

**OF SHRINKING SWEATSUITS AND POISON VINE WAX: A  
COMPARISON OF BASIS FOR EXCUSE UNDER U.C.C. § 2-615  
AND CISG ARTICLE 79**

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1. INTRODUCTION

A U.S. wholesaler contracts with an Italian company for the design, production and shipment of high-end shoes for sale in the United States. The parties agree that the United Nations Convention on Contracts for the International Sale of Goods<sup>1</sup> ("CISG") will govern the contract. All goes well until the Italian company's subcontractor, a shoe designer, fails to deliver. The Italian company breaks off production and claims commercial impracticability due to the failure of the subcontractor. The U.S. wholesaler sues for breach. What result can the parties expect? Can the company in the United States expect a result in line with Uniform Commercial Code ("U.C.C.") cases, or will CISG jurisprudence mandate a different outcome? And if there is a different outcome, is there any basis for applying different standards to cross border transactions than to domestic sales?

The CISG is arguably the most influential uniform law on transborder sales in the world today.<sup>2</sup> Lawyers from the United States whose clients engage in such transactions can both save time

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<sup>1</sup> United Nations Convention on Contracts for the International Sale of Goods ("CISG"), U.N. Doc. A/CONF.97/18 (Annex I) (Apr. 10, 1980), *reprinted in* UNITED NATIONS, OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 178 (1981) [hereinafter CISG or the Treaty].

<sup>2</sup> See PETER SCHLECHTRIEM, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 1 (Geoffrey Thomas trans., 2d ed. 1998) (noting that efforts for a uniform law for the international sale of goods have succeeded far beyond initial expectations).

and money and increase drafting options by understanding the CISG and its differences from U.S. law. In an age when contracts for the sale of goods between U.S. and European companies are common—and in which events all over the world can affect performance under these contracts—it is especially important to understand how CISG cases on excuse<sup>3</sup> compare with the U.C.C. tradition more familiar in the United States. Most contracts for the sale of goods between CISG signatory nations—unless they specify otherwise—are governed by the CISG; over sixty nations are signatories to the CISG, representing over two-thirds of world trade.<sup>4</sup> The United States ratified the Treaty in 1985, and it became effective for U.S. companies in 1988.<sup>5</sup>

This article compares CISG and U.C.C. jurisprudence on excuse for nonperformance and argues for an application of the CISG in excuse cases which is stricter than the U.C.C. and, I suggest, is more consistent with the drafters' intent and the goals of the Treaty. As I will discuss, the CISG's Article 79 seems to set out much narrower grounds for excuse than does U.C.C. § 2-615 (2005). In practice, however, cases in the two jurisdictions diverge less than the wording of the two statutes might lead one to expect, evincing comparable reluctance to excuse nonperformance. There are two reasons for this similarity: first, U.S. courts construe U.C.C. § 2-615 more narrowly than its language might predict; second, tribunals applying the CISG hear more bases for excuse than

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<sup>3</sup> As I will discuss below, the comparable CISG term is "exemption."

<sup>4</sup> As of this writing, signatory nations are: Argentina, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Colombia, Croatia, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, German Democratic Republic, Federal Republic of Germany, Greece, Guinea, Hungary, Iceland, Iraq, Italy, Kyrgyz Republic, Latvia, Lesotho, Lithuania, Luxembourg, Mauritania, Mexico, Moldova, Mongolia, Netherlands, New Zealand, Norway, Peru, Poland, Romania, Russian Federation, St. Vincent and the Grenadines, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States, Uruguay, Uzbekistan, Yugoslavia, and Zambia. See Official Summary of UN Treaty Section, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterx/treaty20.asp>.

<sup>5</sup> The United States derogated from Article 1(1)(b), thus limiting application of the CISG to contracts between contracting states only, and not to contracts between a party in a contracting state and a party in a non-contracting state, even if private international law would otherwise mandate application of the CISG. See Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187, 195-96 (1998) (discussing the derogation from Article 1(1)(b) by the United States and four other countries).

Article 79, based on its drafters' intentions, probably allows. In other words, U.S. courts construe U.C.C. § 2-615 more narrowly than its wording seems to allow, while tribunals applying the CISG apply Article 79 more broadly than its wording seems to justify. The result is that Article 79 tribunals hear cases for excuse that would seem to be acceptable only under the U.C.C., while cases actually decided under the U.C.C. do not show any tendency to excuse nonperformance more often than the CISG.

This unintended convergence is not the end of the story, however. The fact remains that the CISG's wording, at least on the subject of excuse, is intentionally narrower than that of the U.C.C., and this strictness, if rigorously applied, serves the interest of promoting international trade.<sup>6</sup> The fact that tribunals have shown greater flexibility than is warranted in allowing cases to be brought under Article 79 is not necessarily a good thing, and will not necessarily continue to be the case. A more limited reading of Article 79—as the drafters intended—is more suited to transborder transactions and should be encouraged for the following reasons.

International business deals tend to consist of what are called “relational contracts”: they extend over many years; involve series of transactions rather than single isolated deals; and rest upon a strong relationship between the parties involved.<sup>7</sup> First of all, because they are long-term, such contracts face a high risk of being disrupted by a vast array of changing political and economic factors. To enter into such long-term agreements, parties on both sides need some assurances of stability despite this risk. Article 79, if applied consistently with its wording, renders most of the political and economic vicissitudes attendant on transborder sales unavailable as excuses for nonperformance—in fact, it would deny them a forum to be heard. As a consequence, Article 79 gives parties to a contract incentive to write into the agreement details about what changes in circumstance will permit renegotiation or modification, and the requirement that such modification be negotiated between the parties rather than in litigation. Renegotiation during the life of a contract is the norm in international business transac-

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<sup>6</sup> Other commentators have of course noted that the CISG is stricter than the U.C.C. with respect to excuse. See, e.g., ALBERT KRITZER, *GUIDE TO PRACTICAL APPLICATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 516 (1989).

<sup>7</sup> Donald J. Smythe, *Bounded Rationality, the Doctrine of Impracticability, and the Governance of Relational Contracts*, 13 S. CAL. INTERDISC. L.J. 227, 230–33 (2004).

tions and the more the parties can anticipate and provide for it, the less painful and disruptive it need be.<sup>8</sup> The CISG language may also move parties to include some kind of renegotiation clause, which would allow for the contractual relationship to continue rather than falter—clearly promoting the CISG's goals. Knowing that the CISG offers no recourse in times of change, the parties, who are in a much better position to do so than a tribunal brought in after the fact, will work to anticipate possible events which might change the nature of the deal and write provisions for dealing with them into the contract.

What I see as the unwarranted flexibility of Article 79 is that because local arbitrators are interpreting and applying Article 79 in light of their own local laws on excuse, which, at least in the case of European jurisdictions, is more flexible. Indeed, when the CISG first appeared, commentators expressed concern that this would happen.<sup>9</sup> As CISG jurisprudence evolves, however, this may change, and it is one of the goals of this article to urge a more literal reading of Article 79.

In saying this, I disagree with commentators who have criticized Article 79 for being "so vague that there are bound to be differences of interpretation in different jurisdictions and the prime purpose of any uniform law will in consequence be defeated."<sup>10</sup> Indeed, this particular commentator has also claimed that the words in Article 79 are "elastic words," which "provide . . . no guidance to the courts which will have to interpret the provision."<sup>11</sup> To the contrary, I suggest that the words themselves, their literal meaning in the official Treaty languages, and the accompanying drafting history make their meaning clear. They are not meant to be read in the context of the local legal cultures of individual adjudicators but in the context of a uniform sales law, which is developing its own literature and commentary. The test of Arti-

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<sup>8</sup> See Jeswald W. Salacuse, *Renegotiating International Business Transactions: The Continuing Struggle of Life Against Form*, 35 INT'L LAW. 1507, 1509 (2001) (noting three important differences between negotiations and renegotiations in the first instance).

<sup>9</sup> See, e.g., Barry Nicholas, *Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods*, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 5-1 (Nina M. Galston & Hans Smit eds., 1984) (arguing, inter alia, that the language of Article 79 is unavoidably vague).

<sup>10</sup> *Id.* at p. 5-2.

<sup>11</sup> *Id.* at pp. 5-4 to -5.

cle 79 only becomes troublesome when read out of that context. This should hardly unsettle U.S. lawyers, bound by the famous *Erie* decision<sup>12</sup> to recognize a split between state and federal law: one word can mean different things and have different effects on the outcome of a case in each regime.

In this article, I analyze the texts of the two statutes, and compare cases decided under U.C.C. § 2-615 and CISG Article 79; in the case of the latter, where feasible, I have examined the cases in the original languages as well as in translation in order to perform as precise an analysis as possible.<sup>13</sup> My comparison will focus on three areas of discrepancy: the nature of an excusing event; the failure of subcontractors; and the wider category of damages allowed under the CISG. Other commentators have noted that the CISG is stricter than the U.C.C. in regard to excuse,<sup>14</sup> and other articles have touched upon the first and second points of comparison, but none has offered a comprehensive analysis of these issues, or indeed, detailed analysis of a broad segment of CISG case law based on the original texts of decisions.<sup>15</sup> No article has yet situated these differences in the context of commercial law and the culture of international trade. I do so, suggesting that the harsher standards under the CISG are more suitable to that arena than the arguably more flexible standards of the U.C.C. I will suggest that

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<sup>12</sup> *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>13</sup> I have indicated in the footnotes to the cases when the translations are my own.

<sup>14</sup> See, e.g., KRITZER, *supra* note 6, at 501 (observing that the CISG is more liberal than most civil codes, which demand literal impossibility).

<sup>15</sup> See generally Dionysios P. Flambouras, *The Doctrines of 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 INT'L L. REV. 261 (2001) (comparing the doctrines of impossibility of performance and change of circumstance in the CISG and the principles of European Contract Law (PECL)); 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. INT'L & COMP. L. REV. 279, 307-08 (1997) (comparing the U.C.C. and the CISG on impossibility and frustration of purpose); Ole Lando, *Salient Features of the Principles of European Contract Law: A Comparison with the U.C.C.*, 13 PACE INT'L L. REV. 339 (2001) (comparing the U.C.C. with the PECL); Todd Weitzmann, *Validity and Excuse in the U.N. Sales Convention*, 16 J.L. & COM. 265, 286-89 (1997) (analyzing the influence of the Italian Civil Code on a case decided under Article 79); Peter Winship, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 LOY. L. REV. 43 (1991) (discussing the CISG's influence on possible revisions to the U.C.C.). For a discussion of excuse under the CISG, see CLAYTON P. GILLETTE & STEVEN D. WALT, *SALES LAW: DOMESTIC AND INTERNATIONAL* 229-33 (1999).

the underlying goals of the U.C.C. and those of the CISG are fundamentally different. Ultimately, I argue that the absolutist language of Article 79 is not, as many critics have claimed,<sup>16</sup> a weakness and a result of sloppy drafting. Rather, when literally applied, it promotes exactly the goals the Treaty intended; it creates security in transborder sales and forces the parties to these contracts, who are in much better positions to do so than tribunals, to predict contingencies and negotiate risk allocation.<sup>17</sup> Part of the purpose of this article is to urge tribunals—and U.S. courts applying the CISG—to recognize the differences in the two regimes and the reason for these differences.

The CISG and the U.C.C. provisions on excuse differ with respect to three important issues: (1) what constitutes a circumstance severe enough to excuse performance, (2) the contracting party's liability for the failure of subcontractors, and (3) the scope of damages. With respect to the first issue, U.C.C. § 2-615 refers to performance becoming "impracticable" as possible grounds for excuse, while CISG Article 79 requires performance to be prevented by an "impediment." As I will show, this difference indicates that the CISG category of excuse is much narrower and requires a literal, objective—perhaps physical—bar to performance, while the U.C.C.'s term "impracticability" suggests that the category might include a less tangible barrier.<sup>18</sup> Regarding the second issue, under the U.C.C., a subcontractor's failure is analyzed under the foreseeability doctrine. However, the CISG is much stricter; it requires the subcontractor to satisfy the same requirements as the contracting party. Concerning the third issue, although a finding of excuse under § 2-615 relieves the nonperforming party from liability for damages, paragraph (5) of Article 79 expressly preserves the complaining party's right to other remedies under the Treaty, including reduction in price and demand for performance.

As I have noted, the case law in both U.C.C. and CISG jurisdictions diverges from what the wording of the actual statutes seem to require. Despite the seemingly expansive trend in black letter law,

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<sup>16</sup> See, e.g., KRITZER, *supra* note 6, at 501-02 (summarizing analysis of Article 79).

