FAULT AND NO-FAULT IN DANISH, AMERICAN AND INTERNATIONAL SALES LAW. THE RECEPTION OF THE 1980 UNITED NATIONS SALES CONVENTION

BY

JOSEPH M. LOOKOFSKY

1. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (hereinafter: the "Convention") was opened for signature and accession in Vienna on April 11, 1980. It is considered to be a significant improvement on its predecessor, the Uniform Law on the International Sale of Goods, and "in view of the overwhelming international support for this project one may predict that the new Convention will be widely adopted and, at long last, will establish a unified world-wide legal structure for international sales".[1] As was the case with the Uniform Law, however, there is uncertainty as to how the damages provisions of the Convention will be interpreted by the various national courts.

The liability provisions of the Uniform Law have been described as "very vaguely formulated [thus permitting the various national] courts significant discretionary liberty".[2] Now, the corresponding Convention provisions may be an example of "superficial harmony which merely mutes a deeper discord ..."[3] between the Civil and Common legal systems—namely, the "fault" versus the "no-fault" approaches to damages for breach of contract. The potential problem is that various national courts may interpret these Convention provisions in accordance with their own national law and that such interpretations will produce fundamentally varying decisions. While this prospect may not deter nations from adopting the Convention, it might well dissuade parties in the various Contracting States[4] from permitting its non-mandatory[5] provisions to govern their agreements. And where the Convention applies, the prospect of diverging national interpretations might encourage forum shopping and contravene the intent of these new rules for international sales.[6]

[1] Honnold, "The Draft Convention on Contracts for the International Sale of Goods: An Overview", 27 *Am. J. Comp. L.*, pp. 223 ff., (1979). Twenty-one States had signed the Convention as of September 30, 1981; the Convention enters into force following ratification by ten States (art. 99).

[2] Ussing, *Køb* (Sales), 4th ed. (with A. Vinding Kruse), Copenhagen 1976, p. 74. Translation of this and all quoted Scandinavian literature herein by the present author.

[3] Nicholas, "*Force Majeure* and Frustration", 27 *Am. J. Comp. L.*, pp. 231 ff. (1979).

[4] Cf. the Convention, art. 1.

[5] Cf. the Convention, art. 6.

[6] See United Nations Secretariat's *Commentary* to the UNCITRAL Draft Convention (A/CONF./97/5), Comment 1, p. 44 (hereinafter: *Commentary*).

This paper predicts the reception which the Convention's liability system can expect in the courts of Denmark and the courts of the United States using the Danish Sale of Goods Act[7] (hereinafter: the "Danish Act") and the American Uniform Commercial Code ("U.C.C.")[8] as comparative frames of reference. Since, for example, the Convention exempts the seller from damages when he proves, *inter alia,* that non-performance is "due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account ...",[9] and since liability for damages pursuant to the Danish Act and the U.C.C. involves, *inter alia,* the judicial interpretation of similar criteria,[10] the theory and practice pursuant to these national statutes ought to provide valuable information as to the probable interpretation of the Convention's liability provisions in Danish and American courts.[11]

Moreover, it is significant that the Convention appears at a time when Denmark and the other Scandinavian countries are drafting a revision of the uniform Scandinavian Sales Acts: the advent of the Convention is already influencing reform in this area and may even lead to a simplification of the complex Scandinavian liability system.

Regarding the scope of the present paper, two points may be noted: First, the starting point here is the Danish and American seller's liability for delay, non-delivery, and defective goods; however, the "bases of liability" discussed herein are also relevant in a wider comparative context.[12]

Secondly, reference is made to arts. 1(3) and 2(a) of the Convention, in that the Danish and American rules discussed will be those which are applicable to sales between merchants.

[7] *Købeloven,* Act no. 102 of April 4, 1906, as amended. Similar statutes are in effect in Norway and Sweden.

[8] The U.C.C., in force in all American states except Louisiana, has recently influenced joint Scandinavian proposals for a revision of the uniform Sales Acts: see *Köplag, SOU* 1976:66, pp. 119, 126 and 161.

[9] The Convention, art. 79. See section 3, *infra.*

[10] See 2.3, *infra.*

[11] A "comparative approach that seeks guidance from the prevailing patterns and trends of modern domestic law" is consistent with the Convention's goal of uniform application; Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention,* Deventer 1982, pp. 43 f.

[12] A striking degree of uniformity exists as to the interpretation of the Sales Act within the various Scandinavian countries, cf. Dahl, *Produktansvar* (Product Liability), Copenhagen 1973, p. 116. Furthermore, while there is good reason to view the Scandinavian legal systems as an independent legal "family", cf. Gomard, "Civil Law, Common Law and Scandinavian Law", 5 *Sc. St. L.,* p. 29 (1961), "there can be no doubt that Scandinavian law is ... far more closely akin to Continental law than to common law", cf. Strömholm, *An Introduction to Swedish Law,* Stockholm 1981, p. 33, and 2.1, *infra,* regarding fault liability. Regarding American law and the "general Common Law", see Lawson, *A Common Lawyer Looks at the Civil Law,* Ann Arbor 1953, p. 4.

2. CONTRACTUAL LIABILITY PURSUANT TO DANISH AND AMERICAN SALES LAW

2.1. *The bases of liability*

A Danish court will not award damages for "breach"[13] unless a basis of liability (*ansvarsgrundlag*) can be established. The traditional basis of liability for contractual damages is the Civil law concept of fault (*culpa*) attributable to the non-performing party[14] or his agent.[15] Unlike plaintiff's other remedies, e.g. the right to cancel, demand specific performance or a proportionate reduction in the price,[16] the damages remedy generally requires a showing of fault.[17] Thus, in accordance with traditional Civil law principles, a plaintiff suing in a Danish court to recover damages in a contract case is required to allege fault as is a plaintiff suing in tort.[18]

But *culpa* is only the "starting point",[19] and "contractual fault can ... be understood in ways that lead to a blurring of the distinction between fault and no-fault liability".[20] In order to understand the nature of contractual fault in the Scandinavian law of sales, it must first be recognized that no single substantive or procedural standard is applicable, in that the content of the basis of liability varies in accordance with the type of contract and the type of breach involved. The Danish Act's statutory liability scheme may, with a certain degree of simplification, be described as "triple based", in that 3 major bases of liability are discernable:

Basis 1—(a) the traditional fault rule, (b) "guarantee"
Basis 2—the fault rule, burden of proof reversed
Basis 3—liability except for "qualified, extraordinary circumstances".

Basis 1 expresses the standard for "antecedent"[21] defects in "specific sales".[22] Although the statutory basis in such cases is limited to fraud and

[13] I.e. *misligholdelse*. As noted *infra*, this section, the Common law term "breach" does not encompass every instance of "non-performance"; it is, however, convenient to translate *misligholdelse* with "breach" (and vice-versa).

[14] Gomard, *Obligationsretten i en Nøddeskal* (Contract Law in a Nutshell), vol. 2, Copenhagen 1978, p. 129.

[15] Cf. the Danish Code of 1683, art. 3-19-2, and Gomard, *op. cit.*, pp. 151–3.

[16] Ussing, *Obligationsrettens Almindelig Del* (Contract Law, General Part), § 11, 4th ed. (with A. Vinding Kruse), Copenhagen 1967. Note that pursuant to the Danish Act a plaintiff will thus usually be entitled to a proportionate reduction in price even where damages are not recoverable; i.e., within the bounds of this remedy, Danish liability is "strict". Regarding the Convention, see Bergsten & Miller, "The Remedy of Reduction of Price", 27 *Am. J. Comp. L.*, pp. 255 ff. (1979).

[17] Or some other "basis of liability", e.g. "guarantee".

[18] Gomard, *op. cit., supra* note 14, pp. 129 and 149.

[19] Nicholas, *op. cit., supra* note 3, p. 234. Nicholas notes that the Civil law's reversed burden of proof (cf. text *infra* at note 93) reduces the fault/no-fault "gulf". Another important factor is the severity of the fault rule when applied to *generic* sales: cf. text *infra* at notes 61–5.

[20] Bergsten & Miller, *op. cit., supra* note 16, p. 257.

[21] *Oprindelige*, i.e., existing at the time of contracting.

[22] I.e., where the contract provides for the delivery of an individually determined article.

guarantee, modern Danish theory, interpreting the trend of more recent judicial decisions, views the fault rule as an important supplement hereto.[23] And yet, this is still the least rigorous base in the Danish Act.[24]

Basis 2 is the standard for delay or non-delivery in specific sales. A separate basis for this emphasizes that reversing the burden of proof on the fault issue is considered to be a highly significant step in the direction of imposing strict liability.[25]

Basis 3, the standard applicable to delay, non-delivery and defects in generic sales,[26] is the Danish Act's most severe basis of liability, in that only a limited range of circumstances serve to excuse non-performance.[27] And yet Basis 3 has been called "merely ... a specially formulated fault rule".[28]

In apparent contrast with the Danish scheme, the U.C.C., reflecting the Common law rule, provides that "if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may ... reject the whole ...",[29] "cancel and whether or not he has done so may ... recover damages ...".[30] Thus, *any* type of breach by the seller—whether delayed delivery, delivery of non-conforming goods, or other breach—gives the buyer the right to recover damages,[31] and the rule applies irrespective of whether the seller's contractual obligation is specific or generic in nature.

"Fault" is not a prerequisite to liability, in that "money damages are the legal substitute for the promised performance ..."—"a secondary duty imposed by law as a consequence of the breach".[32]

But although a plaintiff need not allege any "basis of liability" apart from defendant's breach,[33] neither Common law nor U.C.C. liability is absolute:

[23] See Gomard, *op. cit., supra* note 14, pp. 156 f. Since fault (*culpa*) covers more than willful acts or omissions, i.e. fraud (*svig*), there is no longer reason to list fraud as a separate basis.

[24] A particular quality is only "impliedly" guaranteed where the specific circumstances so justify. Distinguish U.C.C. warranties, section 2.4, *infra*.

[25] See the Danish Act, sec. 23, and A. Vinding Kruse, *Erstatningsret* (The Law of Torts), 3rd ed. Copenhagen 1976, pp. 77 f.

[26] Sales where the goods are generically determined, e.g. where the seller's obligation is to deliver wheat or machinery of a given grade or type, as opposed to, e.g., a specific lot of grade X wheat which has been "identified to the contract" (*individualiseret*); cf. the Danish Act, sec. 24 and sec. 43(3).

