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UCC Sec 2-615: Defining Impracticability Due to Increased Expense

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to bring increasing justice to an area of the law which has long placed a great premium on formalities. The degree to which this potential can be realized depends on whether the nation's courts will uniformly apply the Code Statute in accord with its purposes. The Statute should be viewed as an evidential rule drafted to facilitate enforcement of valid contracts. As such, courts should give parties every opportunity to reap the benefits of the Statute. This is particularly true of the Statute's oral admissions exception. The section has the potential to limit the Statute of Frauds to its original, rational application, and prevent it from becoming an aid to fraud. Clearly, in the application of the section, involuntary admissions would entail all statements and conduct of the denying party in a judicial proceeding. The admission sought should provide a basis for reasonable belief in the existence of an oral agreement, and should not be required to prove a contract as a matter of law. A demurrer should not be utilized to raise the Code Statute of Frauds. In cases involving an alleged oral contract under section 2-201(3)(b), a party seeking enforcement should be given the right to proceed to trial in an attempt to secure an admission. With these guiding principles, the Code Statute's oral admissions exception can effectuate more just and rational decisions in this area of law.

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UCC §2-615: DEFINING IMPRACTICABILITY DUE TO INCREASED EXPENSE

INTRODUCTION

A continuing source of judicial uncertainty is loss allocation when price increases not provided for by the parties to a contract render a commercial arrangement unworkable.[1] In particular, inflation and the fuel shortage have precipitated crises which present pervasive legal ramifications.[2] Political and economic maneuvers both domestically and abroad have placed suppliers of goods in the middle of what amounts to war by economic sanctions.[3] Illustrative are claims by energy suppliers that fulfillment of their contracts has become

1. *See, e.g.*, Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975) (crude oil); Publicker Indus., Inc. v. Union Carbide Corp., No. 74-2185, 17 U.C.C. REP. SERV. 989 (E.D. Pa. Jan. 17, 1975) (natural gas); Mansfield Propane Gas Co. v. Folger Gas Co., 231 Ga. 868, 204 S.E.2d 625 (1974) (natural gas); Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 365 Mass. 122, 310 N.E.2d 363 (1974) (concrete); Maple Farms, Inc. v. City School Dist., 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974) (raw milk). For a general discussion of the ramifications of this phenomenon, see Hawkland, *The Energy Crisis and Section 2-615 of the Uniform Commercial Code*, 79 COM. L.J. 75 (1974); Hurst, *Drafting Contracts in an Inflationary Era*, 28 U. FLA. L. REV. 879 (1976).

2. *See* Hurst, *Freedom of Contract In an Unstable Economy: Judicial Reallocation of Contractual Risks Under UCC Section 2-615*, 54 N.C. L. REV. 545, 545-47 (1976).

3. *See* Wall St. J., Jan. 29, 1980 at 3, col. 4 ("political or other catastrophic events in any of the major oil-producing countries would spark another severe escalation in prices"). For example, British Petroleum lost its supply of crude oil from Nigeria and Iran because of allegations it had supplied oil to South Africa. Consequently, British Petroleum was forced to terminate its contracts with third parties. FORTUNE MAGAZINE, Jan. 28, 1980, at 56.

impracticable due to "the worldwide energy crisis,"[4] the foreign oil embargo,[5] and the sale of wheat to Russia.[6]

The Uniform Commerical Code excuses a seller of goods from his obligations when his performance has been made impracticable, if certain conditions are met.[7] Section 2-615 codifies the common law rules governing the sale of goods in situations where one party seeks to be excused from his contractual obligations because his performance has become impracticable due to unanticipated cost increases.[8] Excusing performance of contract on this ground directly conflicts with the traditional notion that parties should be bound to perform their contracts.[9] However, the theoretical basis for excuse under section 2-615 is that the parties did not intend the contract to govern under the circumstances.[10] Because the criteria for determining whether the section's requisites are met remain nebulous, current analysis often leads to denial of the seller's claim of excuse.[11] Since such claims frequently arise in a political context, the seller is often forced to bear the economic consequences of foreign policy decisions.

This note will examine the emerging law dealing with claims that cost increases constitute impracticability within the meaning of section 2-615. Although relief is often denied on grounds that performance is not sufficiently impracticable, no standard of impracticability has been articulated. Consequently, results are often reached through analysis which muddles the statute's elements. This note will suggest an alternative analysis enabling courts to reach suitable results without sacrificing either the purpose of section 2-615 or the parties' reasonable commercial expectations. An impracticability standard will be proposed which reconciles the seller's interest in obtaining relief with the buyer's interest in relying on his contract.

THE EVOLUTION OF THE COMMON LAW

Historically, the common law adhered to the maxim *pacta sunt servanda,*

4. *In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, 405 F. Supp. 316 (J.P.M.D.L. 1975). In *Westinghouse,* an energy supplier advised its utility customers it would be unable to fulfill more than 20% of its uranium contracts because of drastic price increases. Wall St. J. Nov. 3, 1975, at 10, col. 3. Declaratory actions filed by the customers were consolidated in one multidistrict litigation docket in the Eastern District of Virginia. Most of the actions have been settled. *In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, 436 F. Supp. 990, 991 n.1 (J.P.M.D.L. 1977); *see* Wall St. J., Jan. 31, 1980 at 2, col. 2.

5. Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975) (foreign embargo caused deregulation of domestic crude oil prices).

6. Maple Farms, Inc. v. City School Dist., 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974) (wheat subsidies caused concomitant milk price increases).

7. U.C.C. §2-615. See notes 64-67 and accompanying text, *infra.*

8. Hurst, *supra* note 1, at 896. The provisions of U.C.C. §2-615 are set forth at note 60 *infra.*

9. Hurst, *supra* note 2, at 562, 565. *See generally* Comment, *Uniform Commercial Code Section 2-615 — Commercial Impracticability From the Buyer's Perspective,* 51 TEMP. L.Q. 518 (1978).

10. See text accompanying notes 57-58 *infra.*

11. *See, e.g.,* cases cited at note 162 *infra.*

"promises must be kept."[12] Claims of excuse on grounds that performance had become more expensive or difficult were of no avail to the promissor.[13] Only two exceptions to this absolute rule were recognized: death or illness of a party to a personal services contract,[14] and destruction of a specific, bailed chattel.[15]

The doctrine of absolute liability prevailed until the 1863 case of *Taylor v. Caldwell*.[16] In *Taylor*, a music hall owner and a concert promoter contracted for use of a hall for the express purpose of giving a series of concerts. Due to neither party's fault, the hall burned down before the first concert. The court denied the promoter's claim against the owner for breach, reasoning that since the hall was specified in the contract, the parties must have known that performance was dependent on its continued existence. Therefore, the contract was subject to the implied condition that performance was excused if the hall was

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12. *See* L. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS 359 (2d ed. 1965); Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413, 1417 (1963); Hawkland, *supra* note 1, at 75; Hurst, *supra* note 2, at 549-50. *But see* the following which question the accuracy of the statement in the text: 6 A. CORBIN, CONTRACTS §1322 (2d ed. 1962); Page, *The Development of the Doctrine of Impossibility of Performance*, 18 MICH L. REV. 589, 593-94 (1920); Schlegel, *Of Nuts, and Ships, and Sealing Wax, Suez, and Frustrating Things — The Doctrine of Impossibility of Performance*, 23 RUTGERS L. REV. 419, 419-22 (1969); Note, *The Economic Implications of the Doctrine of Impossibility*, 26 HASTINGS L.J. 1251 (1975). See note 13 *infra*.

There were also two commonly recognized narrow exceptions to the rule of absolute liability. See notes 14-15 and accompanying text, *infra*.

13. The case often cited for this proposition is Paradine v. Jane, 82 Eng. Rep. 897 (K.B. 1647), which involved an action by a lessor against his tenant for rent. The tenant argued that since a foreign army had invaded and occupied the demised presmises, he could not take his profits from the land and should be excused from his obligation to pay rent. Nevertheless, the court found the tenant's covenant to pay rent was not conditioned on his ability to enjoy the land, and held "the law would not protect him beyond his own agreement." *Id.* at 898. Since the contract in *Paradine* was a lease, however, the court assumed the tenant's primary purpose was to realize the conveyance of an estate for years. *See* 6 A. CORBIN, *supra* note 12, at §1322.

Some scholars have explained this result as a function of independent promises. *Compare* 6 A. CORBIN, *supra* note 12, at §1320 *with* Schlegel, *supra* note 12, at 419-22. In a bilateral contract, the promissor's default would permit an action by the promisee, but the promissor could not assert the defense that the promisee had defaulted in his performance of the return promise. Nothing, however, prevented the promissor from suing the promisee for breach in a second action. Therefore, unless the promises were expressly made conditional on each other, failure of a condition was no defense. 6 A. CORBIN, *supra* note 12, §1320 at 322-23.

Schlegel criticizes Corbin's explanation using the notion of the historical separation of realty contracts from other contracts. He concludes that *Paradine* is merely a "good prophecy of the attitude of the 19th century" regarding impossibility. Schlegel, *supra* note 12, at 420. Corbin's theory was buttressed somewhat in Monk v. Cooper, 93 Eng. Rep. 833 (K.B. 1723). In *Monk*, the court held that despite the lessor's failure to perform his express agreement to rebuild premises destroyed by fire, he still had an action against his lessee for rent. The opinion cited *Paradine* and noted that the lessee had a separate action for losses due to his landlord's breach.

There is considerable doubt as to whether *Paradine v. Jane* described an existing state of the law or formulated a new rule. *See* Page, *supra* note 12, at 591; Note, 26 HASTINGS L.J., *supra* note 12, at 1255 nn.19-21 and cases cited therein.

14. *See* Hall v. Wright, 120 Eng. Rep. 688 (Q.B. 1858), *rev'd*, Exch. (1859) (Pollock, C.B., dissenting); RESTATEMENT OF CONTRACTS §459 (1932).

15. Williams v. Lloyd, 82 Eng. Rep. 95 (K.B. 1628).

16. 122 Eng. Rep. 309 (Q.B. 1863).

destroyed before performance was due.[17] The court analogized the facts to a previous exception to the rule of absolute liability invoked when a specific, bailed chattel had been destroyed.[18] This exception was expanded to include implied conditions of the continued existence of anything specifically mentioned in the contract.

The implication of conditions served as the primary tool in relaxing *pacta sunt servanda*.[19] The conditions which could be implied subsequently included circumstances which, although not specifically mentioned in the contract, were necessarily inferred as the "substance of the contract" recognized by both parties.[20] Using this rationale, courts were free to imply conditions and still adhere to the strict common law rule of absolute liability.[21] The obligation to

17. *Id.* at 312. The court stated: "[w]here, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for fulfillment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." *Id.*

18. 122 Eng. Rep. at 313-14. See notes 13-14 and accompanying text, *supra.*

19. The Second Restatement takes the position that absolute liability remains the general rule, although discharge is granted more liberally today. *See* RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note to Ch. 11 (Tent. Draft No. 9, 1974).

20. Krell v. Henry, [1903] 2 K.B. 740 (C.A.). *Krell* is one of several "coronation cases" which arose when the illness of King Edward VII necessitated cancellation of a coronation procession in his honor. Here, the defendant had hired plaintiff's apartment to view the parade from the window. Although the coronation was not mentioned in the contract, the court held the defendant's purpose was frustrated by the cancellation, and his duty to perform was discharged. See text accompanying notes 35-43 *infra* regarding the doctrine of frustration of purpose.

In another coronation case, where the lessee sued the owner for return of his deposit, the court held the contract frustrated. However, since the contract was "perfectly good" until the moment of frustration, the court refused to order return of the deposit and entered judgment for the owner for the balance, which had been due before the coronation. Chandler v. Webster, [1904] 1 K.B. 493.

See also Herne Bay Steam Boat Co. v. Hutton. [1903] 2 K.B. 683 (agreement to rent a boat to view the navy's participation in the procession was held not frustrated because the fleet could still be viewed at anchor).