<sup>17</sup> Article 7(1) articulates the CISG's goals as "promot[ing] uniformity in its application and the observance of good faith in international trade." CISG, *supra* note 1, art. 7(1).

<sup>18</sup> See U.C.C. § 2-615 cmt. 3 (adopting commercial impracticability to call attention to the commercial character of the Article).

cases applying U.C.C. § 2-615 have consistently construed any ambiguities in the language narrowly against the party claiming excuse.<sup>19</sup> With respect to CISG cases, a significant difficulty with Article 79 case law is that it does not necessarily implement the intentions of the Treaty's drafters. For example, tribunals often allow defenses to be brought under Article 79 that the drafting history of that Article does not seem to countenance. Several tribunals, for example, allow parties to argue for an exemption based on difficulty, rather than objective impossibility, which the text of Article 79 does not seem to envision. Another example arises when, despite the fact that the drafting history and the Secretariat Commentary specifically state that suppliers of goods or raw materials are not to be considered third parties under Article 79,<sup>20</sup> many tribunals allow defenses under Article 79 for supplier failure.<sup>21</sup>

To some extent, these discrepancies may be the fulfillment of the dire predictions attendant on the drafting. Commentators warned that the Article contained ambiguities which would lead to the imposition of interpretations that best conform to the reader's background,<sup>22</sup> not those which reflect the drafters' intentions.

In Part One, I will introduce the CISG and its goals, compare the texts of U.C.C. § 2-615 and of CISG Article 79, and discuss the applicable commentary and goals of the two regimes. In Part Two, I will discuss relevant cases. First, I discuss U.C.C. cases on economic hardship, which suggest that "impracticability" may have slightly broader coverage than "impediment." Second, I discuss third-party cases and damages. Ultimately, I hope to show that the CISG's strict excuse doctrine is not only reasonable in the context of international business transactions but is, in fact, necessary for the flourishing of international trade.

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<sup>19</sup> See Smythe, *supra* note 7, at 228-29 (noting the reluctance of U.S. courts to expand the bases for excuse).

<sup>20</sup> U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group on the Int'l Sale of Goods, *Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat*, at art. 65, cmt 12, U.N. Doc. A/CONF.97 (Mar. 14, 1979) [hereinafter *Secretariat Commentary*] ("[A third person] does not include suppliers of the goods or of raw materials to the seller.").

<sup>21</sup> See *infra* text accompanying notes 158-63 (discussing damages to the non-performing party under the U.C.C.).

<sup>22</sup> See, e.g., E. Allan Farnsworth, *The Vienna Convention: An International Law for the Sale of Goods*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1983 121, 135 (Martha L. Landwehr ed., 1983) (noting that Article 79 is more likely to be subject to different readings because of the international context).

Because there is a relative scarcity of CISG cases compared to U.C.C. cases,<sup>23</sup> I have limited my discussion of U.S. law to cases that can be compared to CISG cases dealing with similar issues and fact patterns. Because Article 79 cases often arise due to changed economic circumstances, I have chosen several U.C.C. cases that turn on the same issue. Because civil law tribunals rely more heavily on legal treatises than their common law counterparts, I will quote commentary where necessary to explicate aspects of CISG excuse jurisprudence that the cases leave unclear. The main sources for clarification of the CISG are the Secretariat Commentary (the closest to an Official Commentary available), the Treaty's legislative history, which includes summaries of committee meetings, and other commentaries.

## 2. HISTORY, GOALS, AND TEXTS

### 2.1. *History of the CISG and the U.C.C.*

The CISG is the result of fifty years of drafting and negotiation.<sup>24</sup> Its roots lie in two earlier conventions promulgated by the International Institute for the Unification of Private Law ("UNIDROIT"): the Uniform Law for the Formation of Contracts ("ULF") and the Uniform Law on the International Sale of Goods ("ULIS"), both of which had been developed by committees of international law experts and finalized in 1964 but neither of which had received much acceptance beyond Western Europe.<sup>25</sup> The drafting of CISG began in 1968, under the auspices of the United Nations Committee on International Trade Law ("UNCITRAL"), and the Treaty was approved in 1980.<sup>26</sup>

Drafting of the U.C.C. began in 1945, with Karl Llewellyn as Chief Reporter.<sup>27</sup> It was finally approved in 1951, but took some time to gain wide acceptance; the late 50's and 60's saw it become

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<sup>23</sup> This is most likely a result of U.S. parties contracting around the CISG.

<sup>24</sup> See generally PETER SCHLECHTRIEM, *UNIFORM SALES LAW: THE UNCONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 17-23* (1986) (describing the history and structure of the CISG).

<sup>25</sup> JOHN O. HONNOLD, *DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 1* (1989).

<sup>26</sup> *Id.*

<sup>27</sup> For a general history of the U.C.C., see Richard E. Coulson, *Private Law Codes and the Uniform Commercial Code - Comments on History*, 27 OKLA. CITY U. L. REV. 615 (2002).



statutory in most states.<sup>28</sup> Article 2 was revised in 2003, although much of it has not yet been widely adopted.<sup>29</sup>

## 2.2. Goals of the CISG and the U.C.C.

The CISG's goals are to promote uniformity in international sales law and, in doing so, to remove barriers to international trade.<sup>30</sup> As of this writing, all major trading nations other than the United Kingdom and Japan have signed the Treaty.<sup>31</sup> The Treaty does not apply to personal, family, or household goods.<sup>32</sup> It can apply when the contracting parties are from signatory states, the contract is for the sale of goods, and the conflict of law rules of the forum require its application.<sup>33</sup> In short, the CISG is probably the most influential uniform law on trans-border commerce in the world today.<sup>34</sup>

Because trans-border transactions are subject to the many vicissitudes which can arise in international affairs and make a contract difficult to perform, the question of what excuses nonperformance is an important one to clarify. Examples of vicissitudes unique to international trade include currency devaluation, political change, war, privatization of resources, expropriation, regulation, and climate change. I turn first to the texts of the two statutes as a framework for comparing their approaches to the issue.

The drafting history of Article 79 reveals a desire to restrict the leeway that previous regimes allowed for excusing nonperformance.<sup>35</sup> For example, Article 74 of the Hague Uniform Law on the International Sale of Goods, the Treaty preceding the CISG, excused performance not only on the basis of physical and legal impossibility and changed circumstances which fundamentally al-

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<sup>28</sup> *Id.* at 627.

<sup>29</sup> See COMMERCIAL AND DEBTOR-CREDITOR LAW: SELECTED STATUTES 1 (Baird et al. eds., 2005) (providing a brief history of Article 2).

<sup>30</sup> CISG, *supra* note 1, at preamble.

<sup>31</sup> Peter Schlechtriem, *Requirements of Application and Sphere of Applicability of the CISG*, 36 VICTORIA U. WELLINGTON L. REV. 781 (2005).

<sup>32</sup> *Id.* at 786.

<sup>33</sup> *Id.* at 782. The United States and China, among others, chose to opt out of 1(1)(b), which makes the Treaty applicable when "the rules of private international law lead to the application of the law of a Contracting State," so that this last sphere of application is not part of the U.S. or Chinese adoption of CISG law. *Id.* at 783.

<sup>34</sup> *Id.* at 782.

<sup>35</sup> SCHLECHTRIEM, *supra* note 2, at 601.

tered the nature of the performance owed, but also performance which changed circumstances had made more difficult.<sup>36</sup> Many members of the working group which prepared the proposed draft of Article 79, therefore, wanted to make grounds for excuse more objective. Ultimately, any consideration of fault with respect to nonperformance was dropped in favor of an objective test, which required that the excuse be based on an impediment beyond the promisor's control. As I will show, the narrowness of this provision makes perfect sense in the context of international sales for a number of reasons, including the nature of both international sales contracts and international transactions.

Article 2 arose from a different context and exemplifies different goals than Article 79.<sup>37</sup> The basis of Article 2 is the "factual bargain" of the parties and it calls on courts, when necessary, to determine what that "factual bargain" is.<sup>38</sup> Such a determination is to be based on an examination of the parties' course of dealing and prior usage of trade to discover what the parties understood and intended.<sup>39</sup> Having established the "factual bargain," the courts' role is to "limit it in term of good faith, reasonableness and decency."<sup>40</sup> Such a role for tribunals in international sales disputes is unrealistic and undesirable. When the parties are from different countries, the task of delving into and understanding their intentions as reflected in prior dealings is much too onerous and costly. To the contrary, it is much more efficient and cheaper for parties in such transactions to rely on themselves to clarify their expectations and intentions to each other. This is especially true in the area of excuse covered by U.C.C. § 2-615 and Article 79. Buyers and sellers are much better at anticipating contingencies that might occur relevant to their transactions and are in much better positions to allocate their risk. International tribunals are not equipped to investigate prior dealings and implement "good faith, reasonableness and decency." By barring recourse to outside adjudication for anything but literal impossibility, Article 79 forces parties to anticipate and allocate risks of nonperformance, which, in turn, serves the

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<sup>36</sup> *Id.*

<sup>37</sup> For a discussion of the goals of the U.C.C., on which I will rely here, see John E. Murray, Jr., *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L. J. 1 (1982).

<sup>38</sup> *Id.* at 20.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

goals of the CISG by furthering international transactions. A consideration of the texts of the two statutes will show how Article 79 achieves this.

*2.3. What Event Constitutes an Excusing Event: The Texts of the Two Sections on Excuse and the Relevant Commentary*

The text of U.C.C. § 2-615 reads as follows:<sup>41</sup>

Excuse by Failure of Presupposed Conditions.

Except to the extent that a Seller may have assumed a greater obligation and subject to § 2-614:

(a) Delay in performance or nonperformance in whole or in part by a Seller that complies with paragraphs (b) and (c) is not a breach of the Seller's duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence 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.

(b) If the causes mentioned in paragraph (a) affect only a part of the Seller's capacity to perform, the Seller must allocate production and deliveries among its customers but may at its option include regular customers not then under contract as well as its own requirements for further manufacture. The Seller may so allocate in any manner that is fair and reasonable.

(c) The Seller must notify the Buyer seasonably that there will be delay or nonperformance and, if allocation is required under paragraph (b), of the estimated quota thus made available for the Buyer.

CISG Article 79, on the other hand, reads as follows:

Exemptions:

(1) A party is not liable for a failure to perform any of his

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<sup>41</sup> I use throughout the pre-2003 version of U.C.C. Article 2 because, to date, no jurisdiction has adopted the 2003 revised version. COMMERCIAL AND DEBTOR-CREDITOR LAW: SELECTED STATUTES, *supra* note 29, at 1.

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 a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) 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 resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

First, the headings of the two corresponding sections, U.C.C. § 2-615 and CISG Article 79, reveal significantly different points of focus. U.C.C. § 2-615 is titled: "Excuse By Failure of Presupposed Conditions."<sup>42</sup> By contrast, the corresponding CISG Section 79 and the related subsequent section 80 are headed: "Exemption."<sup>43</sup> Thus, at the outset, the emphases of the two provisions differ: the U.C.C. focuses on reasons for nonperformance, whereas the CISG heading reminds the reader of the general duty to perform a contract and the limited possibility of release from that duty. It shows no interest in enumerating reasons for nonperformance.

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<sup>42</sup> U.C.C. § 2-615 (1989).

<sup>43</sup> Article 80 reads, "[a] party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission." CISG, *supra* note 1, art. 80.

Indeed, Black's Law Dictionary defines "excuse" as "[a] reason alleged for doing or not doing a thing. A matter alleged as a reason for relief or exemption,"<sup>44</sup> while it defines "exemption" as "[f]reedom from a general duty or service; immunity from a general burden, tax, or charge."<sup>45</sup> This definition is consistent with the other language versions of the Article 79. The German version, for example, is titled *Befreiungen*, which also indicates release from a general duty, the French heading is, similarly, *exoneration*, and the Spanish is *exoneracion*.<sup>46</sup>

Thus, while the U.C.C.'s heading "excuse" emphasizes the *reason for* the exemption from the duty to fulfill the contract, the CISG's heading "exemption" refers to a universal duty to carry out contractual obligations which may be suspended in rare circumstances. By using "exemption" instead of "excuse," the CISG, unlike the U.C.C., evinces little judicial interest in itemizing and investigating reasons for nonperformance. Clearly, the heading of U.C.C. § 2-615 contemplates the possibility of a valid reason being given for the failure to perform a duty, while that of Article 79 does not. Indeed, the rest of the heading "by failure of presupposed condition" supplies that reason. In sum, then, the headings of the two sections suggest a greater willingness on the part of the U.C.C. to examine reasons for nonperformance and a concern on the part of the CISG to urge compliance with a general duty.

