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IMPRACTICABILITY AS RISK ALLOCATION: THE EFFECT OF CHANGED CIRCUMSTANCES UPON CONTRACT OBLIGATIONS FOR THE SALE OF GOODS

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The contract for sale, as envisaged by merchants, puts on the seller the risk of rise in the market, and on the buyer the risk of fall in the market. But that contract presupposes that general conditions of operation will continue in such fashion as to make the contract performable by reasonable business effort.¹

The risk of changed circumstances has existed as long as promises have been legally enforced. The promise speaks to the future;

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¹ K. Llewellyn, *Comment on Section 54* [hereinafter *Comment on Section 54*], *Report and Second Draft: The Revised Uniform Sales Act* 225-26 (Dec. 1941) [hereinafter *Second Draft of December 1941*], reprinted in 1 A.L.I. & N.C.C.U.S.L., *UNIFORM COMMERCIAL CODE: DRAFTS* 505-06 (E. Kelly comp. 1984) [hereinafter *U.C.C. DRAFTS*]. Professor Karl N. Llewellyn was the chief draftsman of Article 2 of the Uniform Commercial Code. See W. TWining, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 276-86 (1973).

it declares that the promisor *will* perform an act. A contractual obligation is the legal recognition of that promise. When circumstances change after the obligation arises, it may become more burdensome to fulfill. The law is thus presented with a dilemma of Shakespearean proportions: to excuse or not to excuse, that is the question. Whether the obligor shall suffer by having to perform or pay damages, or whether he shall be absolved from his obligation, has been a problem with an elusive solution.

Changed circumstances can complicate any executory contract, but this Article will focus on contracts for the sale of goods. Changed circumstances can affect the obligations of the buyer as well as the seller, but this Article will discuss only the effect of changed circumstances upon the seller. There is but little law excusing the buyer, and that law is grounded on fundamentally different considerations.²

² The doctrine of buyer excuse from contractual obligations for changed circumstances is called "frustration of purpose" or "frustration." Though often discussed by the cases, the doctrine virtually never has been applied. See Anderson, *Frustration of Contract—A Rejected Doctrine*, 3 DEPAUL L. REV. 1, 1 (1953); Comment, *Contracts—Frustration of Purpose*, 59 MICH. L. REV. 98, 106-07 (1960). Cf. U.C.C. § 2-615, Official Comment 9 (1977). But see *International Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879 (10th Cir. 1985). The doctrine has fared no better in England. See Wladis, *Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Common Law*, 75 GEO. L.J. 1575, 1622-29 (1987) (discussion of minor role of Coronation cases in later development of English law of impossibility).

In March 1943, at a meeting of the subcommittee drafting what later became Article 2 of the Uniform Commercial Code, Corbin suggested that a separate section covering frustration of purpose probably was needed. The case was put of a buyer who was totally unable to use materials previously contracted for because his plant had been reconditioned for war purposes. A.L.I., *Minutes - Code of Commercial Law - Sales Act, Meeting of Subcommittee, New York, March 7, 8, 9, 10, 1943*, at 14 (1943) [hereinafter *Subcommittee Minutes of March 1943*] in A.L.I. ARCHIVES, drawer 182, file: Commercial Code: Conference March 7-10, 1943.

The July 1943 draft of the Sales Act contains the following note discussing frustration:

The question of frustration. The Sub-Committee have as yet no recommendation on whether a general section on excuse by frustration of purpose should be drawn. The drafting staff oppose such a section. They believe the problem adequately covered in its Sales aspects by Sections 83-85 [now 2-613 to 615] and by what the courts may further develop. They believe that there is no sound means for accomplishing an adjustment of such a situation as the disappearance of the essential purpose of a whole industry directed at war production by purely private

The resolution of the problem of changed circumstances is essentially a process of risk allocation. A judge deciding such a case must determine which party should bear the risk of the occurrence of the changed circumstances, when often neither party caused nor could foresee or control the circumstances. This is a difficult decision, and consequently it merits careful study.

In Part I, this Article will briefly discuss the early law of impossibility in sales, and summarize the law on the subject prior to the drafting of the Uniform Commercial Code. A representative sample of pre-Code cases has been gathered and organized into a table.³ The discussion of these cases will demonstrate that beneath the surface of the rigid excuse rules courts expounded, there was movement toward the more modern views of the Code.

Part II will then canvass the law of impracticability under the Code. It will discuss the major relevant Code sections⁴ with particular emphasis upon the purposes underlying each section and the drafting history, which for some sections is particularly revealing. Part II will then review the case law of impracticability under the Code, and point out how the courts have often failed to move the law of impracticability in the direction intended by the Code drafters. Part III contains some thoughts on risk allocation, and a suggestion that the courts should begin to bring the law of impracticability more in line with commercial realities.

I. THE IMPOSSIBILITY DOCTRINE IN SALES OF GOODS PRIOR TO THE UNIFORM COMMERCIAL CODE

An accurate description of the pre-Code law of impossibility in sales of goods is important for at least two reasons. First, one

law means, operating only contract by contract. And they see no way into the general problem of frustration which does not involve such an attempt.

A.L.I., *Code of Commercial Law - Sales Act, Prelim. Draft No. 9 - Tentative Final, Third Installment, Sections 69-99* (July 16, 1943) (note after section 85) in A.L.I. ARCHIVES, drawer 182, file: Commercial Code: Conference July 19-23, 1943. The view of the drafting staff eventually prevailed, for section 2-615, although it mentions only the seller, not the buyer, apparently was intended to cover the buyer as well. U.C.C. § 2-615, Official Comment 9 (1977).

The American Law Institute Archives are located in Philadelphia, Pennsylvania. Access to them is available through the office of the Institute's librarian.

³ Table I, at the end of the Article, arranges Code and pre-Code cases by the type of interfering event, and indicates whether or not an excuse was granted.

⁴ U.C.C. §§ 2-613, 2-614, 2-615 (1977).

must know the history of a legal doctrine to fully understand it. Legal doctrine occasionally makes clean breaks from the past,⁵ but not the doctrine of impossibility. Second, a description of the law prior to the Uniform Commercial Code provides a benchmark which one can use to measure the effect that the Code has had upon the development of the impossibility doctrine.

A. Early History

The doctrine of impossibility made a relatively late appearance in the reported sales cases. Impossibility had been asserted as a defense to the performance of obligations in cases other than sales since at least the fourteenth century,⁶ but the doctrine did not appear in reported sales cases until the beginning of the nineteenth century. The earliest reported case appears to be *Hinde v. Whitehouse*,⁷ decided in 1806, which applied the rule that risk follows title in a sales transaction,⁸ and in effect excused a seller from

⁵ Examples include the implied warranty of habitability in the sale of new homes, and the shift in products liability law from *caveat emptor* to *caveat venditor*.

⁶ *Vis major* as a defense to an action for waste is discussed in two Year Book cases circa 1300 cited by Holdsworth. See 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 123 n.9 (3d ed. 1923). See also The Abbe of Sherbourne's Case, Y.B. Mich. 12 Hen. 4, fo. 5, pl. 11 (1410); Anon., Y.B. Hil. 40 Edw. 3, fo. 6, pl. 11 (1366). On the development of impossibility law in medieval and Renaissance England, see A. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 29-33, 107-12, 525-32 (1975).

⁷ 7 East 558, 103 Eng. Rep. 216 (1806). Another early English case was *Rugg v. Minett*, 11 East 211, 103 Eng. Rep. 895 (1809), which was approved in the landmark case of *Taylor v. Caldwell*, 3 B. & S. 826, 122 Eng. Rep. 309 (Q.B. 1863). The earliest American cases are probably two that arose from the China tea trade, *Gilpins v. Consequa*, 10 F. Cas. 420 (C.C.D. Pa. 1813) (No. 5,452); and *Youqua v. Nixon & Walker*, 30 F. Cas. 887 (C.C.D. Pa. 1816) (No. 18,189). See also *Dodge v. Van Lear*, 7 F. Cas. 800 (C.C.D.C. 1837) (No. 3,956) (sale of flour; problems with canal seller intended to use for delivery; no excuse); *M'Ghee v. Hill*, 4 Port. 170 (Ala. 1836) (sale of crops; drought caused partial crop failure; no excuse); *White v. Kearney*, 9 Rob. 495 (La. 1845) (sale of lime; delay in sailing of ship because of weather; excused).

⁸ The rule that risk follows title apparently was accepted long before its first use in a reported case. The *Hinde* court cited in support of the rule a maxim published in 1642:

Noyes Maxims, 88: If I sell my horse for money, I may keep him until I am paid; but I cannot have an action of debt until he be delivered; yet the property of the horse is by the bargain in the bargainor or buyer. But if he do presently tender me my money, and I do refuse it, he may take the horse, or have an action of detainment. And if the

the impossible task of delivering destroyed goods to the buyer.⁹ The related rule, that destruction of the goods contracted for, through no fault of the seller, excuses the seller, even though the risk of loss is still on him, appeared in a reported case first in 1871, in an American case, *Dexter v. Norton*.¹⁰

horse die in my stable between the bargain and the delivery, I may have an action of debt for my money, because by the bargain the property was in the buyer.

Hinde v. Whitehouse, 7 East 558, 571, 103 Eng. Rep. 216, 222 (1806), quoting W. NOYE, PRINCIPAL GROUNDS AND MAXIMS OF THE LAWS OF THE KINGDOM, Maxim 88 (1642). The author of this book, William Noye (1577-1634), was Attorney General under Charles I. See 14 DICT. NAT. BIO. 700 (1959-60 reprint). The rule that risk follows title (or property) eventually was codified in England as part of the Sales of Goods Act, 1893, 56 & 57 Vict. Ch. 71 § 20, reenacted, Sale of Goods Act, 1979, Ch. 54 § 20.

⁹ In *Hinde*, 7 East at 558, 103 Eng. Rep. at 216, the buyer purchased at auction a lot of sugar then in storage at a warehouse. The terms of the sale were that the sugar would be at the buyer's risk "from the time of sale." Before the buyer took possession of the sugar, it was destroyed in a fire and the seller sued for the price.

The buyer defended by arguing that a "sale" had not yet occurred, so that the contract term putting the risk on him did not apply. He reasoned that since the seller had not yet paid the customs duties on the sugar, the buyer could not have taken possession of the sugar and removed it from the warehouse. Thus the "property" (or "title" as we now would say) had not passed to the buyer, and consequently the sale had not yet been effected, so that the risk of loss provisions in the terms of sale did not apply.

The court applied the rule that risk of loss follows title and found that the title to the sugar had passed to the buyer when his bid had been accepted. Thus, it found the buyer liable for the price. This case appears to be the earliest reported case applying to a sales transaction the rule that risk follows title.

¹⁰ 47 N.Y. 62 (1871). In *Dexter*, the seller agreed to sell certain marked bales of cotton at a fixed price. Some of the cotton was delivered, but the rest was accidentally destroyed by fire. Since the price of cotton had risen, the buyer sued for damages for nondelivery of the destroyed bales. Title (and therefore risk) still remained in the seller, see *Joyce v. Adams*, 8 N.Y. 291 (1853) (sale of specific bales of cotton; buyer paid before delivery; bales destroyed; buyer held entitled to return of payment). Yet both the trial court and the New York Court of Appeals concluded that the seller was excused.

The only common law sales authority cited by the *Dexter* court to excuse the seller was an example given in J. BENJAMIN, SALE OF PERSONAL PROPERTY 424 (1868). This example concerned the sale of a horse for future delivery, and in it the seller was said to be excused if the horse died before delivery. None of the authorities cited in support of this example concern a sale of specific goods where the risk was said to remain with the seller. Indeed, in Benjamin's example, it is probable that the property (and therefore the risk) had passed to the buyer when the contract was made. See J. BENJAMIN, TREATISE ON THE LAW OF SALE OF PERSONAL PROPERTY 252-54 (6th Am. ed. 1892) (giving rules for transfer of property in goods) [hereinafter J. BENJAMIN TREATISE].

The relatively late appearance of impossibility defenses in the reported sales cases has puzzled commentators.¹¹ Both Williston and Corbin explained it upon two grounds: (1) that the law did not enforce bilateral contracts (a promise for a promise) until the sixteenth century, and (2) for two centuries after the recognition of bilateral contracts, the exchanged promises were, in the absence of express words of condition, held to be mutually independent.¹² The reasoning supporting these positions, and some flaws in this reasoning, are set forth below.