21. *E.g.*, Cosden Oil & Gas Co. v. Moss, 131 Okla. 49, 267 P. 855 (1928). In *Cosden Oil*, the defendant promised to drill wells to a certain depth but stopped drilling when he struck granite. The court excused the defendant's performance after finding the parties had assumed there would be no granite. Consequently, the contract contained an implied condition that if granite were found, performance to that point would be deemed complete. *Id. See also* Dillon v. United States, 156 F. Supp. 719 (Ct. Cl. 1957) (parties contemplated the availability of normal supply within reasonable distance from delivery point); Badhwar v. Colorado Fuel & Iron Corp., 138 F. Supp. 595 (S.D. N.Y. 1955) (parties contemplated ship would sail within a reasonable time), *aff'd*, 245 F.2d 903 (2d Cir. 1957); Mitchell Canneries, Inc. v. United States, 77 F. Supp. 498 (Ct. Cl. 1948) (regardless of the contract, parties contemplated a reasonable limit to the area within which the promissor must seek supplies); Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 P. 458 (1916) (parties intended plaintiff should remove only reasonably accessible gravel); Squillante v. California Lands, Inc., 5 Cal. App. 2d 89, 42 P.2d 81 (1935) (parties intended grapes to be of a particular quality, to be grown and produced in

perform was predicated on the theory that courts were merely construing the contract and the parties' actual intent.

Exemplary of the rationale that the contract was not being altered, but interpreted, was a dispute over whether the defendant was obligated to haul gravel which was later found to be below water level.[22] Although removal of the gravel was not impossible, the cost would have been prohibitive.[23] Implementing the old rule[24] that the defendant's performance would be excused if the basis of the contract ceased to exist, the court reasoned summarily that since the gravel's existence must have been a basic assumption of the parties, the defendant was excused if the gravel did not exist.[25] Because the difficulty of removal made the gravel pragmatically nonexistent,[26] the defendant was excused from completion of the contract.[27] The court thus implied the condition that the defendant was obligated to remove only gravel which was reasonably accessible.[28]

Courts also implied conditions on the premise that if the contingency affecting performance was foreseeable, the contract must be construed to provide for it.[29] This mechanism not only assumed the parties were consciously aware of the possibility the contingency would occur, but endeavored to determine the

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the defendant's vineyards); Midland Elec. Coal Corp. v. Knox County, 1 Ill. 2d 200, 115 N.E.2d 275 (1953) (parties intended the right to coal to be dependent on the right to mine it) (dictum); Dunavant Enterprises, Inc. v. Ford, 294 So. 2d 788 (Miss. 1974) (parties knew the obligation to deliver cotton depended on weather); *cf.* National Presto Indus., Inc. v. United States, 338 F.2d 99 (Ct. Cl. 1964) (implied joint venture frustrated for mutual mistake), *cert. denied*, 380 U.S. 962 (1965). *But cf.* Carnegie Steel Co. v. United States, 240 U.S. 156 (1916) (because the *force majeure* clause omitted a contingency, the risk of its occurrence was impliedly assumed); Peerless Casualty Co. v. Weymouth Gardens, Inc., 215 F.2d 362 (1st Cir. 1954) (holding surety liable for principal). *See generally* 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §1937 (rev. ed. 1938); Sommer, *Commercial Impracticability—An Overview*, 13 DUQ. L. REV. 521, 522, 526-30 (1975). For a criticism of the implied conditions theory, see generally Farnsworth, *Disputes Over Omissions in Contracts*, 68 COLUM. L. REV. 860 (1968); Patterson, *Constructive Conditions of Contracts*, 42 COLUM. L. REV. 903, 946-50 (1942).

22. Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 P. 458 (1916).

23. *Id.* at 290-91, 156 P. at 460.

24. See text accompanying notes 20-21 *supra*.

25. Mineral Park Land Co. v. Howard, 172 Cal. 289, 292, 156 P. 458, 460-61 (1916).

26. *Id.* at 293, 156 P. at 461. If the defendants had to remove the gravel below water level, their cost would have been multiplied by ten. *Id.* See text accompanying notes 161-163 *infra* for a discussion regarding the quantum of increase required for a finding of impracticability in modern cases.

27. Mineral Park Land Co. v. Howard, 172 Cal. 289, 293, 156 P. 458, 461 (1916).

28. *Id.*

29. *See, e.g.*, Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co., 508 F.2d 283 (7th Cir. 1974) (source of supply moving to Canada); Peerless Cas. Co. v. Weymouth Gardens, Inc., 215 F.2d 362 (1st Cir. 1954) (economic dislocation as a result of Korean War); McCulloch v. Liguori, 88 Cal. App. 2d 366, 199 P.2d 25 (1948) (since parties knew labor and materials were scarce, promissor assumed the risk of government controls); Barbarossa & Sons v. Iten Chevrolet, Inc., — Minn. —, 265 N.W.2d 655 (1978) (en banc) (failure of unspecified source of supply); Maple Farms, Inc. v. City School Dist., 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974) (assumption of risk of inflation incorporates risk of price increases caused by wheat sale to Russia). *Accord,* Smit, *Frustration of Contract: A Comparative Attempt at Consolidation*, 58 COLUM. L. REV. 287 (1958) (where the contract evidences a gap regarding unforeseen circumstances, the gap must be judicially filled using proper standards of interpretation).

parties' contemplated resolution. In one such case, a debtor could not repay a loan because a national banking moratorium precluded lending services.[30] The debtor sought to be excused from performance on the ground of supervening impossibility.[31] The court rejected the debtor's contract interpretation as contemplating normal economic conditions, since the prevailing depression made the moratorium foreseeable.[32] The contract was thus construed to allocate this risk to the debtor, although the moratorium was probably foreseeable to both parties.[33]

Because courts increasingly implied conditions as a result-selective escape device,[34] a theory was needed which would allow judges to reach equitable results without straining the terms of the contract to provide for solutions which would not have been selected by the parties themselves. The law attempted to resolve this problem through the doctrine of frustration of purpose.[35] This doctrine involves the proposition that a contract which will not effectuate the

30. Levy Plumbing Co. v. Standard Sanitary Mfg. Co., 68 S.W.2d 273 (Tex. Ct. App. 1933).

31. *Id.* at 274. The term "supervening impossibility" connotes impossibility arising from events occurring after the contract is formed. In contrast, an "existing impossibility" occurs where the contract is void *ab initio* for mutual mistake. *Cf.* 6 A. CORBIN, *supra* note 12, §1322 (existing impracticability or frustration); RESTATEMENT (SECOND) OF CONTRACTS §286(1) (Tent. Draft No. 9, 1974).

32. Levy Plumbing Co. v. Standard Sanitary Mfg. Co., 68 S.W.2d 273, 275 (Tex. Ct. App. 1933).

33. *See* WILLISTON, *supra* note 21, §1937; *accord,* 6 CORBIN, *supra* note 12, §1323, at 334 (where promissor is aware of all facts, interference by promisee will not excuse performance; promissor is deemed to have accepted the risk of interference).

The result in *Levy* may be explained by another common law rule: for performance to be legally impossible, the impossibility must result from the inherent nature of performance, rather than the inability of a particular promisee to render the performance. *See, e.g.,* RESTATEMENT OF CONTRACTS §§454-55 (1932), which uses the terms "objective" and "subjective" impossibility, now abandoned in the Second Restatement. See RESTATEMENT (SECOND) OF CONTRACTS §§281-96 (Tent. Draft No. 9, 1974). *See also* Fratelli-Gardino v. Caribbean Lumber Co., 587 F.2d 204 (5th Cir. 1979) (where the defendant's sister company did not find it difficult to obtain cargo space, the defendant was not excused for failure to find space although the defendant sold at much lower prices); Ballou v. Basic Constr. Co., 407 F.2d 1137 (4th Cir. 1969) (no objective impossibility shown where promissor was able to complete one-fourth of the contract); The Austin Co. v. United States, 314 F.2d 518 (Ct. Cl. 1963) (promissor not excused for impossibility where, although specifications designed by the promisee were possible, promissor designed its own impossible specifications), *cert. denied,* 375 U.S. 830 (1963); Canadian Indus. Alcohol Co. v. Dunbar Molasses Co., 258 N.Y. 194, 179 N.E. 393 (1932) (where promissor's source failed because it was unwilling to produce more, no objective impossibility shown). *But cf.* U.C.C. §2-617 ("Force Majeure. Deliveries may be suspended by either party in case of Act of God, war, riots, fire, explosion, . . . inability to obtain fuel. . . ."). Thus, it may never be impossible to pay money. Levy Plumbing Co. v. Standard Sanitary Mfg. Co., 68 S.W.2d 273, 275 (Tex. Ct. App. 1933).

34. *See generally* Sommer, *supra* note 21, at 522-23.

35. *See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS, §13-10 (2d ed. 1977). The concept of frustration of purpose is said to have originated in Krell v. Henry, [1903] 2 K.B. 740 (C.A.), discussed at note 20 *supra.* Although often used interchangeably with impossibility, Professor Corbin points out that frustration of purpose means the impossibility of attaining the object of one or both parties. Literal performance has not become impossible. If the promised performance of one party has become literally impossible, the object of the other is frustrated. 6 A. CORBIN, CONTRACTS §1322 at 326 (Rev. ed. 1962).

parties' mutual bargain is a nullity.[36] Although performance remains possible, its value is destroyed so that there is "actual, but not literal, failure of consideration" to the promissor.[37]

Frustration does not automatically excuse the promissor. If the contract allocates the risk of the hardship causing the frustration to the promissor, he will be held to his bargain.[38] A risk not clearly allocated by the contract will be judicially allocated[39] by considering the foreseeability and controllability of the hardship which destroyed the value of performance, a method similar to the implied condition mechanism.[40] Assuming the value of performance is affected by an unforseeable and uncontrollable hardship, the promissor would be excused only in extreme cases, for performance must be rendered "vitally different" for the obligation to be discharged.[41] Consequently, a mere loss of profits would not qualify as grounds for frustration, because the counterperformance would retain a modicum of value.[42]

The frustration principle required a case-by-case inquiry into often ambiguous circumstances to determine whether the parties had allocated the risk of the hardship. This was administratively cumbersome and also tended to allo-

36. This doctrine was explained by Justice Traynor in Lloyd v. Murphy, 25 Cal. 2d 48, 153 P.2d 47 (1944), where the lessee of an automobile showroom claimed the lease was frustrated because of government wartime regulations concerning the sale of new cars.

37. *Id.* at 53, 153 P.2d at 52.

38. See notes 86-99 and accompanying text, *infra.*

39. Lloyd v. Murphy, 25 Cal. 2d 48, 53-54, 153 P.2d 47, 52 (1944). See text accompanying notes 19-33 *supra.*

40. Lloyd v. Murphy, 25 Cal. 2d 48, 53, 153 P.2d 47, 52 (1944). This rationale contrasts markedly with Lord Denning's formulation in Ocean Tramp Tankers Corp. v. V/O Sovfracht (The Eugenia) [1963] 2 Q.B. 226 (C.A.). See text accompanying notes 46-56, *infra.* Both §2-615 of the Uniform Commercial Code and §265 of the Second Restatement of Contracts adopt Justice Traynor's view.

41. Lloyd v. Murphy, 25 Cal. 2d 48, 54, 153 P.2d 47, 52-53 (1944).

42. *Id.* at 55-56, 153 P.2d at 52-53. Accordingly, the lessee's claim of frustration failed because he could still use the premises for selling, and in any event, the imposition of governmental regulations was foreseeable at the time the lease was made. *Id.*

Justice Traynor concluded that the foreseeability of the hardship prompting the claim of excuse dictated that the risk fall on the lessee. *Id.* In Doherty v. Monroe Eckstein Brewing Co., however, where a contract provided that premises shall be used only for a saloon, the contract was held frustrated although the lessee could still sell cigars. 198 App. Div. 708, 191 N.Y.S. 59 (1921). A similar provision in the *Lloyd v. Murphy* contract was waived by the lessor. 25 Cal. 2d at 55-56, 153 P.2d at 52-53.