Before turning to the difference between "impracticable" and "impediment," it is worth noting that the two provisions also differ in the language of release. While the U.C.C. states that excused nonperformance is "not a breach," the CISG declares that the exempted nonperforming party is "not liable." The scope of the phrase "not liable" is narrower than the U.C.C.'s "breach" language—it exempts the nonperforming party from damages, while paragraph 5 of Article 79 allows for the exercise of all the other remedies for breach the Treaty allows.<sup>47</sup> Section 2-615, on the other

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<sup>44</sup> BLACK'S LAW DICTIONARY 566 (6th ed. 1990).

<sup>45</sup> *Id.* at 571.

<sup>46</sup> The official languages of the CISG are English, French, Spanish, Russian, Chinese and Arabic. See the Pace Law School CISG Database, <http://cisg.law.pace.edu/cisg/text/text.html> (last visited October 23, 2006) (listing the official language of the CISG). The Chinese version does not have a separate heading. These translations are my own.

<sup>47</sup> JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 423 (1982).

hand, forecloses all remedies by declaring that the nonperforming party is not in breach.

In general terms, the U.C.C. excuses performance when a contingency arises making performance impracticable, and when one of two other elements is established: (1) the contingency was one whose non-occurrence was a basic assumption upon which the contract was made; or (2) the contingency was caused by good faith compliance with an intervening government regulation or order.<sup>48</sup> Any occurrence which was "sufficiently foreshadowed" at the time of contracting bars the application of this section.<sup>49</sup> Courts applying U.C.C. § 2-615 perform a one or two-step inquiry. First, if the parties could reasonably have foreseen the hindering event at the time of contracting, excuse will be denied.<sup>50</sup> If the event was not foreseeable, the court must determine whether it truly prevented performance.<sup>51</sup> Of course, grounds for excuse available in U.C.C. § 2-615 may be negated by language in the agreement.<sup>52</sup> The issue then becomes what "impracticable" means.

The question of whether market change constitutes impracticability is a difficult one to answer. According to Comment 4, neither increased cost nor the rise or collapse of a market offers grounds for excuse, but these situations do leave open the possibility that a severe shortage of raw materials or supplies due to war, embargo or other contingency may do so. Moreover, Comment 1 elaborates on the word "impracticable" by modifying it with the adjective "commercially," suggesting that a severe change in the benefits expected to accrue to one party under a contract might fall under this paragraph.

The CISG, by contrast, allows for exemption when nonperformance is due to an "impediment" which was not only (1) beyond the control of the nonperforming party, but also (2) not reasonably foreseeable at the time of the contract, as well as (3) which the non-performing party could not reasonably have overcome or avoided and (4) whose consequences could not have avoided or

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<sup>48</sup> See Larry A. DiMatteo, *THE LAW OF INTERNATIONAL CONTRACTING* 244-45 (2000).

<sup>49</sup> U.C.C. § 2-615 cmt. 8 (1989).

<sup>50</sup> See Stephen G. York, *Re: The Impracticability Doctrine of the U.C.C.*, 29 DUQ. L. REV. 221, 222 (1991) (noting that courts deny discharge if a disruptive event was foreseeable at the time of contract formation).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

overcome.<sup>53</sup> Performance is exempted only for as long as the impediment exists and the party seeking exemption must give reasonably prompt notice that is actually received by the other party.<sup>54</sup> Unlike U.C.C. § 2-615, the text of Article 79 makes no mention of compliance with government regulations or orders, indicating that they do not constitute a per se basis for excuse. Further, according to the Secretariat Commentary on Article 79, a nonperforming party must prove not only that he could not reasonably have been expected to take the impediment into account, but also that he could not have avoided or overcome the impediment or its consequences.<sup>55</sup> The Commentary remarks further that this may require the party to provide a commercially reasonable substitute for performance.<sup>56</sup>

With respect to the first element of Article 79, it must first be noted that the U.C.C. § 2-615 term "impracticable," on the one hand, and "impediment," on the other, mean significantly different things. Impediment is a more restrictive term, covering only an event which literally prevents performance of the contract. Indeed, some commentators argue that the word "impediment" was chosen to indicate an actual physical hindrance which makes performance literally impossible, and that mere economic hardship or extreme difficulty (i.e., anything short of literal impossibility) is not covered at all by the text.<sup>57</sup> According to one commentator, the term describes "an objective outside force that interferes with the performance of the contract and cannot be traced back to any national laws."<sup>58</sup> Article 79's drafting history is consistent with this

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<sup>53</sup> See *Secretariat Commentary*, *supra* note 20, at art. 65, cmt. 7 (referring to comments for Article 65, since renumbered as Article 79).

<sup>54</sup> See *id.* cmts. 13, 15 (describing, respectively, the temporal boundaries of the exemption from liability after an impediment to performance occurs and the duty to inform the opposing party of that impediment); FRITZ ENDERLEIN & DIETRICH MASKOW, *INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 321 (1992) (offering comments on Article 79).

<sup>55</sup> See *Secretariat Commentary*, *supra* note 20, at art. 65, cmt. 7 (describing why the non-performing party to this burden of proof).

<sup>56</sup> *Id.* (noting that a non-performing party may be required to provide a commercially reasonable substitute).

<sup>57</sup> See Dionysios Flambouras, *Comparative Remarks on CISG Article 79 & PECL Articles 6:111, 8:108* (May 2002), <http://cisgw3.law.pace.edu/cisg/text/peclcomp79.html#er> (offering commentary on Article 79).

<sup>58</sup> BRUNO ZELLER, *DAMAGES UNDER THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 175 (2005).

interpretation; it indicates that the drafters chose the term "impediment" to denote an objective outside force that literally prevents performance, a definition that corresponds to the U.S. doctrine of "objective impossibility."<sup>59</sup> The corresponding words in the other official language versions of the treaties corroborate the objective interpretation of the term "impediment." The French term, *empêchement*, also means an obstruction or hindrance and its related verb, *empêcher*, means to put a stop to something. The Spanish word, *impedimento*, derives from the same root as the English word and has the same sense of objective obstruction. The Russian term is synonymous with the term for an "obstacle" such as, for example, the kind a horse might encounter.<sup>60</sup>

Some commentators have claimed that the term "impediment" may also cover the notion of an objective outside force that frustrates the purpose of the contract, a doctrine which might correspond to the Anglo-U.S. idea of frustration of purpose.<sup>61</sup> The language of Article 79, however, fails to support this inference—an event which frustrates a contract's purpose does not necessarily prevent its performance. Moreover, the UNCITRAL debates during the drafting of the CISG show that the drafters adopted the term "impediment" because they opposed allowing economic hardship as an excuse for nonperformance; as noted above, Article 79 is a stricter version of its predecessor, Article 74 of The Hague ULIS, which had been criticized for excusing performance too readily when it had merely become more difficult.<sup>62</sup> As a refinement of this notion, the word "impediment" may have been intended to denote a barrier to performance such as shipping problems, as opposed to aspects related to the party's personal actions. Under this rubric, impediment would cover such disturbances as industrial disputes, fires, wars, currency changes, or shortage of transport, materials, or power.<sup>63</sup>

One possible impeding event that lies in a grey area is a labor strike or lockout. Commentators on the CISG generally agree that some strikes and lockouts are foreseeable while others are not, and

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<sup>59</sup> *Id.*

<sup>60</sup> These translations are my own.

<sup>61</sup> See, e.g., Henry D. Gabriel, *A Primer of the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code*, 7 *IND. INT'L & COMP. L. REV.* 279, 307-08 (1997).

<sup>62</sup> HONNOLD, *supra* note 47, at 431-32.

<sup>63</sup> *Id.* at 426.



that this question must find its answer in a case-by-case analysis of the circumstances of the particular contract.<sup>64</sup>

CISG tribunals, however, often allow defenses to nonperformance based on less than physical impossibility to be brought under Article 79,<sup>65</sup> which shows that in practice, a literal obstacle to performance is not a bar to bringing an excuse claim under Article 79. No tribunal, however, has excused performance for anything less than a physical obstacle and some tribunals have even refused to hear such a defense under Article 79.

Some commentators have suggested that the civil law notion of hardship, which does cover such circumstances, might serve to expand the scope of Article 79's excuse provisions and would thus reduce the difference between Article 79 and U.C.C. § 2-615, at least textually.<sup>66</sup> It is true that most civil law systems allow considerations of equity and good faith to influence whether performance is excused due to hardship; the French doctrine of *imprévision* and the German *wegfall der geschäftsgrundlage*, for example, allow for a readjustment of the contract based on changed economic circumstances, for example.<sup>67</sup> Moreover, the UNIDROIT Principles, which were drafted as a unifying summary of European sales law, and function as a kind of "European Restatement," allow for excuse based on hardship under limited circumstances.<sup>68</sup>

While the drafting and legislative history make clear that the CISG was intended to foreclose access to widely differing local laws, it is less clear on this issue with regards to UNIDROIT, which was drafted after the CISG and designed to further uniformity in European sales law. UNIDROIT Article 6.2.2 allows for hardship when "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 has a

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<sup>64</sup> See *Secretariat Commentary*, *supra* note 20, at art. 65, cmt. 6 (noting that the final determination can only be made on a case-by-case basis).

<sup>65</sup> See *supra* text accompanying notes 55-60 (exploring defenses other than physical impossibility under Article 79).

<sup>66</sup> See, e.g., Jennifer M. Bund, Comment, *Force Majeure Clauses: Drafting Advice for the CISG Practitioner*, 17 J.L. & Com. 381, 404-05 (1998) (noting that "the overall results may be substantially similar under both doctrines").

<sup>67</sup> NAGLA NASSER, *SANCTITY OF CONTRACTS REVISITED: A STUDY IN THE THEORY AND PRACTICE OF LONG-TERM INTERNATIONAL COMMERCIAL TRANSACTIONS* 198 (1995).

<sup>68</sup> HENRY GABRIEL, *CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: A COMPARISON OF DOMESTIC AND INTERNATIONAL LAW* 220 (2004).

party receives has diminished.”<sup>69</sup> The CISG, however, is meant to bring uniformity to sales law throughout the world, and recourse to a synthesis of European sales law would hardly further this goal. Moreover, as I have tried to show, the drafters of Article 79 intended it to have a narrower scope than previous excuse provisions of local and even uniform laws.

The same objection applies to the use of the Principles of European Contract Law (“PECL”), which, like the UNIDROIT Principles, takes into account changed circumstances after formation of the contract. Article 6:111, paragraph 2, of the PECL excuses performance when: (1) it has become excessively onerous; (2) due to a change of circumstances that occurred after the contract was formed; (3) the change of circumstances was not one that could reasonably have been taken into account at the time the contract was formed; and (4) the risk of the changed circumstances was not one which the affected party should be required to bear.<sup>70</sup>

The PECL, of course, sounds much more like the U.C.C.; rather than the word impediment, the PECL refers to “change of circumstances” and “onerousness,” which seems more like the U.C.C.’s notions of “impracticability” and unexpected contingencies. The case law and commentary suggest that the “excessively onerous” requirement is a harsh standard, and requires performance that would result in the near ruin of the performing party.<sup>71</sup> The PECL, however, unlike the U.C.C., requires the parties to renegotiate a contract which has become excessively onerous. As an example of how the two regimes would mandate different results, the PECL commentary to this section cites to one of the contract disputes that arose as a result of the unexpected closing of the Suez Canal, a change which dramatically raised the shipper’s cost by making it necessary to sail around the Cape of Good Hope, a much longer route. Under the PECL, the parties would have been required to

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<sup>69</sup> UNIDROIT Principles of International and Commercial Contracts, Art. 6.2.7 (2004), available at <http://www.unidroit.org/english/principles/contracts/-principles2004/blackletter2004.pdf> (last visited Oct. 25, 2006) [hereinafter UNIDROIT].

<sup>70</sup> PRINCIPLES OF EUROPEAN CONTRACT LAW—PARTS I AND II (“PECL”) (O. Lando & H. Beale, eds., 2000); see also Private International Commercial Law: Sale of Goods, <http://www.jus.uio.no/lm/private.international.commercial.law/sale.of.goods> (last visited Oct. 25, 2006).

