

# Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles—A Comparative Assessment

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## I. INTRODUCTION

A party to a domestic contract governed by Article 2 of the Uniform Commercial Code must answer in damages for its failure to perform in the absence of an excuse for its nonperformance under sections 2-613<sup>1</sup> or 2-615<sup>2</sup> or some doctrine or rule from the common

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1. U.C.C. § 2-613 (1996). That section states:

Casualty to Identified Goods. Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a “no arrival, no sale” term (Section 2-324) then

(a) if the loss is total the contract is avoided; and

law, such as frustration of purpose under section 1-103.<sup>3</sup> Both the Convention on Contracts for the International Sale of Goods<sup>4</sup> and the UNIDROIT Principles of International Contracts,<sup>5</sup> viewed by some as the *Restatement* of international contract law, contain provisions for exemption for nonperformance of contractual duties. Although there is similarity in language and the substantive requirements among the UCC, the Convention, and the Principles, both the scope and application of the provisions vary substantially among these significant initiatives in commercial law applicable to transactions in goods. This Article begins with a brief review of prevailing legal commentary on frustrating events and the allocation of resulting loss; it identifies the scope of relief available under each of the three bodies of rules, in light of traditional and modern theories on the treatment of frustrating events, and suggests that the provisions represent a continuum in the degree of exemption and application rather than identical relief, despite the similarity of language and substantive requirements. Additionally, this Article recommends that Article 2 be revised to provide an express exemption for buyers upon the occurrence of frustrating events to create parity between the parties, and that

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(b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

*Id.*

2. U.C.C. § 2-615 (1996). That section states:

Excuse by Failure of Presupposed Conditions. Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

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

*Id.*

3. U.C.C. § 1-103 (1996). That section states: "Supplementary General Principles of Law Applicable. Unless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions." *Id.*

4. The United Nations Commission on International Trade Law (UNCITRAL) sponsored the Convention on Contracts for the International Sale of Goods that was adopted by the United Nations Diplomatic Conference in 1980 (hereinafter the Convention).

5. See UNIDROIT PRINCIPLES (1994). The International Institute for the Unification of Private Law (UNIDROIT) finalized efforts to establish general rules for international commercial contracts, the UNIDROIT Principles of International Commercial Contracts (hereinafter the Principles) in 1994.

consideration be given to modifying section 2-615 in light of the remedial provisions of article 6.2.3 (effects of hardship) of the Principles.

## II. TWO ALTERNATIVES TO FRUSTRATING EVENTS

Two viewpoints exist on whether courts should intervene to provide relief or require an adjustment in the obligation of performance of a contract when an unforeseen frustrating event occurs. Traditionalists insist, especially in international transactions, that no intervention should occur.<sup>6</sup> In the absence of a contract term to the contrary, the parties are deemed to have allocated the loss of the frustrating event to the party with the burden of performance.<sup>7</sup> The Modernist camp urges, albeit on differing theoretical bases, that intervention by courts to fill a gap in the parties' agreement is required.<sup>8</sup>

### A. *The Modernist Alternative—Gap-Filling*

The occurrence of a contingency or frustrating event that was unforeseeable at the time of contracting creates circumstances that were not within the contemplation of the parties, and therefore performance exceeds the assent induced and given.<sup>9</sup> Consequently, intervention is required. Disagreement exists on the methodology to be employed to allocate the risk and the loss incurred as a result of the unforeseen frustrating event. Economic theory<sup>10</sup> and risk sharing<sup>11</sup> based on "fairness" are two prevailing views on the methodology to be employed by the courts in gap-filling.

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6. See Harold J. Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413, 1437-39 (1963).

7. See *id.*

8. See generally Hans Smit, *Frustration of Contract: A Comparative Attempt at Consolidation*, 58 COLUM. L. REV. 287, 297-99 (1958) (explaining that the doctrines of mutual assent and good faith in continental Europe and English law support gap-filling, requiring an equitable adjustment of obligations short of discharge).

9. See Joseph M. Perillo, *Force Majeure and Hardship Under the UNIDROIT Principles of International Commercial Contracts*, 5 TUL. J. INT'L & COMP. L. 5, 11 (1997); Smit, *supra* note 8, at 287-88.