Before the sixteenth century,¹³ the only informal¹⁴ contracts enforced in the King's courts were those that had been partially performed. Contracts for the sale of goods were likely to be informal contracts¹⁵ because merchants were unlikely to follow the cumbersome procedures necessary to make a sealed instrument.¹⁶ Thus, there were few opportunities for the impossibility doctrine to be raised. If neither side had performed at all, and it became impossible for the seller to deliver, he need not defend against an action for nondelivery by asserting impossibility, since he could win merely by asserting that the agreement had not been even partially performed. If the seller had performed by delivering the goods, no question of impossibility would arise.¹⁷ If the buyer

¹¹ See, e.g., C. BLACKBURN, *TREATISE ON THE EFFECT OF THE CONTRACT OF SALE ON THE LEGAL RIGHTS OF PROPERTY AND POSSESSION IN GOODS, WARES, AND MERCHANDISE* 151-54 (1845); Williston, *Risk of Loss after an Executory Contract of Sale in the Common Law*, 9 HARV. L. REV. 106 (1895).

¹² The fullest discussion of these two points is by Corbin, see 6 A. CORBIN, *CORBIN ON CONTRACTS* 321-24 (1962), but the basic explanation can be traced to Williston, see Williston, *supra* note 11, at 106 n.2.

¹³ Corbin's reference to the sixteenth century probably refers to the rise of *assumpsit* and the concomitant recognition of bilateral contracts as enforceable even without partial performance. See A. SIMPSON, *supra* note 6, at 194-95; T. PLUCKNETT, *CONCISE HISTORY OF THE COMMON LAW* 643-44 (5th ed. 1956).

¹⁴ "Informal" here means an agreement not under seal. Executory agreements under seal were actionable by writ of covenant (if the amount claimed were unliquidated) or by writ of debt (if the amount claimed were a "sum certain"). See A. SIMPSON, *supra* note 6, at 10-15, 17-18, 88-90.

¹⁵ *Id.* at 136.

¹⁶ Cf. C. FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT* 229 (1949).

¹⁷ The case of a partial delivery by the seller, with the remaining delivery becoming impossible, might have arisen but probably was rare. The vast majority of medieval sale contracts seem to have been for existing goods to be delivered in one

had performed by paying some or all of the price, the defense of impossibility was unlikely to succeed, for otherwise the seller would be able to keep the buyer's money without performing his side of the bargain.¹⁸ Thus, until executory informal bilateral contracts became enforceable, impossibility questions could seldom arise, and when they did, the seller would not prevail.

With one important qualification, this explanation is plausible. Fully executory informal bilateral contracts for the sale of goods were enforced as early as the fifteenth century. It has come to be accepted, following the lead of Holdsworth,¹⁹ that sometime during the fifteenth century informal sales contracts became enforceable in the King's courts by writ of debt, even where there had been no performance by either side.²⁰

The second half of Williston's and Corbin's explanation for the late appearance of the impossibility doctrine in sales cases concerns the independence of mutual promises. Both Williston and Corbin asserted that courts initially presumed that the mutual promises of the bilateral contract were independent of each other in the absence of express words conditioning the performance of one promise upon the performance of the other. This presumption of independence did not, in their view, erode until the nineteenth century.²¹ If mutual promises are independent, the buyer cannot defend a suit for the price upon the ground that the seller has not performed his promise to deliver. Thus, since the seller could make the buyer pay the price even where the seller had not delivered, then justice required that the impossibility of the seller's performance should be no defense to the buyer's counteraction.

lot. See SELDEN SOCIETY, *SELECT CASES ON THE LAW MERCHANT*, VOL. I, A.D. 1270-1683, vol. 23 (1908); SELDEN SOCIETY, *SELECT CASES ON THE LAW MERCHANT*, VOL. II, A.D. 1238-1633, vol. 46 (1930).

¹⁸ 6 A. CORBIN, *supra* note 12, at 322.

¹⁹ 3 W. HOLDSWORTH, *supra* note 6, at 355-56.

²⁰ See C. FIFOOT, *supra* note 16, at 227-29; T. PLUCKNETT, *supra* note 13, at 643; McGovern, *Contract in Medieval England: Necessity for Quid Pro Quo and a Sum Certain*, 13 AM. J. LEGAL HIST. 173, 178-79 (1969); Lucke, *Slade's Case and the Origin of the Common Counts: Part 2*, 81 L.Q. REV. 539, 542-43 (1965); Milsom, *Sale of Goods in the Fifteenth Century*, 77 L.Q. REV. 257, 271-72 (1961); Simpson, *Place of Slade's Case in the History of Contract*, 74 L.Q. REV. 381, 392 (1958).

²¹ See *supra* note 12.

Otherwise, the seller could recover the price without performing his side of the bargain.

Although intuitively satisfying, this part of the explanation is suspect for two reasons. First, the earliest form of the impossibility doctrine found in the cases, the rule that risk follows title, does require the buyer to pay the price without receiving what he bargained for. Under that rule, if the title and risk of loss have passed to the buyer, then, if the goods are destroyed, the buyer must still pay for them. This was the common law at least as early as the seventeenth century²² and it is, with some modification, the law today.²³ Second, it is far from clear that the seller's promise to deliver was treated as independent of the buyer's promise to pay the price, even in medieval England. The Year Books²⁴ contain contradictory statements, some of which require the seller to perform before he can claim the price²⁵ and some of which do not.²⁶ The Nominative Reports following the Year Books

²² See *supra* note 8.

²³ Under the Uniform Commercial Code, risk generally follows control of the goods rather than title. See U.C.C. § 2-509, Official Comments 1, 3 (1977); J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* 215 (3d ed. 1988). If the buyer has control over the goods, the risk of loss is on him, and he must pay the price if the goods are destroyed. See *Salinas v. Flores*, 583 S.W.2d 813 (Tex. Civ. App. 1979) (control of watermelons passed to buyer at time of sale).

²⁴ The Year Books are so named because they were printed and bound by the year of the monarch's reign in which the reported cases were argued. The books consist of reports of the oral arguments of cases in court. They span some 250 years, from the 1280s to about 1535. Almost nothing is known about the authors of the Year Books, although it has been speculated that the books were produced primarily by or for law students.

The Year Books were cited as authority well into the sixteenth century in other Year Book cases, and in the Nominative Reports which followed the Year Books. Together with the Plea Rolls, which contain the official records of the cases, and a few treatises, the Year Books provide the primary source of information still extant on English medieval case law. See generally J. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 151-55, 167 (2d ed. 1979).

²⁵ Y.B. Hil. 18 Edw. 4, fo. 21, pl. 1 (1479) (observation by Brian, C.J.); Y.B. Pasch. 21 Edw. 3, fo. 12, pl. 2 (1347) (sale of tithes, suit for price by seller; buyer's defense that one with elder title had recovered the tithes held good). Both authorities are discussed in McGovern, *Dependent Promises in the History of Leases and Other Contracts*, 52 TUL. L. REV. 659, 671 (1978).

²⁶ Y.B. Mich. 15 Edw. 4, fo. 2, pl. 5 (1475); Y.B. Pasch. 14 Edw. 4, fo. 4, pl. 2 (1474); Y.B. Hil. 21 Edw. 3, fo. 12, pl. 2 (1347). The last authority is quoted in McGovern, *supra* note 25, at 672.

are also contradictory.²⁷ In the opinion of Professor McGovern, there was no strict rule presuming bilateral promises to be mutually independent; judges decided, much as they do today, according to the felt needs of each case, whether it was more just to construe the promises as independent or not.²⁸ Given this unpredictable state of the law, it seems likely that some sellers would have asserted impossibility as a defense.

The absence of reported medieval impossibility sales cases might be explained by the relative simplicity of the sales transactions, and the limitations of the writ of debt for informal contracts. Most recorded sales cases seem to have concerned existing goods specifically identified in the contract.²⁹ If the contract were for existing goods, very few supervening events could interfere with the seller's obligation to deliver, and the most likely one is the destruction of the goods. Since most commercial contracts were informal, the buyer could sue in the Royal courts only in debt or detinue.³⁰ If the goods had been destroyed through no fault of the seller, the buyer had little to gain by such a suit, for debt and detinue were proprietary. They were viewed as enforcing a property right in specific goods, and not as a means of enforcing a broken promise.³¹ Thus, only the value of the goods could be recovered.

With the rise of the writ of assumpsit in the sixteenth century, it became possible for the buyer to recover more than the value of the goods. Assumpsit was conceived of as a tort, for which

²⁷ The conflicting authorities are discussed in McGovern, *supra* note 25, at 672-74. See also Stoljar, *Dependent and Independent Promises*, 2 SYDNEY L. REV. 217, 232 (1957).

²⁸ McGovern, *supra* note 25, at 676.

²⁹ See SELDEN SOCIETY, *SELECT CASES ON THE LAW MERCHANT*, VOL. II, A.D. 1238-1633 vol. 46 (1930); SELDEN SOCIETY, *SELECT CASES ON THE LAW MERCHANT*, VOL. I, A.D. 1270-1683, vol. 23 (1908). But see SELDEN SOCIETY, *SELECT CASES ON THE LAW MERCHANT*, VOL. II, A.D. 1238-1633, vol. 46, at 63-65, IXV (1930) (relating the case of *Pylate v. Cause* (1299), involving the sale of all the wool produced at a monastery).

³⁰ If specific goods were claimed, "detinue" was the proper writ. If the goods were unascertained, as when the seller agreed to sell ten sheep without identifying any ten particular sheep, the proper writ was "debt." See Milsom, *supra* note 20, at 273. "Covenant" required a sealed instrument. See A. SIMPSON, *supra* note 6, at 10.

³¹ A. SIMPSON, *supra* note 6, at 75-80.

the appropriate compensation was to put the buyer in the position he would have been in if performance had occurred.³² Thus, by the mid-sixteenth century, a buyer could recover damages exceeding the price, such as his increased cost to replace the goods.³³ Therefore, upon destruction of the goods, the buyer had incentive to sue, and the seller had incentive to raise the defense of impossibility of performance.

Yet, even allowing fifty years for the courts firmly to establish that assumpsit would lie in lieu of debt,³⁴ there was still a gap of approximately two hundred years before the impossibility doctrine appeared in the recorded cases in the form of the rule that risk follows title.³⁵ This gap narrows appreciably when one considers that the rule of risk following title seems to have been recognized as early as 1642.³⁶ This rule would have sufficed to resolve the most common incidence of interference, destruction of the goods, because in the simple contract for specific goods then prevalent, title (and therefore risk) passed to the buyer when the contract was made.³⁷ Yet as commercial ventures became more sophisticated so that title did not pass to the buyer immediately, and more vulnerable to being upset by subsequent events, one would have expected the impossibility defense to have been pleaded. The defense was known to lawyers of the time, for they raised it in a variety of transactions such as bailments, leases and conditioned bonds.³⁸ Perhaps it was an established commercial custom that destruction of the goods ended the contract.³⁹ Perhaps the merchant community settled most disputes without resort to the

³² *Id.* at 582-83.

³³ For example, in 1533 a brewer was permitted to recover £20 in damages caused by nondelivery of malt for which he had agreed to pay £11 6s. 8d. *Id.* at 628-30 (discussing *Pickering v. Thoroughgood*). The damages occurred because the brewer had to buy malt to maintain his business at a price much greater than the contract price.

³⁴ The process by which assumpsit prevailed over debt is summarized in A. SIMPSON, *supra* note 6, at 286-99.

³⁵ See *supra* note 8 and accompanying text.

³⁶ See *supra* note 8.

³⁷ See C. BLACKBURN, *supra* note 11, at 120-21, 147.

³⁸ See Wladis, *supra* note 2, at 1577-79 nn.15-18.

³⁹ Cf. S. PUFENDORF, *DE JURE NATURAE ET GENTIUM* 497 (1688), reprinted in *CLASSICS OF INTERNATIONAL LAW*, No. 17, at 732 (1934).

courts.⁴⁰ It is also possible that the accepted manner of raising the defense was by pleading the general issue so that specific references to the defense would not appear in the reports.⁴¹ It is often difficult to construe silence, and in the final analysis, all that can be said is that we do not know with any certainty why the impossibility doctrine appears so late in the sales cases.⁴²

B. A Summary of Pre-Code Impossibility Law

Although the defense of impossibility did not appear in the sales cases until the beginning of the nineteenth century, its use thereafter became quite popular, so that by the time the Uniform Commercial Code began to be widely adopted in the early 1960s, there were hundreds of cases discussing the defense. In 1938, Professor Samuel Williston set out a detailed classification of the pre-Code cases granting excuse for impossibility.⁴³ Here, we will examine this classification, and compare it to the results of a study of over 200 pre-Code sales cases in which the seller sought an excuse.

1. *Pre-Code Classification of Excuse.* Under pre-Code law, the first basis for excuse was a contractual excuse clause. The seller was excused where a change of circumstances made his performance impossible or even more difficult, if the seller had included in his contract a clause excusing him should those circumstances occur.⁴⁴ Absent an excuse clause, the pre-Code grounds for excuse

⁴⁰ It was apparently quite common for disputes to be submitted for arbitration. A. SIMPSON, *supra* note 6, at 173-74.

