties include in their CISG contracts either supplement article 79 or limit or supplant the article 79 default rule."¹⁸⁵ Thus, a party's performance could be excused under *force majeure* whether CISG article 79 allows for the excuse or not.¹⁸⁶ Drafters of such clauses should specify the degree of obstruction necessary to invoke the *force majeure* provision, and should address whether foreseeability of an obstruction will prevent the invocation of the clause.¹⁸⁷

The use of *force majeure* clauses should limit the uncertainty of contractual obligations in the aftermath of terrorist events. However, provisions should also be made regarding the losses that businesses may incur due to terrorism. It is imperative that businesses and individuals alike take the proper measures to insure their assets against acts of terrorism. The United States has acknowledged this imperative and taken action to ensure that its citizens will be able to readily purchase such insurance. In 2002, President George W. Bush signed the Terrorism Risk Insurance Act into law. The purpose of the Act is to utilize the resources of the federal government to support the insurance industry's ability to continue to offer insurance covering terrorism risks.¹⁸⁸ The law establishes a temporary federal program under which shared public and private compensation is made available for those with insured losses resulting from acts of terrorism.¹⁸⁹ The Act is also aimed at quelling many of the market disruptions due to the threat of terrorist activity and providing a transitional period in which private markets may stabilize themselves.¹⁹⁰ Legislation such as this will aide in ensuring that

184. See *Richard's 5 & 10, Inc. v. Brooks Harvey Realty Investors*, 264 Pa. Super. 384 (1979) (finding that an exculpatory clause relieved a lessor from liability for damage from a water leak occurring prior to the time notice of the leak was given).

185. Jennifer M. Bund, *Force Majeure Clauses: Drafting Advice for the CISG Practitioner*, 17 J.L. & COM. 381 (1998).

186. *Id.*

187. *Id.*

188. OFFICE OF DOMESTIC FINANCE, UNITED STATES DEPARTMENT OF THE TREASURY, *Terrorism Risk Insurance Program Overview*, at <http://www.ustreas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/> (last visited Feb. 22, 2004).

189. *Id.* The Terrorism Risk Insurance Act § 1001 (2002):

(b) PURPOSE- The purpose of this title is to establish a temporary Federal program that provides for a transparent system of shared public and private compensation for insured losses resulting from acts of terrorism, in order to—

- (1) protect consumers by addressing market disruptions and ensure the continued widespread availability and affordability of property and casualty insurance for terrorism risk; and
- (2) allow for a transitional period for the private markets to stabilize, resume pricing of such insurance, and build capacity to absorb any future losses, while preserving State insurance regulation and consumer protections.

190. OFFICE OF DOMESTIC FINANCE, UNITED STATES DEPARTMENT OF TREASURY, *Terrorism Risk Insurance Act Overview*, at <http://www.ustreas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/> (last visited Feb. 22, 2004). This transitional period would allow for the stabilization of terrorism risk insurance pricing and a build-up of capacity that could serve to absorb losses from future terrorist incidents. The

risks associated with terrorist incidents may be adequately insured against and therefore, future attacks will cause as little disruption in commerce as possible.

VIII. CONCLUSION

It would be difficult to argue against the fact that a single comprehensive, uniform set of international commercial laws would bring clarity and simplicity to the problems addressed herein. Unfortunately, like so many subjects involving cross-border legal issues, the hopes and aspirations of global uniformity far outstrip the realities of achieving such a goal. Therefore, one can only foresee that the framework presented herein will remain in place for a number of years. "Contrary to international lawyers' faith in multilateralism, international systems are still far from being comparable to national legal orders, despite some elements of evolving constitutionalization within the United Nations, for example. . . . Whether a constitutionalization within certain systems will take place in the future is an open question."¹⁹¹

Sadly, future terrorist attacks, of any definition, have become foreseeable events in the world in which we live. Terrorist incidents have become so common and atrocious as to make household names of those who perpetrate these crimes against society. However, while we may have come to expect the unexpected, the time, location, method, and degree of damage of a future terrorist attacks are nearly impossible to predict or prevent. The extreme difficulties in anticipating and thwarting the clandestine plans of terrorist groups warrant the application of laws excusing contractual obligation in light of supervening events. To strictly enforce contractual obligations on those who have been victimized by terrorism would not only work an injustice, but would also often be futile as victims of terrorism are often left with no method of fulfilling their contractual obligations.

To effectively contract for goods and services in a world in which terrorism is an ever-present factor, contracting parties must be proactive in addressing the threat of terrorism. To do anything less amounts to ignoring substantial realities which may put the business entity at grave risk. For them, A Hard Rain's A-Gonna Fall!

Act, while providing for federal intervention into the insurance industry, would preserve State regulation of insurance and consumer protection. *Id.*

191. Dr. Carl Baudenbacher, *Foreword: Globalization of the Judiciary*, 38 TEX. INT'L L.J. 397, 398 (2003).

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