10. See Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977).

11. See CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 59, 70-71 (1981). But see Daniel T. Ostas & Frank P. Darr, *Understanding Commercial Impracticability: Tempering Efficiency with Community Fairness Norms*, 27 RUTGERS L.J. 343, 344-45, 357-66 (1996) (offering a hybrid approach to gap-filling).

## 1. Economic Theory

Richard Posner and Andrew Rosenfield advocated that the risk of loss resulting from an unforeseen frustrating event should be allocated to the “superior risk bearer.”<sup>12</sup> If the promisee is the superior risk bearer, the obligation of performance by the promisor is discharged.<sup>13</sup> Likewise, if the promisor is allocated the risk of the unforeseen event and the loss thereof, as the superior risk bearer, performance must occur to avoid liability for breach regardless of the increased burden.<sup>14</sup> Determining which of the two parties is the superior risk bearer requires an assessment of which party was (1) in a better position to prevent the risk from materializing<sup>15</sup> or (2) in a better position to insure against the risk.<sup>16</sup> Determining whether one is the least cost insurer requires a determination of (1) risk-appraisal costs, including both the probability that the risk will materialize and the magnitude of the loss if it does, and (2) transaction costs.<sup>17</sup>

In evaluating Posner and Rosenfield’s approach to court allocation of risk of frustration, Professor Kull, an advocate of the traditional approach, suggests that the Posner/Rosenfield approach is inconsistent with the goals of gap-filling—that is, providing a result that the parties would choose themselves as a suitable generalized default rule.<sup>18</sup> Kull concluded that no rational contracting party would willingly adopt the “superior risk bearing” approach as a default rule, given the parties’ inability to determine *ex ante* how the court would resolve the factual determination of risk bearing capacity *ex post* and after the unforeseeable frustrating event has materialized.<sup>19</sup> Rational parties, aware of the “superior risk bearer” default rule would incur costs determining the possibility of potential risks and the magnitude of such risks or negotiate an express term to avoid the post frustrating event determination of its *ex ante* risk bearing or insuring potential.<sup>20</sup> Thus, the efficiency of employing an “off-the-rack” default term is lost.<sup>21</sup>

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12. See Posner & Rosenfield, *supra* note 10, at 90.

13. See *id.*

14. See *id.*

15. See *id.*

16. See *id.*

17. See *id.* at 91.

18. See Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 HASTINGS L.J. 1, 43-44 (1991).

19. See *id.* at 46-47.

20. See *id.* at 46-48.

21. See *id.*

## 2. Sharing to Fill Gaps

Accepting the gap-filling role of courts, but suggesting an alternative to economic efficiency as the methodology for allocating loss for an unforeseen frustrating event, Charles Fried, in his book, *Contract as Promise: A Theory of Contractual Obligation*, advocated sharing as the guiding principle for gap-filling in the absence of fault or negligence by the parties.<sup>22</sup>

In frustration cases, there is neither the conferring of a benefit nor the imposition of harm from some culpable or negligent act that justifies the allocation of loss to one rather than the other party. Therefore, Fried concluded that the unforeseen costs should be shared.<sup>23</sup> *Sharing* requires those joined in a common enterprise to share unexpected, unbargained-for benefits and losses. Fried argues that the contractual relationship, a freely chosen concrete relationship, justifies the duty to share both good and bad fortune.<sup>24</sup> The relationship imposes a duty of *caring* between the parties.<sup>25</sup>

The Principles reflect some aspect of this approach in hardship cases. The disadvantaged party may compel the other to renegotiate the contract. However, this renegotiation is something less than the “sharing” imposed by law in the first instance; it is a sharing based on mutual assent.<sup>26</sup> Rather than limiting the resolution of the issue to the judge’s perspective of which should bear the risk, the Principles give the parties who lost the opportunity to address the risk *ex ante* an opportunity to allocate the loss *ex post* and after the frustrating event has occurred. This approach is an efficient one, consistent with the use of a general default rule, because unlike the superior risk bearer rule that encourages extensive negotiation *ex ante* to avoid judicial allocation, renegotiation occurs after the frustrating event, when each party is knowledgeable of its needs and the potential costs and risks to be borne between them. Although transaction costs are incurred, they are only incurred if the frustrating event materializes.