⁴¹ Cf. McGovern, *supra* note 25, at 674; J. BAKER, *supra* note 24, at 71-79.

⁴² The problem created by incomplete historical information has been metaphorically described thusly: "Take a Jackson Pollock painting and cut it into a jigsaw puzzle with a hundred thousand parts. Throw away all the corner pieces, two-thirds of the edge pieces and one-half of the rest." D. FISCHER, *HISTORIANS' FALLACIES* 135 n.10 (1970).

⁴³ 6 S. WILLISTON & G. THOMPSON, *A TREATISE ON THE LAW OF CONTRACTS* § 1935 (rev. ed. 1938). The classification as it appears in the 1938 edition has been selected because that edition is closest in time to the drafting of Article 2 in the early 1940s. It is also, in a rearranged fashion, the classification scheme of the *RESTATEMENT OF CONTRACTS* §§ 458, 460, 461 (1932). This is not surprising, since Williston was the Reporter for the Restatement. *Id.* at vi.

⁴⁴ 6 S. WILLISTON & G. THOMPSON, *supra* note 43, § 1968. See also 6 A. CORBIN, *supra* note 12, § 1342, at 408-09. The contractual excuse clause has been recognized for centuries. See Y.B. Hil. 40 Edw. 3, fo. 6a (1366) (lessor's attorney argued that

were more complex. Williston identified a number of pre-Code classes of excuse,⁴⁵ only three of which are directly relevant to contracts for the sale of goods: (1) impossibility due to a change of domestic law, (2) impossibility due to fortuitous destruction or change in character of something to which the contract related, or which, by the terms of the contract, was made a necessary means of performance, and (3) impossibility due to the failure of a means of performance contemplated but not explicitly stated in the contract. This last class of excuse was not always recognized, as Williston acknowledged.⁴⁶

The first class of excuse, impossibility due to a change of domestic law, covered supervening domestic illegality and other domestic governmental action interfering with performance of the contract.⁴⁷ This excuse rests upon the policies of fairness and deterrence. If the government prevents performance, it should not hold liable the party whose performance it prevented.⁴⁸ Also, the goal of the government policy requiring interference with performance will be more efficiently effected if nonperformance is excused, because the excused party will have less incentive to frustrate the government policy by attempting to perform.

The second class of excuse Williston described as "impossibility due to fortuitous destruction or change in character of something

"you could have made provision in advance for such sudden events and excluded such liability by express covenant" in suit against lessee for failure to return buildings in a condition as good as they had been when leased; lessee's defense was that the damage had been caused by a "great wind"). *See also* *Paradine v. Jane*, Aleyn 26, 82 Eng. Rep. 897 (K.B. 1647) (when a lessee asserted that he need not pay rent for time he had been dispossessed by Royalist forces during English Civil War, court responded, "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract").

⁴⁵ 6 S. WILLISTON & G. THOMPSON, *supra* note 43, § 1935, at 5419.

⁴⁶ *Id.* *See also* 2 S. WILLISTON, *THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT* § 661-661b. (rev. ed. 1948) [hereinafter *LAW GOVERNING SALES*]. Williston's other class of excuse was impossibility due to death or illness of one who, by the terms of the contract, was to do an act requiring his personal performance, and it will not be considered further in this Article. *See generally* 18 S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* §§ 1940-1946 (3d ed. 1978).

⁴⁷ *See generally* 18 S. WILLISTON, *supra* note 46, §§ 1938-1939; 6 A. CORBIN, *supra* note 12, §§ 1320-1333; *RESTATEMENT (SECOND) OF CONTRACTS* § 264 (1981).

⁴⁸ *See, e.g.*, 18 S. WILLISTON, *supra* note 46, 35 n.1.

to which the contract related, or which by the terms of the contract was made a necessary means of performance.”⁴⁹ This class of excuse appears to cover situations in which the contract expressly requires a particular thing or means of performance and that thing or means becomes unavailable. Williston included three categories of cases within this class of excuse: (1) cases in which the goods sold are destroyed or materially damaged, (2) cases in which a specific thing required for performance (other than the goods sold) becomes unavailable, and (3) cases where there has been a change in intangibles necessary to performance.

The first category comprised cases in which specific goods sold were destroyed or materially damaged after the making of the contract.⁵⁰ This category was codified by the Uniform Sales Act.⁵¹ In this category Williston also included future crops. If a contract for crops to be grown stipulated the land on which the crops were to be raised, and that crop failed totally or partially, the seller was excused from full performance.⁵² Williston also included the rare circumstance in which no particular goods were named in the contract, but all goods of the general kind contracted for were destroyed, so that no goods fitting the contract description continued in existence.⁵³

⁴⁹ 6 S. WILLISTON & G. THOMPSON, *supra* note 43, § 1935, at 5419.

⁵⁰ *Id.* §§ 1946-1947.

⁵¹ See UNIF. SALES ACT § 8, 1 U.L.A. 156 (1950) (withdrawn). This section was derived from section 7 of the English Sales of Goods Act of 1893. See *id.*, Commissioner's Note. The English Act was in turn based upon English case law, primarily Taylor v. Caldwell, 3 B. & S. 826, 122 Eng. Rep. 309 (Q.B. 1863), and the authorities cited in that case by Justice Blackburn. The excuse had also been accepted by American case law before the promulgation of the Uniform Sales Act. See, e.g., Dexter v. Norton, 47 N.Y. 62 (1871). See also J. BENJAMIN TREATISE, *supra* note 10, at 561 (American Notes); F. TIFFANY, HAND-BOOK OF THE LAW OF SALES 158-61 (1892).

The Uniform Sales Act was approved in 1906, and it had been drafted by Professor Samuel Williston under the supervision of the Commissioners on Uniform State Laws, which in turn operated under the auspices of the American Bar Association. See L. VOLD, HANDBOOK OF THE LAW OF SALES 5 n.3 (1931). It was eventually enacted in 34 of the 48 states as well as Alaska, Hawaii, and the District of Columbia. See UNIF. SALES ACT, 1 U.L.A. XV (1950) (Table III - Table of States Wherein Act has Been Adopted).

⁵² 6 S. WILLISTON & G. THOMPSON, *supra* note 43, § 1949; 6 A. CORBIN, *supra* note 12, § 1339, at 396; RESTATEMENT (SECOND) OF CONTRACTS § 263 (1981). The rule has roots in English case law. See Howell v. Coupland, 1 Q.B. Div. 258 (C.A. 1876).

⁵³ 6 S. WILLISTON & G. THOMPSON, *supra* note 43, § 1950. Thus, for example,

The second category in this class covered circumstances in which a specific thing required for performance (other than the goods sold) was fortuitously destroyed or unavailable.⁵⁴ In this category Williston included cases in which the contract specified a source from which the goods sold were to be obtained, such as a particular factory or oil well.⁵⁵ If that source were destroyed, or otherwise became unavailable, the seller's obligation to deliver was excused.⁵⁶

The third category in this class Williston described as "change in intangibles essential to performance."⁵⁷ Williston's point seems to be that if means necessary to performance, other than a tangible specific thing, ceased to exist, there was an excuse.⁵⁸ The great majority⁵⁹ of the cases he cited to support this category

if there were a contract for a quantity of "Montana Upland Hay" without further specification of source of supply, and there were a total failure of the crop of that kind of hay, the seller would be excused. *See Browne v. United States*, 30 Ct. Cl. 124 (1895).

⁵⁴ 6 S. WILLISTON & G. THOMPSON, *supra* note 43, § 1948. This category also has English antecedents. *See, e.g., Appleby v. Meyers*, 2 L.R.-C.P. 650 (Ex. Ch. 1867) (sale of machinery to be installed by seller in buyer's building which was later destroyed by fire; buyer excused).

⁵⁵ Apparently the various categories within this class of excuse were not mutually exclusive, for the cases of failure of crops to be grown on specified land would seem to fit this category as well as the first. In fact, Williston cited these future crop cases at various points to support all three categories. *See infra* note 59.

⁵⁶ 6 S. WILLISTON & G. THOMPSON, *supra* note 43, § 1948 n.3 (destruction of specified factory). *See also North American Oil Co. v. Globe Pipe Line Co.*, 6 F.2d 564 (8th Cir. 1925) (specified oil well depleted).

⁵⁷ 6 S. WILLISTON & G. THOMPSON, *supra* note 43, § 1951. *See also* RESTATEMENT OF CONTRACTS § 461 (1932) ("Non-Existence of Essential Facts Other than Specific Things or Persons").

⁵⁸ RESTATEMENT OF CONTRACTS § 461 comment a (1932).

⁵⁹ Aside from governmental interference, Williston cited several other types of cases. For example, he cited cases in which the sole means of transportation became unavailable. *See, e.g., Prescott & Co. v. Powles*, 113 Wash. 177, 193 P. 680 (1920); *Vancouver Milling & Grain Co. v. C.C. Ranch Co.*, 1 D.L.R. 185 (Can. 1924). These cases would seem readily includible within the second category. He also cited *Squillante v. California Lands*, 5 Cal. App. 2d 89, 42 P.2d 81 (1935), a case where the goods sold were crops to be grown on specified lands. It is not clear why Williston cited *Squillante* in this section of his treatise, since he had already classified cases of crops to be grown under the first category, and had also cited this case in that section. *See* 6 S. WILLISTON & G. THOMPSON, *supra* note 43, § 1949 n.3. Apparently Williston's view was that the crop cases could be explained either on the ground that a specific thing necessary for performance (the crops) did not come

involved government interference with the means of performance. Two kinds of government interference predominated: domestic government interference other than a declaration that the performance was illegal,⁶⁰ and foreign government interference.⁶¹ The former kinds of cases Williston already had included within his first class of excuse, change of domestic law,⁶² so, for the most part, only cases of foreign government intervention are unique to this third category of the second class of excuse.

into existence, or upon the ground that essential facts necessary for performance (the weather conditions) changed.

Finally, Williston seems to have included labor strikes within this category of excuse when they removed necessary means of performance. *See* 6 S. WILLISTON & G. THOMPSON, *supra* note 43, § 1951A (placed after the section which discussed change in intangible essentials to performance). *See also* RESTATEMENT OF CONTRACTS § 461 illus. 7 (1932) (strike prevents performance). He stated that the courts have not been entirely consistent in their treatment of strikes, 6 S. WILLISTON & G. THOMPSON, *supra* note 43, § 1951A n.8. Yet in fact there has been a good deal of consistency. Virtually all of the cases which excuse for strikes concern contracts of carriage or charter-parties, *id.*, nn.9-10, while sellers of goods were consistently denied excuse for strikes, unless they protected themselves with a strike clause. *See* Samuel H. Cottrell & Son v. Smokeless Fuel Co., 148 F. 594 (4th Cir. 1906); Oliver Elect. Mfg. Co. v. I.O. Teigen Constr. Co., 177 F. Supp. 572 (D. Minn. 1959); S.A. Ghunheim & Co. v. S.W. Shipping Corp., 124 N.Y.S.2d 303 (Sup. Ct. 1953); DeGrasse Paper Co. v. N.N.Y. Coal Co., 190 N.Y. 227, 179 N.Y.S. 788 (1919); Rudolph Saenger Co. v. Grant Silk Mfg., 172 N.Y.S. 667 (Sup. Ct. 1918); Puget Sound Iron & Steel Works v. Clemmons, 72 Wash. 36, 72 P. 465 (1903); RESTATEMENT OF CONTRACTS 461 illus. 7 (1932). *But see* Barnum v. Williams, 115 A.D. 694, 102 N.Y.S. 874 (1906), *aff'd mem.*, 190 N.Y. 539, 83 N.E. 1122 (1907).

⁶⁰ Examples include requisition of a chartered ship, *see* The Claversk, 264 F. 276 (2d Cir. 1920), and government embargo preventing timely departure of a ship, *see* Allanwilde Transp. Corp. v. Vacuum Oil Co., 248 U.S. 377 (1919). There is some overlap between this category and Williston's first class of excuse, domestic supervening illegality or other domestic governmental interference. In his treatise, Williston cites some of the same cases in the sections covering both these classes. *See* 6 S. WILLISTON & G. THOMPSON, *supra* note 43, §§ 1938, 1951. *See also* RESTATEMENT OF CONTRACTS § 458 illus. 1 (1932) (covenant not to build on particular land; land taken by eminent domain for purpose of building thereon).

⁶¹ 6 S. WILLISTON & G. THOMPSON, *supra* note 43, § 1938, at 5430 n.15 (referring to section 1951 as a grounds for excuse where foreign government prevents performance). *See also* RESTATEMENT OF CONTRACTS § 458 comment b (1932) (referring to section 461 as grounds for excuse where foreign government prevents performance). At the time Williston wrote, there was a substantial body of law denying excuse for foreign government inference. 6 S. WILLISTON & G. THOMPSON, *supra* note 43, § 1938, at 5429 n.12.