[27] See 2.3, *infra*.

[28] Gomard, *Forholdet mellem Erstatningsregler i og uden for Kontraktsforhold* (Rules of Damages Inside and Outside the Contractual Relationship), Copenhagen 1958, pp. 215 f.

[29] U.C.C. § 2-601.

[30] U.C.C. § 2-711.

[31] As well as the right to reject/cancel, i.e., the so-called "rule of perfect tender": *enhver forsinkelse og enhver mangel er væsentlig*; regarding important modifications, see, e.g., U.C.C. §§ 2-612 and 2–508. Time is always "of the essence" among merchants pursuant to the Danish Act, cf. sec. 21(3). The Convention requires a material breach as regards both delays and defects; cf. art. 49.

[32] Cf. 5 *Corbin on Contracts,* 2nd ed. St. Paul 1962, § 995, and Calamari & Perillo, *Contracts,* 2nd ed. St. Paul 1977, pp. 525 f.

[33] Lookofsky, "Det Internationale Kontraktsansvarsgrundlag", *UfR* 1982B, pp. 278 ff.

where a promisor's performance becomes "impossible", through "no fault" of his own, non-performance is excused;[34] there is no "breach".[35]

Clearly, the terms "fault" and "impossibility" deserve closer substantive analysis in the present comparative context.

Before proceeding, however, it may be appropriate to note the legal effect of "excusing" a promisor's non-performance. A distinction has been made between, on the one hand, Civil law theory whereby the effect of a successful *force majeure* defense is to "exempt" the seller from liability in damages, and, on the other hand, Common law theory whereby impossibility in such case would terminate the contract.[36]

The Common law rationale has "generally been articulated in the terms of implied or constructive conditions. The parties are said to have contemplated the continued existence of a state of facts, and if these facts change so as to render impossible a party's performance, it is often said that there is a condition precedent to the promisor's duty that the facts contemplated continue to exist."[37] The failure of the condition precedent—like the Danish "failed assumption" (*bristet forudsætning*)—operates to discharge the promisor from his contractual obligation.

Of course, such non-performance by one party will generally serve to release the other party from his obligation as well.[38] Thus, as regards sales law, "payment and delivery are constructive conditions concurrent";[39] e.g., if lighting destroys specific goods before delivery, the buyer need not pay, "because requiring the payment of something for nothing is repugnant to our notions of justice".[40] Indeed, the "implied condition" is itself a *means* to serve justice: the equitable allocation of risk.[41]

But the exemption from contractual liability pursuant to sec. 24 of the Danish Act is *also* explainable in terms of implied or constructive conditions—or to use the U.C.C. term: "assumptions".[42] "The issue is to decide whether the seller's promise ceases to bind him because his assumptions concerning the possibilities of performance fail."[43] Whether one prefers this line of reasoning, the foreseeability

[34] See 6 *Corbin on Contracts*, § 1329, and *Williston on Contracts*, 3rd ed. Rochester 1978, § 1936. Since the Common law apparently has never applied the impossibility doctrine to defects (see text *infra* with notes 145–6), one might speak of two "bases of liability" pursuant to, e.g., the U.C.C.: one for delay and non-delivery (cf. 2.3, *infra*) and one for defects. U.C.C. § 2-613 may be regarded as an *ex tuto* application of the general principle in § 2-615; cf. Peters, "Remedies for Breach of Contracts Relating to the Sale of Goods under the Uniform Commercial Code: A Roadman for Article Two", 73 *Yale L. J.*, pp. 242 f. (1963).

[35] Knapp, *Problems in Contract Law*, Boston 1976, p. 865.

[36] See Nicholas, *op. cit., supra* note 3, p. 234.

[37] Calamari & Perillo, *op. cit., supra* note 32, p. 477.

[38] 6 *Corbin on Contracts*, § 1337.

[39] The same principle is embodied in the Danish *vederlagsforudsætning*; see v. Eyben & A. Vinding Kruse, *Indledning til Formueretten*, vol. I, 24th ed. Copenhagen 1981, p. 83.

[40] 6 *Corbin on Contracts*, § 1337.

[41] *Op. cit.*, § 1322.

[42] I.e., *forudsætninger* (distinguish *betingelser:* express conditions). Regarding U.C.C. § 2-615, see 2.3, *infra*.

[43] Ussing, *op. cit., supra* note 2, p. 76.

approach, or the more modern analysis in terms of the allocation of risks,[44] it is logical that the legal effect of the Danish excuse be extended beyond the just-stated exemption for damages. Thus, although sec. 24 follows the Civil law approach in only providing an *express* exemption regarding damages, "it would make no sense to relieve the seller of liability in damages for non-performance by virtue of [objective impossibility or] the great sacrifices which performance would require[45] and, at the same time, require specific performance with the same great sacrifices. To the extent whereby sec. 24 relieves a seller of liability in damages, he must therefore also be relieved of the duty to deliver the goods."[46] Since a Danish contract is, by definition, only binding where the promisee is entitled to either specific performance or compensatory damages,[47] it follows that a seller not incurring liability in damages pursuant to sec. 24 is—like his American counterpart—*discharged*[48] from his contractual obligation altogether.[49]

2.2. *Fault and impossibility*

"The possible varieties [of fault] are infinite, and can range from the criminality of the scuttler who opens the sea-cocks and sinks his ship, to the thoughtlessness of the prima donna who sits in a draught and loses her voice ..."[50] When comparing Civil and Common law standards of contractual liability, clear-cut instances of culpable breach, such as that of the scuttler who (intentionally) opens the sea-cocks, present no substantive[51] issue: the promisor who is obviously "responsible" for his own non-performance is liable in damages regardless of whether the test is fault or no-fault. In addition to willful breach, negligent acts or omissions by a promisor or his agent/servant[52] are also within the scope of contractual fault.

[44] See 2.3, *infra*. Gomard finds the "assumptions" issue really a question of risk, cf. *Obligationsretten i en Nøddeskal* (Contract Law in a Nutshell), vol. 1, Copenhagen 1972, p. 18; accord: Corbin, *op. cit., supra* note 41.

[45] See 2.3, *infra*.

[46] Ussing, *op. cit., supra* note 16, p. 67. See also Gomard, *Obligationsret, Almene Emner,* vol. 1, Copenhagen 1971, p. 38.

[47] Ussing, *Aftaler* (Contracts), 3rd ed. Copenhagen 1978, p. 118.

[48] Ussing, *op. cit., supra* note 16, p. 419, classifies impossibility as *fordringens ophør,* i.e., the Danish equivalent of discharge.

[49] Sec. 21(2) of the 1978 draft proposal for a revised Danish Act provides, *inter alia:*

"In the event of delay, the buyer can demand delivery of the goods unless extraordinary circumstances of the type mentioned in sec. 24 exist or performance would require sacrifices of the seller which are clearly disproportionate to the buyer's interest in delivery ..."

See *SOU* 1976:66, p. 139.

[50] *Joseph Constantine Steamship Line, Ltd.* v. *Imperial Smelting Corporation, Ltd.,* (1942) A.C. 154, p. 179.

[51] *Materielretlige.*

[52] Cf. art. 3-19-2 of the Danish Code of 1683 and Gomard, *op. cit., supra* note 14, pp. 151–3. Whereas the promisor-principal's liability for his agent assumes a "culpable" breach, other judicial expansions of the fault rule do not. For example, a seller who cannot deliver specific goods due to financial difficulties is liable notwithstanding the cause thereof, e.g. unforeseeable illness; see Nørager-Nielsen & Theilgaard, *Købeloven* (The Sales Act), Copenhagen 1979, pp. 296, 301 f. Such lack of funds (*pengemangel*) is also describable as "subjective impossibility"; see *infra,* this section. Regarding other expansions of the fault rule, see Ussing, *op. cit., supra* note 16, pp. 117–9.

Since, in Denmark, the general fault criterion of tort law is also generally applicable in the field of contracts,[53] an obligor must act in a "prudent and reasonable" manner.[54] But how is the *bonus pater* standard to be applied, e.g., as regards delay or non-delivery? Since, in America, liability is incurred except where the promisor's performance is "impossible",[55] one might expect that the fault rule involved a less stringent test.

Of course, both Danish and American law excuse non-performance due to so-called "objective" impossibility: "All the king's horses and all the king's men cannot put Humpty Dumpty together again ..."[56] The Humpty Dumpty situation—e.g., the destruction of specific goods—thus lies at one end of the impossibility spectrum.[57]

At the other end of the spectrum is "*subjective* impossibility, where the consideration can, in and of itself, be presented, but where it is impossible for the obligor to do so".[58] And neither Danish nor American law permits such subjective impossibility to operate as an excuse.

> It is the difference between "the thing cannot be done" and "I cannot do it" ... e.g., in cases where performance is impossible because of inability to pay money or render any other performance as a result of insolvency or other financial problems.[59] Such inability is personal to the obligor and does not excuse performance.[60]

A clear-cut instance of "subjective" impossibility in both Danish and American legal theory relates to the obligation of the seller in a generic sale (*genuskøb*). Such a seller is not excused simply because *his* intended source of supply (e.g. a particular wholesaler) or intended means of performance fails, in that his generic contractual obligation is unaffected thereby.[61] Even if the Danish Act did not provide a "specially formulated fault-rule" for generic sales,[62] such subjective impossibility would not excuse the seller,[63] in that his failure to fulfil the generic contract by alternate means would constitute culpable breach and thus make him liable pursuant to the traditional fault standard;[64] indeed, the severity of the seller's liability in generic sales is a

[53] Ussing, *op. cit.*, p. 110.
[54] See A. Vinding Kruse, *op. cit.*, *supra* note 25, pp. 81 f. and Jørgensen, *Kontraktsret* II, Copenhagen 1972, pp. 150 f.
[55] See *infra*, this section.
[56] 6 *Corbin on Contracts*, § 1325.
[57] Cf. U.C.C. § 2-613 and compare *Taylor* v. *Caldwell* (1863) 3 B. & S. 826.
[58] Ussing, *op. cit.*, *supra* note 16, p. 53.
[59] Cf. Ussing, *op. cit.*, *supra* note 2, p. 81.
[60] Calamari & Perillo, *op. cit.*, *supra* note 32, pp. 497 f.
[61] See Ussing, *op. cit.*, *supra* note 2, p. 73, and Simpson, *Contracts*, St. Paul 1965, p. 362.
[62] See 2.3, *infra*.
[63] See Ussing, *op. cit.*, *supra* note 2, p. 73, and Gomard, *op. cit.*, *supra* note 28, pp. 215 f.
[64] Gomard, *op. cit.*, *supra* note 14, p. 157.