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22. See FRIED, *supra* note 11, at 70-71.

23. See *id.*; see also RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b, ill. 4 (1979) (requiring modifications of executory contracts to be fair and equitable in allocating and sharing additional burdens).

24. See FRIED, *supra* note 11, at 72-73.

25. See *id.* at 73.

26. See UNIDROIT PRINCIPLES art. 6.2.3.(4)(b).

### B. *Pacta Sunt Servanda*—*The Traditional View*

Sometimes viewed as harsh, the traditional approach demands that the loss incurred from a frustrating event must lie where it falls.<sup>27</sup> Professor Kull refers to this traditional response to contract frustration as the “windfall principle.”<sup>28</sup> The allocation of a windfall, the unallocated disparity between anticipated and realized contractual exchange, cannot be justified under the bargain theory, because nothing in the bargain provides the court with a basis for allocating to either party all or a part of the windfall.<sup>29</sup> Ergo, there is no intervention—no restitution for part performance<sup>30</sup> and no obligation of further performance. Furthermore, he argues that social utility does not justify intervention—whether one party or the other reaps the windfall is a matter of indifference, and the reallocation would involve administrative costs—cost without a social advantage.<sup>31</sup>

Adherence to the windfall principle places an obligation on the parties to address frustrating contingencies without the expectation of judicial intervention. This approach is consistent with the custom in international trade where parties are accustomed to the “ordinary obstacles” of war, governmental intervention, unreliable communications systems, and currency fluctuation.<sup>32</sup> The gap-filling approach frustrates the expectations of the parties in view of the custom that parties are bound in the absence of stated contingencies. “Liberalization [of the traditional view] impose[s] a heavy burden of draftsmanship upon the parties.”<sup>33</sup> Clauses to cover extraordinary risk are customary,<sup>34</sup> and renegotiation or adaptations clauses are commonplace in long-term sophisticated international trade agreements.<sup>35</sup>

In view of forty years of commentary, which, if any, of the recent initiatives in sales law—CISG, the Principles, or Revised Article 2—respond to the theories and commentary advanced? A party seeking

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27. See Kull, *supra* note 18, at 6.

28. See *id.*

29. *Id.* at 6.

30. Professor Kull acknowledges that this position is contrary to prevailing American authority which “favors a more liberal allowance of restitution to adjust the losses attendant upon frustrated contracts.” *Id.* at 33; see also RESTATEMENT (SECOND) OF CONTRACTS § 377 reporter’s note (citing Law Reform (Frustrated Contracts) Act § 1 (1943) (English law authorizing restitution as is justified by the circumstances)).

31. See Kull, *supra* note 18, at 6.

32. See Berman, *supra* note 6, at 1415 (addressing the custom in international trade of generic goods).

33. *Id.*

34. See *id.* at 1414–16.

35. See Perillo, *supra* note 9, at 11.

exemption under the UCC, the Convention, or the Principles must establish an unforeseen event or contingency that was not within its control and could not have been avoided in order to avoid liability for damages. Given the similarity of requirements, are the rights substantially similar under the three bodies of rules? Is the scope of application identical? Part III of this Article addresses these and other issues, distinguishing and comparing the three bodies of rules.

### III. CURRENT & REVISED ARTICLE 2<sup>36</sup>

#### A. *Casualty to the Goods (Sections 2-613, R2-714<sup>37</sup>)*

Substantially similar to the traditional concept of impossibility, section 2-613 permits a discharge of the seller when specific goods in existence at the time of contracting<sup>38</sup> have suffered casualty without the fault of either party.<sup>39</sup> The seller is discharged without liability for nonperformance if the loss is total; the agreement is avoided.<sup>40</sup> If the loss is partial, the buyer may either avoid or perform under the

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36. The proposed revisions to the excuse provisions for frustrating events of the revised Article 2 do not make substantial changes to the sections of the current Article 2. The proposed revisions do contain some clarification of issues raised under the current statutory language. Those clarifications will be reviewed for the reader's benefit. Citations to proposed sections of the revised Article 2 will be cited as R2-XXX to distinguish its provisions from the current article.