<sup>71</sup> PRINCIPLES OF EUROPEAN CONTRACT LAW—PARTS I AND II, *supra* note 70, at §6.111, available at <http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.-3.2002/6.111.html> (last visited Oct. 25, 2006).

renegotiate the contract. The House of Lords (where the case was decided), by contrast, simply upheld the contract.<sup>72</sup> The PECL and the U.C.C. can thus lead to different outcomes despite their seeming similarity. In sum, then, even possible expanders for the CISG do not seem to undermine the strictness of the impediment requirement. Recourse to its drafting history and goals, however, make clear that the CISG was intended to preempt any other regulation in the area of sales law with respect to contracts it covers.<sup>73</sup> The CISG is strict with respect to excuse because it is in the interest of transborder sales for it to be so, and the CISG's goal is to facilitate such transactions.

With respect to the foreseeability element, obviously the parameters of what is "reasonably foreseeable" differ between domestic sales and transborder transactions. Merchants who routinely engage in international sales should be able to anticipate a broader scope of circumstances than those who habitually buy and sell goods only within domestic boundaries. Thus, courts applying the U.C.C. generally deem a merchant "on notice" of a contingency, such as a change in a foreign country's laws or regulations, only if specific warning of that particular change was available to that merchant, while CISG tribunals assume that the parties to a transborder transaction are generally aware of the possibility of changing laws and regulations in their partner countries and beyond.<sup>74</sup>

The third requirement of Article 79, that the impediment be one that the party could not have overcome or avoided, does not appear in the text of U.C.C. § 2-615, but finds expression in U.C.C. § 2-615 case law. Both regimes apply the reasonable person standard to determine what actions must be taken.<sup>75</sup>

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<sup>72</sup> Private International Commercial Law: Contract Principles, <http://www.jus.uio.no/lm/private.international.commercial.law/contract.principles.html> (last visited Oct. 25, 2006).

<sup>73</sup> See, e.g., Anja Carlsen, Can the Hardship Provisions in the UNIDROIT Principles Be Applied When the CISG is the Governing Law? (Dec. 14 1998) (unpublished essay, on file with the Pace Law School Institute of International Commercial Law), available at <http://www.cisg.law.pace.edu/cisg/biblio/carlsen.html> (noting that the CISG is a binding instrument whereas the UNIDROIT Principles are not). But see ZELLER, *supra* note 58, at 171 (suggesting that because the CISG omits hardship, there exists a gap which needs to be filled by either domestic law or the UNIDROIT or European Principles).

<sup>74</sup> See *infra* notes 145-49 and accompanying text.

<sup>75</sup> See ZELLER, *supra* note 58, at 182 (discussing application of the reasonable person standard in cases decided under Article 79).

Finally, U.C.C. § 2-615 and Article 79 differ in scope. Article 79 may be raised as a defense for the delivery of nonconforming goods, while the U.C.C. does not offer this option. Under the CISG, a buyer who refused to pay for defective goods would do so under Article 79(1) because the nonconforming delivery constituted an "impediment beyond his control" that he could not reasonably have anticipated.<sup>76</sup> English and U.S. laws, on the other hand, infer a warranty by the seller of the conforming nature of the goods, as well as the duty to deliver them.<sup>77</sup>

#### 2.4. *Texts and Commentary on Third Party Failure*

Another possible discrepancy between the U.C.C. and the CISG arises with respect to a party's liability for the failed performance of his subcontractor or supplier; here it is clearer that the CISG imposes stricter standards. U.C.C. § 2-615 does not contain a provision addressing third party failure separately. U.C.C. cases use the language of U.C.C. § 2-615(a) — "a contingency the nonoccurrence of which was a basic assumption on which the contract was made" — to impose a non-foreseeability requirement for excuse under the third-party failure doctrine (unless the contract at issue specifies a single source of supply).<sup>78</sup>

Article 79(2)'s third-party provisions, on the other hand, specifically exempt a promisor from liability for third-party failure only if (1) the impediment hindering performance was out of his control and unforeseeable, and (2) the third party would also be exempt under that same standard. The second provision is more than the U.C.C. requires: U.C.C. § 2-615 subsumes third-party failure under the same foreseeability doctrine, asking only whether the subcontractor (whether supplier or contractor) the failure of

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<sup>76</sup> See, e.g., Landgericht [LG] [District Court of Berlin] Sept. 15, 1994, (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/940915g1.html> (holding that under CISG Article 79(1), the buyer did not have to pay for defective shoes); ZELLER, *supra* note 58, at 179 ("[A]n impediment 'beyond his control' is only possible if the buyer is prevented from either examining the goods, or give timely notice of the defects."); see generally SCHLECHTRIEM, *supra* note 2, at 605 (discussing breach and exemptions under Article 79). A buyer may only invoke this defense if he was for some reason unable to comply with the inspection and notice requirements of CISG Articles 38 and 39.

<sup>77</sup> SCHLECHTRIEM, *supra* note 2, at 606.

<sup>78</sup> See U.C.C. § 2-615 cmt. 5 (2003) ("Where a particular source of supply is exclusive under the agreement and fails through casualty, the present section applies . . .").

whom was reasonably foreseeable to the nonperforming party. Thus, Article 79 appears to create a more rigorous test.

At least two ambiguities appear to arise in the language of Article 79(2). First, it is not clear whether a supplier is considered a third party under the article. Both the drafting history and the Secretariat Commentary on the CISG indicate not. According to the Commentary, a third party must be someone "engaged to perform the whole or a part of the contract. . . [and] does not include suppliers of the goods or of raw materials . . ." <sup>79</sup> The seller tribunals have allowed excuse claims to be brought – though not granted – for supplier/shipper failure under Article 79. According to one of the leading commentators on the CISG, only when the third party is a "secondary supplier whom the seller neither chooses nor controls, and when the seller cannot in any way repair or procure the goods in any other manner" will performance be excused.<sup>80</sup> The bottom line seems to be that if the contracting party has control over the third party, he cannot make an Article 79 defense, which would seem to exclude suppliers.<sup>81</sup>

Second, the words "to perform all or part of the contract" are not explained. Thus, it is unclear whether a supplier would constitute a third party "engaged to perform all or part of the contract" whose breach might allow for excuse. Debate continues on this matter. Although the drafting history and the Secretariat Commentary indicate that suppliers are not covered, tribunals, as mentioned above, have allowed claims to be brought under Article 79 for supplier failure and it is possible to imagine, for example, a contract in which a supplier's performance would be so substantial and integral as to fulfill the role of a subcontractor – for example, a supplier of gas or electricity in a contract to supply power. Commentators have explained that there must be "a concrete link" between the main contract and the subcontract, such as exists when the contracting party entrusts the subcontractor with manufacturing goods to the buyer's specifications, or with procuring and delivering goods to the buyer.<sup>82</sup> This requirement, at least as tribunals apply it, does not necessarily exclude suppliers as the above

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<sup>79</sup> See *Secretariat Commentary*, *supra* note 20, at art. 65, cmt. 12.

<sup>80</sup> See SCHLECHTRIEM, *supra* note 2, at 613-17.

<sup>81</sup> ZELLER, *supra* note 58, at 183 ("[I]f a party has control over a third party, he assumes responsibility and cannot use Article 79 to overcome his failure to do so.").

<sup>82</sup> SCHLECHTRIEM, *supra* note 2, at 617.

examples make clear—even if this application contradicts the drafters' intentions.

As mentioned above, however, the drafting history of Article 79(2) suggests that suppliers were not meant to be covered. At the March 1980 meeting of the Legislative Committee, Denmark introduced an amendment which would have added the words "by his supplier or" in paragraph 2, before the phrase "third party engaged to perform all or part of the contract."<sup>83</sup> This proposed amendment was ultimately withdrawn, amidst much discussion about its potential for unacceptably broadening the exemption, perhaps, as one delegate hinted, to an extent that might disrupt the world economy, given the oil crisis of the time.<sup>84</sup> The ensuing discussion, however, did allow for the possibility that supplier failure might be covered by paragraph 1.<sup>85</sup>

The discussion of supplier failure indicates in other ways that any such exemption is meant to be very narrow. For example, a proposal was made—and later rejected—to delete paragraph 2 based on the concern that it unacceptably broadened paragraph 1's exemption provision.<sup>86</sup> Finally, the Secretariat Commentary on Article 79 states that the term "third person" does not include "suppliers of the goods or of raw materials to the seller."<sup>87</sup> As discussed *supra*, however, the Secretariat Commentary and other commentaries, as well as the actions of actual tribunals, may conflict.

U.C.C. § 2-615, on the other hand, clearly covers suppliers as well as subcontractors. By subsuming the question of a subcontractor's failure under the rubric of "impracticability" caused by "the occurrence of a contingency the nonoccurrence of which was a basic assumption in which the contract was made," the U.C.C. is broad enough cover both types of third party failure. Comments 4 and 5 to U.C.C. § 2-615 tend to corroborate this interpretation of the section's scope by linking the issue of third party supply failure to the standard of foreseeability.<sup>88</sup> Thus, when the failure of a sub-

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<sup>83</sup> United Nations Conference on Contracts for the International Sale of Goods, ¶ 23, U.N. Doc. A/CONF.97/C.1/SR.27 (March 28, 1980).

<sup>84</sup> *Id.* at ¶ 24.

<sup>85</sup> *Id.* at ¶ 25.

<sup>86</sup> *Id.* at ¶ 21.

<sup>87</sup> *Secretariat Commentary, supra* note 20, at art. 65, cmt. 12.

<sup>88</sup> See U.C.C. § 2-615 cmt. 4 (1989) ("Increased cost alone does not excuse performance unless [it] is due to some unforeseen contingency."); *id.* cmt. 5 ("[T]here

contractor or supplier was not reasonably foreseeable at the time a given contract was formed, U.C.C. § 2-615 suggests that the main contractor or promisor may have a basis for excuse.<sup>89</sup> In other words, the promissory, at the time of contract formation, must have reasonably been able to assume that the contingency would not occur.

Article 79, on the other hand, requires that the third party's excuse fulfill the same elements as the main contractor's. For performance to be excused for third-party failure, first, the main contractor or promisor must be exempt under paragraph 1 (there must be an impediment out of his control and which was not foreseeable at the time of the contract, and he must have been unable to avoid its consequences). Second, the third party must also be exempt under the provision of paragraph 1. This means that, for performance to be excused, the third party must meet the same requirements as the main contractor: that is, the third party must have met an impediment which was unforeseeable, which was out of his control, and which he could not overcome.

Under this analysis, the CISG sets the bar higher than does the U.C.C. for excuse based on a third party's failure to perform. While the U.C.C. merely requires that a third party's completed performance was a reasonable assumption on the part of the promisor, the CISG requires that this analysis be applied to both the main contractor and the third party. It is not hard to imagine a scenario in which these discrepancies would lead to different outcomes. For example, a main contractor might have every reason to believe in the continued reliable performance of a subcontractor with whom he had worked on many previous projects, but who, unbeknownst to him or the main contractor, suddenly faced unprecedented hardship. Under such circumstances, it is also reasonable to think that the subcontractor would try to keep its difficulties hidden from its business partners, making the main contractor's assumptions perfectly reasonable. The U.C.C. seems to allow for performance to be excused under such circumstances. The CISG, on the other hand, by applying the same foreseeability standards to the subcontractor as it applies to the main contractor,

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is no excuse under this section . . . unless the seller has employed all due measures to assure himself that his source will not fail.").

<sup>89</sup> See U.C.C. § 2-615 cmt. 5 (1989) ("In the case of failure of production by an agreed source for causes beyond the seller's control, the seller should, if possible, be excused.").

precludes such an outcome. The subcontractor, if it had known about its potential difficulties and had kept them secret, would not be exempt under paragraph 1 and thus neither would the main contractor. I now turn to cases decided under these two regimes to see how these differences have played out.

### 3. CASES

#### 3.1. *Impracticability vs. Impediment*

The case type that tellingly differentiates the U.C.C. concept of "impracticability" from the CISG concept of "impediment" is that where one party seeks to be excused due to a drastic change in market conditions which makes its performance financially disastrous. While the term "impracticable" would seem at least conceivably to cover some of the most extreme of these cases, the term "impediment," with its apparently more limited sense of physical barrier to performance, would not. In fact, the cases support this supposition: U.S. courts applying U.C.C. § 2-615 seem at least willing to allow market change to be a basis for excuse, whereas tribunals applying the CISG have not. One must observe, however, that the latter tribunals have yet to face a case of such extreme financial disruption as have the few U.S. courts which have allowed financial hardship as a basis for excuse.