highly significant feature of Civil systems generally.[65] On the other hand, since the starting point for American liability is strict regardless of the type of sale, it is a sufficient explanation for Common law theory to state that such subjective impossibility does not constitute impossibility at all, in that "it is never impossible to procure and deliver an article of commerce which may be had in the market in some corner of the world".[66]

> Even though a contractor may have expected to perform in a particular manner or place, the subsequent impossibility or illegality of performing in that manner or place does not discharge him from duty, *if the terms of his promise* are such that the agreed performance is still possible and lawful in some other manner or place.[67]

But although the concept of impossibility thus plays a central and similar role in Danish and American law, the "excuse" issue is not resolvable on this basis alone.[68] In Danish law, fault is acknowledged as the common standard for both tort and contractual liability,[69] and since the underlying criterion—indeed the "quintessence"—of fault liability in Danish tort law is foreseeability,[70] one may reason that impossibility of performance which could have been reasonably foreseen will not excuse the promisor: a promisor–seller's delay or non-delivery is culpable breach where it is "due to circumstances which he ought to take into account at the time of the conclusion of the contract".[71]

> In this case liability in damages does not, therefore, depend on the fact that the seller is responsible for the delay except in the sense that he has entered the agreement despite the fact that he should have taken into account those circumstances which caused the delay. These circumstances comprise not only those which existed at the time of the conclusion of the agreement ... but also circumstances which *could be expected to occur* thereafter and *ought to be taken into account* by the seller.[72]

[65] See French CC art. 1245, German CC (BGB) § 279, Ussing, *op. cit., supra* note 2, p. 74, Kessler, "The Protection of the Consumer under Modern Sales Law, Part 1", 74 *Yale L. R.*, pp. 273 f. (1964), and von Mehren, *The Civil Law System*, 2nd ed. Boston 1977, p. 1107. See also Medicus, *Bürgerliches Recht*, no. 268, Cologne 1978, p. 120, and Larenz, *Allgemeiner Teil*, vol. 1, 12th ed. Munich 1979, pp. 262 ff.

[66] *Holmes*, v. *Cameron*, 267 Pennsylvania 90, 110 A 81.

[67] 6 *Corbin on Contracts*, § 1327, citing *Thompson & Stacy Co.* v. *Evans, Coleman & Evans*, 100 Washington 277 (1918) and *Waugh* v. *Morris*, L. R. 8 Q. B, 202 (1873). As the emphasis added indicates, the problem is often one of contractual interpretation; see 2.3, *infra*.

[68] The extent to which impracticability and economic *force majeure* excuse non-performance is discussed in connection with sec. 24 of the Danish Act and U.C.C. § 2-615 in section 2.3, *infra*.

[69] Ussing, *op. cit., supra* note 16, p. 110. The applicability of the fault rule in both tort and contract law refers to the mutual applicability of the doctrine of "responsibility" (*tilregnelse*) for willful or negligent conduct but not to the objective nature of the acts which incur liability; see Gomard, *op. cit., supra* note 28, p. 226.

[70] A. Vinding Kruse, *op. cit., supra* note 25, pp. 100 f.

[71] Cf. *SOU* 1976:66, pp. 244 f. The 1975 draft revision of the Scandinavian Sales Acts would include this statement of the *culpa in contrahendo* doctrine, *ex tuto*, in sec. 23. The statement confirms that "the comprehensive [*culpa in contrahendo*] theory ... is still in the process of expansion", Kessler & Fine, "*Culpa In Contrahendo*, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study", 77 *Harvard L. R.*, p. 404 (1964).

[72] *SOU* 1976:66, pp. 244 f. (translation, emphasis added by the present author).

Whereas the court decisions do not yet seem to afford concrete examples of this foreseeability standard for delay and non-delivery in specific sales, the potential severity of the rule is indicated by the fact that the narrow exceptions to liability pursuant to sec. 24 of the Danish Act are essentially phrased in similar terms: the sec. 24 seller is *also* liable for circumstances which he should have taken into account at the time of the conclusion of the contract.[73]

As in Danish law, impossibility will only excuse the American seller from liability for delay or non-delivery where he is free from "fault".[74] "Whatever be the meaning given to the term impossibility, whether it be objective or subjective, and even though it be used to include varying degrees of difficulty and expense, the supervening situation that is so described does not excuse a promisor from his contractual duty if he himself wilfully brought it about, or if he could have foreseen and avoided it by the exercise of reasonable diligence and efficiency."[75] Thus, although the Common law makes a formal distinction regarding the applicability of fault in tort and contract law,[76] the substantive *bonus pater* standard, hereunder the doctrine of foreseeability, is nonetheless relevant to both fields.

Perhaps because contractual liability at Common law was "absolute" until 1863,[77] the foreseeability factor is not always given the same theoretical prominence as the impossibility factor.[78] But another explanation lies in the fact that Common law impossibility is not one single doctrine but a collection of more narrowly applicable rules—in reality, exceptions—developed gradually in concrete cases.

The allocation of risk is really the central task for the courts when impossibility prevents timely performance,[79] and foreseeability is among the significant elements considered in this regard. "All these rules involve consideration of whom would the community normally expect to assume the risk of the unexpected occurrence. If the risk is reasonably *foreseeable,* courts take the position that the promisor has assumed the risk of impossibility or frustration."[80]

[73] The fact that the *examples* listed in sec. 24 are interpreted as "qualifying", i.e., narrowing, the scope of legally unforeseeable circumstances does not detract from this fundamental similarity; see 2.3, *infra.* On the other hand, the Danish fault criterion as applied to defects in specific sales would not seem to comprise such a broad, *culpa in contrahendo* approach. See 2.3 and 2.4, *infra.*

[74] See *Restatement (Second) of Contracts,* § 266 (1981).

[75] 6 *Corbin on Contracts,* § 1329.

[76] See 2.1, *supra.*

[77] *Taylor* v. *Caldwell* (1863) 3 B. & S. 826.

[78] Even though the U.C.C. codification of the exceptions to liability for delay and non-delivery does not expressly mention foreseeability, this factor is emphasized in the theory and the cases; see 2.3, *infra.* Cf. English theory: "a contract should not be frustrated by an event which was, or clearly should have been, foreseen by the parties"; Treitel, *Law of Contract,* 5th ed. London 1979, p. 661.

[79] 6 *Corbin on Contracts,* § 1322.

[80] Calamari & Perillo, *op. cit., supra* note 32, p. 316 (my italics). Regarding frustration, see note 92, *infra.*

In sales contracts where the promisor incurs a generic obligation, truly objective impossibility is often due to circumstances so unusual as to be typically beyond the contemplation of contracting parties, and it is thus reasonable to let the buyer bear the risk thereof. But even though this may be the general rule in such instances, the seller may nonetheless bear the risk when the supervening contingency, in a particular case, is deemed "foreseeable": if the goods of the particular class or genus "do not exist, the reason is not necessarily an excusable fortuitous circumstance but merely that the ordinary processes of trade, of which the promisor takes the risk, have absorbed the entire supply".[81]

Where, on the other hand, impossibility is due to the fortuitous destruction of the specific subject matter or the specifically contemplated means of performance of the contract, the custom of men—and the judicial decisions—require the promisor to bear the risk of not getting the agreed exchange and the promisee to bear the risk of not getting the profit.[82] Where specific goods are destroyed, the risk is allocated in accordance with general assumptions; such a contingency might be regarded as typically unforeseeable.[83]

Thus, the foreseeability of a supervening contingency is only one method of expressing the underlying problem of an equitable allocation of risks. And the basic issue is the same in Danish theory: "The contract continues to be binding if the promisor foresaw what later occurred or if the intervening change, for special reasons, was not of decisive significance for him ... And even apart from these extreme cases, there is a gradual transition from the typical cases to others where one or both parties have or more or less ought to have expected the possibility of the circumstance which later occurred, which may be influential in deciding the question of risk ..."[84]

> Just as Danish and American theory are generally compatible regarding the conditions whereby "total" impossibility may serve to excuse a promisor, the systems also appear to take a similar view of so-called instances of partial impossibility. As indicated, the American Common law concept of impossibility may be viewed in terms of implied or constructive conditions (*forudsætninger*) which qualify the promisor's contractual obligation. "Since the qualification of the literal terms of the promise is imposed by the law, on principles of justice, not because of the expressed intention of the parties, the extent of the qualification depends merely on what is just."[85] Williston states the principle as follows: "Partial impossibility excuses performance only to the extent of such impossibility; the promisor remains bound to perform that portion of his promised performance

[81] 18 *Williston on Contracts*, § 1950.
[82] 6 *Corbin on Contracts*, § 1321. See also U.C.C. § 2-613.
[83] Regarding "typical assumptions" (*typeforudsætninger*) see v. Eyben & A. Vinding Kruse, *op. cit., supra* note 39, pp. 82 f.
[84] Ussing, *op. cit., supra* note 47, pp. 475 f.
[85] 18 *Williston on Contracts*, § 1956.

which remains possible."[86] Ussing applies the same rule in Danish sales theory: "If the supervening, excusing circumstances preclude full performance but do not preclude delivery of a portion of the quantity sold, the seller is obligated to deliver as much as he can deliver despite the impediment."[87] American Common law has neither conceptual nor practical problems with partial impossibility:[88] partial impossibility gives rise to partial discharge.[89] When Nicholas states that the "Common law has difficulty in knowing how to deal with partial impossibility",[90] he is presumably only referring to English law, which "has allowed impossibility of performance to be absorbed into the category of frustration";[91] American theory has not.[92]

The preceding considerations have emphasized the substantive content of such factors as impossibility, fault and foreseeability in Danish and American theory. A theoretically distinct issue is the procedural burden of proving the (non) existence of these elements in a court of law. It is said that Danish law "reverses" the burden of proof as to the seller's fault for delay and non-delivery in specific sales;[93] this is a typical feature of Civil law contractual systems.[94] Whether or not the generic-seller's liability pursuant to sec. 24 of the Danish Act is regarded as employing a strict starting point or a specialized version of the fault rule, the allocation of proof corresponds to the "reversed" standard applicable pursuant to sec. 23: the non-performing seller must prove that he qualifies for an exemption from liability. Similarly, the general rule in American law is that the non-performing defendant has the burden of establishing "the nature, extent and causative effect of the alleged impossibility".[95]

[86] *Op. cit.* p. 149.