⁶² *See supra* notes 47-48 and accompanying text (discussing change of domestic law).

Williston's third class of excuse covered the failure of the means of performance contemplated by the parties. It differed from the second class of excuse in that, here, the express terms of the contract did not stipulate a specific means of performance. Rather, the parties tacitly assumed that a particular means of performance would be used. For example, if the parties had contracted for a quantity of lumber, and had tacitly assumed that the lumber would come from a specific tract of land, the seller would be excused if the wood on that tract were destroyed by fire, even if the parties did not stipulate to an exclusive source of supply in the contract.⁶³ Williston acknowledged that this third class of excuse was not universally recognized,⁶⁴ though he opined that the law was tending in the direction of its recognition.⁶⁵

Thus, to recapitulate, pre-Code sales law recognized four major grounds for excusing the seller for impossibility: (1) contractual excuse clause; (2) change in domestic law rendering performance illegal or impossible; (3) destruction or unavailability of the goods, or failure of a source of supply or other means of performance made exclusive by the express terms of the contract; and (4) failure of a source of supply or other means of performance contemplated as exclusive by the parties but not made exclusive by the express terms of the contract.

2. *Pre-Code Sales Case Law.* In order to assess the accuracy of this description of pre-Code sales law, one of the research tasks undertaken in the preparation of this Article was the collection and organization of pre-Code sales cases in which the seller sought excuse. This research unearthed over 200 cases which have been arranged in Table I, at the end of this Article.⁶⁶ Despite the mass of case law represented in Table I, the research should not be taken to have been exhaustive.⁶⁷ Two decisions were made to keep

⁶³ See *International Paper Co. v. Rockefeller*, 161 A.D. 180, 146 N.Y.S. 371 (1914) (cited and discussed in U.C.C. § 2-615, Official Comment 5). See also 6 S. WILLISTON & G. THOMPSON, *supra* note 43, § 1952 nn.2-5 (other examples of this excuse).

⁶⁴ 6 S. WILLISTON & G. THOMPSON, *supra* note 43, § 1952 nn. 6-7; *id.* § 1935, at 5418-19 n.2.

⁶⁵ *Id.* § 1952 n.8; *id.* § 1935, at 5418.

⁶⁶ The Table also includes cases decided under the U.C.C. for purposes of comparison. These case names are printed in capital letters.

⁶⁷ This refers only to the pre-Code research. An attempt was made to be exhaustive in locating all the relevant U.C.C. cases.

the number of cases manageable. First, it was decided to limit the cases to situations in which the seller, and not the buyer, sought excuse.⁶⁸ Second, the research was designed to elicit a representative, though not completely comprehensive, sampling of cases.⁶⁹

The results of this pre-Code case research show an apparent uniform approach to excuse in the sales impossibility cases. Of the fifty-eight pre-Code cases in Table I granting excuse, fifty-four do so under the classes of excuse described by Williston. Twenty-six of these cases excused the seller because there was a contractual excuse clause.⁷⁰ Twenty-six cases excused the seller upon the ground that a contracted-for or contemplated specific thing or means necessary for the seller's performance had become unavailable.⁷¹ Four cases excused because the seller's performance had been prevented by governmental action.⁷² Only a handful of cases

⁶⁸ See *supra* note 2.

⁶⁹ This was done by consulting the American Digest System, which is said to be the most comprehensive of the digests. It includes all standard law reports from appellate courts rendering written decisions from 1658 to date, and selective opinions from certain courts of first instance, including federal district courts and some lower state courts. See M. PRICE, H. BITNER & S. BYSIEWICZ, *EFFECTIVE LEGAL RESEARCH* 193-94 (4th ed. 1979). Digests from the present back through the Century Digest were consulted, so cases as far back as 1658 were covered.

Each case digested under Sales, Keynumber 172 (Excuse for default or delay in delivery in general) was read. The research design initially also included Sales, Keynumber 85(2) (Conditions and provisos - prevention of performance), containing cases in which there was a contractual clause excusing the seller, and Sales, Keynumber 150(2) (Obligation to deliver in general - loss or injury to goods). Keynumbers 85(2) and 150(2) were later excluded from the research design because Keynumber 172 proved to have a fairly representative number of cases containing excuse clauses or allegations that goods had been lost or destroyed. In the Century Digest, which covers cases decided between 1658 and 1896, the numbering system is different, and sections 425-429 were consulted.

Each case involving an event which allegedly interfered with the seller's performance was categorized and organized in Table I. Not all of the cases in which government wartime activity interfered with the seller's performance were included. They seem to be *sui juris*, and thus little was to be gained from including them wholesale, but a sampling of them was included so that the reader would be aware of their existence. For a comprehensive collection of war cases, see Annotation, *Legal Questions Arising Out of War Conditions*, 137 A.L.R. 1199 (1942).

⁷⁰ See Table I.

⁷¹ See Table I. This category combines the second and third classes of excuse described at *supra* notes 49-65 and accompanying text.

⁷² See Table I. The figure is small compared to the other categories of excuse

excused on traditional theories other than those described by Williston: one granted excuse on the ground of mistake,⁷³ and two excused because the seller had fully performed under the contract as properly construed.⁷⁴ One case excused on an unusual theory, but even that case is consistent in result with one of the traditional classes of excuse.⁷⁵

because only a few of the war cases have been included in the Table. See *supra* note 69. The total number of excuses is more than the number of cases granting excuse because a few cases employed several theories to excuse.

⁷³ *McCaull-Webster Elevator Co. v. Steele*, 43 S.D. 485, 180 N.W. 782 (1921) (sale of corn in seller's possession which both parties mistakenly believed to be of a stipulated grade).

⁷⁴ See *White v. Kearney*, 9 Rob. 495 (La. 1845); *Miller & Sons Co. v. E.M. Sergeant Co.*, 191 A.D. 814, 182 N.Y.S. 382 (1920). In *Miller*, there was a one year contract for monthly installments of soda ash. The seller could not deliver the initial installment because of a railroad embargo. He delivered later installments, and the buyer sued for nondelivery of the initial installment. The court held that the seller was not liable. It reasoned that because the contract was silent as to place of delivery, this was presumed to be seller's place of business, and so the buyer had the obligation to supply transportation. In *White*, lime was to be shipped to New Orleans (probably from Connecticut), but the departure of the ship was delayed by winds for five days and the buyer refused the goods. The seller sued for the price, and the court held the buyer liable by finding that the seller had fully performed. The real reason for the buyer's dissatisfaction with the delivery appears to have been the fall in market price of the goods.

⁷⁵ See *Losecco v. Gregory*, 108 La. 648, 32 So. 985 (1901). Here there was a forward contract for all the oranges that the seller's trees may produce in the years 1899 and 1900. The buyer, an orange merchant, agreed to pay \$8000 for the oranges, half at the time of contracting, and the other half in December 1900. The contract stated that "purchaser assumes all risks." During the ensuing winter, an unprecedented freeze destroyed the seller's orange trees, and he delivered no oranges to the buyer for either year. The buyer sued for the return of his down payment, and the seller counterclaimed for the rest of the price.

The Supreme Court of Louisiana initially affirmed a judgment for the buyer by a three to two vote, essentially upon the traditional excuse theory that destruction of the particular contracted-for crop ended the contract. The court limited the "purchaser assumes all risks" clause to usual, known or foreseen risks, and held that the destruction of the trees by frost was unprecedented and therefore not within the clause. However, on rehearing, the court, in effect, divided the loss between the parties. Three of the five justices agreed that the seller did not have to return the buyer's down payment, and three agreed that the buyer did not have to pay the seller the other half of the contract price. However, only two of the five justices endorsed the loss splitting result.

Finally, on the second rehearing of the case, three justices held that the buyer should bear the entire loss. They so concluded because the contract language and the circumstances surrounding the making of the contract indicated that the intent

Yet the uniformity of the pre-Code impossibility sales cases is more apparent than real. The cases agree that only a few kinds of interference will excuse nonperformance,⁷⁶ but the courts have not always agreed upon the application of those excuses. When the cases are grouped by the type of interfering event, as has been done in Table I, it is evident that there are a number of recurring situations in which courts reach different results on similar fact patterns.

Crop failure is one such area. Assume that the seller has agreed to sell a specified quantity of crops, and there is a subsequent failure of the source of the crops allegedly contemplated by the parties. The written contract says nothing about the source of the crops. Several cases permit the admission of parol evidence of the parties' contemplated source,⁷⁷ but other cases do

of the parties was that the buyer acquire a mere "hope" that there would be crops. On this theory, which was supported by civil law authorities, failure of the crops did not discharge the buyer's obligation to pay.

The ultimate conclusion, that the parties intended the buyer to acquire by the contract only a mere "hope" that there would be crops, seems but another way of saying that the parties allocated the risk of crop failure to the buyer. As such it is consistent with traditional common law excuse theory.

The *Losecco* case is a wonderful illustration of the exquisite difficulty of deciding evenly balanced impossibility cases, and sheds some light upon how the administrative problems of obtaining a majority vote on a case can affect the grounds of decision. On the second rehearing, one justice viewed the contract as one for a hope, and would put the entire loss on the buyer. Two justices viewed the contract as one for future crops, and would put the entire loss on the seller. The remaining two justices were of the view that the buyer's risk assumption clause could be interpreted only to cover usual, known or foreseen risks, and would have preferred to split the difference, but they could not persuade a majority of the court to adopt this approach. Given the choice between placing the entire loss on either the buyer or the seller, they chose to place it on the buyer.

⁷⁶ See *supra* notes 70-75 and accompanying text.

⁷⁷ See, e.g., *Barkemeyer Grain & Seed Co. v. Hannant*, 66 Mont. 120, 213 P. 208 (1923); *Pearce-Young-Angel Co. v. Charles R. Allen, Inc.*, 213 S.C. 578, 50 S.E.2d 698 (1948); *Snipes Mountain Co. v. Benz Bros.*, 162 Wash. 334, 298 P. 714 (1931). See also *RESTATEMENT OF CONTRACTS* § 460 comment d (1932). There are a number of cases which admit parol evidence of the source contemplated by the parties where the contract ambiguously refers to some source. See, e.g., *Ontario Deciduous Fruit Growers' Ass'n v. Cutting Fruit Packing Co.*, 134 Cal. 21, 66 P. 28 (1901); *St. Joseph Hay & Feed Co. v. Brewster*, 195 S.W. 71 (Kan. City Ct. App. 1917); *Ryley-Wilson Grocer Co. v. Seymour Canning Co.*, 129 Mo. App. 325, 108 S.W. 628 (1908); *McCaull-Webster Elevator Co. v. Steele*, 43 S.D. 485, 180 N.W. 782 (1921). There are also a number of cases in which it is clear that parol

not.⁷⁸ These divergent results may reflect uncertainty about the reasons for the rule that failure of a contemplated source of supply should, without more, excuse the seller.⁷⁹ There is also some evidence that the differing results may reflect the courts' views of the equities of each case.⁸⁰

There is a similar diversity of result where the seller's performance is prevented by the destruction of his manufacturing plant. Where the buyer knew that the seller intended to manufacture the goods at the plant subsequently destroyed, two cases grant excuse⁸¹

evidence was admitted, but apparently the admissibility of the evidence was not challenged and so the courts did not discuss it. *See, e.g.*, *Haley v. Van Lierop*, 64 F. Supp. 114 (W.D. Mich.), *aff'd mem.*, 153 F.2d 212 (6th Cir. 1945); *C.G. Davis & Co. v. Bishop*, 139 Ark. 273, 213 S.W. 744 (1919); *F.C. Tomlinson v. Wander Seed & Bulb Co.*, 177 Cal. App. 2d 462, 2 Cal. Rptr. 310 (1960); *Squillante v. California Lands, Inc.*, 5 Cal App. 2d 89, 42 P.2d 81 (1935); *Rice & Co. v. Weber*, 48 Ill. App. 573 (1892); *Matousek v. Galligan*, 104 Neb. 731, 178 N.W. 510 (1920).