As to extreme hardship, nearly 30 years prior to *Lloyd v. Murphy,* the court in Mineral Park Land Co. v. Howard, 172 Cal. 287, 156 P. 458 (1916), found that increased cost to the promissor rendered his performance impracticable. See note 161 and accompanying text, *infra.* However, in *Mineral Park,* the cost to the promissor would have more than eliminated any profits so that counterperformance could have been so valueless as to constitute literal failure of consideration. *See also* WILLISTON, *supra* note 21, §1931; Farnsworth, *supra* note 21, Schlegel, *supra* note 11, *passim. Compare* Davis Contractors Ltd. v. Fareham Urban Dist. Council, [1956] A.C. 696 (increased labor and material costs due to postwar conditions held not to frustrate building contract since the parties intended the contract to apply to these conditions) *with* F.H. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Prods., [1916] 2 A.C. 397 (delay caused by war held not to frustrate charter party because neither the contract nor surrounding circumstances gave reason to imply a condition of continued existence of pre-contract circumstances).

cate the risk to the promissor, dispensing with the need to determine what constituted frustration.[43] Holding the promissor to his obligation ostensibly promoted certainty in commercial transactions.[44] The unwieldly route to this result, however, defeated that purpose, since parties are rarely conscious of risk allocation.[45] Consequently, no contract could be definitively construed without litigation.

Frustration analysis also failed to consider that a given risk was intentionally not allocated. This was recognized in an English case arising from the Suez Canal seizure.[46] When the canal's closing was imminent, the owners of a vessel negotiated an agreement with the charterers which provided for a voyage from the Black Sea to India.[47] The charter party[48] was silent on the route, because the parties could not agree on alternative provisions if the canal did close.[49] When the canal was seized,[50] the charterer alleged the charter party was frustrated.[51] The court rejected the implied term theory because in view of the parties' conscious disagreement, the facts would not support an implied term.[52] Because the new performance was not radically different from that bargained for, the charter party was ultimately found not frustrated.[53]

By suggesting that lack of risk allocation is not the exception but the rule, the court rejected any implication that the parties would not have contracted had they foreseen the situation.[54] The court reasoned that the parties more likely did not know what terms to insert.[55] Accordingly, the foreseeeability of a

43. *E.g.*, Lloyd v. Murphy, 25 Cal. 2d 48, 153 P.2d 47 (1944) (lessee assumed risk of wartime restrictions on the sale of new cars); Levy Plumbing v. Standard Sanitary Mfg. Co., 68 S.W.2d 273 (Tex. Ct. App. 1933) (debtor assumed risk of banking moratorium).

44. *See* Hurst, *supra* note 2, at 562, 565.

45. See text accompanying notes 55-56 *infra*.

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

47. *Id.* at 234. Although limited to one specific voyage, the charter party was nevertheless based on time as opposed to a fixed rate for the voyage. *Id.*

48. A charter party is the document reflecting the terms of the charter contract. G. GILMORE & C. BLACK, JR., THE LAW OF ADMIRALTY 193 (2d ed. 1975).

49. "That meant that, if the canal were to be closed, they would leave it to the lawyers to sort it out." Ocean Tramp Tankers Corp. v. V/O Sovfracht (The Eugenia), [1964] 2 Q.B. 226, 240 (C.A.) (Lord Raymond, concurring).

50. *Id.* at 234. The canal was seized after the vessel had entered and she therefore had to remain anchored within the canal for two months. Conditions were such that she finally exited from the port of entrance, never reaching the other end. The alternative route to India was a three-month trip around the Cape of Good Hope, and the charterer refused to complete the voyage. The owner claimed damages representing freight charges for the two months the vessel was trapped inside the canal. *Id.*

51. *Id.* at 235. The owners treated the charterers' claim as repudiation and entered into a new charter party, at increased rates, with the original charterers' subchaterer, who completed the voyage around the Cape of Good Hope, minimizing the owners' losses. *Id.*

52. *Id.* at 239.

53. *Id.* This finding overruled Societé Franco Tunisienne A'Armement v. Sidemar S.P.A. (The Massalia), [1961] 2 Q.B. 278, which held that a voyage around the Cape of Good Hope is fundamentally different from a voyage through the Suez Canal.

54. Ocean Tramp Tankers Corp. v. V/O Sovfracht (The Eugenia), [1963] 2 Q.B. 226, 239 (C.A.).

55. *Id.* at 239-40.

risk may not always be conclusive of its allocation. Because the parties may specifically decide not to provide for a foreseen occurrence, foreseeability alone is not indicative of their intentions.[56] Conceptually, the contract may not have been intended to apply under the new circumstances.[57] In the absence of the contract, the dispute may still be resolved on equitable principles.[58]

This framework permits achievement of justice in particular cases while not excusing parties who seek withdrawal from a bad bargain. However, the distinction between frustration and mere variance between contemplated and actual performance remains elusive. There has been no definitive determination as to whether more expensive performance may ever be deemed radically different from contemplated performance.[59]

SECTION 2-615

Section 2-615 of the Uniform Commercial Code[60] is intended to excuse a seller from his duty to deliver goods when circumstances not within the parties' contemplation at the time of contracting make performance commercially impracticable.[61] The results reached under this section are consistent with common law[62] and support its characterization as a codification of the doctrines of implied conditions and frustration of purpose.[63]

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56. *Id. But see* U.C.C. §2-615, Comment 8 (if the event is sufficiently foreshadowed, it may be regarded as an assumed business risk). In the words of the English court: "if they have provided for [the contingency], the contract must govern. There is no frustration. If they have not provided for it, then you have to compare the new situation with the old situation for which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be positively unjust to hold the parties bound. It is often difficult to draw the line. But it must be done, and it is for the courts to do it as a matter of law." 2 Q.B. at 239 (Denning, J.) (citations omitted).

57. *See generally* Farnsworth, *supra* note 21.

58. *See* quotation at note 56 *supra.*

59. See notes 147-165 and accompanying text, *infra.*

60. U.C.C. §2-615 provides: "§2-615. Excuse by failure of presupposed conditions. Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance: (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid. (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable. (c) The seller must notify the buyer seasonably that there will be a delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer."

61. U.C.C. §2-615, Comment 1.

62. *Compare* text accompanying notes 29-33 *supra* (implied conditions to strictly enforce an obligation) *with* text accompanying notes 92-93 *infra* (tendency to find assumption of risk to strictly enforce an obligation).

63. Hurst, *supra* note 1, at 896.

The Framework

Section 2-615[64] essentially provides that a seller is not in breach of his contract for failure to deliver goods if: (1) a contingency occurs; (2) the contingency's non-occurrence was a basic assumption on which the contract was made; and (3) the contingency's occurrence made the seller's performance impracticable.[65] Surrounding circumstances and trade usage may indicate that events sufficiently foreshadowed at the time of contracting may be regarded as assumed business risks.[66] These provisions are supplemented by judicial requisites that the contingency's occurrence must have been unforeseen rather than part of the risk undertaken by the seller,[67] and that the resulting impracticability must be of a commercial nature.[68]

The most widely followed interpretation of the scope of section 2-615 appears in a case not governed by the Uniform Commerical Code because it did not involve the sale of goods. In *Transatlantic Financing Corp. v. United States*,[69] which arose during the Suez Canal crisis, the United States entered into a voyage charter with a vessel operator.[70] The charter party did not specify the route, but the "usual and customary route" was through the Suez Canal.[71] The closing of the canal necessitated completing the voyage around the Cape of Good Hope.[72] The vessel owner sued the United States for expenses arising from the divergence, an amount allegedly 12.27 percent above the contract price.[73] Although the canal closing constituted an unexpected contingency, the court observed that the contingency's foreseeability indicated the vessel operator may have accepted the risk of its occurrence.[74] The court did not consider whether the canal remaining open was a "basic assumption on which the contract was made," nor did it find whether the risk was allocated to either party.[75]

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64. For the text of U.C.C. §2-615 see note 60 *supra*.

65. U.C.C. §2-615(a); *cf.* Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966) (since there was no sale of goods, Article Two of the U.C.C. did not govern; but treats commercial impracticability under the common law as parallel to §2-615). For an inquiry as to whether §2-615 is available to the buyer, see Comment, *U.C.C. §2-615: Commercial Impracticability From the Buyer's Perspective*, 51 TEMP. L.Q. 518 *passim* (1978) (concluding in the affirmative).

66. U.C.C. §2-615, Comment 8.

67. Section 2-615, Comments 1 & 8; *see also* United States v. Wegematic Corp., 360 F.2d 674 (2d Cir. 1966), which in addition to adopting the U.C.C. as the federal law of sales, asserted that §2-615 is a "somewhat complicated way of putting Professor Corbin's question of how much risk the promissor assumed." *Id.* at 676.

Compare the foreseeability requirement of §2-615 *with* RESTATEMENT (SECOND) OF CONTRACTS §281, Comment b (Tent. Draft No. 9, 1974), indicating that in borderline cases a finding of foreseeability does not preclude a finding that non-occurrence of the contingency was a basic assumption.

68. U.C.C. §2-615, Comments 1 & 3.

69. 363 F.2d 312 (D.C. Cir. 1966).

70. *Id.* at 315.

71. *Id.* "Usual and customary" routes is a term of art used in admiralty, requiring such routes to be implied in the contract. *Id.*

72. *Id.* at 314. The canal closed after the vessel sailed but before it entered the canal. *Id.*

73. *Id.* at 319. The cost difference over the contract price of $305,842.92 was $43,972. *Id.*

74. *Id.* at 316-19.

75. *Id.* "[T]he implied expectation that the route would be via Suez is hardly adequate

Instead, the court determined that while foreseeability did not preempt impracticability, it did justify imposing stricter criteria. Although these stricter criteria were not specified, the 12.27 percent variation was held inadequate to constitute impracticability.[76] Thus, a risk need not be actually assumed. If it might have been assumed, however, performance must be more burdensome than section 2-615 would otherwise require to be deemed impracticable.[77]

The analysis adopted in *Transatlantic Financing* was followed in *Maple Farms, Inc. v. City School District*.[78] In *Maple Farms*, a milk supplier faced a twenty-three percent rise in the cost of milk over a four-month period, after prices had risen only twelve percent during the previous four years.[79] Contending the increase was due to the government's sale of wheat to Russia, the supplier sought relief from his obligations under the fixed price contract.[80] Relying on *Transatlantic Financing*, the court decided the seller's predicament was caused by foreseeable inflation rather than the wheat sale.[81] Although the court conceded the wheat sale was an unexpected contingency, it held that even if the sale had caused the price increase, the nature of fixed price contracts indicates such risks are allocated to the seller.[82] The court was reluctant to decide whether the seller in fact assumed this risk, as the possibility the risk was assumed supported application of a stricter standard of impracticability.[83] Reasoning that the increase involved was not disproportionate to the risk impliedly assumed, performance was not held impracticable.[84] The net result of *Transatlantic Financing* and *Maple Farms* is to merge the separate elements which must be shown to excuse a seller under section 2-615: the parties' basic assumptions, impracticability and the causal nexus between these two elements.[85]

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proof of an allocation to the promisee of the risk of closure. In some cases, even an express expectation may not amount to a condition of performance." *Id.* at 317. The court's reference to a "condition of performance" is somewhat enigmatic in light of the universal rejection of the fictional implied condition theory. See text accompanying note 34 *supra*. However, it may be taken as an attempt to define the terms "basic assumption on which the contract was made."

76. 363 F.2d at 319; *see also* American Trading & Prod. Corp. v. Shell Int'l Marine Ltd., 453 F.2d 939 (2d Cir. 1972), *aff'g*, 343 F. Supp. 91 (S.D.N.Y. 1971), where a claim of commercial impracticability was rejected because a 30% increase is not an extreme and unreasonable difference; *see generally* text accompanying notes 161-163 *infra*.

77. See text accompanying note 174 *infra*. Also see Comment, *Commercial Impracticability and Intent in U.C.C. Section 2-615: A Reconciliation*, 9 CONN. L. REV. 266, 271-73 (1977).

78. 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974).

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

80. *Id.* at 1081-82, 352 N.Y.S.2d at 786-87.

81. *Id.* at 1085, 352 N.Y.S.2d at 789.