[87] Ussing, *op. cit., supra* note 2, p. 83. Moreover, both systems have similar solutions where the seller contracts to deliver a given class of goods to several buyers, and a supervening contingency prevents performance of one or more such agreements: the seller must allocate the supply available—in Denmark, proportionately, if possible, in America, "in any manner which is fair and reasonable". Cf. Ussing, *loc. cit.*, Gomard, *op. cit., supra* note 46, p. 17, and U.C.C. § 2-615 (b).

[88] 18 *Williston on Contracts,* § 1956.

[89] Cf. *Restatement (Second) of Contracts,* § 270 (1981).

[90] Nicholas, *op. cit., supra* note 3, p. 235.

[91] *Loc. cit.*

[92] Cf. 6 *Corbin on Contracts,* § 1322, and *Restatement (Second) of Contracts,* ch. 11 (1981). Corbin, *loc. cit.*, notes that "the English judges appear to regard 'Frustration' as substantially identical with 'Impossibility', and that in all such cases the legal effect must be the complete discharge of both parties alike from further contractual duty ... Much aid can be got from [English theory] and the English court opinions. It is believed, nevertheless, that further cases will compel a more detailed analysis and a 'restatement' of definition and doctrine."

The doctrine of frustration originated with the so-called "coronation cases", cf. *Krell* v. *Henry,* 2 K.B. 740 (1903); interestingly, Denmark has a nearly direct parallel in its case law (cf. 1920 UfR 848), and Danish—like American—theory classifies such cases in a separate category, "right of withdrawal" (*afbestillingsret*), where a variety of factors enter into the judicial determination, cf. Gomard, *op. cit., supra* note 44, p. 42, and cf. Corbin, *loc. cit.*

Regarding frustration of sales in Scandinavian and American law, see 1924 NJA 510 and *Bardons & Oliver* v. *Amtorg Corp.* 93 N.E. 2d. 915 (1950). "In the 75 years since the *Krell* case, virtually no American court has used the doctrine of frustration to excuse a buyer of goods", cf. Crandall, "Frustration as an Agricultural Buyer's Excuse Under U.C.C. Section 2-615", 11 *Univ. of Cal., Davis, L. R.* (1978).

[93] Gomard, *op. cit., supra* note 14, p. 153.

[94] Nicholas, *op. cit., supra* note 3, p. 234.

[95] *Williston on Contracts,* § 1978 B, distinguishing *Joseph Constantine SS Line, Ltd.* v. *Imperial Smelting Corp.* (1942) AC 154, 2 All Eng. 165. Corbin (§ 1329) agrees with the result in *Constantine*

2.3. *Liability for delay and non-delivery: Sec. 24 of the Danish Act and U.C.C. § 2-615*

Sec. 24 of the Danish Act provides that the seller having a generic contractual obligation is liable for delay or non-delivery unless "the possibility of performing the contract must be considered precluded by circumstances not of such a nature that the seller should have taken them into account at the time of the conclusion of the contract, such as the accidental destruction of all goods of the kind or lot concerned, war, prohibition of import, or the like".[96]

U.C.C. § 2-615 provides (*inter alia*): "Delay in delivery or non-delivery in whole or in part by a seller ... is not a breach of his duty under a contract of 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 ..."

Despite the disparity in formulation, both provisions contain variants of the impossibility and foreseeability tests which, as indicated previously,[97] are central to both the Danish and American traditional theories of liability for delay and non-delivery. The legislative history and theory underlying § 2-615 indicate that the term "impracticable" is used broadly,[98] in that the provision not only encompasses (1) impracticability in the narrower sense of "economic *force majeure*", i.e., performance which is burdensome but nonetheless objectively possible, but also (2) the traditional "objective" impossibility doctrine.[99]

The fact that impossibility is also a key element in sec. 24 of the Danish Act is clearly indicated by the words "possibility ... precluded". Here too, the statutory wording—"must be considered (deemed) precluded"—comprises not only objective impossibility but also certain subjectively impossible instances of economic *force majeure*.[100]

The issue of subjective vs. objective impossibility is common to both the Danish and American analysis:[101] in both systems, the generic-seller's con-

but not with the Lords' reasoning; he would decide the question on a case-by-case basis. See also von Mehren, *op. cit., supra* note 65, p. 1106.

The burden of proof in U.C.C. § 2-615 (discussed *infra*) is on the party claiming an excuse; see *Eastern Air Lines* v. *Gulf Oil Corp.*, 415 F. Supp. 429 (1975).

[96] Compare the Unidroit translation of the corresponding Swedish Sales Act provision in Unidroit's *Unification of Law, Yearbook 1961*, Rome 1962, p. 203.

[97] In 2.2, *supra*.

[98] Cf. U.C.C. Official Comment 3 to § 2-615 and Calamari & Perillo, *op. cit., supra* note 32, pp. 491 and 506.

[99] Regarding "frustration" and buyer's claim of excuse, see note 92, *supra*, and Calamari & Perillo, *op. cit.*, p. 506.

As § 261 of the *Restatement (Second) of Contracts* (1981) indicates, the principles of U.C.C. § 2-615 are general principles of American contract law.

[100] See *infra*, this section.

[101] See 2.2, *supra*.

tractual obligation is impossible only in the subjective sense—i.e., neither "precluded" nor "impracticable"—where the intervening contingency merely affects the seller's *intended* means of performance as opposed to his (generic) contractual obligation.[102] In many cases, however, a question arises as to whether both parties—as opposed to the seller alone—"assumed" that the contingency would not occur: i.e., whether the seller's performance was subject to an implied or constructive condition (assumption/*forudsætning*) regarding the continued existence of a particular factory, supplier, shipping route, etc., or whether the contract permits—and indeed requires—the delivery of the given class of goods from any available source and by any available means. The fact that the Danish and American court decisions on the issue are not easily reduced to clear-cut rules may indicate the difficult questions of law presented.

The statutory provisions themselves give no assistance in resolving the problem; the courts utilize general principles of law to "interpret" the contract and determine whether delivery by the seller is "precluded". "By this process, it may be found that the performance actually undertaken is not impossible at all ..."[103]

The problem was before the Danish Supreme Court in 1917. In July 1914 a Danish seller sold 100 sacks of rye and bolted rye flour to the buyer, to be delivered in lots until January 1915. In August of 1914 the seller cancelled due to the non-availability of Russian and German rye. Although nearly all such grain was imported from these countries before the outbreak of war, the seller could not allege this as an *assumption* for the obligation to deliver; i.e., delivery was possible, and the seller was held liable in damages.[104]

Thus, even though both parties to the said contract may have assumed that Russian or German rye would be available, the court did not consider the assumption to be "relevant"; i.e., it did not deem that the circumstances justified placing the risk of non-availability thereof on the buyer. And whereas this "assumptions-theory"[105] is thus really reducible to the problem of allocating the risk,[106] the "term assumption is nonetheless often used in both day-to-day and legal language ... [and] this terminology emphasizes that certain assumptions have not been satisfiable, facilitating familiarity with a given situation, which is a prerequisite for the performance of a good judicial determination (*judicium*)".[107]

In an American case,[108] the defendant, a Texas dealer, contracted to sell

[102] See Gomard, *op. cit.*, note 14, p. 157, and 18 *Williston on Contracts*, § 1952.
[103] 6 *Corbin on Contracts*, § 1327.
[104] Cf. 1917 UfR 388 H.
[105] *Forudsætningslære.*
[106] Cf. Gomard, *op. cit., supra* note 44.
[107] Gomard, *loc. cit.*
[108] *Pearce-Young-Angel Co. Inc.* v. *Charles R. Allen, Inc.* 213 South Carolina 578, 50 S.E. 2d 698, discussed in 18 *Williston on Contracts*, § 1946.

800 bags of "Texas No. 1 blackeye peas" to the plaintiff for delivery on June 30. Heavy rain destroyed the entire pea crop in the area of Dilley, Texas; the dealer failed to deliver and was sued for damages. The evidence presented showed that the buyer, prior to accepting the peas offer, had inquired how the dealer could be sure the peas would be "No. 1"; the dealer answered by referring to the unusually dry, current crop of Dilley, Texas, hereunder his existing contracts for the purchase of 7000 bags thereof. The court held that the defendant was discharged from his duty to perform—a controversial decision, arguably justified by the fact that a specific source was contemplated by both parties.[109]

Although both systems sometimes refer to the resolution of these issues as contractual interpretation, the condition or assumption in the particular case is often not "implied" from the contract but rather imposed or constructed by the court. As Williston puts it, "The only evidence ... of such a mutual assumption is, generally, that the court thinks a reasonable person, that is, the court itself, would not have contemplated taking the risk of the existence of the fact in question."[110] Thus the court, in applying the "basic assumption" (*væsentlig forudsætning*) standard of U.C.C. § 2-615, has as its task the allocation of risk.[111]

> It may be noted that even where contractual interpretation leads to the result that performance is objectively impossible due to the agreed *manner of delivery*, the seller is *not* excused pursuant to the U.C.C., in that § 2-614(1) provides: "Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but as a commercially reasonable substitute is available, such performance must be tendered and accepted."[112] Nor would a Danish seller be excused in the situations covered by § 2-614(1).[113] In fact, the Danish conception of objective impossibility may be stricter than the American view in certain circumstances. Where the ship chosen by the seller to deliver generic goods sinks en route, he is liable for a resulting delay pursuant to sec. 24 of the Danish Act even where it is impossible for alternate goods to be delivered in time; since the delay is seen as a result of the seller's "unfortunate choice" of ship, he cannot plead temporary impossibility.[114]

[109] Williston, *loc. cit.*: Regarding failure of seller's source of supply, see text *infra* with notes 142–3.

[110] 18 *Williston on Contracts,* § 1937.

[111] Calamari & Perillo, *op. cit., supra* note 32, p. 481. See also notes 79–84, *supra,* and accompanying text.