With respect to the U.C.C., Comment 4 to § 2-615 explains that neither increased cost nor a rise or collapse in a market is a basis for excuse, but it leaves open the possibility that a severe shortage of supplies due to an unforeseen and drastic contingency such as war or embargo might excuse performance. Many breaching parties, however, have argued that a change in profit margins makes performance impracticable under this section.

With notable exceptions, U.S. courts in sales of goods cases fairly consistently reject impracticability arguments based solely on market change. Judge Posner offered a traditional economic analysis of the doctrine in the Seventh Circuit case *Northern Indiana Public Service Co. v. Carbon County Coal Co.* ("*NIPSCO*").<sup>90</sup> In *NIPSCO*, Carbon County had sued NIPSCO to enforce performance of a con-

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<sup>90</sup> *N. Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 276-78 (7th Cir. 1986) [hereinafter *NIPSCO*]; see also *United States v. Sw. Elec. Coop., Inc.*, 869 F.2d 310, 315-16 (7th Cir. 1989) (denying the frustration of purpose defense where the contract in question allows for escalation of price).



tract to buy its coal. The utility company argued that performance should be excused under both U.C.C. § 2-615 and the contract's force majeure clause because, since the contract had been signed, state regulators had ordered the utility company to seek out and, if possible, buy cheaper electricity and, if cheaper sources were available, barred NIPSCO from passing on the cost of more expensive energy to its customers.<sup>91</sup> It turned out to be cheaper for NIPSCO to buy electricity from a third party than to generate it from the coal it was contracted to purchase from Carbon County, and NIPSCO knew it would not be able to pass the higher costs of the Carbon County coal on to consumers. The district court refused even to submit the impracticability defense to the jury, on the grounds that a buyer could not assert impracticability under Indiana law.<sup>92</sup> NIPSCO was found liable for breach and ordered to pay \$181 million in damages.<sup>93</sup>

On appeal, the Seventh Circuit ruled that the doctrine of impracticability was inapplicable to NIPSCO's contract.<sup>94</sup> It explained that the contract had explicitly assigned the risk to NIPSCO.<sup>95</sup> The contract at issue was a fixed price contract; it placed a limit on how low prices could go but did not include a ceiling to limit their escalation.<sup>96</sup> Such a clause, the court asserted, constituted a clear agreement between the parties that the buyer should bear the risk of price decreases.<sup>97</sup> The buyer ran the risk of having incorrectly predicted the future market, and "has only himself to blame" if he finds that he has done so.<sup>98</sup> He may not use the doctrines of impracticability or frustration to shift the risk back to the seller when this happens.

It made no difference to this analysis that it was an act of government—a new law requiring utility companies to find the cheap-

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<sup>91</sup> NIPSCO, 799 F.2d at 267-68.

<sup>92</sup> *Id.* at 276. The district court declined to submit the impracticability and frustration issues to the jury because it held that a buyer could not assert those defenses under Indiana law. The Seventh Circuit questioned this holding, but found that the facts of *NIPSCO* did not bring it within the scope of the frustration doctrine. *Id.* at 276-77.

<sup>93</sup> *Id.* at 268.

<sup>94</sup> *Id.* at 276-78.

<sup>95</sup> *Id.* at 278.

<sup>96</sup> *N. Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 278 (7th Cir. 1986).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

est energy source available and barring them from passing the cost of more expensive ones on to ratepayers—that caused one of the parties to lose money under the contract.<sup>99</sup>

The court observed that government intervention in the marketplace is common, especially in the area of utilities, and a government act which changes the outcome of the contract is one of the risks the contract allocates.<sup>100</sup> This reasoning, of course, leaves open the possibility of a different outcome if the contract had failed to allocate risk as it did, or had failed to address the issue at all.

U.S. courts have similarly denied relief when the change in economic circumstances takes place at the transborder level even though the parties are both U.S. companies. The Tenth Circuit, for example, denied relief to an U.S. importer of sewing machines who had begun to lose money due to a severe fluctuation in the currency exchange rate with the exporting country, Switzerland, and hence sought to impose a corresponding surcharge on its sales to the distributor.<sup>101</sup> By the time of the trial in the district court, the devaluation of the dollar in relation to the Swiss franc had doubled the importer's costs and reduced by half its return on each dollar it had invested. The trial court refused to interpret the contract so as to allow the importer to pass on its increased cost to the distributor through the surcharge.<sup>102</sup> The importer appealed, arguing that the lower court's interpretation of the contract—i.e., barring the surcharge—made performance impracticable.<sup>103</sup>

The Tenth Circuit denied relief on three grounds. First, it noted that the contract always allowed for a gross profit margin, even with the devaluation of the dollar.<sup>104</sup> Second, it concluded from the evidence that the importer displayed foreknowledge of, and thus assumed, the risk of currency fluctuations.<sup>105</sup> What is interesting here, in contrast to CISG cases, is that the court looked for specific evidence that this particular party had foreknowledge of the risk of currency fluctuation; as we will see, CISG courts assume this awareness on the part of companies doing transborder sales. Fi-

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Bernina Distrib., Inc. v. Bernina Sewing Mach. Co., Inc.*, 646 F.2d 434, 438-40 (10th Cir. 1981).

<sup>102</sup> *Id.* at 438.

<sup>103</sup> *Id.* at 439.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

nally, the court observed that "cost increases alone, though great in extent, do not render a contract impracticable."<sup>106</sup> The court went on to hold open the possibility of impracticability when "the party seeking to excuse performance could show he could perform only at a loss, and that the loss would be especially severe and unreasonable."<sup>107</sup>

U.S. courts applying the U.C.C. have taken the same position in cases in which regulatory acts of foreign governments increase the costs to a supplier. Indeed, these courts have gone to the length of insisting that the supplier find any means possible to acquire the goods, even at a price that results in an overall loss under the contract. The Seventh Circuit, for example, refused to excuse performance under a contract involving Canadian fertilizer "merely because it [was] burdensome."<sup>108</sup>

In this case, Canadian government regulations had significantly increased the cost of performance to a supplier of potash who imported from Canada to sell in the United States.<sup>109</sup> The court based its holding on a combination of foreseeability and allocation of the risk: it noted that previous Canadian regulations should have put the supplier on notice of possible further government action and asserted the buyer's right, absent more severe facts than were present, "to rely on the party to the contract to supply him with goods regardless of what happens to the market price."<sup>110</sup> The court relied, in part, on evidence that the supplier was on notice of Canadian regulations and not on a general awareness of the risks of a transborder transaction.<sup>111</sup>

On the other hand, U.S. courts have at least occasionally been willing to allow changed market conditions to qualify as the basis for an excuse under U.C.C. § 2-615. Their willingness to diverge from the general rule seems to hinge on the extremity of the changed conditions and the element of bad faith on the part of the party seeking to enforce the contract. Two cases impart a sense of

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<sup>106</sup> *Bernina Distrib., Inc. v. Bernina Sewing Mach. Co., Inc.*, 646 F.2d 434, 439 (10th Cir. 1981).

<sup>107</sup> *Id.* at 440 (citing *Gulf Oil Corp. v. Fed. Power Comm'n*, 563 F.2d 588, 600 (3d Cir. 1977)).

<sup>108</sup> *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283, 294 (7th Cir. 1974).

<sup>109</sup> *Id.* at 286-87.

<sup>110</sup> *Id.* at 294.

<sup>111</sup> *Id.*

what motivates a court to grant an excuse under U.C.C. § 2-615 for dramatic market fluctuations. First, a district court declined to find that a twenty-five percent increase in the cost of some materials, a 185 percent increase in the cost of others, and a twenty-one percent increase in labor costs excused performance.<sup>112</sup> The seller claimed the increases would cause a \$428,500 loss on a contract that had an original profit expectation of \$589,500.<sup>113</sup> The court insisted on performance, finding that the contract was not unprofitable due to the increases.<sup>114</sup> Even price increases of fifty to fifty-eight percent are not considered severe enough.<sup>115</sup>

Second, the opinion of the District Court for the Western District of Pennsylvania suggests that under some circumstances economic changes can become sufficiently egregious so as to be grounds for an excuse.<sup>116</sup> The Aluminum Company of America ("ALCOA") sought relief from performance of its toll conversion contract with Essex Group ("Essex") due to impracticability and frustration of purpose.<sup>117</sup> The Court, after a thorough review of the applicable law, granted the requested relief and reformed the contract to adjust the equities and ensure a fairer distribution of benefits.<sup>118</sup> The main basis for the ruling seems to be the extraordinary

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<sup>112</sup> Louisiana Power & Light Co. v. Allegheny Ludlum Indus., Inc., 517 F. Supp. 1319, 1324 (E.D. La. 1981).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Iowa Elec. Light & Power Co. v. Atlas Corp., 1978 WL 23494 (N.D. Iowa 1978); see also Golsen v. ONG Western, Inc., 756 P.2d 1209, 1212 (Okla. 1988) (holding that a 26.4 % reduction in price did not excuse the buyer under the "take-or-pay" natural gas contract); Lawrance v. Elmer Bean Warehouse, Inc., 702 P.2d 930, 933 (Idaho Ct. App. 1985) (suggesting that the threat of bankruptcy might have been offered as grounds for excusing the buyer's performance, but declining to apply the doctrine because the buyer offered no evidence to prove the assertion); Maple Farms, Inc. v. City School Dist. of Elmira, 352 N.Y.S.2d 784, 790 (N.Y. Sup. Ct. 1974) (ruling that a ten percent price increase did not excuse performance).

<sup>116</sup> Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53, 72-73 (W.D. Pa. 1980). The contract containing the performance The Aluminum Company of America ("ALCOA") sought to excuse was arguably not governed by the U.C.C., but the issue was never raised. *Id.* at 72-76. The Court used U.C.C. principles, the Restatement, and common law principles to analyze the issue of excuse. *Id.* It also drew from analogies to U.C.C. cases. *Id.* Thus, I suggest that the case has implications for the U.C.C. doctrine of excuse.

<sup>117</sup> *Id.* at 70.

<sup>118</sup> *Id.* at 78-80. The unorthodox nature of this decision has generated commentary. See Larry A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law*, 33 NEW ENG. L. REV. 265, 307 (1999) (discussing the equitable adjustment of long-term contracts).

losses that the increased price of its non-labor costs would have caused ALCOA, and Essex's possible opportunism in enforcing a contract that would severely harm a competitor; ALCOA's losses were shown to exceed seventy-five million over the life of the contract, while Essex stood to gain in proportion to ALCOA's losses.<sup>119</sup>

By making this ruling, the Court adopted a less strict application of the doctrine of impracticability than is customary in U.C.C. or CISG jurisprudence. The reason for the Court's anomalous ruling in ALCOA may be the result of converging circumstances that contributed to the inequity of the situation. To begin with, the losses to ALCOA were staggering—a thousand times greater than that in another distinguished case.<sup>120</sup> Moreover, because the contract permitted a fluctuation in the price Essex paid ALCOA to process the aluminum, the price, even at its high end, fell far short of ALCOA's increased production costs. Finally, Essex was insulated from having to pay the same prices for aluminum production that it would have had to pay another vendor at the time of the suit. The Court noted that this discrepancy gave Essex a "tremendous advantage . . . under the contract as it is written and as both parties have performed it."<sup>121</sup>

The problems in the ALCOA contract arose because the parties had agreed to use the Wholesale Price Index for Industrial Commodities ("WPI-IC") as the standard by which to account for increases in ALCOA's non-labor costs.<sup>122</sup> The combination of OPEC price hikes and what the Court called "unanticipated pollution control costs" caused ALCOA's electricity costs to rise much faster than the WPI-IC.<sup>123</sup> Although the Court acknowledged that "[a] mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability, since it is this sort of risk that a fixed price con-

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<sup>119</sup> *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 59 (W.D. Pa. 1980).

<sup>120</sup> *Id.* at 75. The Court here distinguished the case at bar from *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 320 (D.C. Cir. 1966), which held that the plaintiff was only entitled to the contract price for transporting cargo because performance of the contract was not rendered legally impossible by the closure of the customary shipping route.

<sup>121</sup> *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 59 (W.D. Pa. 1980).

<sup>122</sup> *Id.* at 56.