82. *Id.* at 1086, 352 N.Y.S.2d at 789-80. *But cf.* U.C.C. §2-615, Comment 4 (which may be construed to support the conclusion that a rise in the market price, *if due to an unexpected contingency*, need not compel a finding that this particular risk was allocated by the contract). *See also* Mishara Constr. Co. v. Transit Mixed Concrete Corp., 365 Mass. 122, 310 N.E.2d 363 (1974) (whether prevalence of labor strikes in a particular industry indicates the risk of a strike was allocated is a jury question).

83. 76 Misc. 2d at 1085-86, 352 N.Y.S.2d at 791.

84. *Id.*

85. U.C.C. §2-615(a). See text accompanying notes 75 and 83 *supra*.

Basic Assumption on Which the Contract Was Made

Delineation of the parties' basic assumptions, an elusive process, is often necessary in typical cases invoking section 2-615.[86] If the parties have allocated the risk of occurrence of a particular contingency, its non-occurrence cannot be a basic assumption on which the contract was made.[87] Where the risk is not expressly or impliedly allocated, however, non-occurrence of the contingency may be such a basic assumption.[88]

The most successful assertions that the parties assumed a particular contingency would not occur have been made in cases involving contracts for the sale of a specific crop to be grown by the promissor. Performance of such contracts often becomes impossible due to crop failure.[89] Since historically performance was excused if the basis of the contract ceased to exist,[90] the promissor's relief is explainable on the ground the parties assumed there would be a crop to sell.[91] Discerning allocation of a particular risk in the contract has been

86. *E.g.*,United States v. Wegematic Corp., 360 F.2d 674 (2d Cir. 1966) (whether parties assumed the seller's engineering innovation would work); Center Garment Co. v. United Refrig. Co., Mass. App. Ct. Adv. Sheet (Jan. 30, 1976), 18 U.C.C. REP. SERV. 672 (Mass. App. 1976) (whether the seller's source of supply would continue); Barbarossa & Sons, Inc. v. Iten Chevrolet, Inc., — Minn. —, 265 N.W.2d 655 (1978) (en banc) (whether the seller's source of supply would continue); Canadian Indus. Alcohol Co. v. Dunbar Molasses Co., 258 N.Y. 194, 179 N.E. 383 (1932) (seller's supplier unexpectedly curtailed output).

87. U.C.C. §2-615, Comments 1 & 8. See note 66 and accompanying text, *supra*.

88. See text accompanying notes 54-56 *supra*.

89. *E.g.*, Dillon v. United States, 156 F. Supp. 719 (Ct. Cl. 1957) (severe drought); Mitchell Canneries, Inc. v. United States, 77 F. Supp. 498 (Ct. Cl. 1948) (heavy rains); Squillante v. California Lands, Inc., 5 Cal. App. 2d 89, 42 P.2d 81 (1935) (crop spoiled by excessive heat); Gold Kist, Inc. v. Stokes, 138 Ga. App. 482, 226 S.E.2d 268 (1976) (storage bins destroyed by fire); Dunavant Enterprises, Inc. v. Ford, 294 So. 2d 788 (Miss. 1974) (severe weather prevented planting); Low's Ezy-Fry Potato Co. v. J.A. Wood Co., 26 A.D. 583, 4 U.C.C. REP. SERV. 483 (Dep't Agriculture 1967) (harvest did not yield potatoes large enough to meet contract specifications). *But see* Bunge Corp. v. Miller, 15 U.C.C. REP. SERV. 384 (W.D. Tenn. 1974) (not contemplated that contract would be satisfied with soybeans from any particular crop); Anderson v. May, 50 Minn. 280, 52 N.W. 530 (1892) (no impossibility because contract failed to specify the crop was to be grown in any particular land); Bliss Produce Co. v. A.E. Albert & Sons, Inc., 35 A.D. 742, 20 U.C.C. REP. SERV. 917 (Dep't Agriculture 1976) (contract failed to specify the crop was to be grown in any particular land and Act of God defense was specifically rejected during negotiations).

See also U.C.C. §2-615, Comment 9: "The case of a farmer who has contracted to sell crops to be grown on designated land . . . may be excused, when there is a failure of the specific crop, either on the basis of the destruction of identified goods or because of the failure of a basic assumption of the contract." *See generally* Comment, *Crop Failures and Section 2-615 of the Uniform Commercial Code*, 22 S.D. L. REV. 529 (1977).

Section 2-617 of the U.C.C., not adopted in all states, expressly provides for contingencies beyond the seller's control, whether or not non-occurrence was a basic assumption of the parties. See note 33 *supra*. This section has proven useful in application to cases where excuse is claimed due to crop failure. *E.g.*, Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652 (Miss. 1975); see notes 198-206 *infra* for a carryover of this treatment into the area of what constitutes impracticability.

90. See notes 17-21 and accompanying text, *supra*.

91. *See* cases cited in note 89 *supra*; *cf.* Housing Auth. v. East Tenn. Light & Power Co., 183 Va. 64, 31 S.E.2d 273 (1944) (where there was only one field in the area, contract contained implied term that natural gas would be supplied from that field).

relatively simple in most other cases,[92] precluding findings that the contingency's non-occurrence was the parties' basic assumption.[93] For example, continued supply of a man-made product has been rejected as a basic assumption on which the contract was made, because no reasonable buyer would agree to accept the risk of the source's failure.[94]

When performance has allegedly become impracticable due to increased costs, the Code is adamant that the increase must be due to a contingency the parties assumed would not occur.[95] Any other construction would merely require the basic assumption that the contract be profitable.[96] Consequently, the tendency of courts to find risk allocation extends with even greater force to the price area.[97] Long-term contracts to supply goods at a fixed price often warrant a finding that the supplier assumed the risk of rising costs.[98] In this situation, it may not be a basic assumption of the parties that inflation will remain minimal,

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Most courts have inferred the requisite basic assumption by implication, from the context of the industry, that the crop would be grown on specified land. Of course, if the promissor did actually assume the risk, harsh weather will not excuse performance, but courts are reluctant to find the actual assumption. *E.g.*, Bliss Produce Co. v. A.E. Albert & Sons, Inc., 35 A.D. 742, 20 U.C.C. REP. SERV. 917 (Dep't Agriculture 1976) (promisee specifically rejected Act of God defense); *cf.* U.C.C. §2-615, Comment 5: "In the case of failure of production by an agreed source . . . [it] is, without more a basic assumption."

92. *E.g.*, Wills v. Shockley, 52 Del. 295, 157 A.2d 252 (1960), *noted in* Sommer, *supra* note 21, at 530. This result appears to have been intended by the drafters of §2-615. *See* U.C.C. §2-615, Comment 8, which provides, in part: "The provisions of this section are made subject to assumption of greater liability by agreement and such agreement is to be found not only in the expressed terms of the contract but in the circumstances surrounding the contracting, in trade usage and the like . . . . Generally, express agreements . . . are to be read in the light of mercantile sense and reason . . ."

Also see notes 115-146 and accompanying text, *infra,* for a discussion of the provision making the section subject to the seller's greater obligation.

93. *Cf.* Austin Co. v. United States, 314 F.2d 518 (Ct. Cl. 1963) (not decided under the U.C.C. but promissor designed its own specifications for a government contract when it thought the government's specifications were unworkable. The court held it therefore must have believed its own specifications were possible and must have assumed the risk), *cert. denied,* 375 U.S. 830 (1963).

See Heat Exch. Inc. v. Map Constr. Corp., 34 Md. App. 679, 368 A.2d 1088 (Ct. Spec. App. 1977) (since sellers in the same industry as promissor often had difficulty getting component parts from their suppliers, the non-occurrence of this contingency could not have been a basic assumption of the parties).

94. This rationale was employed in Center Garment Co. v. United Refrigerator Co., Mass App. Ct. Adv. Sh. (Jan. 30, 1976), 18 U.C.C. REP. SERV. 672 (1976), where the promissor sought to be excused because his source of supply had failed. The court refused to allow excuse under §2-615 because continuance of supply could not have been a basic contingency on which the contract was made. *See also* Canadian Indus. Alcohol Co. v. Dunbar Molasses Co., 258 N.Y. 194, 179 N.E. 383 (1932) (decided before the adoption of the U.C.C.).

95. U.C.C. §2-615, Comment 4.

96. *See* Note, *Sharp Inflationary Increases in Cost as Excuse From Non-Performance of Contract,* 50 NOTRE DAME LAW. 297, 304-05 (1974).

97. *Id.*

98. *E.g.*, Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721 (Mo. Ct. App.) (supplier could have demanded a different price index be used), *cert. denied,* 100 S. Ct. 135 (1979); Maple Farms, Inc. v. City School Dist., 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974) (this is the precise purpose of a long-term contract).

since even an unsophisticated businessman could not credibly claim ignorance of inflationary conditions.[99]

The seller may still disclaim the risk of inflation by tying the contract price to a particular cost index.[100] If the contract contains a price index device intended to protect the supplier from inflation, he is ordinarily bound to any adjustment mandated by that index.[101] In *Eastern Air Lines, Inc. v. Gulf Oil Corp.*,[102] the parties negotiated a contract in 1972 which clearly indicated that Gulf, as the supplier of jet fuel to Eastern, did not intend to bear the risk of inevitable crude oil price increases.[103] Accordingly, the parties agreed that a portion of the increases during the contract term would be passed on to Eastern.[104] To effectuate the agreement, the contract provided that the price would be based on the posted price of a certain domestic crude oil which had proven a reliable indicator.[105] At the time of contracting, domestic crude oil prices were under federal control and were generally higher than the foreign oil prices.[106] Due to actions by the Organization of Petroleum Exporting Countries,[107] foreign prices equaled domestic prices by late 1973. In response, the federal government instituted an unprecedented "two-tier" price decontrol system designed to spur domestic production by freeing a portion of domestic oil from the controls.[108] Since the indicator in the contract was based on price-controlled crude oil, the indicator no longer reflected the going price for domestic crude oil.[109]

Contending the escalation indicator did not serve its intended purpose, Gulf invoked section 2-615 and claimed its performance had become commercially impracticable because Eastern no longer bore its contemplated share of the cost increases.[110] Gulf further contended that because the deregulation was unforeseeably "two-tiered," the escalation device did not work as intended.[111] Finding the decontrol of domestic crude oil foreseeable by Gulf, the

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99. Maple Farms, Inc. v. City School Dist., 76 Misc. 2d 1080, 1085, 352 N.Y.S.2d 784, 790 (Sup. Ct. 1974).

100. *See* Dawson & Coultrap, *Contracting by References to Price Indices*, 33 MICH. L. REV. 685, 686 (1935).

101. *E.g.*, Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721 (Mo. Ct. App.), *cert. denied*, 100 S. Ct. 135 (1979). *See generally* Hurst, *supra* note 1, at 889-93.

102. 415 F. Supp. 429 (S.D. Fla. 1975).

103. *Id.* at 432-33.

104. *Id.* at 433.

105. *Id.*

106. *Id.* at 434-35.

107. Popularly known as OPEC. *Id.* at 433 n.3.

108. *Id.* at 433-34. The amount of oil produced from a given well in May, 1972, is designated "old oil." That *amount* remains subject to price regulations. The oil produced above that amount is termed "new oil." Under the two-tier system, not only was all of the "new oil" not subject to the price controls, but an equivalent amount of "old oil" would be released from the controls. *Id.*

109. *Id.* at 434. The oil companies' actual prices were not posted. *Id.*

110. Gulf had threatened to cease performance if Eastern did not meet Gulf's demand for an increase. Eastern then sought a mandatory injunction requiring Gulf to perform under the terms of the contract. *Id.* at 432.