[112] The provision applies regardless of the nature of the supervening contingency, hereunder, fire, war, etc. (i.e., Danish law's "qualified, extraordinary circumstances" discussed *infra,* this section). See Official Comment 1 to U.C.C. § 2-614.

[113] Ussing, *op. cit., supra* note 16, p. 64.

[114] See Ussing, *op. cit., supra* note 2, pp. 77 f. Regarding temporary impossibility, see Ussing, *op. cit.*, p. 84, and 18 *Williston on Contracts,* § 1957.

Although neither Danish nor American law generally recognizes subjective impossibility as an excuse for non-performance, there is one sense in which contingencies short of the objectively impossible may excuse both the Danish and American promisor: in Denmark the doctrine is referred to as "economic *force majeure*", whereas the corresponding American concept is "impracticability".[115] The issue is whether the promisor may be discharged where performance, although still possible, has become so expensive and burdensome that it "must be considered as (deemed) precluded".[116]

The general rule according to both Danish and American law is that increased cost will not constitute a sufficient excuse. As if to emphasize the strength of this proposition, each system has traditionally only been able to cite one case—"the exception which proves the rule"—where economic *force majeure* was recognized as an excuse for non-performance. The American case is from 1916. The contract involved the removal of earth and gravel and the payment therefor at specified rates. As the work progressed it became evident that the cost of continued performance would amount to 12 times that originally anticipated, in that about half the material lay under water. Since the parties contracted on the assumption of removal by ordinary means, the promisor was excused.[117]

The Scandinavian "exception" is a 1923 Swedish case.[118] The contract involved the delivery of a minimum of 100 tons of cardboard per year for 5 years. In 1916 the quantity was amended to 200 tons at 41 300 Crowns per ton (amended to 66 000 Crowns per ton in later negotiations). When the market price went to 104 000 Crowns, the seller refused further delivery. The price rise was held to "have had such a character that it must be deemed to have lain entirely outside the contract's assumptions".[119]

Notwithstanding these cases, Danish and American courts have not been willing to exempt sellers in similar situations. In Denmark, not even wartime cost increases of 400–500 % have relieved the seller.[120] And recent American cases indicate that U.C.C. "impracticability" is a no more lenient standard in this respect.[121] In *Eastern Airlines, Inc.* v. *Gulf Oil Corp.*[122] a 400 % cost

[115] In the "narrower sense"; see text *supra* at notes 98 and 99.

[116] Cf. sec. 24 of the Danish Act and Ussing, *op. cit., supra* note 2, pp. 81–3.

[117] *Mineral Park Land Co.* v. *Howard*, 172 Calif. 289, 156 P. 458 (1916). Regarding the Convention and English law, see note 194, *infra*.

[118] Decided pursuant to sec. 24 of the corresponding Swedish Sales Act.

[119] 1923 NJA 20.

[120] Nørager-Nielsen & Theilgaard, *op. cit., supra* note 52, pp. 345 ff.

[121] See cases *infra* and, e.g., *Louisiana Power & Light Co.* v. *Allegheny Ludlum Industries, Inc.*, 517 F. Supp. 1319 (1981). For a recent exception, see *Aluminium Co. of America* v. *Essex Group*, 499 F. Supp. 53 (1980), cited somewhat disapprovingly in *Florida Power & Light Co.* v. *Westinghouse Electric Corp.* (U.S. District Ct., ED Va., No. 75-1677-R, 1981) 31 U.C.C. Rep 930, 956.

[122] 415 F. Supp. 429 (1975).

increase during the 1973 OPEC embargo did not relieve Gulf of its obligation to supply Eastern pursuant to the terms of the contract.

Faced with similar, embargo-related cost increases in 1975 the Westinghouse Electric Corporation refused to deliver pursuant to a number of uranium supply contracts that it held with various public utilities. In the resulting litigation,[123] Westinghouse attempted to invoke (U.C.C.) section 2-615, claiming commercial impracticability due to the drastic (600%) increase in the price of uranium.[124] Yet despite the magnitude of the alleged potential loss (2.5 billion dollars), the U.S. District Court judge ruled that "Westinghouse did not meet its burden of establishing that it is entitled to excuse ...".[125]

It is notable that although the impracticability/economic *force majeure* issue is treated as part of the "impossibility test" in both Danish and American theory,[126] the defenses asserted in these recent American cases failed by virtue of the *foreseeable* nature of the contingencies concerned.

> Many, if not most, of the Code impracticability cases have been ones involving cost increases, and just about all of them have been disposed of on the basis of foreseeability. Inflation has regrettably become such a badge of contemporary society that even substantial increases in cost do not escape being classified as foreseeable.[127]

Whereas sec. 24 of the Danish Act employs terminology traditionally associated with foreseeability ("should have taken into account"), U.C.C. §2-615 provides that a given contingency will only excuse a seller where a "basic assumption" of the contract was that the contingency would not occur. But the U.C.C. "basic assumptions" test is also a test of foreseeability. "Foreseeability has been central to impossibility cases for as long as they have been around. It

[123] *In re Westinghouse Elec. Corp. Uranium Contracts Litigation,* MDL Docket No. 235 (E.D. Virginia, Oct. 27, 1978).

[124] Maughmer, "In re Westinghouse: Commercial Impracticability As A Contractual Defense", 47 *UMKC L. Rev.,* pp. 650, 661 (1979).

[125] Cf. Eagan, "The Westinghouse Uranium Contracts: Commercial Impracticability and Related Matters", 18 *American Bus. L. J.,* p. 300 (1980). The majority of plaintiffs settled with Westinghouse out of court (Eagan, *op. cit.,* p. 301)—a fact related to the possibility of an equitable adjustment of the contract price, cf. U.C.C. §2-615 Official Comment 6 and Huffmeyer, "Section 2-615 and Corporate Accountability", 13 *U.C.C. L. J.,* p 263 (1981).

Regarding Norwegian theory and arbitration practice, see Lund, "Inflasjon og Konjunktursvikt som Problem for Skipsfartens Langtids-Kontrakter", 14 *Arkiv for Sjørett,* p. 339 (1977).

Whether (e.g.) an "equitable adjustment" pursuant to sec. 36 of the Danish Contracts Act (*aftaleloven*) would be consistent with the Convention would seem to be one of the Convention's "loose ends", cf. Nicholas, *op. cit., supra* note 3, pp. 231 f., and note 197, *infra.*

[126] Ussing, *op. cit., supra* note 2, pp. 81 f., and *Williston on Contracts,* §1963.

[127] Duesenberg, "Contract Impracticability: Courts Begin to Shape §2-615", 32 *The Business Lawyer,* p. 1096 (1977). The role of foreseeability as a supplement to the impracticability test in U.C.C. §2-615 is clearly demonstrated in a recent decision by the Kansas Court of Appeals (December 31, 1981, No. 52, p. 175), *Sunflower Electric Cooperative, Inc.* v. *Tomlinson Oil Co., Inc.,* 32 U.C.C. Reporting Service 1462.

is proving no less important under section 2-615, even though the word nowhere appears in its lines. The theory is that the non-occurrence of a contingency cannot fairly be said to be a basic assumption of the agreement if its occurrence is reasonably foreseeable."[128] "If a contingency is foreseeable, it and its consequences are taken outside the scope of U.C.C. § 2-615, because the party disadvantaged by fruition of the contingency might have protected himself in his contract ..."[129]

Danish theory impliedly supports the U.C.C. reasoning: "[foreseeability] may be seen as a question of assumptions (*forudsætningsspørgsmål*)".[130] And, as is the case under Danish law, impossibility will not excuse the seller pursuant to U.C.C. § 2-615 unless the supervening contingency was—also—unforeseeable.

> Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen[131] contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which contracts made at fixed prices are intended to cover.[132]

The Official Comments to § 2-615 offer some guidance on the foreseeability issue: "a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section".[133] But it is significant that this list of "unforeseeable" contingencies, which contains elements similar to those named in sec. 24 of the Danish Act,[134] is given in the non-binding[135] Comments and not in § 2-615 itself. In fact, the Comments expressly provide that § 2-615 *deliberately refrains* from any "exhaustive expression of contingencies" which excuse delay or non-delivery; the courts are simply bound to interpret the provision "in terms of its underlying reason and purpose"[136]—the purpose being "[to excuse] a seller from timely delivery of goods contracted for, where his performance has become commercially im-

[128] Duesenberg, *op. cit.*, p. 1095.

[129] *Eastern Airlines, Inc.* v. *Gulf Oil Corp.*, 415 F. Supp. 429 (1975). See also *Florida Power and Light Co.* v. *Westinghouse Electric Corp.*, *supra* note 121, pp. 950 f.

[130] See Ussing, *op. cit.*, *supra* note 2, p. 76, and note 47, pp. 475 f. Cf. Gomard, quoted in text *supra* at note 107.

[131] I.e., and foreseeable.

[132] *Cf. Official Comment* 4 to U.C.C. § 2-615.

[133] *Id.*

[134] See translation of sec. 24 *supra*, this section.

[135] White & Summers, *The Uniform Commercial Code*, 2nd ed. St. Paul 1980, pp. 12–14.

[136] Cf. U.C.C. *Official Comment* 2 to § 2-615, cited in *Restatement (Second) of Contracts*, § 261, Comment a (1981).

practicable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting".[137]

In contrast herewith, sec. 24 of the Danish Act not only requires unforeseeability in general terms—"should not have taken into account"—but also provides a list of contingencies which are legislatively deemed to be unforeseeable, at least in normal situations. While the list is not exhaustive, its effect has been to statutorily narrow the scope of permissible excuses to so-called "qualified, extraordinary impediments"[138] of a nature similar to those listed, e.g., "rebellion, export prohibition, blockade, public confiscation, and conflagration";[139] i.e., circumstances not in sec. 24's list, as narrowly expanded by interpretation, are deemed foreseeable: the generic seller bears the risk of impossibility caused by non-*force majeure* contingencies.[140]

In Corbin's view, such phrases as *vis major* and *force majeure* are "convenient catchwords", unhelpful in "determining when to throw the risk upon a promisee, rather than a promisor".[141] And although the American courts have hardly been lenient in delineating the range of (un)foreseeable excuses,[142] the fact that contingencies not having the character of *force majeure* in the Danish sense can, depending upon the circumstances, excuse pursuant to U.C.C. § 2-615 indicates a certain degree of flexibility in the basic assumptions test which is absent in sec. 24 of the Danish Act.