⁷⁸ *See, e.g.*, *Ross Seed Co. v. Sturgis Implement & Hardware Co.*, 297 Ky. 776, 181 S.W.2d 426 (1944); *Clay Grocery Co. v. Kenyon Canning Corp.*, 198 Minn. 533, 270 N.W. 590 (1936); *Davis v. Davis*, 266 S.W. 797 (Tex. Civ. App. 1924); *Newell v. New Holstein Canning Co.*, 119 Wis. 635, 97 N.W. 487 (1903). *Cf. A.L. Jones & Co. v. Cochran*, 33 Okl. 431, 126 P. 716 (1912) (here the parol evidence may only have been that the seller was a grower who did not purchase on the open market and not that the buyer knew this); *United Sales Co. v. Curtis Peanut Co.*, 302 S.W.2d 763 (Tex. Civ. App. 1957). *See also Thomson & Stacy Co. v. Evans, Coleman & Evans, Ltd.*, 100 Wash. 277, 170 P. 578 (1918) (denying the admission of parol evidence regarding the parties' contemplated source in a contract for the sale of grain sacks); *McDonald v. Gardner*, 56 Wis. 35, 13 N.W. 689 (1882) (denying admission of parol evidence regarding parties' contemplated source in contract for sale of lumber).

⁷⁹ *See supra* notes 63-65 and accompanying text.

⁸⁰ Thus, for example, in *Davis v. Davis*, 266 S.W. 797 (Tex. Civ. App. 1924), the seller/farmer contracted to sell 25 bales of cotton to the buyer. He planted between 45 and 55 acres of cotton and then left the farm to go to Boston because of family illness. He left an intelligent but inexperienced man in charge. For unspecified reasons the farm produced only six bales, which the seller delivered to the buyer. The buyer sued for damages and got judgment.

In affirming the judgment, the Texas Court of Civil Appeals agreed with the trial judge who had declined to admit parol evidence to the effect that the seller and buyer both knew that the sale was of cotton raised on the seller's farm. It is apparent from the appellate court's opinion that it did not desire to excuse a farmer where the crop failure was not caused by climate or crop disease, but because the crop might not have been properly tended.

⁸¹ *Western Hardware & Mfg. Co. v. Bancroft-Charnley Steel Co.*, 116 F. 176 (7th Cir. 1902); *Leavenworth State Bank v. Cashmere Apple Co.*, 118 Wash. 356, 204 P. 5 (1922). A U.C.C. case, *Goddard v. Ishikawajima-Harima Heavy Indus. Co.*, 29 A.D.2d 754, 287 N.Y.S.2d 901, *aff'd mem.*, 24 N.Y.2d 842, 300 N.Y.S.2d

and two do not.⁸² In these cases, the courts may have been influenced by factors other than what the parties had contemplated as the source of the goods, such as ready means of dividing the loss between the parties,⁸³ the seller's delay prior to destruction of the plant,⁸⁴ or the seller's knowledge that the buyer would rely to his

851 (1968), is probably also a case in which the parties contemplated that the seller would manufacture the goods at the factory that was subsequently destroyed. The facts in the opinion do not so state, but the court, in holding the seller excused by destruction of its factory, cites Restatement of Contracts § 460 and cases which state that if the existence of a specific thing is, in the contemplation of the parties, necessary for performance, the duty to perform is excused if the contemplated specific thing is unavailable. From the court's citation of these authorities, it may be inferred that the seller's factory was contemplated by the parties as the source of the goods in *Goddard*.

The solicitude of the courts for sellers apparently does not extend beyond plant destruction. If there are machinery problems, the seller will be excused only if there is a relevant excuse clause in the contract, *see Greco Canning Co. v. P. Pastene & Co.*, 277 F. 877 (9th Cir. 1922) (seller of tomato paste excused by contract clause), *rev'g* 268 F. 168 (N.D. Cal. 1920); *Maxwell v. Zenith Limestone Co.*, 142 Okla. 286, 286 P. 879 (1930) (seller of crushed stone excused by contract clause), but not if there is no such clause, *see Porto Rico Sugar Co. v. Lorenzo*, 222 U.S. 481 (1912); *Summers v. Hibbard, Spencer, Bartlett & Co.*, 153 Ill. 102, 38 N.E. 899 (1894). *See also Chemetron Corp. v. McLouth Steel Corp.*, 381 F. Supp. 245 (N.D. Ill. 1974) (a U.C.C. case denying excuse), *aff'd*, 522 F.2d 469 (7th Cir. 1975). Nor will a power failure at the seller's plant excuse the seller. *See Port Aux Quilles Lumber Co. v. Meigs Pulp Wood Co.*, 204 A.D. 541, 198 N.Y.S. 563 (1923); *Kingsville Cotton Oil Co. v. Dallas Waste Mills*, 210 S.W. 832 (Tex. Civ. App. 1919).

⁸² *Hottellet v. American Corn Milling Co.*, 160 Ill. App. 58 (1911); *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N.Y. 487 (1875).

⁸³ In *Leavenworth State Bank v. Cashmere Apple Co.*, 118 Wash. 356, 204 P. 5 (1922), the seller of apple box shooks had but one mill, which the buyer knew. The contract said that the boxes were to be manufactured. The court concluded that the destruction of the seller's mill excused the seller from the contract. Here the court may have been dividing the loss, for it held the seller liable on a separate contract for existing boxes.

⁸⁴ In *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N.Y. 487 (1875) even though the contract said that the iron caps were to be manufactured and delivered at the seller's mill, the destruction of that mill did not excuse the seller. The court rested its decision upon the ground that it did not appear, nor had it been found as a fact, that the mill destruction had caused the seller's nonperformance. The seller had contracted at the end of December for delivery the following April 1. The mill burned on March 10, at which time the seller apparently had not manufactured any of the 100 tons of steel caps. It is not clear from the opinion whether it would have been possible to perform in the time remaining had the mill not been destroyed, but according to the court, "there was ample time, prior to that event, to have manufactured the caps. A party cannot postpone the performance of such a

detriment on the contract.⁸⁵

The pressure of felt equities may also explain the divergent results in cases construing language in the contract, often the language of an excuse clause.⁸⁶ The typical excuse clause contains an enumeration of specific excusing events followed by a more general reference to "any other events beyond the seller's control."⁸⁷ Sometimes courts will honor the general reference, but often they will limit the clause to those events specifically enumerated. Thus, railroad car shortages have been held to be covered by the general clause,⁸⁸ but not shortages of water

contract to the last moment and then interpose an accident to excuse it. The defendant took the responsibility of the delay." *Id.* at 491. The buyer's attorney was fortunate to get this ruling, since he seems not to have argued that it was the seller's delay, rather than the destruction of the mill, that caused the nonperformance. *Id.* at 490. The court may also have been influenced by the fact that the seller knew at the time it contracted that the buyer needed the caps to fulfill another contract.

⁸⁵ In none of the cases granting excuse for destruction of the seller's factory was there evidence that the seller knew at the time of contracting of the buyer's resale contract. On the other hand, in both cases denying excuse where the buyer knew that the goods were to be manufactured at the seller's mill, the seller knew of the buyer's resale contract. *See Hottellet v. American Corn Milling Co.*, 160 Ill. App. 58 (1911); *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N.Y. 487 (1875). *See also Jesse R. McNames, Inc. v. Henry C. Bergmann, Inc.*, 175 Cal. App. 2d 263, 346 P.2d 57 (1959). In *McNames*, there was a contract for a milk tank that the buyer knew the seller was to acquire on trade-in. The buyer bought a truck and had it modified to accommodate the tank, but the owner of the tank breached its contract with the seller by selling the tank to another. The buyer sued the seller, and the court found the seller not excused. *McNames* would seem to have been a contract for goods from a specified source which failed through no fault of the seller, and ordinarily the seller would be excused. Here the court did not excuse the seller, perhaps because the buyer had incurred substantial expenses in reliance on the seller's performance.

⁸⁶ The cases are collected in Annotation, *Express Provisions in Contract for Sale, or for Supply of a Commodity, for Relief From the Obligation in Certain Event*, 51 A.L.R. 990 (1927), and Annotation, *supra* note 69, at 1247.

⁸⁷ *See, e.g., Greco Canning Co. v. P. Pastene & Co.*, 277 F. 877, 878 (9th Cir. 1922) (excuse clause which read: "If seller should be unable to perform all its obligations under this contract by reason of a strike, fire, or other circumstances, beyond its control, such obligations shall at once terminate and cease.")

⁸⁸ *See, e.g., Bradley Lumber & Mfg. Co. v. Cutler*, 253 Mass. 37, 148 N.E. 101 (1925); *Consolidated Coal Co. v. Mexico Fire Brick Co.*, 66 Mo. App. 296, 297 (1896); *Consolidated Coal Co. of St. Louis v. Jones & Adams Co.*, 232 Ill. 326, 83 N.E. 851 (1908); *Hatfield v. Thomas Iron Co.*, 208 Pa. 478, 57 A. 950 (1904). *See also Jessup & Moore Paper Co. v. Piper*, 133 F. 108 (E.D. Pa. 1902) (jury

transport.⁸⁹ Breakdowns at the seller's factory have been found covered by the general clause,⁹⁰ but not destruction of the seller's mill.⁹¹ Weather conditions which interfere with the seller's performance sometimes are held to be covered by the general clause,⁹² and sometimes not.⁹³ War conditions which cut off the seller's source of supply sometimes are covered,⁹⁴ and sometimes not.⁹⁵ There is little explanation for these divergent results, other than individual case equities.

Cases construing the specific events enumerated in the escape clause also manifest diverse results. Consider, for example, a clause covering "strikes."⁹⁶ Sometimes that term is held to cover strikes

charge that coal car shortage covered); *Canadian Steel Foundries v. Thomas Furnace Co.*, 186 Wis. 557, 203 N.W. 355 (1925) (railroad embargo on shipments covered). Car shortage cases are collected in Annotation, *Inability to Obtain Cars for Shipping as Excuse for Noncompliance with Contract for Sale*, 14 B.R.C. 199 (1927).

⁸⁹ See, e.g., *Haigh Hall S.S. Co. v. Andersen*, 246 Mass. 34, 140 N.E. 302 (1923) (lengthy excuse clause included "shortage of railway trucks" and "other hindrances, of any kind whatsoever, beyond the control of [seller]"; shortage of water vessels to transport coal held not covered).

⁹⁰ See, e.g., *Greco Canning Co. v. P. Pastene & Co.*, 277 F. 877 (9th Cir. 1922) (difficulties with new machinery to produce tomato paste covered); *Obear-Nester Glass Co. v. Mobile Drug Co.*, 205 Ala. 214, 87 So. 159 (1921) (leak in essential part of manufacturing plant for glass containers covered).

⁹¹ See, e.g., *C.R. Garner & Co. v. Beaumont Cotton Oil Mill Co.*, 212 S.W. 690 (Tex. Civ. App. 1919) (destruction of seller's mill by fire not covered).

⁹² See, e.g., *J.N. Pharr & Sons v. C.D. Kenny Co.*, 272 F. 37 (5th Cir. 1921) (wet weather delaying maturation of sugar cane covered); *Durden-Coleman Lumber Co. v. William H. Wood Lumber Co.*, 221 Mass. 564, 109 N.E. 648 (1915) (stormy weather preventing prompt teaming of logs to lumber mills covered); *Tanner v. Childers*, 180 Utah 455, 160 P.2d 965 (1945) (unfavorable weather conditions which retarded turkey egg production covered).

⁹³ See, e.g., *Scullin Steel Co. v. Mississippi Valley Iron Co.*, 308 Mo. 453, 273 S.W. 95 (1925) (extremely cold weather which delayed remodeling of seller's pig iron plant not covered); *United Sales Co. v. Curtis Peanut Co.*, 302 S.W.2d 763 (Tex. Civ. App. 1957) (drought which reduced peanut crop not covered).

⁹⁴ See, e.g., *B.P. Ducas Co. v. Bayer Co.*, 163 N.Y.S. 32 (Sup. Ct. 1916) (European embargo of dyestuffs during First World War covered).

⁹⁵ See, e.g., *Krulewitch v. National Importing & Trading Co.*, 195 A.D. 544, 186 N.Y.S. 838 (1921) (foreign government embargo interrupting supply of tapioca flour not covered); *Thaddeus Davids Co. v. Hoffman-La Roche Chem. Works*, 178 A.D. 855, 166 N.Y.S. 179 (1917) (embargo by European governments which cut off supply of carbolic acid crystals during First World War not covered).

⁹⁶ This event has been chosen because it has generated a significant number of cases. The cases are collected in Annotation, *Construction and Effect of "Strike*

by third parties,⁹⁷ and sometimes it is not.⁹⁸ Sometimes the effect of a covered strike is to terminate the contract, and sometimes the effect is merely to suspend the contract until the strike ceases.⁹⁹

The rule of contract law often applied to interpret an excuse clause, the rule of *ejusdem generis*, is flexible enough to permit a court to construe an excuse clause so as to reach what it believes to be a fair result. According to that rule, a general phrase which follows a list of specific things will be interpreted as including only things that are like the specific things.¹⁰⁰ The application of the rule usually leads to a restrictive interpretation,¹⁰¹ but this is not a necessary corollary of the rule. The breadth of the rule's application depends upon the breadth with which one defines the common ground of the specific enumerated events, and on this point the rule gives no guidance.¹⁰² Some commentators have

Clause" of Contract, 125 A.L.R. 1304 (1940); Annotation, *Construction and Effect of "Strike Clause" of Contract*, 35 A.L.R. 721 (1925); Annotation, *What Amounts to a Strike Within "Strike Clause" of a Bond or Other Contract*, 11 A.L.R. 1004 (1921). See also Note, *Contracts: Clauses Excusing Performance in Case of Strikes or Causes Beyond Control*, 6 CORNELL L.Q. 189 (1920); Note, *Clauses in Contracts Excusing Default in Performance*, 20 COLUM. L. REV. 776 (1920).