111. *Id.* at 438-39.

court decreed specific performance of the contract on the theory that it was not a basic assumption of the parties that prices would remain subject to federal regulation.[112] By ordering Gulf to bear the entire difference between the posted and actual prices, the court allocated to Gulf a particular risk that Gulf had patently rejected.[113] This decision demonstrates that requiring the contingency's non-occurrence to be a basic assumption on which the contract was made is subject to the same manipulation as was the implied term theory at common law. In both, foreseeability tends to support the irrebuttable presumption that no such basic assumption existed.[114]

Risk Assumption — Displacement by the Seller's Greater Obligation

Section 2-615 applies only to the extent a seller has not "assumed a greater obligation."[115] This clause has several potential effects: (1) the seller may well assume absolute unconditional liability under the contract, in effect becoming an insuror;[116] (2) the seller may protect himself by explicitly disclaiming a

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112. *Id.* at 439. Not only was Gulf "constantly urging" such de-control, but "[g]overnment price regulations were confused, constantly changing, and uncertain during the period of the negotiation and execution of the contract. During that time frame, high ranking Gulf executives . . . were in constant repeated contact with officials and agencies of the Federal Government regarding petroleum policies and were well able to protect themselves from any contingencies." *Id.* at 442.

113. *Id.* at 442-43. Price indexing and price escalator clauses are a recommended method of guarding against the effects of inflation in long-term contracts. *See generally* Hurst, *supra* note 1, at 889-93. It would appear axiomatic that a party who inserts such a provision in his contract is specifically disclaiming assumption of the risk despite the risk's foreseeability.

Apart from failing to carry its burden of proving the risk was not assumed, Gulf continued to deal primarily in the less expensive regulated oil. 415 F. Supp. at 440. Moreover, its profits increased in direct correlation with the price of oil, but the company's books reflected direction of these funds to foreign subsidiaries. *Id.* at 440-41. Therefore, Gulf also failed to prove its performance was impracticable. *See id.*

114. *See* U.C.C. §2-615, Comment 8. It is preferable to relegate implied conditions to questions of actual fact. *Id.;* Tombigee Constructors v. United States, 420 F.2d 1037, 1041 (Ct. Cl. 1970) (although the case was argued on the theory of mutual mistake, the court found no mistake where, during extensive negotiations, no mention was made of a particular contingency; the contract could not be construed to be conditional on its non-occurrence). *But see* Ocean Tramp Tankers Corp. v. V/O Sovfracht (The Eugenia), [1963] 2 Q.B. 226 (C.A.); Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966) for the position that lack of discussion is not conclusive.

115. U.C.C. §2-615. This provision is cryptic in light of the terminology of the 1949 draft, "unless otherwise agreed." *Id. See generally* Hawkland, *supra* note 1. However, it is commonly concluded that §2-615 permits a seller to assume a lesser obligation by agreement. *See* J. CALAMARI & J. PERILLO, CONTRACTS §13-11 (2d ed. 1977). The following authorities assume *sub silento* the propriety of the latter position: Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 990 (5th Cir. 1976); Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966); United States v. Wegematic Corp., 360 F.2d 674, 677 (2d Cir. 1966) and U.C.C. §2-615, Comment 8.

116. Mansfield Propane Gas Co. v. Folger Gas Co., 231 Ga. 868, 870, 204 S.E.2d 625, 627 (1974).

risk[117] through a *force majeure* clause;[118] and (3) the seller may assume the risk by implication.[119]

The first effect is illustrated by a case in which the seller intentionally and expressly "warranted" that it would be able to fulfill the contract requirements to supply natural gas.[120] Even assuming performance had become sufficiently impracticable to otherwise satisfy section 2-615, the seller could not invoke the statutory protection because of the warranty language.[121] The seller's assumption of a greater obligation requires that he affirmatively promise his performance despite the possible contingency.[122] For instance, a contract that provides for reduced damages in certain circumstances places the seller in the position of having affirmatively assumed the greater obligation of paying damages regardless of whether circumstances would otherwise result in excusable impracticability.[123]

Second, the seller may shift to the buyer a risk which would otherwise fall on him.[124] To effectuate such a disclaimer, the excusing contingencies must be delineated in an affirmative and explicit contractual provision.[125] However, delineation of excusing contingencies has been treated as an affirmative assumption of the risk of non-enumerated contingencies, thus justifying treatment as if the seller had assumed a greater obligation.[126] This principle was

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117. Whether U.C.C. §2-615 may be given this effect is a matter of controversy. *See* note 115 *supra.*

118. A *force majeure* clause is a contract provision excusing the promissor from performance when his failure to perform is occasioned by forces beyond his control. BLACK'S LAW DICTIONARY 774 (Rev. 4th ed. 1968). Such clauses were commonly inserted in commercial contracts as a reaction to the strict common law rules regarding impossibility. The practice continues today either out of habit or an abundance of caution. Hawkland, *supra* note 1, at 77.

119. See text accompanying notes 89-94 *supra.*

120. Gulf Oil Corp. v. FPC, 563 F.2d 588, 599 (3d Cir. 1977), *cert. denied,* 434 U.S. 1062 (1978). The preamble to the contract indicated the gas would be supplied from a specific area. However, it was held that the unconditional warranty within the body of the contract negated any implication of a specified source. *Id.*

121. *Id. See also* Bliss Produce Co. v. A.E. Albert & Sons, Inc., 35 A.D. 742, 20 U.C.C. REP. SERV. 917 (Dep't Agriculture 1976) (rejection of Act of God defense during negotiations).

122. Mansfield Propane Gas Co. v. Folger Gas Co., 231 Ga. 868, 204 S.E.2d 625 (1974).

123. *E.g.,* Gold Kist, Inc. v. Stokes, 138 Ga. App. 482, 226 S.E.2d 268 (1976). The parties' contract provided for reduced damages if nondelivery was due to causes beyond the seller's control. After the seller was unable to perform because the goods were destroyed by fire, the court held that although the fire was a contingency that would ordinarily come within the ambit of §2-615, the damage clause indicated he had assumed the greater obligation. *Id.* at 484, 226 S.E.2d at 269.

124. See notes 117-118 and accompanying text, *supra.*

125. Mansfield Propane Gas Co. v. Folger Gas Co., 231 Ga. 868, 871, 204 S.E.2d 625, 628 (1974). *But cf.* Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 989 n.90 (5th Cir. 1976) (where general terms of excusing contingencies follow the specific provisions, the general terms may include all similar to those specified).

126. This result has been justified under the doctrine of *ejusdem generis,* a principle of contract interpretation whereby words of limitation following an enumeration are construed as limiting the category to things similar to those enumerated. Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 988-90 (5th Cir. 1976). *See* Austin Co. v. United States, 314 F.2d 518 (Ct. Cl. 1963), *cert. denied,* 375 U.S. 830 (1963); Excelsior Motor Mfg. & Supply Co. v. Sound Equip., 73 F.2d 725 (7th Cir. 1934) (where war and embargo enumerated,

modified in *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*,[127] where the parties' contract for the manufacture and sale of airplanes contained a *force majeure* clause purporting to excuse the seller for delays due to causes beyond its control.[128] The provision listed several examples of other possible causes, such as intervening governmental priorities, preceded by the language "including but not being limited to."[129] Delay was ultimately due to informal governmental pressure on the seller to fill military orders first in lieu of formal priorities.[130] The buyer argued that the seller effectively waived the protection of section 2-615, claiming the *force majeure* clause limited excuse to delays caused by the enumerated contingencies.[131] Construing the "including but not being limited to" terminology to embrace all contingencies similar to those enumerated, the court declared section 2-615 to be available to the seller.[132]

Although any agreements superseding section 2-615 protections must be specific, the court reasoned that such clauses should be construed in accordance with mercantile sense and reason.[133] In emphasizing the commercial context of such agreements, the court noted that it was incorporating the commercial impracticability doctrine into the contract.[134] Significantly, the court refused to incorporate section 2-615's requirement that the contingency be unforeseeable, reasoning that where a risk is specifically disclaimed, its foreseeability is immaterial since the promissor has protected himself in the contract.[135]

Finally, a greater obligation of the seller may arise through implication.[136] For example, the court implied a greater obligation in a case where the parties

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manufacturing difficulties do not fall within the *force majeure* clause); Publicker Indus., Inc. v. Union Carbide Corp., 17 U.C.C. REP. SERV. 989 (E.D. Pa. 1975) (dictum). See sources cited at note 115 *supra* for the proposition that §2-615 allows the seller to assume a lesser obligation than that set out in the statute.

127. 532 F.2d 957 (5th Cir. 1976).

128. *Id.* at 988.

129. *Id.*

130. *Id.* at 983.

131. *Id.* at 988. The contingency causing the delay was the acceleration of the United States' involvement in Viet Nam. As a result, demand for production of military aircraft was stepped up and the federal government exerted formal pressure on the seller through the Defense Production Act, 50 U.S.C. App. §2157 (1978) (originally enacted as Act of September 8, 1950, Ch. 932, Title VII, §707, 64 Stat. 818), which provided for military priorities. The civilian aviation industry was concerned they would lose priority to non-emergency military orders; in response, the government withdrew the enumerated priorities and opted for an informal system. The enumerated contingencies included acts of government and governmental priorities. 532 F.2d at 989-90.

132. *Id.* at 989.

133. *Id.* at 990-91, *citing* U.C.C. §2-615, Comment 8. "[W]e presume that Comment 8 establishes 'mercantile sense and reason' as a general standard governing our construction of agreements enlarging upon the protections of section 2-615." 532 F.2d at 990.

134. 532 F.2d at 991.

135. *Id.* at 992 (analogizing to Glenn R. Sewell Sheet Metal, Inc. v. Loverde, 70 Cal. 2d 666, 678 n.13, 451 P.2d 721, 728 n.13, 75 Cal. Rptr. 889, 896 n.13 (1969) (en banc), which declared that voluntary assumption of a risk obviates the need for inquiry into the foreseeability of an event).

136. See text accompanying notes 87-99 *supra* for a discussion of the requirement that the non-occurrence of the contingency be a basic assumption of the parties.

entered a three-year requirements contract[137] for the sale of a natural gas product.[138] The sale price was to be adjusted annually to reflect changes in the seller's cost but the contract also imposed a maximum price.[139] The 1974 oil embargo caused the seller's cost to rise 150 percent, and the seller sought relief from the contract's price ceiling clause.[140] A *force majeure* clause excused the seller if performance had become impracticable "due to any occurrence beyond its reasonable control."[141] Without deciding whether the non-occurrence of the embargo and consequential price increase were basic assumptions of the parties, the court sustained the buyer's contention that the price ceiling clause was inserted precisely to put this risk on the seller. Thus, the clause suggested that the seller had thereby assumed the greater obligation of bearing the risk of extraordinary price fluctuations.[142] A determination of whether this particular contingency was encompassed by the *force majeure* clause was therefore unnecessary.[143]

The drafters of section 2-615 intended its "greater obligation" provision to afford parties a license to define their own obligations.[144] This autonomy is necessarily limited by the inability to predict all possible contingencies that will affect performance.[145] The provision attempts to create boundaries within

137. *See* U.C.C. §2-306.

138. Publicker Indus., Inc. v. Union Carbide Corp., 17 U.C.C. Rep. Serv. 989 (E.D. Pa. 1975).

139. *Id.* at 990. The ceiling price for 1974 was $.255 per gallon, while the seller's cost for that year was $.372 per gallon. The seller would have lost $5.8 million if he had had to perform. *Id.* at 991.

140. The court found the increase in natural gas prices was connected with the rise in oil prices and therefore did increase as a result of the OPEC action. *Id.* at 990.

141. *Id.* at 991. "[I]ncluding Acts of God, Fires, Floods, Wars, sabotage, accidents, labor disputes or shortages, governmental laws, ordinances, rules and regulations, . . . inability to obtain material, equipment or transportation, and any other similar or different occurrence." *Id.*

The court noted the similarity between the parties' *force majeure* clause and §2-615. *Id.* This appears to be a bootstrap approach, as the court incorporated the impracticability requirement of §2-615 into the parties' *force majeure* clause, and the seller rejected the risk of hardship due to the enumerated contingencies.

142. *Id.* at 992. However, the court did not determine the price hikes were such a basic assumption and allowed, *obiter*, they may not be. *Id.* at 993.

See U.C.C. §2-615, Comment 4: "[A] rise or collapse in the market [is not] a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover."

The court's conclusion begs the question, since Comment 4 also states that "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 . . . causes a marked increase in cost . . . is within the contemplation of this section." U.C.C. §2-615, Comment 4.