The framers of the Code deliberately chose to preserve the flexible Common law standard where "the question is one of degree and is to be answered on the basis of what should have been (or actually was) within the reasonable contemplation of the parties".[143] Sec. 24 of the Danish Act, although sometimes criticized for its rigid harshness, has afforded a clear, consistent allocation of the risk in generic sales. Whether one prefers flexibility or consistency in the "borderline" cases, the fundamental similarity underlying these American and Danish provisions would appear to be the most prominent result of the foregoing comparative inquiry.

2.4. *Liability for defects*

The U.C.C. codifies the Common law rule of no-fault liability for the seller of defective goods. If the goods are defective, the seller is in breach and the buyer

[137] U.C.C., *id.*, Comment 1.
[138] Ussing, *op. cit.*, *supra* note 2, p. 76.
[139] *Loc. cit.*
[140] Nørager-Nielsen & Theilgaard, *supra* note 52, p. 318.
[141] 6 *Corbin on Contracts*, § 1324.
[142] "Vagaries of the weather", for example, seldom excuse; see 18 *Williston on Contracts*, § 1964. A failure of the seller's source of supply is generally foreseeable and thus a risk normally assigned to the promisor, e.g.: *Center Garment Co.* v. *United Refrigerator Co.*, 341 NE 2d 69 (1976) and *Barbarossa & Sons, Inc.* v. *Iten Chevrolet, Inc.*, 265 NW 2d 655 (1978).
[143] 6 *Corbin on Contracts*, § 1333, citing *Farnsworth* v. *Sewage & Water Board*, 139 So. 638 (12

is, by definition, entitled to damages.[144] Since the Common law doctrine of impossibility has apparently never been applied to excuse the seller for defects,[145] the standard here is rightly described as "absolute", and the U.C.C. paraphrases the defect/non-conformity issue in terms of breach of (express or implied) "warranty".[146] Pursuant to § 2-314—"by far the most important warranty in the Code"[147]—the issue is thus whether, e.g., the goods are "merchantable", i.e., pass without objection in the trade, are of fair average quality and fit for ordinary purposes, etc.

As regards the defect issue, (also) a Danish buyer "generally has the right to expect that the item purchased has the usefulness and value ordinarily associated with that particular type of goods".[148] Moreover, the following U.C.C. Official Comment would apply equally in Denmark. "In cases of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation ..."[149] And such similarities are not confined to the merchantability question; Danish theory also measures defects in terms comparable to the U.C.C. "express" warranties (2-313) and the implied warranty of fitness for a particular purpose (§ 2-315).[150]

Thus, Danish and American law are likely to afford the same result on the "defect issue". What then is the practical significance of the Danish Act's

inches of rainfall within 24 hours). Regarding assumptions as to production at a given factory, see Calamari & Perillo, *op. cit., supra* note 32, p. 481.

[144] Cf. U.C.C. § 2-601 and text *supra* at notes 29 and 30. Of course, not only American and Danish but also Convention plaintiffs need to establish a reasonably foreseeable (*adækvat*) loss resulting from the breach. See 5 *Corbin on Contracts,* ch. 56; Gomard, *Obligationsretten i en Nøddeskal,* vol. 2, pp. 164 ff.; and the Convention, art. 74.

A substantive comparison of the extent of damages recoverable (*erstatningens omfang*) pursuant to the Danish Act, U.C.C. and the Convention is beyond the scope of the present paper. It may be noted, however, that contractual liability judgments pursuant to the U.C.C. may, depending on the particular American state, include compensation for injury to both persons and property (U.C.C. § 2-318, Alternatives A–C), whereas such judgments in Denmark are never made pursuant to the (Sales) Act but based either on tort or separate product liability principles (Gomard, *op. cit., supra* note 14, ch. 12). The Convention's art. 5 excludes only *personal* injury from its scope.

[145] See Nicholas, *op. cit., supra* note 3, and 18 *Williston on Contracts,* ch. 58, and note 201, *infra.*

[146] Both express and implied warranties are "contractual at their core", cf. Kessler, *op. cit., supra* note 65, p. 278.

Apart from the fact that the term "warranty" conjures notions of absolute liability, there seems to be no theoretical obstacle to applying the impossibility doctrine to defective/non-conforming goods. (Cf. *id.*, p. 273, note 58). Nor is the limited scope of U.C.C. § 2-615 (seller's delay/non-delivery) determinative; regarding, e.g., the "gap" as to a buyer's claim of excuse, see Calamari & Perillo, *op. cit., supra* note 32, p. 506.

The Convention's art. 35 is phrased in terms of non-conformity, not warranty; see 3.3, *infra.*

[147] White & Summers, *op. cit., supra* note 135, p. 343.

[148] Ussing, *op. cit., supra* note 2, p. 123.

[149] Cf. Comment 7 to § 2-314 and Gomard, *op. cit., supra* note 28, p. 298. Note that only merchants automatically give the 2-314 warranty.

[150] See the Danish Act, sec. 76—essentially a codification of the concept of defect applicable to sales in general.

additional basis-of-liability (*ansvarsgrundlag*) "hurdle"? Given the overwhelming dominance of generic sales, the answer may be: "not much", in that the applicable basis of liability (sec. 43(3)) is the same severe standard applicable to delay and non-delivery. Apart from the case of "semi-generic sales",[151] delivery of conforming goods is nearly always possible for sellers of wheat, iron and the like; similarly, a sec. 24 *force majeure* circumstance would only be likely to affect the entire "class" in a semi-generic sale.[152] In practical terms, sec. 43(3) would seem fully compatible with the absolute U.C.C. standard.

However, whereas U.C.C. strict liability extends to all sales, the "specially formulated fault rule"[153] of sec. 43(3) applies only to generic sales; in specific sales, sec. 42(2) provides that the bases of liability are fraud and "guarantee" where the defect was present at the time of contracting.[154]

Although the Danish seller of specific goods is liable for wilfully or negligently setting aside his duty to "loyally inform" the buyer of knowledge or suspicions he has concerning possible defects,[155] he is not liable for innocent misrepresentations, i.e., made in good faith with respect to the truth thereof, unless he *guarantees* the accuracy of the information given.[156] Whereas the express guarantee—in the Danish sense, i.e., where the promisor expressly undertakes to be liable for defects—may have limited practical significance, this is not so as regards the implied warranty (*stiltiende garanti*) which the court may find present due to a variety of factors: e.g., the fact that the information is given in reply to an inquiry by the buyer; a sales price in excess of the value; the major significance of the information concerned with respect to the valuation of the goods.[157] And interestingly, these factors have a bearing on the requirement in U.C.C. § 2–313 that the information given be the "basis of the bargain"—i.e., that the buyer rely thereon.[158]

Despite the growing significance in Denmark of implied warranties in specific sales, there is still a gap between the sec. 42(2) basis on the one hand, and the standard governing all U.C.C. sales and generic sales pursuant to the Danish Act on the other. No implied warranty of merchantability is automatically given by the Danish merchant in specific sales. Nor do the courts seem to

[151] *Halvgenerisk køb*, cf. sec. 3.

[152] Nørager-Nielsen & Theilgaard, *op. cit., supra* note 52, p. 812.

[153] See text *supra* at note 28.

[154] As noted in 2.1, *supra*, fault supplements the express statutory basis; see discussion immediately following.

[155] Gomard, *op. cit., supra* note 44, pp. 24–6, and Nørager-Nielsen & Theilgaard, *op. cit., supra* note 52, pp. 720 ff. and 793.

[156] Gomard, *loc. cit.*

[157] *Loc. cit.* Regarding similar developments in German law, see Kessler, *op. cit., supra* note 65, p. 274.

[158] The "basis of the bargain" requirement has yet to be fully delineated by the American courts, and something less than Common law "reliance" may suffice; see White and Summers, *op. cit., supra* note 135, pp. 332 ff.

imply a warranty in all situations covered by §§ 2-313 and 2-315. And the fact that recent Danish theory supplements fraud and "guarantee" with fault as the basis of liability in specific sales[159] would not seem to fill the said gap.

> Although fault is added as a basis of liability, one cannot conclude that the seller's *bonus pater* standard as regards defects in specific sales is analogous to that applicable for delay and non-delivery or that the secs. 23–24 "sacrifice-threshold"[160] applies; since the reasonable Danish seller is not required to inspect the goods so as to acquire relevant information as to possible defects,[161] he will not be liable in many cases where it was presumably "possible" to discover the defect and avoid the breach. Nor does sec. 42(2) give the seller the burden of proving the absence of fault.[162]

And yet, since the remedy of proportionate reduction in price[163] is always[164] available in Denmark to the buyer of non-conforming specific goods, and since generic sales dominate the national and international markets, it seems proper to characterize the net result as indicating a notable similarity between the Danish and American rules for compensating the buyer of defective merchandise.

3. LIABILITY PURSUANT TO THE 1980 U.N. SALES CONVENTION

3.1. *A single basis of liability*

Art. 45 of the Convention provides, *inter alia:*

> (1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:
>
> (a) exercise the rights provided in articles 45 to 52;[165]
>
> (b) claim damages as provided in articles 74 to 77.

In the same manner as U.C.C. § 2-601,[166] the Convention's art. 45[167] refers to *any* non-performance by the seller; unlike the Danish Act, one basis of liability applies to both specific and generic sales and irrespective of whether the breach involves delay, non-delivery, defective goods, etc.

[159] See Gomard, *op. cit., supra* note 14, p. 156.
[160] *Offergrænsen.* See Gomard, *op. cit., supra* note 46, pp. 41 f.
[161] See Nørager-Nielsen & Theilgaard, *op. cit., supra* note 52, p. 721.
[162] See Ussing, *op. cit., supra* note 16, p. 113.
[163] As noted *supra* at note 16.
[164] Assuming that the non-conformity results in reduced value (*værdiforringelse*); see Ussing, *op. cit., supra* note 2, p. 130.
[165] I.e., remedies other than damages such as: re-delivery (art. 46), avoidance (art. 49), proportionate reduction in price (art. 50), etc.
[166] See text *supra* at note 29.
[167] And its "twin", art. 61, regarding buyer's breach.