⁹⁷ See, e.g., *International Paper Co. v. Beacon Oil Co.*, 290 F. 45 (1st Cir. 1923) (clause covered strike at mill of buyer's chief customer); *Metropolitan Coal Co. v. Billings*, 202 Mass. 457, 89 N.E. 115 (1909) (clause covered strike at mines from which seller ordinarily purchased coal); *Davis v. Columbia Coal Mining Co.*, 170 Mass. 391, 49 N.E. 629 (1898) (clause covered strike at mines which created scarcity and caused railroad to seize and use coal seller shipped to buyer); *Boehme & Rauch v. Lorimer*, 221 Mich. 372, 191 N.W. 8 (1922) (clause covered labor troubles at mine from which seller agreed to purchase coal).

⁹⁸ See, e.g., *Consolidated Coal Co. of St. Louis v. Jones & Adams Co.*, 232 Ill. 326, 83 N.E. 851 (1908) (clause did not cover general strike of miners causing car shortage which interfered with seller's shipment); *De Grasse Paper Co. v. N.N.Y. Coal Co.*, 190 A.D. 227, 179 N.Y.S. 788 (1919) (clause did not cover strike at mines from which seller obtained coal).

⁹⁹ The cases are collected in Annotation, *Construction and Effect of "Strike Clause" of Contract*, *supra* note 96, at 727-29.

¹⁰⁰ See 3 A. CORBIN, *supra* note 12, § 552, at 204-06; Patterson, *Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 853 (1964).

¹⁰¹ Patterson, *supra* note 100, at 853.

¹⁰² See R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 233-34 (1975). One might, in the absence of any evidence of the parties' intent other than the language of the clause, reason that the general phrase "beyond seller's control" identifies the common element of each of the enumerated specific events. Yet courts often give the rule of *ejusdem generis* a more restrictive interpretation, Patterson, *supra* note 100, at 853, and usually limit the clause to the specific

expressed doubt that rules of interpretation such as *ejusdem generis* play a significant role in deciding cases.¹⁰³

It has been suggested that courts may be influenced by whether the seller is a "dealer" (or "jobber") who buys finished goods for resale, or a "producer" who manufactures or grows the goods he sells.¹⁰⁴ This factor was rarely an explicit ground of decision in the pre-Code case law,¹⁰⁵ and if it has had an implicit influence in some of the cases, that influence is difficult to detect. Of forty-four pre-Code cases in Table I, Part I in which the seller seeking excuse was a producer who was a manufacturer, eleven excuse the seller, and thirty-three do not. Of forty-one pre-Code cases in which the seller seeking excuse was a dealer, nine excuse the seller, and thirty-two do not. Thus, there seems to be no tendency to favor producers who are manufacturers over dealers.

However, where the seller is a producer other than a manufacturer, there does seem to be a tendency to excuse. Of thirty-three

enumerated events. Nothing in the rule as it usually is stated compels this result, which leads one to suspect that the rule has been used as a justification for a result arrived at through means other than the application of the rule.

Perhaps the real reason for these restrictive interpretations is the view that clauses uncertain in scope ought to be construed against the drafter, who is usually the seller seeking excuse. Or maybe courts feel that, generally, supervening events ought not to excuse the seller, and so excuse him only if he clearly has said so. Perhaps the restrictive interpretation merely reflects the court's judgment that the equities of the individual case are against the seller. In any event, just as with the rule granting excuse for a specific or contemplated source, we have a rule without a settled reason which is therefore subject to manipulation to reach a result considered fair by the court.

¹⁰³ E. FARNSWORTH, *CONTRACTS* 496 (1982); R. DICKERSON, *supra* note 102, at 52-53. See also K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 521-35 (1960), which contains a table of rules for statutory interpretation which shows that many of these rules have counter-rules. The "thrust" of the rule of *ejusdem generis* and its "parry" are listed there. See *id.* at 526-27 (no. 22). See also R. DICKERSON, *supra* note 102, at 233.

¹⁰⁴ See, e.g., Speidel, *Excusable Nonperformance in Sales Contracts: Some Thoughts About Risk Management*, 32 S.C.L. REV. 241, 255-57 (1980); Posner & Rosenfeld, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 105-07 (1977); Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 COLUM. L. REV. 335, 351-52 (1924); Note, *The Fetish of Impossibility in the Law of Contracts*, 53 COLUM. L. REV. 94, 101-02 (1953).

¹⁰⁵ There have been a few cases in which it was an explicit ground. See *Squillante v. California Lands, Inc.*, 5 Cal. App. 2d 89, 42 P.2d 81 (1935); *Canadian Indus. Alcohol Co. v. Dunbar Molasses Co.*, 258 N.Y. 194, 179 N.E. 383 (1932); *De Grasse Paper Co. v. N.N.Y. Coal Co.*, 190 A.D. 227, 179 N.Y.S. 788 (1919).

such cases in Table I, Part I, twenty excuse the seller, and only thirteen do not. Twenty-two of the thirty-three cases concern sales of crops by farmers and a subsequent crop failure, usually because of adverse weather. Of these twenty-two cases, thirteen excuse the farmer, all but one on the theory that the parties contemplated that the farmer was selling his own crop. Though the "failure of the contemplated specific source" excuse does not explicitly rest solely upon the seller's position as a producer, since it also requires that the buyer know the seller is selling what he produces, in practice it often serves to protect the producer of crops. This is true because it is not uncommon for the buyer to visit the seller's farm to inspect the premises or the crops at the time the deal is closed.¹⁰⁶

One reason the distinction between producers and dealers does not play a more significant role in the cases is that the distinction between the two often is not clear-cut.¹⁰⁷ If the reason for excusing a producer is that he is less likely than a dealer to be able to cover the goods by purchasing in the market, this rationale is weakened if the producer also regularly buys goods for resale. Dealers sometimes speculate, a circumstance which might justify allocating to the seller a larger share of the risk of interfering events than if the seller were a producer,¹⁰⁸ but many dealers hedge their liability by making fixed-price contracts for the purchase of goods immediately before they contract to sell those goods,¹⁰⁹ and the last thing they desire is to speculate. Thus, the producer/dealer distinction should be used with care, and not without knowing whether the producer is also a dealer, and whether he typically speculates.¹¹⁰

¹⁰⁶ See, e.g., *Squillante v. California Lands, Inc.*, 5 Cal. App. 2d 89, 42 P. 2d 81 (1935); *Barkemeyer Grain & Seed Co. v. Hannant*, 66 Mont. 120, 213 P. 208 (1923); *Snipes Mountain Co. v. Benz Bros.*, 162 Wash. 334, 298 P. 714 (1931).

¹⁰⁷ See *Colley v. Bi-State, Inc.*, 21 Wash. App. 769, 586 P.2d 908 (1978) (seller was a farmer who also bought crops); *Patterson*, *supra* note 104, at 351-52.

¹⁰⁸ See the argument of the seller in *Losecco v. Gregory*, 108 La. 648, 32 So. 985 (1901). This case is discussed at *supra* note 75.

¹⁰⁹ See, e.g., *Ozier v. Haines*, 411 Ill. 160, 103 N.E.2d 485 (1952); *Wickliffe Farms, Inc. v. Owensboro Grain Co.*, 684 S.W.2d 17 (Ky. App. 1984). These cases present examples of grain dealers who resold their purchases immediately at fixed prices.

¹¹⁰ Of eighteen U.C.C. cases in Table I involving sellers who are manufacturers,

In summary, the pre-Code case law displayed an apparent consensus that sellers should be excused for nonperformance caused by supervening events only in limited circumstances, primarily: (1) where an excuse clause covered the event; (2) where the seller's performance had been prevented by government action; or (3) where the goods were to come from some source or by some means either specified in the contract or contemplated by the parties. Yet this apparent agreement on theories of excuse disguised some disagreement about the application of those theories. There was some divergence of opinion about whether parol evidence of a contemplated source was admissible for the purpose of excusing a seller.¹¹¹ There was also disagreement about the appropriate interpretation of the typical excuse clause.¹¹² Even the excuse theories of government action and risk-of-loss-on-the-buyer were not immune to judicial manipulation.¹¹³ Thus, pre-Code courts were not really rigid and uncompromising, but seem to have engaged in an incipient process of risk allocation.

six excuse. Of twenty U.C.C. cases involving sellers who are producers other than manufacturers, five excuse. Of twenty U.C.C. cases concerning sellers who are dealers, seven excuse.

¹¹¹ See *supra* notes 77-78 and accompanying text.

¹¹² See *supra* notes 86-103 and accompanying text.

¹¹³ The rule was established early that risk of loss followed title, see *supra* note 8, and the Uniform Sales Act contained a series of sections concerning when title passed, see UNIF. SALES ACT § 17-19, 22, 1 U.L.A. 309, 373 (1950) (withdrawn), but the case law concerning passing of title was horribly confused. Witness the following passage:

My brother Bacon has taught sales law for 28 years. When he says it isn't too difficult to determine where the court will decide the title is or isn't or is going to be or should be, he is speaking a truth within limits for people who have taught sales law for 28 years. I submit to you, sir, that there are not many of them.

1 N.Y. STATE LAW REVISION COMM'N 1954 REPORT 160-61 (1954) (statement by K. Llewellyn). See also J. WHITE & R. SUMMERS, *supra* note 23, at 213-14.

On the manipulation of the governmental action excuse, compare *McLouth Steel Corp. v. Jewell Coal & Coke Co.*, 570 F.2d 594 (6th Cir.) (early compliance with order of state air pollution agency no excuse), *cert. dismissed*, 439 U.S. 801 (1978), with *International Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879 (10th Cir. 1985) (early compliance with order of state air pollution agency does excuse), *cert. denied*, 495 U.S. 1015 (1986), and *Eastern Air Lines, Inc. v. McDonnell-Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976) (compliance with unofficial governmental requests without requiring issuance of official order can excuse).

II. THE DOCTRINE OF EXCUSE FOR SUPERVENING EVENTS UNDER THE UNIFORM COMMERCIAL CODE

In 1892, the National Conference of Commissioners on Uniform State Laws ("N.C.C.U.S.L.") was founded with the purpose of promoting "uniformity in the law among the several states on subjects where uniformity is desirable and practicable."¹¹⁴ N.C.C.U.S.L. approved a Uniform Sales Act in 1906, but the Act did not fully address the problem of changed circumstances. By 1940,¹¹⁵ N.C.C.U.S.L. was in the process of producing a new Revised Uniform Sales Act which would more fully address changed circumstances and other issues.¹¹⁶ It entrusted the drafting to the "Special Committee on a Revised Sales Act"¹¹⁷ attached to its "Section on Uniform Commercial Acts."¹¹⁸ Professor Karl Llewellyn chaired both bodies and performed the actual drafting.¹¹⁹

¹¹⁴ N.C.C.U.S.L. CONST., art. I, § 1.2, *reprinted in* N.C.C.U.S.L., HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS NINETIETH YEAR 351 (1981) [hereinafter all annual N.C.C.U.S.L. handbooks will be cited as N.C.C.U.S.L. HANDBOOK (year)]. N.C.C.U.S.L. consists of Commissioners who are appointed by the governor or legislature of each state, the District of Columbia, and Puerto Rico. The Conference drafts and recommends various Uniform Laws for states' approval. *See generally* N.C.C.U.S.L., *Origin, Nature and Scope of the National Conference of Commissioners on Uniform State Laws*, in N.C.C.U.S.L. HANDBOOK (1981), *supra*, at 349-50.

¹¹⁵ *See* Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 473-75, 477-92 (1987) (history of sales act drafting from 1906 up to and including Llewellyn's "Draft of a Uniform Sales Act, 1940").

¹¹⁶ *Id.*

¹¹⁷ N.C.C.U.S.L. HANDBOOK (1940), *supra* note 114, at 70.

¹¹⁸ The Section on Uniform Commercial Acts was a standing section of N.C.C.U.S.L. *See* N.C.C.U.S.L. CONST., art II, § 2, *reprinted in* N.C.C.U.S.L. HANDBOOK (1938), *supra* note 114, at 432-33.