143. Publicker Indus., Inc. v. Union Carbide Corp., 17 U.C.C. Rep. Serv. 989, 991 (E.D. Pa. 1975).

144. Unpublished notes of Karl Llewellyn, at 1-2, *cited in* Hawkland, *supra* note 1, at 77; *accord*, U.C.C. §2-615, Comment 1.

145. *E.g.*, Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957 (5th Cir. 1976) (informal pressure by government); Gay v. Seafarer Fiberglass Yachts, Inc., 172 N.Y.L.J. 13 (July 22, 1974), 14 U.C.C. Rep. Serv. 1335 (N.Y. Sup. Ct. 1974) (polyester resin, lead and teak prices increased due to 1974 oil shortage).

which a greater obligation can be construed. The boundaries include not only express assumption of a greater obligation and circumstantial implication, but also express disclaimer of a particular category of risks.[146]

Impracticability

Section 2-615 requires a sellers' performance be made impracticable before he is excused.[147] The comments to the section indicate that impracticability must be judged by commercial standards[148] and that increased costs excuse performance only if the essential nature of performance is altered.[149] Axiomatically, if the seller has assumed the risk of inflation, an excessive burden must have been caused by a contingency other than the inflation.[150]

Mere expense does not warrant excuse if the seller will earn a profit, even if the profit is less than anticipated.[151] This principle governs although the essential nature of performance was altered by the contingency, the nonoccurrence of which was a basic assumption on which the contract was made.[152] Interpreting this limitation, the courts tend to hold sellers to their bargains absent a compelling reason to grant excuse.[153] While numerous decisions have

146. See text accompanying note 126 *supra.*

147. U.C.C. §2-615(a).

148. U.C.C. §2-615, Comments 1 & 3.

149. U.C.C. §2-615, Comment 4. *See also* text accompanying note 65 *supra.*

150. *See* U.C.C. §2-615, Comment 4.

151. *See, e.g.,* Gulf Oil Corp. v. FPC, 563 F.2d 588 (3d Cir. 1977) (discussed at text accompanying notes 120-121 *supra;* holding failure to excuse did not work a grave injustice where seller would in any event earn a net profit of $190 million); United States v. Wegematic Corp., 360 F.2d 674 (2d Cir. 1966) (after seller expended extra funds to complete the contract, he could sell more machines and reap profit on the extra sales); Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975) (no undue burden where loss of profits was due to intra-company assignment of profits for favorable tax treatment); Kinser Constr. Co. v. State, 125 N.Y.S. 46 (Ct. Cl. 1910) (new performance would have been less expensive), *aff'd,* 204 N.Y. 381, 97 N.E. 871, 129 N.Y.S. 567 (1912).

152. The statement in the text assumes, under a frustration of purpose analysis, that a seller's purpose may be frustrated if his anticipated profit margin is lessened to any great extent, although performance still would not be excessively burdensome. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS §281d (Tent. Draft No. 9, 1974) (performance may be impracticable due to extreme and unreasonable expense).

If the other requirements of §2-615 are met, it is arguable that the ensuing situation still falls within the "omitted case" concept advanced in Farnsworth, *supra,* note 21, *passim; see* RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note to Ch. 11 (Tent. Draft No. 9, 1974); Smit, *supra* note 29. *But see* Hurst, *supra* note 2, at 565 (a less restrictive rule would tend to encourage litigation and discourage timely performance of contracts).

153. *E.g.,* Gulf Oil Corp. v. FPC, 563 F.2d 588 (3d Cir. 1977) (would not work grave injustice); Dillon v. United States, 156 F. Supp. 719 (Ct. Cl. 1975) (where seller performed at a net loss of $17 million, the court awarded excess costs, noting that denial of relief would penalize energy and integrity); Nova Springs Coop. Co. v. Brandau, 247 N.W.2d 744 (Iowa 1976) (mere difficulty is insufficient).

See U.C.C. §2-615, Comment 3: "The . . . test of commercial impracticability (as contrasted with 'impossibility,' 'frustration of performance' or 'frustration of the venture') has been adopted in order to call attention to the commercial character of the criterion chosen by this Article." *Accord,* Note, *supra* note 96, at 302 n.49, where it is observed that §2-615, Comment 4, contemplates excuse due to marked increase in cost if the increase is due to acknowledged that added expense may be grounds for excuse, the added burden must be extreme.[154]

Accordingly, despite judicial leniency in crop failure disputes,[155] courts applying the stringent impracticability standard usually find insufficient proof that the greater expense has imposed an excessive burden on the promissor.[156] These decisions typically rely on the interdependency of foreseeability and degree of burden, concluding that mere expense may not be grounds for excuse.[157] Dictum supporting this result[158] is often utilized in concluding that increased expense has not become extreme and unreasonable.[159] Inexplicably, courts have justified use of the stringent impracticability standard even where the promissor has assumed a particular type of risk, such as inflation, but the increased costs arise from a different risk.[160]

Numerical analysis may be helpful in identifying the parameters of impractability. While 1000 percent cost increase has been held impracticable,[161] increases of less than 100 percent have not excused performance.[162] Conceiva-

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failure of presupposed conditions. *But cf.* Hurst, *supra* note 2, at 566 n.128 (excuse should be allowed in such a situation only if the increase is due to runaway inflation).

154. *E.g.*, Swift Textiles, Inc. v. Lawson, 135 Ga. App. 799, 219 S.E.2d 167, 18 U.C.C. REP. SERV. 115 (1975) (seller must pay increased market price); Savage v. Peter Kiewit Sons', Co., 249 Or. 147, 432 P.2d 519 (1967) (mere unprofitability will not excuse); *see* Note, 26 HASTINGS L.J., *supra* note 12, at 1256-75.

155. *E.g.*, Dillon v. United States, 156 F. Supp. 719 (Ct. Cl. 1957) (increase of approximately one-third of contract price held to warrant excuse); Mitchell Canneries, Inc. v. United States, 77 F. Supp. 498 (Ct. Cl. 1948) (one-third increase). However, this category of cases is distinguishable from the rest because of its roots in the classical doctrine of strict impossibility. See text accompanying notes 90-91, *supra*.

156. *E.g.*, Hancock Paper Co. v. Champion Int'l Corp., 425 F. Supp. 285, 21 U.C.C. REP. SERV. 132 (E.D. Pa. 1976) (mere unanticipated difficulty); Olson v. Spitzer, — S.D. —, 257 N.W.2d 459 (1977) (less than 100% increase).

157. See text accompanying notes 170-174, *infra*.

158. Lloyd v. Murphy, 25 Cal. 2d 48, 153 P.2d 47 (1944). See text accompanying notes 36-42 *supra*.

159. *E.g.*, Hancock Paper Co. v. Champion Int'l Corp., 425 F. Supp. 285, 21 U.C.C. REP. SERV. 132 (E.D. Pa. 1976); Publicker Indus., Inc. v. Union Carbide Corp., 17 U.C.C. REP. SERV. 989 (E.D. Pa. 1975); 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp., 23 N.Y.2d 275, 244 N.E.2d 37, 296 N.Y.S.2d 338 (1968); Gay v. Seafarer Fiberglass Yachts, Inc., 172 N.Y.L.J. 13 (July 22, 1974), 14 U.C.C. REP. SERV. 1335 (Sup. Ct. 1974); Schafer v. Sunset Packing Co., 256 Or. 539, 474 P.2d 529 (1970); Savage v. Peter Kiewit Sons', Co., 249 Or. 147, 432 P.2d 519 (1967); *see also* McCulloch v. Ligouri, 88 Cal. App. 2d 366, 199 P.2d 25 (1948) (holding unclear as to whether excuse precluded by foreseeability, lack of total frustration, or whether unusual expense may never constitute grounds for excuse).

The RESTATEMENT (SECOND) OF CONTRACTS §281 (Tent. Draft No. 9, 1974) adopts the "extreme and unreasonable" criterion for excuse. *See* RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note to Ch. 11 (Tent. Draft No. 9, 1974). The comments to §2-615, however, indicate the increase must be merely "marked" so long as the other requirements are met. U.C.C. §2-615, Comment 4.

160. See text accompanying notes 79-84 *supra*.

161. Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 P. 458 (1916); see note 26 *supra*.

162. *E.g.*, Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966) (12.27%); Publicker Indus., Inc. v. Union Carbide Corp., 17 U.C.C. REP. SERV. 989 (E.D. Pa. 1975) (37.2%); American Trading & Prod. Corp. v. Shell Int'l Marine, Ltd., 343 F. Supp. 91

bly, the line of demarcation is 100 percent.[163] More likely, "impracticable" is a relative term determined by subjective factors and equitable principles.[164] Regardless of whether a party has assumed the risk, equitable impracticability would place the loss on the party most able to bear it and most able to structure the contract to meet his needs.[165]

Commercial Impracticability in Perspective

The judicial tendency to uphold contracts makes sense pragmatically in light of the commercial context in which section 2-615 is to be read.[166] Commerce and enterprise are facilitated by satisfaction of the parties' reasonable expectations.[167] The cumbersome analysis by which contracts are upheld over claims of impracticability is antithetical to the goal of certainty in business transactions.[168]

Foreseeability and Impracticability: A Fluid Standard

In general, cases governed by section 2-615 adopt a two-pronged analysis to decide whether a seller should be excused. First, a presumption is created allocating the risk of a hardship to the seller if the event causing it was foreseeable at the time of contracting.[169] Under section 2-615, the seller who has assumed the risk may be bound regardless of the impracticability of his performance.[170] Distinguishing "unexpected" and "unforeseeable," the court in *Transatlantic Financing*[171] held that the foreseeability of the risk indicated assumption although the parties did not expect the event to occur.[172] Presuming the risk may have been allocated to the seller, the court nevertheless attempted to decide whether the required impracticability had been reached.[173] The opinion suggests that the foreseeability of an event does not indicate conclu-

(S.D. N.Y. 1971) (less than one-third), *aff'd*, 453 F.2d 939 (2d Cir. 1972); Maple Farms, Inc. v. City School Dist., 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974) (less than 100%).

163. *See* sources cited at note 162 *supra*. *But see* Note, *supra* note 96, at 306 (200%).

164. *See* Allen, *Excuse Me Please: It is Impossible — Er — Impracticable to Perform*, 53 Fla. B.J. 623, 625 (1979).

165. *See* Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721, 726 (Mo. Ct. App.) (dictum), *cert. denied*, 100 S.Ct. 135 (1979). The seller's petition for certiorari urged that application of §2-615 denies equal protection and due process to "large and strong" sellers. 48 U.S.L.W. 3121 (U.S. Aug. 28, 1979) (No. 79-29). Consideration of these factors may provide an additional explanation of the results in cases involving crop failure. See cases cited at note 89 *supra*; *cf.* U.C.C. §2-302 (unconscionability provision); Transatlantic Financing Corp. v. United States, 363 F.2d 312, 315 n.3 (D.C. Cir. 1966) (where promissor is not excused from performance for impracticability, nothing prevents courts from providing relief under U.C.C. §2-302).

166. *See* U.C.C. §2-615, Comment 3.

167. *See* Hurst, *supra* note 2, at 562; Note, 26 Hastings L.J., *supra* note 12, at 1259.

168. See text accompanying note 178 *infra*.

169. See text accompanying notes 74-77 *supra*.

170. U.C.C. §2-615, Comment 8.

171. 363 F.2d 312 (D.C. Cir. 1966).

172. See note 74 and accompanying text, *supra*.

173. See text accompanying note 76 *supra*.

sively whether its risk has been allocated, since courts are reluctant to grant or deny excuse created solely by a presumption of risk allocation.

Second, impracticability is determined by increasing the degree of hardship required to meet the impracticability standard whenever the foreseeability of the hardship increases. Rather than determine whether a particular cost increase by itself rendered performance impracticable, the *Transatlantic Financing* court used a fluid standard in holding the presumption of allocation created by the risk's foreseeability required a higher degree of hardship for impracticability.[174]

Although followed in later cases,[175] this reasoning appears to conflict with the statutory mandate. Section 2-615 excuses the seller if his performance has become impracticable due to a contingency the parties assumed would not occur. Fusion of the elements, therefore, seems unsupportable.[176] Since section 2-615 is displaced to the extent the seller assumes a greater obligation,[177] a finding that the risk was actually assumed obviates the need for further factual inquiry.[178] If foreseeability and impractability are correlated, increased costs may never constitute impracticability regardless of the essential nature of performance.