<sup>123</sup> *Id.* at 58.

tract is intended to cover,"<sup>124</sup> it found that even the strict impracticability standard of "severe disappointment [was] clearly met in [this] case."<sup>125</sup>

The Court noted that "the nonoccurrence of an extreme deviation of the WPI-IC and ALCOA's non-labor production costs was a basic assumption on which the contract was made,"<sup>126</sup> and it declined to find the risk allocated to ALCOA, determining that the "circumstances surrounding the contract show[ed] a deliberate avoidance of abnormal risks."<sup>127</sup>

The Court also noted that the contract was negotiated and signed in 1967, before the 1971 oil price increase could have been foreseen.<sup>128</sup> The Court insisted, however, that the fact that a risk is foreseeable or even recognizable at the time of contract formation does not necessarily end the inquiry as to impracticability.<sup>129</sup> It went on to say, "[i]f it were important to the decision of this case, the Court would hold that the foreseeability of a variation between the WPI-IC and ALCOA's costs would not preclude relief under the doctrine of impracticability."<sup>130</sup> It explained this reasoning by reference to the underlying spirit of the U.C.C., which calls for a balancing of the equities in commercial decisions and sensitivity to "the mores, practices, and habits" of the business world.<sup>131</sup> The Court found that there was a point when the "community's interest in predictable contract enforcement shall yield to the fact that enforcement of a particular contract would be commercially senseless and unjust."<sup>132</sup> Indeed, some of the comments to U.C.C. § 2-615 arguably support this reading. Comment 4, for example, allows

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<sup>124</sup> *Id.* at 72 (quoting the RESTATEMENT (SECOND) OF CONTRACTS § 281 cmt. d (1981)).

<sup>125</sup> *Id.* at 73.

<sup>126</sup> *Id.* at 72.

<sup>127</sup> *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 75 (W.D. Pa. 1980). Although the Court did not specify the circumstances, it seems likely they were under the impression that the contract allowed for the fluctuation of ALCOA's profit within the standard deviation of the price index and that ALCOA's losses had risen to several times this standard deviation by the time of the lawsuit.

<sup>128</sup> *Id.* at 74.

<sup>129</sup> *See id.* at 76 (explaining that foreseeability of a risk does not end the impracticability inquiry because of the parties' inability to provide for all the possibilities of which they are aware).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

that while market collapse itself is not grounds for excuse, there may be contingencies such as wars, embargos, or crop failures that cause a "marked increase in cost" and may be grounds for an excuse.<sup>133</sup>

What really seems to have driven the Court's decision, however, was the issue of good faith, and the sense that Essex was acting opportunistically in seeking to enforce the contract. While ALCOA's production costs had gone up sharply, the price of the aluminum that Essex bought from ALCOA and subsequently resold had simultaneously risen even more drastically. Thus, the Court observed that the "margin of profit shows the tremendous advantage Essex enjoys under the contract . . . [and a] significant fraction of Essex's advantage is directly attributable to the corresponding . . . losses ALCOA suffers."<sup>134</sup> Furthermore, the Court also noted that ALCOA manufactured and sold the same aluminum products as Essex, and that Essex was in competition with ALCOA for this market. Thus, one benefit to Essex from enforcing the contract was to undermine a competitor. These inequities seem to have influenced the court's decision. Comment 6 to U.C.C. § 2-615, moreover, supports this use of the equity factor in analyzing excuse cases. It refers to the general policy of the U.C.C. as using "equitable principles in furtherance of commercial standards and good faith."<sup>135</sup>

Two other federal cases from Pennsylvania, while declining to apply the doctrine of impracticability, leave open the possibility that it might be applied in harsher circumstances. In *Hancock Paper Company*, the District Court for the Eastern District of Pennsylvania held that "the problem of the depressed market [an increase of 8 percent in the buyer's costs] . . . does not reach the level of severity required to excuse performance under either the Restatement or the U.C.C."<sup>136</sup> In *Publicker Industries*, the Eastern District ruled that a contract to supply ethanol over a three-year period was not rendered impracticable due to the doubling of the seller's costs be-

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<sup>133</sup> U.C.C. § 2-615 cmt. 6 (1989).

<sup>134</sup> *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 59 (W.D. Pa. 1980).

<sup>135</sup> U.C.C. § 2-615 cmt. 4 (1989).

<sup>136</sup> *Hancock Paper Co. v. Champion Int'l Corp.*, 424 F. Supp. 285, 290 (E.D. Pa. 1976).

cause of events resulting from the 1973 Mideast War.<sup>137</sup> Union Carbide argued that its aggregate losses under the contract would amount to \$5.8 million, but the Court refused relief on two grounds: First, it quoted Comment 4 to U.C.C. § 2-615 to the effect that increased costs alone are not sufficient to render performance impracticable, and noted that it had found no case in which an increase of less than one hundred percent had been found to create impracticability.<sup>138</sup> It also agreed with the plaintiff's contention that, because the contract had been signed in 1972, a year after the oil producing countries had instituted a twenty-five percent price increase, further price hikes were foreseeable.<sup>139</sup> Finally, the court also referred to the contract provision which put a ceiling on price increases as evidence that the seller was intended to bear the risk of any "substantial and unforeseen" cost increase.<sup>140</sup>

In sum, the cases show that a defense of excuse under § 2-615 based on market failure is unlikely to succeed. The only significant exception to this rule appears in *ALCOA*, a case in which an unusual combination of at least three factors seems to have moved the court to grant relief: (1) there were some indications that the plaintiff was acting opportunistically in seeking enforcement of the contract; (2) while the nonperforming party's expenses rose exponentially, the performing party's profits also increased dramatically, drastically increasing the inequities of the contract, and the losses suffered were especially egregious; and finally, (3) the facts of the case reveal that the parties were competitors in the same market, and that enforcement of the contract might have financially disabled one of them. This case thus seems like the exception which proves the rule, particularly because the court declared that it was excusing performance of the existing contract under U.C.C. § 2-615 for reason of equity. Perhaps in a similar situation, where the convergence of inequities was equally compelling, another court applying the U.C.C. would act the same way, but another similar concatenation seems unlikely. Whatever rationale courts use, their general trend is to enforce contracts despite losses, even severe losses, to the party seeking to be excused.

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<sup>137</sup> *Publicker Indus. v. Union Carbide Corp.*, 17 UCC Rep. Serv. 989, 993 (E.D. Pa. 1975).

<sup>138</sup> *Id.* at 991.

<sup>139</sup> *Id.* at 992.

<sup>140</sup> *Id.*



For cases decided under the CISG, I turn to European arbitration tribunals, which so far have far outstripped U.S. courts in deciding cases under the Treaty. So far, tribunals in Bulgaria, France, Germany, and Russia, as well as at the International Chamber of Commerce, have refused to excuse performance due to changed market conditions. This makes perfect sense—even more so than under the U.C.C.—based on the wording of the treaty and in the context of trans-border sales. First, it is unlikely that a mere market change could impose the kind of physical impossibility that the wording of Article 79 seems to require. Second, in the context of trans-border sales, parties need to be assured that the fluctuations of national markets will not put their contracts at risk. Only a strict policy in this regard would further the CISG's stated goal of promoting international sales: a seller or buyer who had to worry about every shift within a country's borders would endanger the contract would be unwilling to take the risk.

Tribunals applying the CISG have so far looked upon market failure defenses unsympathetically but have allowed them to be heard, despite indications that Article 79 was not meant to cover this defense at all. CISG commentators have suggested that increased costs of one hundred percent may offer a basis for excuse, and that even less than that might be considered under certain circumstances.<sup>141</sup> On the other hand, there is a consensus that fluctuations of up to fifty percent are insufficient.<sup>142</sup> Moreover, as mentioned *supra*, some commentators argue that the word "impediment" was chosen to limit the application of the section to cases when a physical hindrance literally makes performance impossible, and that economic hardship is not covered by the section at all.<sup>143</sup> The ultimate goal of the CISG in this regard is to force parties to negotiate into their contracts hardship clauses specifically designed to reflect and allocate the risks attendant upon the particular enterprise, rather than using a "one size of economic risk fits all" approach.<sup>144</sup>

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<sup>141</sup> ENDERLEIN & MASKOW, *supra* note 54, at 325.

<sup>142</sup> Sarah Howard Jenkins, *Exemption for Nonperformance: UCC, CISG UNIDROIT Principles—A Comparative Assessment*, 72 TUL. L. REV. 2015 (1998).

<sup>143</sup> Dionysios Flambouras, *Comparative Remarks on CISG Article 79 & PECL Articles 6:111, 8:108*, May 2002, <http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html>.

<sup>144</sup> SCHLECHTRIEM, *supra* note 2, at 618.

*Societe Romay AG v. SARL Behr France* is a perfect example of a case that should never have been heard under Article 79.<sup>145</sup> The Appellate Court of Colmar declined to excuse the buyer's performance despite the fact that a collapse of the automobile market had reduced prices for the parts it was contracted to buy by about half on the open market. The Court agreed that this was a "significant drop in prices" but not one that was unforeseeable.<sup>146</sup> It added that over the life of a long term contract such as the one at issue, price fluctuations are predictable, and that the buyer, "an experienced professional acting in the international market," should have addressed this possibility in the contract.<sup>147</sup> Having failed to do so, it must bear the risk.<sup>148</sup> What is interesting here is that the Court allowed the excuse of market change to be heard as part of an Article 79 defense, although it declined to grant it. Ignoring the difficulties caused by the word "impediment," the court used a foreseeability analysis, much as an U.S. court would do. Also interesting is the implication of the court's reasoning that a severe drop in prices caused by an unforeseeable event might bring the contract within the purview of Article 79(1). Also important, however, is the court's view that even a fifty percent drop did not excuse performance, and that such a shift was foreseeable in international markets.<sup>149</sup>

If the *Romay* Court had adhered to the intended meaning of the word "impediment," it would not have heard this case. Indeed, the very logic the Court employed in making its decision supports the proposition that it should not have done so. The Court made reference to the long-term nature of the contract at issue, and to the buyer's extensive experience in the international market. These are two key features of trans-border contracts in general, and the underlying message in the Court's decision seems to be that the matter of market change in this context should have been addressed in the agreement by the parties, and not brought to a court for adjudication. This case offers a perfect example of why courts and tribu-

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<sup>145</sup> *Société Romay AG v. SARL Behr France*, Cour d'appel Colmar (Fr.), 12 June 2001, available at <http://witz.jura.uni-sb.de/CISG/decisions/120601v.htm>, translation available at <http://www.cisg.law.pace.edu/cases/010612f1.html>. I have used my own translation.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

nals should read Article 79 to preclude market change defenses. When the parties know they will not receive a hearing in cases like this, they will provide for these contingencies themselves. It misuses the parties' time and money—as it undoubtedly did in this case—to ask a court to do what they should have done themselves.

Other cases have led to similar conclusions. In similar circumstances, a Russian Federation tribunal refused to excuse a buyer who pleaded a drop in prices, noting sternly that “a change in market conditions cannot serve as an excuse for the buyer to avoid payment for the goods.”<sup>150</sup> Though the tribunal did not elaborate, one reason for this ruling may have been the limited meaning of the word “impediment.” More encouragingly, a Bulgarian Tribunal went so far as to refuse even to allow the seller to make a price fluctuation argument under Article 79, a result that seems consistent with the language of the treaty. A buyer sought to be excused from further performance of a contract to buy steel ropes because the increase in the value of the dollar and a depressed construction market had depressed the market.<sup>151</sup> The Bulgarian tribunal ruled that these circumstances were not covered by Article 79 of the CISG, and in any case were foreseeable.<sup>152</sup>

Two more cases, however, show that courts are still willing to do a foreseeability analysis which should be left to the parties—i.e., one that doesn't first require that the grounds for excuse fall under the narrow literal meaning of “impediment.” The Appellate Court of Hamburg refused to excuse from a contract a seller who tried to cease delivery of tomatoes.<sup>153</sup> Market prices had gone up, and the court observed that the seller “only wanted to gain profit from the increased prices.”<sup>154</sup> In 1989, the International Chamber of Commerce refused to excuse a seller from performance despite a

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<sup>150</sup> Payment for Goods Supplied (Russia v. Germany), *Arbitrazhnaja praktika za 1996-1997 gg Moskva (Statut) No. 63 (1998)*, translation available at <http://www.cisg.law.pace.edu/cases/970611r1.html>.

<sup>151</sup> Arbitration Case No. 11/96 (Russ. v. Bulg.), *Praktika Bulgarska turgovsko-promishlena palata [Bulgarian Chamber of Commerce & Indus.] 1998-1999, No. 3, 12 (1998)*, translation available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980212bu.html>.

<sup>152</sup> *Id.*

<sup>153</sup> *Oberlandesgericht Hamburg [OLG][Provincial Court of Appeal] July 4, 1997, 1 U 143/95*, translation available at <http://cisgw3.law.pace.edu/cases/97070-4g1.html>.