¹¹⁹ Llewellyn became chairman of the Section on Uniform Commercial Acts in 1937, *see* Letter from K. Llewellyn to W. Schnader (Oct. 25, 1937), in THE KARL LLEWELLYN PAPERS, file J-XXV(1) (located at the University of Chicago Law Library) [hereinafter THE LLEWELLYN PAPERS]; Letter from W. Schnader to K. Llewellyn (Oct. 27, 1937), in THE LLEWELLYN PAPERS, *supra*, file J-XXV(1); N.C.C.U.S.L. HANDBOOK (1938), *supra* note 114, at 10, and the chairman of the Special Committee on a Revised Sales Act upon its formation on January 8, 1940, *see* N.C.C.U.S.L. HANDBOOK (1940), *supra* note 114, at 70.

THE LLEWELLYN PAPERS, *supra*, are collected in files at the University of Chicago Law Library. The arrangement of the papers is detailed in Ellenwood & Twining,

In the meantime, in 1923, the American Law Institute ("A.L.I.") was founded by a group representing the judiciary, lawyers, and professors, with the goal of improving the law by publishing Restatements of the Law on various topics.¹²⁰ A.L.I. and N.C.C.U.S.L. cooperated on a number of drafting projects, and in May 1942, they agreed to cooperate in the preparation of the Revised Uniform Sales Act and the Uniform Commercial Code.¹²¹ The general cooperation procedure used for the drafting of this Sales Act called for the selection of a Reporter and a joint group of Reporter's Advisers who would produce a draft to be submitted to both A.L.I. and N.C.C.U.S.L. for approval.¹²² Llewellyn was chosen to be the Reporter.¹²³

Drafting and revision of the Sales Act and the rest of the Uniform Commercial Code continued for another nine years, and it was finally approved by both A.L.I. and N.C.C.U.S.L., and promulgated in 1951.¹²⁴ The new Code was first enacted by Pennsylvania in 1953, then by Massachusetts in 1957, by sixteen other states from 1957 to 1962, and by every state except Louisiana before 1967.¹²⁵

The Karl Llewellyn Papers: A Guide to the Collection 1-93 (1970). The University of Pennsylvania Biddle Law Library has 25 microfilm reels of the "J" segment of the papers, which comprise the materials dealing with the Uniform Commercial Code. It is from these reels that copies of documents and citations to THE LLEWELLYN PAPERS have been taken.

¹²⁰ For an explanation of A.L.I., its goals and history, see 21 A.L.I. PROC. 31 (1944); see generally 1 A.L.I. PROC. (1923).

¹²¹ The history of the process by which N.C.C.U.S.L. and A.L.I. came to cooperate in drafting the Sales Act and the rest of the Uniform Commercial Code is set forth in N.C.C.U.S.L., *Report of the Committee on Cooperation with the American Law Institute in Preparation of a Commercial Code* (1944), reprinted in N.C.C.U.S.L. HANDBOOK (1944), *supra* note 114, at 143-67.

¹²² A.L.I. & N.C.C.U.S.L., *Agreement of Cooperation* (Dec. 17, 1935), reprinted in N.C.C.U.S.L. HANDBOOK (1936), *supra* note 114, at 33-34. A.L.I. and N.C.C.U.S.L. adopted a modified procedure for the development of the rest of the Uniform Commercial Code. See A.L.I. & N.C.C.U.S.L., *Program for Co-Operative Preparation of the Proposed Uniform Commercial Code By the American Law Institute and the National Conference of Commissioners on Uniform State Laws*, reprinted in A.L.I. ARCHIVES PUBLICATIONS IN MICROFICHE, microfiche titled "A.L.I. Annual Report: 1946, 23d Annual Meeting," at 45-53 (1985).

¹²³ Lewis, *Annual Report of Director*, in 20 A.L.I. PROC. 40-41 (1943).

¹²⁴ A.L.I. & N.C.C.U.S.L., *Report No. 1 of the Permanent Editorial Board for the Uniform Commercial Code*, reprinted in 1 U.L.A. XXV-XXVII (Master ed. 1976).

¹²⁵ 1 U.L.A. 1 (Master ed. 1976).

Three sections in the Code cover changes in circumstances after the formation of a contract for the sale of goods: 2-613 (Casualty to Identified Goods), 2-614 (Substituted Performance), and 2-615 (Excuse by Failure of Presupposed Conditions). Each section covers an area of pre-Code impossibility law: Section 2-613 codifies the rule that destruction or material deterioration of the goods sold excuses the seller.¹²⁶ Section 2-615 includes the pre-Code rules for excuse by contract clause, change of law, and failure of particular or contemplated source of goods or means of performance.¹²⁷ Section 2-614 is not really an excuse section; it requires a party to tender a commercially reasonable substitute means of performance where the agreed means of delivery or of payment have failed.¹²⁸ Each of these sections will be examined separately below, along with important relevant drafting history and case law.

*A. Section 2-613 (Casualty to Identified Goods)*¹²⁹

Sometimes a contract requires for its performance the delivery of specific goods, such as a prize bull or certain marked bales of cotton.¹³⁰ Section 2-613 codifies the long-established rule that if these specific goods materially deteriorate or are destroyed before delivery,

¹²⁶ Llewellyn, *Comment on Section 6-1 (S.85) - Casualty to Unique Goods* (n.d.) in THE LLEWELLYN PAPERS, *supra* note 119, file J-IX(2)b, (reproduced in the Appendix of this Article) [hereinafter *Comment on Section 6-1*].

¹²⁷ Llewellyn, *Comment on Section 6-3 (S.88) - Merchant's Excuse by Failure of Presupposed Facilities or Conditions*, comments 1 and 2 (n.d.) in THE LLEWELLYN PAPERS, file J-IX(2)b and in A.L.I. ARCHIVES, *supra* note 2, drawer 198 (reproduced in the Appendix of this Article) [hereinafter *Comment on Section 6-3*].

¹²⁸ U.C.C. § 2-614 (1977).

¹²⁹ The text of U.C.C. § 2-613 (1977) is:

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

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

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

¹³⁰ *Dexter v. Norton*, 47 N.Y. 62 (1871).

the seller is excused from his obligation to deliver them.¹³¹ Thus, this section applies where the contract requires for its performance goods identified when the contract is made.¹³² This requirement effectively limits the section to contracts for goods which are both in existence¹³³ and designated as the goods to which the contract refers¹³⁴ when the contract is made. For example, the farmer who sells crops is covered by this section only if the crops have been planted on designated land by the time he contracts.¹³⁵ In addition to the identification requirement, the goods also must suffer casualty¹³⁶ without

¹³¹ The rule has roots in Roman law, see DIG. JUST. 45.1.33; *id.* 45.1.23; INST. JUST. 3.23.2. The modern common law recognition of the rule is usually said to be *Taylor v. Caldwell*, 3 B. & S. 826, 122 Eng. Rep. 309 (Q.B. 1863), though in fact the rule seems to have been recognized much earlier, W. NOYE, *supra* note 8, maxim 88. For a discussion of this maxim, see C. BLACKBURN, *supra* note 11, at 147-50.

The rule first was codified in the English Sale of Goods Act, 56 & 57 Vict., ch. 71, §§ 6, 7 (1893). These sections were the bases for American codification of the rule in the Uniform Sales Act §§ 7-8, upon which section 2-613 was based. See U.C.C. § 2-613, Official Comments, Prior Uniform Statutory Provisions and Changes (1977). See generally W. HAWKLAND, *SALES & BULK SALES* 109-10 (1958).

¹³² See *supra* note 129.

¹³³ "Identification" presumably cannot occur until the goods are in existence, otherwise there results the absurdity that a buyer can by identification obtain a special property and an insurable interest in nonexistent goods. Cf. U.C.C. § 2-501(1) (1977). Note that since the buyer has an insurable interest in the goods, his casualty insurance should cover the loss of the goods.

¹³⁴ "Identification" seems to refer, in the absence of explicit agreement, to the seller's act in designating goods as the goods which are the subject matter of the contract. Cf. U.C.C. § 2-501(1)(b) (1977). Identification of the goods to the contract does not affect the risk of loss, U.C.C. § 2-501, Official Comment 4 (1977), which is governed by other considerations, see U.C.C. §§ 2-509, 2-510 (1977).

¹³⁵ Crops to be grown become identified to the contract when planted. U.C.C. § 2-501(1)(c) (1977). Presumably, a contract for the sale of crops to be grown on designated land is covered by U.C.C. § 2-613 only if the crops have been planted, and thus can be identified, when the contract is made. Crops not yet planted when the contract is made are covered by U.C.C. § 2-615. See U.C.C. § 2-615, Official Comment 9 (1977). This distinction could become important when pleading a lawsuit, but in either instance, if the crop fails for reasons beyond the seller's control, he is excused. *Id.*

¹³⁶ In the case of a "no arrival, no sale" contract, "casualty" includes not only physical change in the goods but also delay in arrival or delivery. The reason for this (and for the specific reference to the "no arrival, no sale" term in section 2-613) is to permit the buyer the option of taking the goods under section 2-613 when they arrive late under a "no arrival, no sale" term, rather than voiding the contract for the delay and thus perhaps giving the seller a fortuitous profit. See U.C.C. § 2-613, Official Comment 3; *id.* § 2-324(b), Official Comment 5. For an

the fault¹³⁷ of either party, and the risk of loss must not yet have passed to the buyer.¹³⁸

The drafting history of section 2-613 is relatively uneventful¹³⁹ and makes it clear that no significant change from pre-Code law was intended.¹⁴⁰

explanation of the "no arrival, no sale" term, see W. HAWKLAND, *supra* note 131, at 72-74.

¹³⁷ "Fault" includes negligence as well as willful misconduct. U.C.C. § 2-613, Official Comment 1 (1977). See also U.C.C. § 1-201(16) (1977) (definition of "fault").

¹³⁸ U.C.C. § 2-613 (1977). If the risk of loss has passed to the buyer, then the seller may not avoid the contract under section 2-613, but since the buyer has the risk of loss, he is liable to the seller for the price. See *Salinas v. Flores*, 583 S.W.2d 813 (Tex. Civ. App. 1979). This was also the pre-Code rule. See 1 LAW GOVERNING SALES, *supra* note 46, at 429-30. The Code rules for determining who has the risk of loss are contained in U.C.C. §§ 2-509, 2-510 (1977). These rules represent something of a departure from the Uniform Sales Act risk of loss rules. Compare UNIF. SALES ACT §§ 17-19, 22, 1 U.L.A. 309, 373 (1950) (withdrawn).

¹³⁹ One aspect of section 2-613 drafting history deserves mention. In 1943, the section contained the present requirement that a contract to be avoided under this section must relate to "identified goods." In March of that year the drafting subcommittee added the further requirement that the goods be "unique in themselves or treated by the parties as unique for purposes of the contract." Compare A.L.I., *Code of Commercial Law - Sales Act, Prelim. Draft No. 6 - Proposed Sections: First Installment* § 68 (1943) in A.L.I. ARCHIVES, *supra* note 2, drawer 182, file: Commercial Code: Conference March 7-10, 1943, with *Subcommittee Minutes of March 1943*, *supra* note 2, § 68, at 12-13 and A.L.I., *Code of Commercial Law - Sales Act, Prelim. Draft No. 9 - Tentative Final, Third Installment, Sections 69-99*, § 82 (July 16, 1943) [hereinafter *Preliminary Draft No. 9, Third Installment*], in A.L.I. ARCHIVES, *supra* note 2, drawer 182, file: Commercial Code: Conference July 19-23, 1943. "Uniqueness" had not been required under pre-Code law, and the reason for adding it does not appear. Perhaps it was the drafters' way of saying that specific goods had to be designated as the goods to which the contract referred before the contract was within this section. Cf. W. HAWKLAND, *supra* note 131, at 110. If so, this accords with pre-Code law. In any event, when the New York Law Revision Commission objected to the uniqueness requirement, see 1 N.Y. LAW REVISION COMM'N REP. 681 (1955), it was deleted, and the section attained its present form. A.L.I. & N.C.C.U.S.L., *1956 Recommendations of the Editorial Board for the U.C.C. 69-70*, reprinted in 18 U.C.C. DRAFTS, *supra* note 1, at 93-94.

¹⁴⁰ See U.C.C. § 2-613, Official Comments, Changes (1977). On several occasions, Llewellyn stated that this section reflected existing law. See, e.g., N.C.C.U.S.L., *Transcript of N.C.C.U.S.L. Consideration in Committee of the Whole of the Revised Uniform Sales Act* 149 (Aug. 17-21, 1943) [hereinafter *1943 Conference Transcript*] in THE LLEWELLYN PAPERS, *supra* note 119, file J-V2h ("This section involves no important change in the existing law . . ."); Llewellyn, *Discussions: Proposed Final Draft of the Uniform Revised Sales Act*, 21 A.L.I. PROC. 188-89 (1944) ("The rules stated are the result of case law.").