Quantity of Hardship or Quality of Risk?

Grafted onto the two-prong approach is another level of analysis which imposes a risk on the seller on the basis of the degree of hardship assumed, rather than the particular kind of risk.[179] In *Maple Farms, Inc. v. City School District*,[180] for example, the seller specifically assumed the risk of inflation. Although the hardship might have been caused by the sale of wheat to Russia,[181] the court allocated the loss to the seller. The opinion reasoned that each contingency resulted in the same degree of consequential hardship.[182]

A contract to supply goods at a fixed price over a long term justifies holding the seller liable for cost increases due to inflation.[183] If the hardship is caused

174. See text accompanying notes 76-77 *supra.*

175. *E.g.*, Heat Exch., Inc. v. Map Constr. Corp., 34 Md. App. 679, 368 A.2d 1088, 21 U.C.C. Rep. Serv. 123 (Ct. Spec. App. 1977) (foreseeability of strike and patent suit increases degree of hardship that will be deemed to constitute impracticability); Barbarossa & Sons, Inc. v. Iten Chevrolet, Inc., — Minn. —, 265 N.W.2d 655 (1978) (*en banc*) (cancellation of supplier's order to manufacturer was foreseeable).

176. U.C.C. §2-615. *See* Glenn R. Sewell Sheet Metal, Inc. v. Loverde, 70 Cal. 2d 666, 676 n.13, 451 P.2d 721, 728 n.13, 75 Cal. Rptr. 889, 89 n.13 (1969) (*en banc*) (where risk assumed, foreseeability is irrelevant); *cf.* Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 990-91 (5th Cir. 1976) (rejection of risk in *force majeure* clause).

177. U.C.C. §2-615. See text accompanying notes 115-146 *supra.*

178. See note 135 and accompanying text, *supra. Compare* the foreseeability requirement of §2-615 *with* Restatement (Second) of Contracts §281, Comment b (Tent. Draft No. 9, 1974) (indicating that in borderline cases, a finding of foreseeability does not preclude a finding that non-occurrence was a basic assumption).

179. See text accompanying notes 84-85 *supra.*

180. 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974). See notes 78-84 *supra.*

181. Maple Farms, Inc. v. City School Dist., 76 Misc. 2d at 1085, 352 N.Y.S.2d at 789-90.

182. *Id.*

183. U.C.C. §2-615, Comment 4; Hancock Paper Co. v. Champion Int'l Corp., 424 F. Supp.

by a contingency other than inflation, however, the normal presumptions triggered by the long-term contract are irrelevant.[184] Section 2-615 may be read as contemplating application to a situation where the supplier assumes the risk of even rampant inflation, but would reject the risk of other contingencies which cause higher prices.[185]

Businessmen make contracts contemplating profit and take calculated risks to that end. The cases following *Maple Farms* permit judicial allocation of a risk to the seller when he has taken a calculated risk, although a different risk caused the hardship.[186] Conceivably, a seller might be aware of a particular contingency, such as inflation, but unaware of another, such as an embargo by a foreign state. Likewise, the buyer may have not considered the possibility of an embargo. When the embargo, an unconsidered risk, occurs, current analysis allows the buyer to take advantage of a situation for which neither party has provided.[187] While the unconsidered risk is not necessarily a contingency the parties assumed would not occur, it is treated as such because both the considered and unconsidered risks are manifested by cost increases.

Transatlantic Financing and *Maple Farms* considered together demonstrate the judicial reluctance to draw the line by determining what contingencies the parties assumed would not occur. In lieu of definitive analysis, courts are inclined to construct a sliding scale between the degree of variance constituting impracticability and the quality of risks conceivably assumed.[188]

Alteration of the Essential Nature of Performance

The "radical difference" criterion developed in prior case law for determination of impracticability connotes a substantive difference between contemplated and actual performance.[189] This substantive standard should be con-

285, 21 U.C.C. REP. SERV. 132 (E.D. Pa. 1976) (decline in market price may not constitute impracticability), *aff'd*, 565 F.2d 151 (3d Cir. 1977); Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975) (where market price has increased without a concomitant rise reflected in the index, the seller has assumed the greater obligation to be bound to the index price).

184. Several illustrative cases expressly or impliedly presume that the 1974 oil embargo would ordinarily be the type of contingency the non-occurrence of which was the basic assumption on which the contract was made, but did not pin their holdings on that dicta. *E.g.*, Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451 (9th Cir. 1979) (no contract found to exist); Publicker Indus., Inc. v. Union Carbide Corp., 17 U.C.C. REP. SERV. 989 (E.D. Pa. 1975) (less than 100% cost increase); Gay v. Seafarer Fiberglass Yachts, Inc., 172 N.Y.L.J. 13 (July 22, 1974), 14 U.C.C. REP. SERV. 1335 (Sup. Ct. 1974) (lack of causation between oil shortage and increased cost of polyester resin, lead and teak).

185. This result would comport with the mandate that §2-615 be interpreted in the light of mercantile sense and reason, since businessmen's calculated risks would not be rendered meaningless by being interpreted to subsume similar consequences arising from dissimilar events. *See* U.C.C. §2-615, Comment 3.

186. See text accompanying note 84 *supra*.

187. *E.g.*, Maple Farms, Inc. v. City School Dist., 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974); see text accompanying notes 180-185 *supra*.

188. See notes 169-178 and accompanying text, *supra*; *see also* Joskow, *Commercial Impracticability, The Uranium Market and the Westinghouse Case*, 6 J. LEGAL STUD. 119 (1977).

189. *See* Lloyd v. Murphy, 25 Cal. 2d 48, 53, 153 P.2d 47, 51 (1944), discussed at notes

trasted with a difference in degree, or quantitative difference in performance. Under the substantive standard, a difference in the cost of performances is merely quantitative and does not constitute excusable impracticability.[190] However, the comments to section 2-615 indicate intentional forebearance from use of the terms "impossibility" or "frustration" by the drafters.[191]

Because there terms have been interpreted to require a substantive variance in performance, their absence buttresses the proposition that the section addresses situations in which the variance between contemplated and actual performance is merely quantitative.[192]

The comments to section 2-615 indicate that increased costs generally do not excuse performance unless the essential nature of performance is altered.[193] Theoretically, more expensive performance may constitute alteration of the essential nature of performance under these directives.[194] As a hypothetical illustration, a contract's distinguishing characteristic may be the seller's ability to perform at substantially lower prices because his proximity to the delivery site lowers his transportation costs. If the circumstances enabling the less expensive performance disappear because the seller's supplier imposes a fuel surcharge for transportation to the seller's place of business, then the essential nature of performance would be altered. The buyer would have been aware that the bargain was made possible by the circumstances enabling the lower costs.[195] Therefore, any expectations the buyer had that the seller would be bound under changed circumstances would be unreasonable.

The statement that more expensive performance can never excuse a contractual obligation assumes that circumstances increasing costs may never reach the impractability threshold of section 2-615. Essentially, the event causing the hardship is viewed as sufficiently unexpected to justify relief.[196] Alternatively,

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36-42 *supra*; Ocean Tramp Tankers Corp. v. V/O Sovfracht (The Eugenia), [1963] 2 Q.B. 226 (C.A.), discussed at text accompanying notes 46-58 *supra*. *But see* Mishara Constr. Co. v. Transit Mixed Concrete Corp., 365 Mass. 122, 310 N.E.2d 363 (1974) (no error to let jury decide whether severity of impact from labor strike altered essential nature of performance).

190. Lloyd v. Murphy, 2 Cal. 2d 48, 55-56, 153 P.2d 47, 51 (1944); see note 38 and accompanying text, *supra*.

191. U.C.C. §2-615, Comment 3.

192. Mishara Constr. Co. v. Transit Mixed Concrete Corp., 365 Mass. 122, 128, 310 N.E.2d 363, 366 (1974). *Mishara* intimated that a labor strike rendering performance more difficult might constitute excuse under §2-615 in an industry where strikes are relatively unusual. Therefore, the same degree of increased difficulty would qualify as excuse for one promissor (in an industry where strikes are rare) but not for another (in an industry where strikes are foreseeable). *Cf.* Portland Section of Council of Jewish Women v. Sisters of Charity, 266 Or. 448, 513 P.2d 1183 (1973) (not decided under the U.C.C., where performance was rendered extremely impracticable but it was found that the purpose of the contract was to benefit the needy and not to earn a profit). *See also* Note, *supra* note 96.

193. U.C.C. §2-615, Comment 4; see note 65 *supra*.

194. *See* U.C.C. §2-615, Comment 4. Comment 4 indicates that "increased cost alone does not excuse performance *unless* the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance." *Id.* (emphasis supplied).

195. *But cf.* Neal-Cooper Grain Co. v. Texas Sulphur Co., 508 F.2d 283 (7th Cir. 1974) (relief denied to seller where he had to obtain supply from Canada because it was his own decision to close his previous source).

196. See text accompanying note 174 *supra*.

the seller may have indicated a willingness to accept this degree of burden in another context.[197]

Force Majeure and Escalation Devices

The seller may still protect himself against the unconsidered risk by inserting a *force majeure* clause into the contract. Since neither party has anticipated the risk, however, this device is not entirely satisfactory.[198] The court's construction of the *force majeure* clause in *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*[199] points out that an attempt at inclusivity may be self-defeating. A risk not expressly disclaimed is assumed, thereby denying the seller section 2-615 protections. Absent the *force majeure* clause, any contingency which causes performance to become impracticable would justify excuse if the parties assumed it would not occur. Present treatment of an express disclaimer denies consideration under section 2-615 on the theory that the *force majeure* clause would mention any contingency the parties would assumed not occur. Thus, the seller who undertakes to disclaim any risk is penalized. The rule that a risk is assumed unless expressly and specifically excluded ignores marketplace realities by requiring expert contract drafting for each routine transaction, or the use of boilerplate clauses with their own interpretational problems.[200]

Similarly, price indicator devices may protect a seller from the burden of increased costs. Such clauses can rebut inferences that the purpose of the long-term fixed price contract was to place inflation risks on the seller.[201] Even if this device is used, however, the seller is not completely protected. In *Eastern Air Lines, Inc. v. Gulf Oil Corp.*,[202] the parties' chosen indicator did not reflect the going price for crude oil as intended by the contract, due to governmental action taken during the contract term.[203] The seller was nevertheless bound to

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197. See text accompanying notes 179-187 *supra*; *cf.* Duesenberg, *Contract Impracticability: Courts Begin to Shape §2-615*, 32 BUS. LAW. 1089, 1096 (1976) (foreseeability is key factor in §2-615).

198. *E.g.*, Gulf Oil Corp. v. FPC, 563 F.2d 588, 597-602 (3d Cir. 1977) (error in calculations of natural gas reserves), *cert. denied*, 434 U.S. 1062, *cert. denied*, 435 U.S. 911 (1978); Chemetron Corp. v. McLouth Steel Corp., 381 F. Supp. 245 (N.D. Ill.) (party must make all reasonable efforts to avoid impracticability even where disclaimed in *force majeure* clause), *aff'd*, 522 F.2d 469 (7th Cir. 1974).

199. 532 F.2d 957 (5th Cir. 1976). See notes 127-132 and accompanying text, *supra*; *see also* Comment, *supra* note 9, at 522.

200. *See generally* Griffin, *Standard Form Contracts*, 9 N.C. CENT. L.J. 24 (1978).

201. See notes 98-100 and accompanying text, *supra*; *accord*, U.C.C. §2-615, Comment 4. Publicker Indus., Inc. v. Union Carbide Corp., 17 U.C.C. REP. SERV. 989 (E.D. Pa. 1975), provides an illustration. Although the contract for sale of a natural gas product contained an annual price adjustment feature, rebutting the inference that the seller assumed the greater obligation to be bound by drastic cost increases, the imposition of a maximum price re-triggered the inference of the greater obligation. *Id.* at 991-92.