<sup>154</sup> *Id.*

13.16% increase in the price of the goods.<sup>155</sup> Here, the buyer sought to exercise a contractually guaranteed option to buy an additional 80,000 tons of steel bars, and the seller tried to renegotiate the price due to market changes.<sup>156</sup> Although the Tribunal decided that the CISG did not apply and used Yugoslav law instead, it remarked that the outcome would have been the same under the CISG, and found that fluctuations in steel prices were predictable, and thus not grounds for excuse.<sup>157</sup> The Tribunal noted the necessity of a strict approach in assessing lack of predictability, and observed that the increase in prices was "well within the customary margin."<sup>158</sup> This leaves open the possibility, as do some of the U.S. cases, that a market change could be so severe that it would exceed "the customary margin," and offer grounds for excuse. As we have seen in ALCOA, this reasoning is in harmony with U.C.C. case law, given that in ALCOA relief was granted based upon the egregiousness of the circumstances. Nonetheless, it seems that tribunals applying the CISG, like U.S. courts applying the U.C.C., are unreceptive to using market change as a basis for excuse. In general, however, CISG-based holdings often rely on the idea of foreseeability, implying that the word "impediment" is not a bar to bringing an excuse claim for market change under the CISG, a trend I claim is unfortunate. The next basis for excuse, third party failure, reveals more dramatic differences between the two regimes.

### 3.2. *Third Party and Supplier Failure*

The U.C.C. envisions two kinds of supply failure. The first supply failure occurs when the contract specifies a single source for the goods, and both parties have agreed that this is to be the case. In this case, the failure of the agreed upon single source is a valid excuse for nonperformance. In the second kind, the contract fails to specify a single source, and the source the seller has counted on

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<sup>155</sup> Award 6281 of 26 Aug. 1989 (Egypt v. Yugo.), International Chamber of Commerce Court of Arbitration-Paris, *translated in* 15 Y.B. COM. ARB. 96 (1990).

<sup>156</sup> *Id.* at 96-97.

<sup>157</sup> *Id.* at 97, 100.

<sup>158</sup> *Id.* at 99; *see also* Nuova Fucinati SpA. v. Fondmetall Int'l A.B., Tribunale di Monza [Trib.] [ordinary court of first instance], 14 Jan. 1993, Foro. It. 1994, I, 916, *translated in* 15 J.L. & COMM. 153 (1995-1996) (observing that the CISG did not "seem to contemplate the remedy of dissolution of contract for supervening excessive onerousness").

fails. In this case, the U.C.C. is deemed to mandate that the seller acquire the goods from any possible source, regardless of difficulty or expense. These scenarios are perfectly in line with Section 2-615's language: if the contract identified a single source for the goods to be sold, then that source's failure is indeed the "occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made." The exception to this general rule is that Section 2-615 relief would not be forthcoming if the parties discussed a particular supplier, or mentioned one in the purchase order.<sup>159</sup> Normally, the risk of failure is considered allocated to the seller who promises to deliver and is assumed to know the market.<sup>160</sup> Thus, the District Court of Maryland refused to excuse a seller's performance under a contract to sell antimony oxide when the seller's source failed, because the seller had every reason to know of problems with the supplier and with the market in general, and the contract was silent as to the source of the goods.<sup>161</sup> Other courts applying the U.C.C. agree that the main test under the facts of supply failure is foreseeability.<sup>162</sup> Without an escape clause in the contract, moreover, courts will find the possible failure sup-

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<sup>159</sup> *Zamoiski Co. v. Tenavision, Inc.*, No. 84 Civ. 3231 (BN), 1986 WL 10274, at \* 4 (S.D.N.Y. Sept. 9, 1986) (holding that there is no excuse where the seller did not make reasonable efforts to get televisions to buyer when the seller was not able to get the televisions from the manufacturer, and the supply of televisions directly from the manufacturer was not specified).

<sup>160</sup> *Rockland Inds., Inc. v. E+E (US) Inc.*, 991 F. Supp. 468, 472 (D. Md. 1998) (holding that the seller had no excuse in its failure to send product to buyer since supplier's possible failure was a foreseeable risk).

<sup>161</sup> *Id.* at 473.

<sup>162</sup> *See, e.g., Roy v. Stephen Pontiac-Cadillac, Inc.*, 543 A.2d 775, 778-79 (Conn. App. Ct. 1988) (holding that a car dealer that contracted to sell a car whose specifications the manufacturer would not meet did not excuse performance because the dealer could have consulted manufacturer's publications and discovered that fact); *Heat Exchangers, Inc. v. Map Constr. Corp.*, 368 A.2d 1088, 1094, 21 U.C.C. Rep. Serv. 123 (Md. Ct. Spec. App. 1977) (noting that shortage of air conditioner parts was foreseeable by the seller); *Barbarossa & Sons, Inc. v. Iten Chevrolet, Inc.*, 265 N.W.2d 655, 659 (Minn. 1978) (declining to excuse performance of truck dealer which had failed to deliver truck because the manufacturer had cancelled the order, because of the fact that the dealer's other contracts contained an escape clause in case of supply failure, and because "a partial failure of a seller's source of supply generally has been treated as a foreseeable contingency"); *Alamance Country Bd. of Educ. v. Bobby Murray Chevrolet, Inc.*, 465 S.E.2d 306, 311, 28 UCC Rep. Serv. 2d 1220 (N.C. Ct. App. 1996) (observing that foreseeability is an "objective standard").

ply failure allocated to the seller.<sup>163</sup> Moreover, the promisor must make every effort to find alternate sources of supply.<sup>164</sup>

Courts and tribunals hearing cases under Article 79 allow claims to be brought involving suppliers, which, as we have seen, is probably not consistent with the intention of the drafters or the analysis of the commentators. While the general trend in CISG courts is to apply Article 79 very narrowly to cases involving supply failure, the fact that they do not dismiss supplier-based defenses out of hand is noteworthy and unfortunate.

Rather than refuse to hear the claims under Article 79, CISG tribunals employ reasoning similar to that of U.S. courts applying the U.C.C.: the possible failure of a third party supplier is a contingency which the seller should have anticipated. For example, the Arbitral Tribunal of Hamburg has refused to excuse under Article 79 a seller who failed to deliver goods due to the financial difficulties of its manufacturer, noting that such eventualities were within the risks the seller was expected to bear.<sup>165</sup> This Tribunal did not conduct a detailed application of Article 79(2) criteria, but its decision is fully consistent with what they seem to require. Apparently finding that the seller had failed the requirements of Article 79(2)(a) (i.e., finding that the possible supply failure was an impediment the seller should have taken into account at the time of the contract) it did not need to ask further whether, under Article 79(2)(b), the supplier would have been culpable under paragraph

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<sup>163</sup> See, e.g., *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974) (ruling that a seller of potash was not excused from delivery by closing of the mine which was its main source of supply absent an escape clause in the contract explicitly so providing); *Heat Exchangers, Inc. v. Map Constr. Corp.*, 368 A.2d 1088, 1094, 21 UCC Rep. Serv. 123 (Md. Ct. Spec. App. 1977) (noting that shortage of air conditioner parts was foreseeable by the seller); *Alamance County Bd. of Educ. v. Bobby Murray Chevrolet, Inc.*, 465 S.E.2d 306, 311, 28 UCC Rep. Serv. 2d 1220 (N.C. Ct. App. 1996) (denying seller's excuse because of lack of escape clause in contract). *But cf.* *Selland Pontiac-GMC, Inc. v. King*, 384 N.W.2d 490, 493, 1 UCC Rep. Serv. 2d 463 (Minn. Ct. App. 1986) (excusing performance when manufacturer went bankrupt in part because the contract and the price quotation had specified the supplier).

<sup>164</sup> *Luria Bros. & Co., v. Pielet Bros. Scrap Iron & Metal, Inc.*, 600 F.2d 103, 112, 26 UCC Rep. Serv. 1081 (7th Cir. 1979) (holding that seller was not excused from delivering scrap metal to buyer on impracticability grounds since the seller did not find other alternatives to complete the transaction).

<sup>165</sup> Partial Award of 21 Mar. 1996 (H.K. v. Ger.), *Scheidsgerecht der Handelskammer Hamburg* [Hamburg Chamber of Commerce] March 21, 1996, *Rechtsprechung Kaufmännischer Schiedsgerichte* [RKS] E 5b no. 84, *translated in* 22 Y.B. COM. ARB. 35, 39 (1997).

one.<sup>166</sup> Similarly, the District Court of Hamburg refused to apply Article 79 to a seller whose supplier raised the price and had supply problems after the seller had signed the contract with the buyer.<sup>167</sup> The Tribunal observed that the financial straits of a seller's manufacturer were not unforeseeable or terribly exceptional, as would be required for a finding of force majeure.<sup>168</sup> In neither case did the Tribunal have to move beyond paragraph (2)(a): both found the analysis complete when they determined that supply failure was a foreseeable problem. This result is perfectly consistent with U.S. cases addressing this issue: both regimes apply the foreseeability analysis.

Some Article 79 cases, however, show less willingness than U.S. courts to excuse a seller's performance based on supplier failure. In a noteworthy example, the International Chamber of Commerce Arbitration Tribunal found Article 79 inapplicable to a seller's failure to find a supplier who could use the proper packaging for the goods it had contracted to sell and deliver.<sup>169</sup> Up to this point, the case seems predictable by U.S. standards: surely troubles with packaging are reasonably foreseeable. The Tribunal further added that even if the seller had attempted to ascertain the supplier's ability to use the packaging and had been given false information, he would still have been held responsible because "the Seller's responsibility for his supplier is an integral part of the general risk of the supply of goods."<sup>170</sup> This seems likely to have been a closer

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<sup>166</sup> Award in Case No. 152/1996 (Ger. v. Russ.) (Trib. of Int'l Commercial Arbitration at the Russ. Fed'n Chamber of Commerce & Indus. 1998), reprinted in ROZENBERG, ARBITRAZHNAJA PRAKTIKA za 1998 god, 18 (Moscow, Straut, 1999), translation available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/9801-12r1.html>.

<sup>167</sup> Oberlandesgericht Hamburg [OLG][Provincial Court of Appeal] Feb. 28, 1997, 1 U 167/95, translation available at <http://cisgw3.law.pace.edu/cases/97022-8g1.html>.

<sup>168</sup> *Id.*

<sup>169</sup> Award 8128 of 1995 (Austria v. Switz.) (Court of Arbitration of the Int'l Chamber of Commerce 1995), reprinted in 123 JOURNAL DU DROIT INT'L 1024 (1996), translation available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/958128i-1.html>.

<sup>170</sup> *Id.* at 5. See also Arbitration Proceeding 155/1994 (Ger. v. Russ.) (Trib. of Int'l Arbitration at the Russ. Fed'n Chamber of Commerce and Indus. 1995), reprinted in ROZENBERG, 24 PRAKTIKA MEZH DUNARODNOGO KOMMERCHESKOGO ARBITRAZHNOGO SUDA NAUCHNO-PRAKTICHESKIY KOMMENTARIYI 63 [Practice of the International Commercial Arbitration Court: Scientific-Practical Comments] (Moscow 1997), translation available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/950316r1.html> (holding that the seller was responsible for performance

question under the U.C.C.: is misleading, or deliberately false information by a third party reasonably foreseeable by the seller? Though the Tribunal in this case did not elaborate on its reasoning beyond the risk analysis already noted, its ruling makes sense in light of the application of Article 79(2)(b): a third party supplier who gave false information to the seller would not be excused under 79(1), and thus the seller, under Article 79 as whole, would not be excused. This ruling seems more consistent with the full analysis Article 79 requires (i.e., applying the same test to both the main contractor and the third party). It remains the case, however, that supplier failure probably has no place in this article, and the packaging case is a particularly egregious example. Surely packaging does not have an "organic" relationship to the contract.

With respect to third party excuses under Article 79, something close to strict liability seems to operate. Again, this is consistent with the Article's language. A Federal Supreme Court of Germany ruling reflects this strictness in a much-cited case involving a contract for the sale of vine wax.<sup>171</sup> The wax in question was a newly developed type of wax, and was sent directly from the manufacturer to the buyer in the original packaging, as the seller had requested.<sup>172</sup> It turned out to be defective and damaged the vines it was used on. The nature of this transaction, it should be noted, seems to fit more closely than previous transactions the requirements for the definition of a third party supplier encompassed by Article 79 as set forth in the commentary: the procurement and supply of product to the buyer was delegated to the supplier. This seems, at least arguably, to be performing an organic part of the contract. The lower court found that the buyer had a valid claim, and the Supreme Court agreed. It rejected the seller's argument that, as a mere intermediary, it had no control over the wax.<sup>173</sup> It ruled that, under Article 79, the risk of a nonconforming delivery is allocated to the promisor – in this case, the seller – unless the con-

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despite a work stoppage at the supplier's factory since the seller was reasonably expected to take such an eventuality into account).