> [A] single consolidated set of remedial provisions for breach of a contract by the seller ... makes it easier to understand what the seller must do, that which is of prime interest to merchants.[168]

And as does U.C.C. § 2-601, art. 45[169] directly correlates the damage remedy with the seller's breach, i.e., failure to perform.

> "In order to claim damages it is not necessary to prove fault or a lack of good faith or the breach of an express promise, as is true in some legal systems. Damages are available for the loss resulting from any objective failure by the seller to fulfil his obligations."[170] This accords with the Common law: "Contract liability is strict liability. It is an accepted maxim that *pacta sunt servanda*, contracts are to be kept. The obligor is therefore liable in damages for breach of contract even if he is without fault ..."[171]

But although its starting point is clearly "no-fault",[172] the Convention's single basis of liability is subject to the "exemptions" clause of art. 79:

> (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences ...

> Before considering the major substantive elements of this provision, note may be made of the legal effect of an exemption and the procedural burden of proof with respect thereto.
>
> If a court finds that a party's excuse for non-performance qualifies for an art. 79 exemption, he is "not liable" for such non-performance; whereas the obligee will thus not be able to recover damages, his other remedies are not directly affected by the exemption.[173] This is the Civil law approach of exemption of liability in damages,[174] hereunder the Danish Act's approach.[175] However, this factor, in itself, permits no inference as to the substantive standard of liability, hereunder the exemptions standard.

[168] Commentary, *supra* note 6, p. 111.

[169] And art. 61 regarding buyer's breach.

[170] *Commentary, supra* note 6, p. 111. "Articles [74–77], to which article (45) (1) (b) refers, do not provide the substantive conditions as to whether the claim for damages can be exercised, but the rules for the calculation of the amount of damages."

[171] *Restatement (Second) of Contracts,* Introductory Note to Chapter 11. Compare Zweigert and Kötz, *An Introduction to Comparative Law,* vol. 2, Amsterdam 1977, p. 184: "Where different theories lead to much the same results, the comparative lawyer must choose the most appropriate one. Here it seems to us that the Common Law should be preferred ... it is truer to the reality of 'contract' as a social phenomenon if we normally treat the parties not as simply promising to do their best to produce the envisaged result but as actually guaranteeing it. It is also the better legal policy." See also text *supra* at notes 32 and 33.

[172] See Honnold, *op. cit., supra* note 11, p. 297.

[173] Art. 79(5) provides: "Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention."

[174] See Nicholas, *op. cit., supra* note 3, p. 234.

[175] See text *supra* at notes 45–9.

As discussed previously,[176] the direct effect of an "excuse" pursuant to secs. 23 and 24 of the Danish Act is to preclude the buyer from claiming damages; the indirect effect may be to bar a judgment for specific performance (*naturalopfyldelse*) as well.[177] Where the impediment giving rise to an exemption has made performance *impossible*, Danish law would preclude a judgment for specific performance, and the same would be true where the Convention were the substantive sales law.[178]

Regarding the burden of proof, art. 79 exempts the non-performing party "if he proves" that his excuse fulfils the conditions stated.[179]

3.2. *Delay and non-delivery*

It has been noted that both Danish and American sellers are liable for delay or non-delivery where timely delivery is legally "possible". Regarding this form of breach, it is thus relevant to inquire whether art. 79 employs an impossibility-test similar to those of, e.g., the Danish Act and the U.C.C.

According to Danish law, the seller is expected to overcome all contingencies short of the so-called sacrifice-threshold—i.e., short of economic *force majeure*. American Common law theory is generally consistent with this Danish standard.[180]

For the art. 79 exemption to apply, non-performance must be due to an "impediment". This could be interpreted as denoting (1) objective impossibility, (2) objective impossibility plus economic *force majeure*, or (3) some more flexible standard. Regarding the first alternative, it may be noted that the 1975 draft revision of sec. 24 of the Danish Act would expressly denote objective impossibility in terms of an "impediment" (*hindring*).[181] But even if a Danish court were to interpret "due to an impediment" as extending beyond the impossible to the e.g. "unreasonably burdensome", this would not encompass

[176] *Id.*

[177] Except in the "partial impossibility" situation discussed *supra* in section 2.3 and in cases of "temporary impossibility". The Convention's art. 79(3) provides: "The exemption provided by this article has effect for the period during which the impediment exists"; regarding the corresponding Danish Act and U.C.C. rules, see Ussing, *op. cit., supra* note 2, p. 84, and 18 *Williston on Contracts*, § 1957.

[178] Cf. art. 28; compare U.C.C. § 2-716.

[179] Nicholas (*op. cit., supra* note 3, pp. 234 ff.) seems to equate the Uniform Law of International Sales and the Convention exemption clauses with the Civil law's fault rule, burden of proof reversed. But when art. 79 is viewed in conjunction with the strict starting point in art. 45—a provision not discussed by Nicholas—the Convention's basis of liability seems equally reminiscent of, e.g., the U.C.C. scheme; see *infra*. Regarding the burden of proof, see note 95, *supra* and accompanying text.

[180] See text *supra* following note 114.

[181] Regarding interpretation of the corresponding Swedish draft legislation, see *SOU* 1976:66, p. 248. As indicated in section 1, *supra*, the 1975 draft revision is being re-evaluated in light of the Convention.

a range of contingencies greater than that now covered by the commercial impracticability standard of U.C.C. § 2-615.

> The addition of the phrase "unreasonably burdensome" (*urimeligt byrdefuld*) to sec. 24 proposed by the Scandinavian Sales Law Commission was in fact intended to correspond to U.C.C. impracticability.[182]

A factor indicating that mere difficulty will not relieve the seller of his obligation of timely performance is that the impediment will only excuse if "he could not reasonably be expected ... to have avoided or overcome it or its consequences". "This rule reflects the policy that a party who is under an obligation to act must do all in his power to carry out his obligations and not await events which might later justify his non-performance."[183]

An example of an impediment which neither Danish nor American law expects the seller to avoid or overcome is the accidental destruction of specific goods.[184] Such objective impossibility would also excuse the Convention seller.

> *Example 65A:* The contract called for the delivery of unique goods. Prior to the time when the risk of loss would have passed ... the goods were destroyed by a fire which was caused by events beyond the control of Seller. In such a case Buyer would not have to pay for the goods for which the risk had not passed but Seller would be exempted from liability for any damage resulting from his failure to deliver the goods.[185]

On the other hand, not only the Danish Act and the U.C.C. but also the Convention would require the seller of generic goods to overcome "subjective impossibility".

> *Example 65B:* The contract called for the delivery of 500 machine tools. Prior to the passage of the risk of loss, the tools were destroyed in similar circumstances to Example 65A. In such a case Seller would not only have to bear the loss of the 500 tools but he would also be obligated to ship to Buyer an additional 500 tools. The difference between this example and example 65A is that in example 65A Seller cannot provide that which was contracted for whereas under example 65B Seller can overcome the effect of the destruction of the tools by shipping replacement goods.[186]

[182] Cf. *SOU* 1976:66, p. 248.

[183] *Commentary, supra* note 6, p. 170.

[184] See text *supra* at note 82 and the Danish Act, sec. 23.

[185] *Commentary, supra* note 6, p. 171. Although the *Commentary* may not come to play an interpretative role commensurate with, e.g., the U.C.C.'s Official Comments (see White & Summers, *op. cit., supra* note 135, pp. 12–14) or the Danish Act's *Motiver*, it is the work-product of a "remarkable international team" and a significant part of the Convention's legislative history; see Honnold, *op. cit., supra* note 11, pp. 42, 52.

[186] *Commentary, id.*, p. 171.

Example 65C, *id.*, exempts the seller from damages for late delivery of the replacement tools shipped in 65B. This is a more lenient, and arguably more reasonable, approach than the "unfortunate choice" doctrine developed pursuant to sec. 24 of the Danish Act (see text *supra* at note 114).

Certain problems of contractual interpretation are more predictable than the solutions thereto. As already noted, both Danish and American courts consistently face the issue of whether an agreement for generic goods is limited to a particular source of supply, factory, or the like.[187] In art. 79 terms, the issue is, e.g., whether the seller is expected to overcome an "impediment" such as the failure of his usual and intended source of supply, i.e., whether or not the contract may be read as being limited thereto. Since not even the Danish or American national statutes resolve this issue, one could hardly expect art. 79 to do so.[188]

In addition to "impossibility", the non-performing party must *also* prove that the impediment was "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". As in Danish and American law, only where the seller is without fault will a given delay or non-delivery be excusable pursuant to art. 79; if the impediment was not "beyond his control" or where it could reasonably have been "avoided", his non-performance may be characterized as negligent or perhaps even intentional, depending upon the circumstances. Beyond this, however, the passage just quoted requires that the seller prove the impediment was not reasonably *foreseeable*.

The Convention's foreseeability test is notably similar to that of sec. 24 of the Danish Act (circumstances which the seller "should have taken into account at the time of the conclusion of the contract".[189] On the other hand, art. 79 is distinguishable from sec. 24 by the absence of enumerated examples of impediments. U.C.C. § 2-615 also lacks a list of typically (un)foreseeable contingencies.[190] But as with the Code, the absence of such a list need not imply that the seller's burden is easily carried.

[187] See text *supra* following note 100.

[188] Regarding failure of supplier, see text *infra* at notes 198–9.

A related issue is illustrated by

Example 65E: The contract called for shipment on a particular vessel. The schedule for the vessel was revised because of events beyond the control of both Buyer and Seller and it did not call at the port indicated within the shipment period. In this circumstance the party responsible for arranging the carriage of the goods must attempt to overcome the impediment by providing an alternative vessel.

Here, the *Commentary* (*supra* note 6, p. 172) interprets the contract in such a way that timely performance is possible in the art. 79 sense, and Danish theory would also require as much of the seller in this situation; see text *supra* at note 113. And while the U.C.C. position squares with that of the Commentary, this is not due to the Code's exemptions-provision (§ 2-615) but to another provision (§ 2-614) expressly covering such situations, *id.*

Commentary (*id.*, p. 173) would not interpret art. 79 to release the seller "on the grounds that there had been such a major change in the circumstances that the contract was no longer that originally agreed upon". Although this seems unclear (excuse of the seller is almost always describable in terms of "changed circumstances") the reference is apparently to excuses such as "impracticability/*økonomisk force majeure*", see text *infra* with notes 194–7.