37. U.C.C. § R2-714 (Revised Draft March 1998). That section states:

*Casualty to Identified Goods.*

If the parties to a contract assume the continued existence and eventual delivery to the buyer of goods identified when the contract is made and the goods suffer casualty without the fault of either party before the risk of loss passes to the buyer and no commercially reasonable substitute is available, the following rules apply:

- (1) The seller shall seasonably notify the buyer of the nature and extent of the loss.
- (2) If the loss is total, the contract is avoided [terminated].
- (3) If the loss is partial or the goods no longer conform to the contract, the buyer may nevertheless demand inspection and may treat the contract as *terminated* [avoided] or accept the goods with due allowance from the contract price for *the partial loss or* the nonconformity but without further right against the seller.

*Id.*

38. See U.C.C. § 2-613. Identification of the goods under section 2-501 is an essential requirement of both section 2-613 and R2-714. However, the Notes to proposed section R2-714 state an attempt to liberalize the standard reflected in section 2-613 by substituting for the phrase describing the goods as goods "the parties assume the continued existence and eventual delivery to the buyer" for the term "contract requires for its performance." No real substantive change should result from this "more lenient test," given the further clarification included in the Notes that excuse is only applicable if "no commercially reasonable substitute" for the goods is available. U.C.C. § R2-714 n.1 (Revised Draft July 1997).

39. See U.C.C. § 2-613.

40. See *id.* § 2-613(a).

contract.<sup>41</sup> To the extent the goods are accepted, the buyer is entitled to an allowance against the price for the deficiency without further relief against the seller.<sup>42</sup>

No mention is made in section 2-613, however, regarding the availability of restitution to the buyer of any portion of the price previously paid as a deposit or installment on total casualty to the goods.<sup>43</sup> On its face, in the context of total casualty, section 2-613 appears to leave the loss where it falls. The seller does not receive restitution for any preparation of the goods for performance, and no provision is made for restitution of any prepayments or deposits by the buyer. However, section 1-103 permits supplementation of Article 2 unless the specific provision in question displaces the applicable common law rule.<sup>44</sup> The *Restatement (Second) of Contracts* in sections 272 and 377 grants a court broad flexibility to provide relief to the buyer who has made prepayments or deposits.<sup>45</sup> Going beyond restitution, the *Restatement* authorizes recovery of reliance expenses even though the other party has not benefited<sup>46</sup> from them and grants the court the power to supply terms “as justice requires,” to fill the gap in the contract that resulted from their failure to address at contracting the circumstances existing after the casualty to or deterioration of the goods.<sup>47</sup> The supplementation available under the existing article should likewise be applicable to the revised Article 2.

### B. *Impracticability (Sections 2-615, R2-716)*

Upon the occurrence of an unforeseeable frustrating event, “a contingency whose non-occurrence was a basic assumption,”<sup>48</sup> only the seller’s delay or nonperformance is excused. Unlike the scope of relief available under the Principles and the Convention,<sup>49</sup> impracticability of performance is expressly available only to the seller under current Article 2 with the suggestion of the availability of relief for buyers under Official Comment 9.<sup>50</sup> However, the revised Article

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41. *See id.* § 2-613(b).

42. *See id.*

43. *See id.* § 2-613.

44. *See id.* § 1-103.

45. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 272, 377 (1979).

46. *See id.* § 272 cmt. a.

47. *See id.* § 272(2).

48. U.C.C. § 2-615; *see* U.C.C. § R2-716 (Revised Draft March 1998).

49. *See* UNIDROIT PRINCIPLES art. 6.2.1. (1994).

50. *See* U.C.C. § 2-615 cmt. 9. That comment states:

[W]here the buyer’s contract is in reasonable commercial understanding conditioned on a definite and specific venture or assumption as, for instance, a war



2 will reflect an intent by the drafters to foreclose any use of impracticability by buyers and to limit buyers to the relief available under the common law doctrine of frustration of purpose under section 1-103.<sup>51</sup>