<sup>171</sup> See Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 24, 1999, 141 Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 129, translation available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990324g1.html> (holding that liability of the seller resulted from its failure to comply with its obligation to deliver conforming goods; it made no difference whether the defect was the fault of the seller or the supplier).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*



tract specifies otherwise.<sup>174</sup> The promisor's culpability or lack thereof is immaterial: it is simply a matter of statutory allocation of risk.<sup>175</sup>

This case and others like it seem to restrict almost completely the possibility of a seller's excuse under Article 79, but commentators have suggested that excuse might exist in cases where the nonconformity is attributable to a risk which can neither be attributed to the sphere of influence of the seller nor that of his suppliers. For example, a seller sells a buyer demonstrably safe food-stuffs for resale that are nonetheless suspected of being dangerous by the public.<sup>176</sup> The goods in such a case would be nonconforming, because unusable, but the seller could not be held accountable for general public suspicion.<sup>177</sup>

There are, however, at least hypothetical scenarios under which a seller may be excused. A recent German Supreme Court case offers such a scenario.<sup>178</sup> A seller's shipment of powdered milk was discovered, after delivery, to be contaminated with lipase, and the buyer sued.<sup>179</sup> The seller first claimed that his performance should be excused because the infestation occurred after the milk had been delivered, and therefore the goods as delivered had conformed to the contract.<sup>180</sup> Remanding for further fact finding on the timing of the contamination, the Supreme Court ruled that if the existence of the infestation prior to the transfer – and thus the delivery of nonconforming goods – could not be excluded, the seller's success under Article 79 would depend on the seller proving (1) that the contamination would not have been detectable with the best possible testing methods, and (2) that any infestation had occurred outside of its sphere of influence.<sup>181</sup>

Although the court does not explain how it derived this test, it certainly seems to have been based on the language of Article 79.

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 24, 1999, 141 *Entscheidungen des Bundesgerichtshofs in Zivilsachen* [BGHZ] 129.

<sup>178</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 9, 2002, 23 *Zeitschrift für Wirtschaftsrecht* 672 (F.R.G.), translation available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020109g1.html#cx> (demonstrating that there are scenarios under which a seller may be excused).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 676.

The Court's first condition for excusing the seller—that the non-conformity would be undetectable with the best possible methods of testing—arguably restates Article 79's requirement that the failure to perform be out of the seller's control. If "the best available testing" failed to detect the defect, the seller could not have discovered and cured it, nor could he have taken it into account or overcome its consequences. The Court's second requirement that the seller prove that the infestation was caused by something "outside its sphere of influence" also restates Article 79's "beyond the seller's control" test. Another exception to the fairly strict application of the third-party excuse doctrine that Article 79 seems to require appears in a French District Court case. The District Court of Besançon, France allowed a seller to take refuge in Article 79 when sweatsuits it sold to a judo club owner in Switzerland shrank in the buyer's wash.<sup>182</sup> Again, under the U.C.C. this would have arisen as a breach of warranty case, but under the CISG it was brought as a breach resulting from failure to deliver conforming goods, and the seller sought refuge from the breach claim in Article 79. Several extraneous factors may account for this anomalous decision. First, according to the Tribunal, the buyer failed to prove that the entire shipment was nonconforming.<sup>183</sup> Second, the buyer had, despite the nonconformity, sold some of the suits and derived a profit from them.<sup>184</sup> Moreover, despite allowing the seller to claim excuse under Article 79, the buyer did reduce the contract price to account for the problems with the goods.<sup>185</sup> The Tribunal's reading of Article 79 jurisprudence, however, seems confused and at odds with the other cases. For example, it excused the seller because the manufacturer was out of its control, which should not be grounds for excuse.<sup>186</sup> Also, it notes an absence of bad faith as another reason for applying Article 79.<sup>187</sup> This reasoning not only misses the point of Article 79, it also flies in the face of all of the other cases interpreting it.

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<sup>182</sup> Christian v. SARL Douet Sport Collection (SABAKI), Tribunal de Commerce [Trib. Com.] [Commercial Court] Besançon, Jan. 19, 1998, <http://www.unilex.info/case.cfm?pid=1&do=case&id=416&step=FullText> (Fr.), translation available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980119f1.html#cx>.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

A classic third-party fact pattern emerges when strikes or other labor disputes impede the performance of a third party to a contract. In general, under U.C.C. § 2-615 jurisprudence, strikes are not considered within the risks a promisor should anticipate; however, this is not an absolute rule. As the Supreme Judicial Court of Massachusetts stated in *Mishara Construction*, “[w]e are asked to decide as matter of law and without reference to individual facts and circumstances that ‘picket lines, strikes or labor difficulties’ provide no excuse for nonperformance by way of impossibility. This is too sweeping a statement of the law and we decline to adopt it.”<sup>188</sup> The *Mishara* court explained that in determining whether performance has become impracticable or whether the occurrence at issue was one whose risk the parties bargained for, “[t]he emphasis in contracts governed by the Uniform Commercial Code is on the commercial context in which the agreement was made.”<sup>189</sup> Thus, in assessing the question of whether a strike made performance under a particular contract impractical, it is necessary to examine the facts known to the parties at the time of signing with respect to the possibility of strikes during performance, the history of strikes in the industry involved, and the potential severity of a possible strike.<sup>190</sup> In some cases, strikes, while an impediment, would be considered neither unforeseeable nor out of the control of the promisor.

The sole relevant case suggests that CISG courts would generally consider strikes among the risks implicitly allocated to the promisor.<sup>191</sup> Though striking workers employed directly by the main contractor seem to be likely candidates for third-party status under Article 79, by the same token this is exactly the kind of con-

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<sup>188</sup> *Mishara Constr. Co., Inc. v. Transit-Mixed Concrete Corp.*, 310 N.E.2d 363, 366 (Mass. 1974) (ruling on the objection of the plaintiffs to the trial judge allowing evidence as to the hardships the defendant encountered or might have encountered because of the strike, and to the trial judge’s refusal to give an instruction that the defendant was required to comply with the contract regardless of labor difficulties).

<sup>189</sup> *Id.* at 367.

<sup>190</sup> *Id.* at 368.

<sup>191</sup> Arbitration Proceeding 155/1994 (F.R.G. v. Russ.) (Trib. of Int’l Arbitration at the Russian Federation Chamber of Commerce and Indus. 1995), reprinted in ROZENBERG, 24 PRAKTIKA MEZHDUNARODNOGO KOMMERCHESKOGO ARBITRAZHNOGO SUDA NAUCHNO-PRAKTICHESKIY KOMMENTARIY 63 [Practice of the International Commercial Arbitration Court: Scientific-Practical Comments] (Moscow 1997), translation available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/950316r1.html>.

tingency that should be allocated to the seller: it is a generally foreseeable risk and one which an international business person should foresee. Moreover, it is the kind of disturbance which, if allowed as an excuse, would severely undermine the security of transborder deals. In the one available case involving a strike, a seller sought to be excused due to the fact that his failure to perform was due to an "emergency stopping of . . . production" by a third party.<sup>192</sup> The Tribunal ruled that the seller was expected to have taken the possibility of such an impediment into account when entering into the contract.<sup>193</sup> Again, although the Tribunal does not offer a detailed analysis, this result is consistent with the language of Article 79: strikes were an impediment that both the seller and the sub should have "taken into account at the time of the conclusion of the contract." Thus, neither could find refuge in paragraphs 2(a) or 2(b). Both the U.C.C. § 2-615 and Article 79 call for an examination of the facts to determine whether a strike is a basis for excuse or exemption.

### 3.3. *Damages*

The U.C.C. is more lenient than the CISG to the non-performing party with respect to damages. With respect to damages, Albert Kritzer observes that Article 79 "relieves but does not relieve."<sup>194</sup> Though it precludes liability for damages when performance is excused, Article 79 does not address other types of relief, such as a buyer's right to reduction on price (Article 50), the right of compel performance (Articles 46, 62), the right to avoid the contract (Articles 49, 64), the right to collect interest (Article 78), or the right to collect penalties or liquidated damages if local law permits.<sup>195</sup> Indeed, it specifically reserves a party's right to these remedies. In contrast, the U.C.C. relieves the seller in cases of delayed, partial, or non delivery due to an excusing event from all liability.

A party who is not excused under Article 79 is liable for all damages, including consequential damages. As one treatise explains, "under the CISG, every breach of obligation produces a

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> KRITZER, *supra* note 6, at 502.

<sup>195</sup> *Id.*; *Secretariat Commentary, supra* note 20, at art. 65, cmt. 9 (claiming that the CISG relegates the enforcement of penalty clauses in contracts to local law).

claim for damages as long as the obligor cannot exempt himself from liability under Art. 79," and "the seller is therefore also liable in damages for the harm caused by the defect."<sup>196</sup> Under the U.C.C., by contrast, a buyer who suffers damages due to defective goods would sue the seller for breach of warranty.<sup>197</sup> These damages arise under Articles 45(1)(b), and Articles 74-76. Under CISG Article 77, however, a complaining party must mitigate damages, and failure to do so may result in the exclusion of the damages claim.

The Federal Supreme Court of Germany ruling in the vine wax case also reflects this aspect of CISG contract damages.<sup>198</sup> The court ruled that the defendant could be liable for the damages because the wax it had delivered did not meet the applicable industry standards, and was therefore not in conformity with the contract. Because the seller had delivered nonconforming goods, he could be liable for any and all damages they caused. In accordance with Article 77, however, the court remanded the case for further fact finding about defendant's failure to mitigate damages. Under the U.C.C., by contrast, in the above case the buyer would most likely have brought a case for breach of warranty, and the seller would have sued or impleaded the supplier for the same claim.<sup>199</sup> In such a scenario, the excuse issue would probably not have arisen. The CISG, however, creates no separate warranty claims: whatever damages flow from the delivery of defective goods are part of the breach of contract claim, thus making the excuse defense appropriate.

#### 4. CONCLUSION

Despite the discrepancies in their language, U.C.C. § 2-615 and Article 79 have proven equally unhelpful to those seeking excuse for nonperformance. U.C.C. cases reflect the same spirit that animates the CISG by rarely excusing performance when the hinder-

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<sup>196</sup> Peter Schlechtriem, *Uniform Sales Law in the Decisions of the Bundesgerichtshof* (Todd J. Fox trans.), in *REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 2002-2003 (2004)* available at <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem3.html>.

<sup>197</sup> U.C.C. § 2-613 to -615 (1989).

<sup>198</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 24, 1999, 141 *Entscheidungen des Bundesgerichtshofs in Zivilsachen* [BGHZ] 129 (132-33), translation available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/9903-24g1.html>.

<sup>199</sup> U.C.C. § 2-315 (1989).

ing contingency is anything but a physical impediment. In cases involving extreme financial hardship due to market changes, the U.C.C.'s "impracticability" doctrine has so far offered occasional refuge while the CISG's "impediment" doctrine has offered none. With respect to third-party liability, both legal systems agree that events that are foreseeable to the seller provide no basis for excuse; the systems differ in that the U.C.C. analysis ends there, while the CISG analysis goes on to ask whether the third-party subcontractor itself should have foreseen the difficulty. If anything, this has so far led to a stricter application of the excuse doctrine in cases involving third-party performance. With respect to damages, success under U.C.C. § 2-615 cuts off liability for damages on the part of the nonperforming party, while success under Article 79 does not.

The main problem with the way tribunals apply Article 79, I suggest, is that they hear defenses that the drafters did not intend to allow under the Article (i.e., defenses which fall short of physical impediments). Moreover, at least one tribunal has excused performance for third-party failure under Article 79 when the Article's language does not seem to justify it. A more restrictive application of the CISG is consistent with its intent, makes perfect sense in cross-border sales, and should be encouraged.

The difference between U.C.C. and CISG jurisdictions, then, is that U.C.C. courts are willing to examine the circumstances of the contract and infer which party had assumed the risk, while the CISG, at least ideally, forces the parties to make the risk determination explicit. Thus, the CISG leads parties to do that kind of risk analysis as part of the contract negotiation and drafting, which is the only way suitable for international transactions. Courts and tribunals seeking to strengthen uniform sales law and facilitate transborder transactions should adhere to the narrow path laid down by the drafters.