[189] See 2.3, *supra*.

[190] *Id.*

> It is this later element which is the most difficult for the non-performing party to prove. All potential impediments to the performance of a contract are foreseeable to one degree or another. Such impediments as wars, storms, fires, government embargoes and the closing of international waterways have all occurred in the past and can be expected to occur again in the future.[191]

The issue is whether it was reasonable for the particular seller to foresee or take the impediment into account. Absent a sec. 24-type qualification, "this determination can only be made by a court or arbitral tribunal on a case-by-case basis".[192] Given this flexible standard, both Danish and American courts are presented with the familiar task of deciding which of two essentially "innocent" parties should be made to bear the risk of a given impediment, and although the Convention's test may bear a closer resemblance to U.C.C. "basic assumptions" than to the Danish Act's "qualified circumstances",[193] neither American nor Scandinavian courts are likely to let many sellers off the art. 45 "hook"; as the U.C.C. experience demonstrates, foreseeability is itself a formidable barrier.

In these inflationary times, the foreseeability of (exorbitant) cost increases is an issue likely to be tested pursuant to art. 79.[194] Here the Convention does no more than what could reasonably be expected of a modern statutory provision: provide the framework necessary "for the performance of a good judicial determination (*judicium*)".[195] But the Convention's starting point in art. 45 is *pacta sunt servanda*; and "an increase in price ... is the thing that contracts are designed to protect against. Because of that and because the experience of the last 10 years has made such cost changes more foreseeable than formerly ...",[196] "hard nosed" decisions are likely to be handed down by American and Scandinavian courts pursuant to the Convention.[197]

[191] *Commentary, supra* note 6, pp. 169 f. Rapsomanikis ("Frustration of Contracts in International Trade Law and Comparative Law", 18 *Dusquesne L. R.*, p. 574) finds UNCITRAL's emphasis (in art. 65, now art. 79) of the foreseeability factor "a misconception", although perhaps mitigatable via case-by-case determination (cf. *loc. cit.* and text *infra* at note 192). However, Scandinavian and American law indicate that the notion of foreseeability lies at the heart of modern judicial analysis, hereunder the equitable allocation of risk, cf. 2.2 and 2.3, *supra*.

[192] *Commentary, id.*, p. 170.

[193] See 2.3, *supra*.

[194] Assuming that such increases are classifiable as "impediments" (*hindringer*); see Honnold, *op. cit., supra* note 11, pp. 442 f. While such a possibility might, until recently, "astonish" an (English) Common Lawyer (see Nicholas, *op. cit., supra* note 3, p. 237), times are changing: see *Staffordshire Area Health Authority* v. *South Staffordshire Waterworks Co.* (1978) 3 All England Reports 769.

[195] Gomard, *op. cit., supra* note 44.

[196] White & Summers, *op. cit., supra* note 135, p. 133 (regarding U.C.C. § 2-615).

[197] Here, as elsewhere, recourse to domestic law would "undermine the Convention's central objective to provide uniformity" (Honnold, *op. cit., supra* note 11, pp. 442 f.). Under this view, a provision such as sec. 36 of the Danish Contracts Act should not supplement the Convention as authority for an "equitable adjustment", notwithstanding the fact that sec. 36 is couched in terms of "validity"; see note 125, *supra*.

Para. (2) of art. 79 of the Convention provides:

> (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 (1); and
>
> (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

The *Commentary* states that the "third person" in para. (2) "... does not include suppliers of the goods or of raw materials to the seller".[198] Thus, non-performance due to failure of supplier should be judged pursuant to para. (1) of art. 79, hereunder pursuant to the foreseeability test. As indicated previously, the failure of a supplier is often viewed as foreseeable contingency pursuant to Danish and American law.[199]

3.3. *Defective/non-conforming goods*

The extent to which a seller may escape liability for defects pursuant to art. 79 may present somewhat greater problems of interpretation for Danish and American courts than those discussed in the preceding part with respect to delay and non-delivery. Neither system will be likely to feel fully at home with the Convention's approach: the single basis of art. 79 is a significant departure from the Danish basis for defects in specific sales,[200] and the Common law has never excused sellers from absolute liability for defects.[201]

Art. 79 would seem to have at least theoretical applicability (also) as regards defects. Nicholas[202] finds the substitution of the word "impediment" for (the Uniform Law term) "circumstances" unlikely to prevent the application of art. 79 to defective goods. Danish theory, whereby arts*hindringer* (impediments affecting all goods of the relevant generic class) can excuse pursuant to both sec. 24 and sec. 43(3), would tend to confirm this observation.

> The exemption applies to a failure to perform "*any* ... obligations", hereunder the obligation to deliver conforming goods pursuant to art. 35 which provides, *inter alia:*
>
> (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
>
> (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

[198] *Commentary, supra* note 6, p. 172.

[199] See text *supra* with note 142 and Honnold, *op. cit., supra* note 11, p. 435.

[200] See text *supra* at note 154.

[201] See text *supra* with notes 145–6. Both American and English theory have questioned the bounds of Common law absolute liability for defects (see White & Summers, *op. cit., supra* note 135, p. 347, and Miller & Lovell, *Product Liability,* London 1977, pp. 107 ff.), but these inquiries have been made within the special context of liability for personal injury due to, e.g., a hospital's use of defective blood in transfusions.

[202] *Op. cit., supra* note 3, p. 240.

> (a) are fit for the purposes for which goods of the same description would ordinarily be used;
> (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely ...

Honnold,[202a] emphasizing the Convention's legislative history, would not apply art. 79 to defective goods. Though Scandinavian courts might disagree herewith, they are not likely to "water down" the Convention's no-fault starting point (art. 45) for non-conforming delivery (see text below). "Exemption based on the care taken in a producer's manufacturing processes is anomalous as well as impractical."[202b]

Given the Convention's single basis of liability, any "exemption" granted as regards defects must be consistent with the criteria applicable to delay and non-delivery; the Danish Act may serve as a model in this respect. Sec. 43(3) applies the sec. 24 foreseeability standard to defects in generic sales.[203] When this standard, as qualified by those circumstances which the framers of sec. 24 deemed normally unforeseeable, is applied in practice, virtually no defect will be excused.[204] But if the qualified circumstances listed in sec. 24 are taken as *examples* of the "unforeseeable", no decisive change in interpretation need result from their removal from the statutory standard; this was in fact the U.C.C. legislative technique regarding the seller's liability for delay and non-delivery.[205] By the same token, the Convention seller may "reasonably be expected to take" most impediments not generally classified as *force majeure* "into account at the time of contracting"—also as regards defects. And since *force majeure* contingencies tend to destroy—as opposed to damage—goods, the strict starting point of art. 45 would remain virtually intact.

Art. 79's theoretical applicability to defects is thus no cause for buyers to panic. The starting point for resolving the issue of liability for defects is the same as for delay and non-delivery: the *defect* itself is the relevant allegation (*anbringende*), and art. 79 provides no "it-wasn't-my-fault" catchall exemption.[206] Sellers who seek to limit their liability for, e.g., consequential damages may of course do so by contractual modification of the Convention's non-mandatory rules.

Nicholas[207] states that even pursuant to Civil law systems, "it will not be easy to find 'circumstances' (the Uniform Law's equivalent of impediments) to which a defect is 'due' and which the seller was not 'bound to take into account'". He

[202a] *Op. cit., supra* note 11, pp. 430 ff.
[202b] *Op. cit.*, p. 432.
[203] See text *supra* following note 150.
[204] *Id.*
[205] Regarding U.C.C. § 2-615, see text *supra* following note 132.
[206] See 3.2, *supra*.
[207] *Op. cit., supra* note 3, p. 238.

> finds a possibility to be "fraudulent concealment of a defect by a third party supplier",[208] but this is a foreseeable contingency pursuant to, e.g., the Danish Act, sec. 43(3). On the other hand, exemption from liability for non-conformity might result where an unforeseeable export restriction prohibits packing the goods in plastic containers as provided by contract.[209]
>
> Similarly, defects due to extreme bad weather may be deemed unforeseeable, depending on the circumstances—i.e. the U.C.C. approach in § 2-615.[210]

Of course, the single basis of liability requires a correspondingly strict standard in specific sales—something heretofore unknown pursuant to the Danish Act.[211] But even if a relatively strict, uniform standard would require a departure from current Danish national sales law, the practical significance thereof would be limited, given the relative predominance of generic sales in the international market. And the Convention's uniform standard would serve admirably as a model for Scandinavian law reform: "a significant simplification in terms of presentation is achieved by [integrating] contract law's rules of liability".[212]

4. CONCLUSION

Ussing wrote that the "frustration" (hereunder impossibility) doctrine reduced the Anglo-American theory of absolute liability to "most nearly a fault liability" rule[213]—this because the "term impossibility in American contract law is defined in terms similar to those used in defining the fault rule",[214] and "there is no sharp dividing line between fault and objective liability".[215]

> A comparison of fault liability with strict liability is a useful point of departure for ... illustrating the content of the fault criterium. One can imagine a continuum of liability rules establishing a gradual transition between complete, unconditional liability and liability conditioned upon subjective fault. The general fault rule does not coincide with either of these outer limits.[216]

Although the Convention's liability rules naturally embody a certain degree of compromise, the result does not so much ignore or conceal differences between

[208] *Op. cit.*, pp. 238 and 240.
[209] Compare Nicholas, *op. cit.*, p. 235, and *Commentary*, *supra* note 6, p. 171. The *Commentary* would require a commercially reasonable substitute in this situation.
[210] See text *supra* at notes 142–3.
[211] See text *supra* at notes 154–62. The very fact that art. 79 gives the seller the burden of establishing the exemption is a step towards stricter liability.
[212] Gomard, *op. cit.*, *supra* note 14, p. 143 (speaking of the distinction between antecedent and supervening defects).
[213] Ussing, *op. cit.*, *supra* note 16, p. 110.
[214] Gomard, *op. cit.*, *supra* note 28, p. 207.
[215] *Op. cit.*, p. 214.
[216] *Op. cit.*, p. 197.

opposing legal theories as it highlights a surprising degree of substantive agreement—an agreement resting on common fundamental criteria. In Denmark and America at least, one may look forward to an essentially uniform interpretation of this appropriate basis of liability in international sales.