Section 2-615 operates as a general default gap-filling rule if the parties have not by agreement determined the scope of the seller's obligation. The section grants as relief an excuse for the delay or nonperformance to the extent the performance was affected by the contingency<sup>52</sup> or adaption, expressly limited to prorating the seller's production among its customers.<sup>53</sup> Although the Official Comments suggest a broader scope of adjustment if "neither sense nor justice is served by either answer when the issue is posed in flat terms of 'excuse' or 'no excuse,'"<sup>54</sup> case authority provides little evidence of an attempt to expand the relief available.<sup>55</sup>

#### IV. THE CONVENTION

Broader in application than the UCC, the Convention on Contracts for the International Sale of Goods extends the rule of exemption beyond delay and nondelivery to all aspects of either party's performance.<sup>56</sup> However, this broad statement of exemption should not include a nonconforming tender, goods delivered but defective.<sup>57</sup> Exemption is available after a preliminary determination of three factors<sup>58</sup> established by the nonperforming party: (1) the

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procurement subcontract known to be based on a prime contract which is subject to termination, or a supply contract for a particular construction venture, the reason of the present section may well apply and entitle the buyer to the exemption.

*Id.* But see *Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 277 (7th Cir. 1986) (cited in Peter A. Alces & David Frisch, *Commenting on "Purpose" in the Uniform Commercial Code*, 58 OHIO ST. L.J. 419, 448 n.105 (1997) (explaining that section 2-615 is inapplicable to buyers, and the official comments were not adopted by the Indiana state legislature)).

51. See U.C.C. § R2-716 n.2 (Revised Draft July 1997).

52. See U.C.C. § 2-615 cmt. 11 (1996).

53. See *id.* § 2-615(b).

54. *Id.* cmt. 6. See generally Marion W. Benefield, *General Provisions, Sales, Bulk Sales*, 36 BUS. LAW. 1267, 1282 (1981) (acknowledging the effect of Official Comment 6).

55. But see *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980) (holding that seller was entitled to reformation of a conversion service contract).

56. See United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF. 97/18, Annex 1 (1980), reprinted in 19 I.L.M. 668 (1980) [hereinafter C.I.S.G.].

57. See JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* ¶ 427 (1982); see also *id.* (1991 ed.).

58. The causal connection between the impediment and the failure to perform must be established and may be viewed as a fourth factor. See C.M. BIANCA & M.J. BONELL,

failure to perform was due to an impediment beyond his control (occurrence of an external impediment); (2) at the time of contracting, the party could not reasonably be expected to have taken the impediment into account (unforeseeable); and (3) following the contract, the party could not reasonably be expected to have avoided or overcome the impediment or its consequences (unavoidable).<sup>59</sup>

Use of the term “impediment”—a word that . . . [connotes or] implies a barrier to performance, such as delivery of the goods rather than an aspect personal to the seller’s performance,” is evidence of an intent by the Diplomatic Conference to exclude defective performance resulting from a party’s personal performance and to give effect to other articles authorizing remedial recovery for such failures.<sup>60</sup> Impediments such as industrial disputes, fire mobilization, requisition embargo, currency restrictions, insurrection, shortage of transport, general shortage of materials, or limited use of power should be established.<sup>61</sup> Professor Honnold uses the following hypothetical situation to illustrate article 50, Reduction of the Price,<sup>62</sup> but it also illustrates the interplay between exemption from liability for damages because of an impediment without excuse for defective performance:

Seller contracted to sell a \$100,000 cargo of No. 1 quality Edam cheese to Buyer . . . with delivery by June 1 “Ex ship” at a port in Buyer’s country. . . . Seller dispatched cheese that conformed to the contract; the time of dispatch and other shipping arrangements would have led, under normal conditions, to timely and safe arrival of the shipment. However, unexpected hostilities led to the interning of the ship for two months during its transit through a canal. Normal refrigeration facilities on the ship could not cope with the hot climate in the canal area; when the ship finally arrived on August 1 the cheese was moldy and graded at only No. 4 quality. . . . [T]he moldy cheese was worth . . . one-fifth of the contract price . . . . Buyer needed the cheese . . . and elected to keep the cheese . . . .<sup>63</sup>

Buyer has the right to avoid the agreement but elects not to do so. Under article 79, the seller is exempt from damages for the two-month

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COMMENTARY ON THE INTERNATIONAL SALES LAW THE 1980 VIENNA SALES CONVENTION, art. 79 ¶ 2.6 (1987).