202. 415 F. Supp. 429 (S.D. Fla. 1975) (discussed at text accompanying notes 102-113 *supra*).

203. *Id.* at 432-33. *But see* U.C.C. §2-615, Comment 10, which provides that impracticability due to operation of law is contemplated as an excusing contingency under §2-615, and that statutes, acts, rules and regulations are to be deemed "laws" within the meaning of that section.

perform at the price dictated by the index.[204] In cases where the use of a particular price indicator is deliberate, refusal to allow excuse when the chosen indicator fails is justified.[205] If the use of an escalation device is intended by both parties to merely spread inflation among themselves, it strains the contract terms to find the parties intended to bind themselves to an indicator no longer serving its purpose.

Because of the treatment of *force majeure* clauses and escalation devices, the seller remains at a disadvantage in structuring a contract to protect himself. Since the rationale for strict liability in contract is the ability to protect oneself by prior agreement, denial of relief despite intent manifested by a *force majeure* clause or escalation device is anomalous.[206]

The Culpability Factor

The requirement that the event leading to increased costs be unforeseeable has been judicially incorporated into section 2-615.[207] This rule requires the seller to foresee and provide for all foreseeable contingencies.[208] Since section 2-615 is essentially aimed at the distribution of risks in contract, it should be recognized that certain risks are so unusual they must have been beyond the circumstances to which the promissor may be deemed to have consented.[209]

Imposition of liability because a party has failed to provide for the foreseeable seems to inject negligence criteria into a pragmatic theory. The real justification for the importance of foreseeability may be that the seller is somehow to blame for his predicament.[210] Application of a lower impracticability threshold in some circumstances may indicate concern for the seller who is exposed to uncontrollable risk, such as drought and floods.[211] Where the event predicating the claim of excuse is not due to active human intervention, the

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204. 415 F. Supp. at 434.

205. Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721 (Mo. Ct. App.), *cert. denied,* 100 S. Ct. 135 (1979). In *Peabody Coal,* the Consumer Price Index would have more accurately reflected the supplier's costs than did the Industrial Commodities Index to which the parties agreed. However, the buyer specifically rejected the Consumer Price Index, and therefore use of the Industrial Commodities Index was a negotiated term. *Id.*

206. Section 2-615 is based on the imputation of reasonable expectations to the parties. *See* Note, *supra* note 95, at 311-12. Denial of relief despite the express disclaimer may be the result of confusion over whether a seller may assume a lesser obligation than that imposed by §2-615 itself. The considered authorities have concluded in the affirmative. *See* sources cited at note 115 *supra.* To the extent the lesser obligation detracts from the statutory protection afforded the buyer, however, an express disclaimer is construed more strictly than assumption of a greater obligation.

207. See note 67 *supra.*

208. *E.g.,* Iowa Elec. Light & Power Co. v. Atlas Corp., 23 U.C.C. REP. SERV. 1171 (N.D. Iowa 1978) (where event is capable of being protected against contractually it is unnecessary to determine what constitutes impracticability); Mishara Constr. Co. v. Transit Mixed Concrete Corp., 365 Mass. 122, 310 N.E.2d 363 (1974) (labor disputes).

209. Mishara Constr. Co. v. Transit Mixed Concrete Corp., 365 Mass. 122, 128, 310 N.E.2d 363, 366 (1974).

210. For a discussion of the emerging reconciliation of contract with tort, see G. GILMORE, THE DEATH OF CONTRACT, 89-90 (1974).

211. See notes 89-91 and accompanying text, *supra.*

total absence of culpability may be the key to successful invocation of section 2-615.[212] For example, the disparate treatment of crop cases from others suggests a relevant distinction between middlemen and original producers.[213]

As has been acknowledged by the English courts[214] and, in the context of *force majeure* clauses, by American courts,[215] the risk allocation issue is not concluded simply because an event is foreseeable.[216] Foreseeability, therefore, should be relevant only to the extent it shows the event was foreseen, and if it was foreseen, only to the extent it indicates the parties came to terms regarding its consequences.

A Proposed Analysis and Impracticability Criterion

Ascertainment of the parties' subjective intentions and assumptions inevitably entails evaluation of ambiguous and conflicting evidence. Since courts are often reluctant to decide whether an assumption existed, indications in either direction are used to adjust the applicable standard of impracticability.[217] As a threshold matter, however, no standard of impracticability has been articulated.[218] The following is suggested as an appropriate analysis.

One: Whether performance has been rendered impracticable should be the first inquiry in any claim for relief under section 2-615. Current analysis is deficient in that it merges impracticability with a determination of which assumptions are the basis of the contract.[219] Because of the amorphous nature of the statute's other elements, disposition of the impracticability issue at the outset may render further inquiry superfluous.

Two: Performance should be deemed impracticable only where the seller will be unable to continue operating beyond the performance in question. Where price increases lead to claims of excuse, denial or granting of excuse often determines which party will shoulder the impact of economic war.[220] Such risks are typically placed on the seller,[221] perhaps because he is presumed to be

212. *See* Chemetron Corp. v. McLouth Steel Corp., 381 F. Supp. 245 (N.D. Ill. 1974) (§2-615 not available to party at fault in negligently allowing compressor in his factory to explode); 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp., 23 N.Y.2d 275, 281, N.Y.S.2d 338, 343-44, 244 N.E.2d 37, 41 (1968) (must be due to Act of God) (not decided under U.C.C.).

213. Where crops are to be grown on specified land, the grower-seller is exposed to a plethora of risks arising from natural causes which are beyond his control. *See* cases cited at note 89 *supra*.

214. Ocean Tramp Tankers Corp. v. V/O Sovfracht (The Eugenia), [1963] 2 Q.B. 226, 237-40 (C.A.); see text accompanying notes 46-56 *supra*.

215. *See* Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957 (5th Cir. 1976) (discussed at text accompanying notes 127-135 *supra*).

216. See notes 135 and accompanying text, *supra*.

217. See text accompanying notes 174-178 *supra*.

218. See text accompanying notes 147-165 *supra*.

219. The provision of U.C.C. §2-615, reproduced at note 60 *supra* (excusing performance where it has become impracticable due to a contingency the parties assumed would not occur) does not seem to permit use of the basic assumption as an element of impracticability *vel non*. See text accompanying notes 175-178 *supra*.

220. See notes 3-6 *supra* for examples of the political context of many contingencies giving rise to claims of impracticability due to increased expense.

221. See notes 155-156 and accompanying text, *supra*.

a "deep pocket" or in the best position to bear the burden. The more likely justification is that the seller is in the best position to be educated by his unprofitable experience. Despite the futility of attempting to account for the range of contingencies that may affect performance,[222] the seller's risks surrounding the goods are more limited than those of his purchaser, who is also exposed to risks surrounding commodities he purchases from other sellers. Unless excused under section 2-615, an energy supplier who did not consider arbitrary action by the oil producing states must initially absorb the loss. Thereafter, price increases caused by seemingly irrational actions should be among the seller's considered risks. In essence, the seller is better acquainted with his enterprise than the buyer.

At the other extreme, unconsidered risks should not be allocated so as to destroy the enterprise. Ordering a seller to perform a contract which will render him insolvent would impair commerce.[223] If the seller chooses to buy out of his contract by suffering a damage judgment, the buyer holds a potentially uncollectible judgment.[224] Additionally, the buyer must make new arrangements to obtain the performance. Whatever event caused the impracticability has likely affected the entire industry, so that any new arrangements would probably be at the higher price. Since the buyer will eventually have to pay more for the performance, excusing the original seller and allowing him to renegotiate the arrangement would be more efficient. The buyer is protected from bearing the entire loss because if the seller does not negotiate, he will lose the market for his product.[225]

As section 2-615 is now interpreted, an extreme burden must exist to avoid the seller's duty to perform.[226] Because the contingencies giving rise to claims of excuse are often caused by political exigencies, the consequences should not be borne solely by the industry affected. Spreading the cost of political contingencies over a wider segment of commerce more equitably distributes the loss. Therefore, the burden required to excuse the seller should not be limited to the seller's circumstances, but should encompass each party's relative ability to maintain financial integrity despite the burden.

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222. *See, e.g.*, cases cited at note 198 *supra*. That accounting is futile is exemplified by the future availability of "political risk insurance." *See* FORTUNE MAGAZINE, Jan. 28, 1980, at 56. *See generally* Henszey, *U.C.C. §2-615 — Does "Impracticable" Mean Impossible?*, 10 U.C.C. L.J. 107 (1977).

223. *See generally* Note, 26 HASTINGS L.J., *supra* note 12, at 1254-58, for a cost-benefit analysis of disputes over impracticability of performance.

224. O.W. HOLMES, THE COMMON LAW 301 (1881). "The only universal consequence of a legally binding promise is, that the law makes the promissor pay damages if the promised event does not come to pass. In every case it leaves him . . . free to break his contract if he chooses." *Id.*

225. See Macneil, *Contracts: Adjustments of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. L. REV. 854 (1978), for a discussion regarding the different considerations in breach where the parties' relationship is a continuing one.

226. See notes 161-164 and accompanying text, *supra*, for the tentative conclusion that "extreme burden" must entail an increase of 100% of the contemplated cost of performance; see also Note, *supra* note 96, at 306 (200%).

This standard assumes the desirability of a policy that seeks to further commerce in the determination of contract disputes. Since the seller is often in the best position to be educated by his unprofitable experience, this policy would be encouraged only if the seller retains the ability to profit from his education.[227] Where the seller will be able to continue operating and making new contracts, his performance is not impracticable. Reciprocally, only if the seller's continued ability to function is doubtful would analysis to determine satisfaction of the remaining requisites of the section be warranted.

Conclusion

Section 2-615 retains the doctrine of *pacta sunt servanda* yet excuses performance based on the theory that under certain circumstances[228] the contract was not intended to apply.[229] The factors of basic assumption, greater obligation and risk allocation are guides to ascertain which situations the contract is intended to govern.[230] Analyzed in this manner, section 2-615 is essentially a tool of construction which inherently affords wide margin for interpretation and equity balancing.

The latitude provided by use of the relative term "impracticable" justifies determination by the proposed criteria.[231] If the seller will become economically incapacitated by performing, it should be ascertained whether the seller has assumed the greater obligation to perform despite the contingency or if the parties' basic assumption was that the contingency would not occur. These factors should use foreseeability of the hardship in its evidentiary sense alone, rather than as triggering the presumption that the risk was allocated to the seller.[232]

Because impracticability will have already been determined, courts will not be tempted to merge it with foreseeability to construct a fluid standard. Under this analysis, section 2-615's purpose will not be thwarted by deeming impracticability categorically unavailable when hardship consists of increased costs. At the same time, the parties' reasonable expectations arising from their contracts will be neither sacrificed for lenience nor strained for strict contract liability.

Linda Ebin

227. *See, e.g.*, United States v. Wegematic Corp., 360 F.2d 674 (2d Cir. 1966) (increased expense will enable the seller to perfect the product and thereafter sell more machines at a higher price).

228. *E.g.*, Gulf Oil Corp. v. FPC, 563 F.2d 588 (3d Cir. 1977) (use of term "warranty" supported the inference that the contract was intended to apply under all circumstances), *cert. denied*, 435 U.S. 911 (1978).

229. *See generally* Comment, note 9 *supra*, at 530-36.

230. *E.g.*, Dillon v. United States, 156 F. Supp. 719 (Ct. Cl. 1957) (where contract specified the land on which crop was to be grown, severe drought affecting that land excused breach by the grower-seller); Hancock Paper Co. v. Champion Int'l Corp., 424 F. Supp. 285 (E.D. Pa. 1976) (fact that contract was made at a fixed price indicates the parties intended the contract to govern despite market price decline), *aff'd*, 565 F.2d 151 (3d Cir. 1977).

231. See notes 164-165 and accompanying text, *supra*.

232. *Cf.* Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957 (5th Cir. 1976) (disclaimer attempted through *force majeure* clause).