59. See C.I.S.G. art. 79(1).

60. HONNOLD, *supra* note 57, at 432; see also BIANCA & BONELL, *supra* note 58, art. 79 ¶ 2.6.1.

61. See HONNOLD, *supra* note 57, at 343 (discussing contingencies included in exemption clauses in standard contracts supervised and finalized by the United Nations Economic Commission for Europe).

62. See C.I.S.G. art. 50; HONNOLD, *supra* note 57, at ¶ 309; see also *id.* at ¶ 313 (discussing the history and evolution of price reduction from Roman law).

63. HONNOLD, *supra* note 57, at ¶ 310.

delay. However, the buyer is entitled to a price reduction under article 50 for the decrease in value of the goods delivered. Although the defective performance—moldy cheese—was not the result of the seller's personal performance but rather resulted from the impediment that was beyond the seller's control and could not have been avoided by him, the seller is not entitled to full contract price. The illustration suggests that, having assumed the risk of loss until tender at a port in the buyer's country under the terms of the contract, the exemption from damages for failing to deliver on June 1 is unavailable to alleviate the seller's duty of personal performance to tender conforming goods at the designated port. Furthermore, neither party gets a windfall under this resolution of the issues. The seller bears the loss of the one-fifth reduction in the value of the goods, and the buyer bears the loss incurred from the late delivery.

Although broader in its applicability, exemption under the Convention is more narrow in scope. Unlike the UCC, which is applicable to circumstances of impracticability where performance is possible but unduly burdensome or would cause economic hardship, the Convention is limited to those impediments that result in impossibility of performance but not impracticability, frustration, or *imprévision*.<sup>64</sup> Thus, the Convention is more restrictive than the UCC on the degree of exemption available and reflects more of the traditional view of *pacta sunt servanda* if increased costs of performance are experienced. In the absence of contractual provisions that authorize exemption upon frustration or impracticability, such theories should not be appropriated from domestic law in contravention of the express goals of uniformity and international interpretation that are consistent with the international character of the Convention.<sup>65</sup> However, if the character of international trade evolves and is reflected in usage, interpretation of the Convention should likewise reflect this change.

In the context of exemption because of nonperformance of a third party, both the Convention and the UCC recognize exemption. However, the Convention does not appear to be as stringent in applicability as the UCC, which requires, before section 2-615 is applicable, the nonperformance of an agreed exclusive source of

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64. See *id.* ¶ 435.1; BIANCA & BONELL, *supra* note 58, art. 79 ¶ 3. But cf. 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, 308 (1997) (stating the view that CISG is closer to the civilian approach to frustration of purpose and more permissive than the common law).

65. See C.I.S.G. art. 7.

supply or one assumed or contemplated as the particular source of supply.<sup>66</sup> In contrast, the Convention permits exemption if both the third party and the party seeking the exemption satisfy the three conditions required under article 79.<sup>67</sup> The legislative history behind article 79 suggests that the third party must be more than the seller's general supplier. While not agreed to as the exclusive or sole source, the third party must stand in a delegated contractual relationship such as a subcontractor.<sup>68</sup> Nonperformance by a general supplier of goods would not constitute the kind of impediment necessary for the seller to qualify individually under article 79. Although more comprehensive in the types of third parties, the availability under the Convention is more restrictive because of the scope of impediment necessary to establish the right to an exemption.

Finally, the remedial relief under the Convention is not limited to avoidance or allocation. Article 79, subsection 5 expressly reserves the right of both parties to pursue all rights under the Convention, excluding the recovery of damages.<sup>69</sup> Consequently, restitution for any portion of the price paid or goods delivered can be demanded, as well as any benefit accruing to the party who received the part performance.<sup>70</sup> Unlike the *Restatement (Second) of Contracts*, no reliance expenses incurred by the seller may be recovered in the absence of some benefit accruing to the buyer. Some have argued that, in addition to avoidance, article 79 reserves the right to specific performance.<sup>71</sup> However, such a view is inconsistent with the rights granted to the party seeking exemption in view of an impediment that caused the failure to perform, and should not be sought as a right of the other party in all cases.<sup>72</sup>

## V. THE UNIDROIT PRINCIPLES

In 1994, a Working Group of the International Institute for the Unification of Private Law (UNIDROIT) finalized the Principles for International Commercial Contracts applicable to contracts for goods

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66. See U.C.C. § 2-615 cmt. 5 (1996).

67. See C.I.S.G. art. 79(5).

68. See HONNOLD, *supra* note 57, ¶ 433.

69. See C.I.S.G. art. 79(5).

70. See *id.* arts. 79(5), 81(2), 84.

71. See Amy H. Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 WASH. L. REV. 607, 620-21 (1988); Wanki Lee, *Exemptions of Contract Liability under the 1980 United Nations Convention*, 8 DICK. J. INT'L L. 375, 392 (1990).

72. See MICHAEL J. BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW 112-13 n.21 (1994); HONNOLD, *supra* note 57, at 551 (1991).

and nongoods.<sup>73</sup> Lauded as the most serious effort in harmonizing international contract law,<sup>74</sup> the Principles were drafted by individuals acting in their individual capacity rather than as governmental representatives. "The group that prepared the rules was not bound by instructions of governments with their mostly conservative attitude towards new legal inventions."<sup>75</sup> Thus, the rules on exemption in the Principles seek to address unforeseen contingencies without any attempt to show a deference for any system's domestic rule of law and to provide well-reasoned principles of international law to govern contracts that are more often of longer duration and greater complexity than domestic contracts.<sup>76</sup>

Despite the express fundamental principle that a validly entered contract is binding,<sup>77</sup> the Principles expand the concept of exemption beyond those reflected in the UCC or the Convention. The Principles recognize two contexts in which a party's duty of performance might be excused, hardship<sup>78</sup> and force majeure.<sup>79</sup> The first, hardship, would encompass frustration, *imprévision*, and impracticability.<sup>80</sup> The second, force majeure, addresses exemption when performance becomes impossible.

#### A. *Hardship*

Hardship requires a change in circumstances so severe and fundamental that the promisor cannot be held to its promise in spite of the possibility of performance. If an unforeseeable event, not within the control of the disadvantaged party and the occurrence of which was not a risk assumed by the disadvantaged party, occurs or becomes known after contracting, and the equilibrium of the contract is fundamentally altered for either party because of an increased cost of

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73. See UNIDROIT PRINCIPLES preamble (1994).

74. See generally M.J. Bonell, *Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts*, 40 AM. J. COMP. L. 617, 618-19 (1992); Peter Linzer, *The UNIDROIT Principles of International Contracts: Should American Lawyers Pull Their Hair Out Over Them?*, 13 TEX. TRANSNAT'L L.Q. 1 (1997); Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORDHAM L. REV. 281, 282-84 (1994).

75. Dietrich Maskow, *Hardship and Force Majeure*, 40 AM. J. COMP. L. 657, 659 (1992).

76. See *id.* at 657; Perillo, *supra* note 9, at 11.

77. See UNIDROIT PRINCIPLES art. 1.3; *id.* at 6.2.1. See generally Maria Viscasillas, *UNIDROIT Principles of International Commercial Contracts: Sphere of Application and General Provisions*, 13 ARIZ. J. INT'L & COMP. L. 381, 423 (1996).

78. See UNIDROIT PRINCIPLES art. 6.2.2.

79. See *id.* art. 7.1.6.

80. See *id.* art. 6.2.1 cmt. 2.

performance or the decrease in value of the performance to be received, hardship results.<sup>81</sup> Although performance has become more onerous or burdensome, if performance is possible, such possibility of performance distinguishes hardship from article 79 of the Convention where performance is impossible. Additionally, hardship is distinguishable from frustration of purpose under the *Restatement (Second) of Contracts* which is available to buyers under section 1-103 of the UCC. *Restatement* section 265 only permits discharge when a party's principal purpose is *substantially* frustrated. The principal purpose "must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense."<sup>82</sup> The mere fact that the transaction has become less profitable is insufficient to establish frustration of purpose;<sup>83</sup> the performance must become commercially valueless, which requires near total frustration.<sup>84</sup> At least one author suggests that a fifty percent decrease in value of the performance to be received or a fifty percent increase in the cost of performance is sufficient to satisfy the "fundamental change" requirement of article 6.2.2,<sup>85</sup> a substantial difference from the level reflected in section 265.

The criteria required for exemption by both the UCC and the Convention are likewise applicable under the Principles: an unforeseeable event or contingency, beyond the party's control, and the occurrence of which was an unassumed risk. Unlike the UCC and the Convention, the Principles mandate good faith, constructive renegotiation between the parties to adapt the contract to the unforeseen circumstances.<sup>86</sup> Here, the parties, in the first instance, are allocated the responsibility to resolve the disequilibrium or to fill the gap in their agreement. Only after an unsuccessful attempt for a

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81. See *id.* art. 6.2.2. This article provides:

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.

*Id.*

82. RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (1979).

83. See *id.*

84. See *id.* cmt. a, ill. 5, 6; see also *Felt v. McCarthy*, 922 P.2d 90 (1996) (finding developer's intended purpose for use of land adversely affected by wetlands regulations but some use remained available, so commercial frustration inapplicable).

85. See *Maskow*, *supra* note 75, at 662.

86. See UNIDROIT PRINCIPLES art. 6.2.3 cmt. 5.

reasonable time may either party request the intervention of a court or arbitral tribunal.

In the absence of an agreement between the parties to adapt the contract, a court is authorized to grant four possible options of relief if it finds a hardship: (1) terminate the contract at a specified date and on terms to be fixed; (2) adapt the contract with a view to restoring its equilibrium;<sup>87</sup> (3) direct the parties to resume negotiations to reach an agreement adapting the contract; (4) confirm the terms of the contract as originally agreed.<sup>88</sup> A disadvantaged party may not during the pendency of renegotiation or resolution withhold its performance.

### B. *Force Majeure*

Force majeure under the Principles is a restatement of exemption under the Convention with some clarification of the remedial rights reserved.<sup>89</sup> Thus, the analysis and experience under the Convention will illuminate article 7.1.6.

## VI. CONCLUSION

Despite the similarity of language and factors to be established, a party desiring to plan for exemption for nonperformance is confronted with a continuum of exemptions rather than identical opportunities for relief. Greater leeway and flexibility of exemption and remedial rights are granted in the Principles. The Convention limits exemption to impossibility of performance with the UCC falling between the two. Because parties may opt out of the Convention<sup>90</sup> and elect to be governed by the Principles<sup>91</sup> or the UCC, knowledge of the distinctions between these rules is important. Furthermore, proposed revisions to UCC Articles 1 and 2 suggest that parties may opt out of Article 2 and elect to be governed by other rules of law such as the Convention or the Principles.<sup>92</sup> However, the choice of law provision of the revised Article 1 may limit the right of parties to a domestic contract to elect international rules as the governing law for their transaction. Nonetheless, where the express terms of the agreement

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87. See *id.* art. 6.2.3(4)(a)(b).

88. See BONELL, *supra* note 72, at 76.

89. See *id.* at 112-13 n.21. *But see* Maskow, *supra* note 75, at 664-65 (asserting that exemption under the Principles is enlarged because the right to demand specific performance under the Convention is unavailable here).

90. See C.I.S.G. art. 6.

91. See UNIDROIT PRINCIPLES preamble.

92. See U.C.C. § R2-104 n.1 (Revised Draft July 1997); U.C.C. § R1-303 (Revised Draft September 1997).

delineate the standard to be applied for exemption, that express provision—even if extracted from the Principles—should be honored by the courts.

As the process of revising Article 2 continues, thought should be given to providing parity between buyers and sellers under the express terms of the statute. Currently, sellers are entitled to exemption when performance becomes impracticable but not impossible. Buyers may have some right to exemption under section 2-615, but clearly have a right under section 1-103 to resort to the doctrine of frustration of purpose. This, however, requires near total frustration before an exemption can be granted. This difference in standards is inconsistent with prevailing international practice and will thereby limit the exportability of the UCC to other countries. The burgeoning global marketplace, the growing interdependency among sovereign nations on the international trade of goods, and the impact of modern computer and telecommunications technologies that facilitate transnational and global contracting strongly suggest that the current initiative to modernize Article 2 should be more global in its focus in an effort to encourage the harmonization of the commercial law of the sale of goods.