Though the rule codified by this section is probably the oldest of the impossibility excuses, the reason for the rule seldom has been articulated.¹⁴¹ Occasionally the reason for the rule is said to be that the seller's performance has become impossible, and this may well have been the original reason for the rule.¹⁴² Another plausible reason was that excusing the seller tended to divide the loss of the goods between the parties.¹⁴³

¹⁴¹ In the first modern case explicitly to recognize the rule, *Taylor v. Caldwell*, 3 B. & S. 826, 122 Eng. Rep. 309 (Q.B. 1863), Justice Blackburn justified the rule upon the ground that it accorded with the presumed intent of the parties:

There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfill the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition.

Id. at 834, 122 Eng. Rep. at 312. Justice Blackburn, though, did not explain why this is so.

¹⁴² *Ontario Deciduous Fruit-Growers' Ass'n v. Cutting Fruit Packing Co.*, 134 Cal. 21, 66 P. 28 (1901); 6 A. CORBIN, *supra* note 12, at 338 n.34. An early bailment case in which the subject-matter of the bailment perished also gave impossibility as the reason for excusing the bailee's obligation to return the bailed goods. See *Williams v. Hide*, Palm. 548, 81 Eng. Rep. 1214 (K.B. 1629). See also *Williams v. Lloyd, Jones* 179, 82 Eng. Rep. 95 (K.B. 1629) (report of this case under another name). The rule and its reason probably predated even this case. Cf. *Anon.*, Y.B. Hil. 40 Ed. 3, fo. 5, pl. 11 (1366) (giving following example: borrowing of horse which subsequently dies without fault of borrower; obligation to return horse said to be excused).

There is some evidence that there was a commercial custom to excuse the seller. In his discussion on the risk of loss in sales contracts, Pufendorf had the following comment upon the seller's excuse for destruction of the specific goods sold:

Nor does the statement that the promisor of a certain kind of thing does not meet its loss, concern the matter before us [cites to *Dig. Just.* omitted] for the person promised was going to acquire the thing at a profit. In such a case it would be absurd and unjust for a man who had promised a certain kind of thing to have to make good its value, when it is lost. *Even the nature of business which requires strict interpretation makes no such demand.*

S. PUFENDORF, *supra* note 39, at 497.

¹⁴³ Cf. *Dexter v. Norton*, 47 N.Y. 62 (1871). In that case, the seller had agreed to sell certain marked bales of cotton, some of which subsequently were destroyed by fire. The market price of cotton had increased, so the buyer brought suit for the enhanced value of the destroyed cotton. In affirming a judgment for the seller, Chief Justice Church wrote, "There is no hardship in placing the parties (especially the buyer) in the position they were in before the contract was made. The buyer can only lose the profits of the purchase; the seller may lose the whole contract price" *Id.* at 66. Corbin gave a similar explanation. See 6 A. CORBIN, *supra* note 12, at 388-89.

The courts have so far been true to the rule, and thus the cases decided under this section contain few surprises.¹⁴⁴

*B. Section 2-614 (Substituted Performance)*¹⁴⁵

If the agreed manner of performance has become commercially impracticable, this section does not actually provide for an excuse. Rather it requires that a commercially reasonable substitute¹⁴⁶ for the agreed¹⁴⁷ performance be tendered and accepted. Subsection 2-614(1) covers failure of agreed transportation facilities. Although it is consistent with some pre-Code case law,¹⁴⁸ the Uniform Sales

¹⁴⁴ Cases are collected in Annotation, *Construction and Effect of UCC § 2-613 Governing Casualty to Goods Identified to a Contract, Without Fault of Buyer or Seller*, 51 A.L.R.4TH 537 (1987).

¹⁴⁵ The text of U.C.C. § 2-614 (1977) is:

(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

¹⁴⁶ In deciding what constitutes a commercially reasonable substitute, courts will presumably look to the difference in cost and difficulty to the seller, between the substitute performance and the agreed performance, and the difference in the value to the buyer between the substitute performance and the agreed performance. *See Meyer v. Sullivan*, 40 Cal. App. 723, 726, 181 P. 847, 850 (1919). *See also* 6 A. CORBIN, *supra* note 12, § 1339, at 403-04. Corbin's explanation is particularly significant, for he was a member of the Subcommittee that drafted this section, *see infra* note 191.

¹⁴⁷ "Agreed" is not limited to explicit agreement. "Under this Article in the absence of specific agreement, the normal or usual facilities enter into the agreement through the circumstances, usage of trade or prior course of dealing." U.C.C. § 2-614, Official Comment 1 (1977). *See also* U.C.C. § 1-201(3) (1977).

¹⁴⁸ *See e.g.*, *Boehmer Coal Co. v. Burton Coal Co.*, 2 F.2d 526, 529 (8th Cir. 1924); *Douglas Fir Exploitation & Export Co. v. Conyn*, 279 F. 203 (9th Cir. 1922); *Ladd Lime & Stone Co. v. MacDougald Constr. Co.*, 32 Ga. App. 709, 124 S.E. 551 (1924); *Meyer v. Sullivan*, 40 Cal. App. 723, 181 P. 847 (1919).

"Section 87 [now section 2-614] again states ordinary case law in sub (1)." Llewellyn, *Discussions: Proposed Final Draft of the Uniform Revised Sales Act*, 21 A.L.I. PROC. 189 (1944) [hereinafter 1944 *Annual Meeting Transcript*]. *See also* RESTATEMENT OF CONTRACTS § 463 comment b (1932) (reference to performance being possible with only insubstantial variation).

Act contained no similar provision.¹⁴⁹ Subsection 2-614(2) covers failure of agreed manner of payment because of domestic or foreign governmental regulation. This subdivision is partly based on pre-Code case law, and it is partly a response to certain types of governmental regulation thought to be unfair.¹⁵⁰

¹⁴⁹ See U.C.C. § 2-614, Official Comments, Prior Uniform Statutory Provisions (1977) (none listed).

¹⁵⁰ The following comments illustrate Llewellyn's views on governmental regulations that interfere with payment:

Section 87 [now section 2-614] . . . goes somewhat beyond what can be safely said to be the ordinary case law in the latter part of sub. (2). I take it that the first sentence of sub (2) is good law as it now stands. However, recent events in the field of control, especially currency, have led to a good many types of currency regulation not familiar to the standard law.

The effort has been made in this section to discriminate between that type of regulation which more or less fits within American notions of due process, and that type of foreign regulation which does not represent the kind of thing that an American court ought to be asked to encourage as wiping out an obligation of payment.

I am thinking of various types of blocked mark transactions in which you are forced to pay over to somebody from whom you get practically nothing, and are told, "That wipes out the debt on which you have paid."

Llewellyn, *1944 Annual Meeting Transcript*, *supra* note 148, at 189.

The following quotation is also pertinent:

The reason for that strange language which you find at the end [i.e., the last sentence of sub. (2)] is that in these days we are faced with a great deal of currency control and the regulation controlling the export of money, a good deal of which is reasonably necessary to the internal economy of the government acting. You may recall, whether it pleases you or not, that it was felt necessary in this country to remove gold as the standard of payment. Similar things have happened in many other places. On the other hand, another phenomenon that has gone hand in hand with that, especially typified by the actions of the German government prior to the present war, have been regulations of this sort which, under color of appearing to be merely domestic regulation, were in fact instruments of international economic warfare, and the attempt is made here in consonance with a rather amazingly large body of case law, not too much of it American, a reasonable quantity of it English, and the rest of it Continental, to chart the actual lines of the results that the cases have grouped around and to give a clean guide as to where the issue lies, as again and again in this Act as you know, we have attempted to use a section to point the true issue, leaving the courts, once it was pointed, to work their way through. We believe that the language here chosen is such as in the light of the recorded experience of cases to make it infinitely easier, clearer, and more certain to

The evident purpose of section 2-614 is to salvage a deal when essentially full performance is possible in a commercially reasonable fashion, although not by the precise means agreed to by the parties.¹⁵¹ This result is desirable, since objections to such a commercially reasonable substitute performance are usually motivated by a desire to end the deal because of a shift in the market price of the goods sold, and have nothing to do with the quality of the substitute.¹⁵²

The premise of section 2-614, that one could be required to tender a substitute performance if the agreed performance failed, is limited to failures concerning incidental aspects of performance. In Llewellyn's view, the transfer of the goods to the buyer in

determine how decisions both will and should come out.

1943 Conference Transcript, *supra* note 140, at 149. See also *Comment on Section 54*, *supra* note 1, reprinted in 1 U.C.C. DRAFTS, *supra* note 1, at 506. Draft comments to section 6-2 [now section 2-614] included a discussion of moratory legislation. See *Comment on Section 6-2 (S.87), Substituted Performance*, comment 5, THE LLEWELLYN PAPERS, *supra* note 119, file J-IX2b (reproduced in the Appendix of this Article) [hereinafter *Comment on Section 6-2*].

¹⁵¹ *Comment on Section 6-2*, *supra* note 150, Introductory Comment; U.C.C. § 2-614, Official Comment 1 (1977). Several of this section's early drafts described this as a "cy pres conception": "NOTE: The cy pres conception of subsection 1 runs throughout the Act, wherever the dominant purpose is to conclude a contract." Preliminary Draft No. 9, Third Installment, *supra* note 139 (Note after § 85). See also *Informal Appendix to Revised Uniform Sales Act, Third Draft, 1943, Tentative Sketch of Material For Comments* 39 [hereinafter *Tentative Sketch of Comments*], A.L.I. ARCHIVES, *supra* note 2, drawer 202 (same comment).

The cy pres doctrine was traditionally applied where a trust settlor had a general intention to devote his property to charitable purposes, but the specific means he chose to carry out that purpose have failed. Under these circumstances, a court could direct the property to be applied in a manner consistent with the settlor's general intent. More broadly, the doctrine applies where there is a general intent to do something and there is a failure of the specific means chosen to effect that general intent. In Llewellyn's view, the normal general intent of a contract for sale is the delivery of goods and the payment of the price. *Infra* text at note 153. Thus, where the specific means chosen to effect this general intent fail, but it is commercially practicable to carry out the general intent by substitute means, the substitute means must be offered and accepted. For a discussion of the cy pres doctrine as it applies to trusts, see IV A. SCOTT, THE LAW OF TRUSTS §§ 399-399.5 (3d ed. 1967); RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

¹⁵² For a study of this phenomenon, see Eno, *Price Movement and Unstated Objections to the Defective Performance of Sales Contracts*, 44 YALE L.J. 782 (1935). Note that Eno attributes to Karl Llewellyn the idea that courts are influenced by the fact that a shift in market price was a motivation for objection to performance. *Id.* at 783.

return for payment of the price is the essential or dominant purpose of the contract; other portions of the contract, such as manner of delivery or payment, are undertaken to carry out this essential purpose and are thus incidental to it.¹⁵³ If an incidental means of performance should become impracticable, yet the transfer of the goods and payment still be attainable through substitute means, then section 2-614 requires the substitute means to be tendered and accepted.

The application of this distinction between essential and incidental aspects of the contract is illustrated by two pre-Code cases described in the Official Comments to section 2-614. The first case is *International Paper Co. v. Rockefeller*.¹⁵⁴ Here there was a contract to sell wood to be cut from a particular tract of land, but fire destroyed the trees on that tract. The seller was excused from his obligation to supply the wood because the fire had destroyed the agreed source of supply. The fire had prevented performance of an essential part of the contract, the transfer of goods from the agreed source to the buyer. Thus, the Official Comments to section 2-614 describe the interfering event as going "to the very heart of the contract."¹⁵⁵ Consequently, had the current Code then been in force, section 2-614 would not have applied and the seller would not have been obliged to tender a commercially reasonable substitute source of supply for the wood.¹⁵⁶

In the second case, *Meyer v. Sullivan*,¹⁵⁷ there was a contract to sell wheat, delivery to be "F.O.B. Kosmos Steamer at Seattle."¹⁵⁸ The seller duly engaged shipping space on that line, but the subsequent outbreak of the First World War caused the steamship line to cancel its shipping schedule. The buyer then offered to take delivery of the goods at the steamship line's warehouse

¹⁵³ *Comment on Section 6-2, supra* note 150 (Introductory paragraph).

¹⁵⁴ 161 A.D. 180, 146 N.Y.S. 371 (1914).

¹⁵⁵ U.C.C. § 2-614, Official Comment 1 (1977).

¹⁵⁶ The drafter's intent was that the seller be excused under section 2-615. See U.C.C. § 2-615, Official Comment 4 (1977) (failure of agreed source of supply excuses seller; citing *International Paper*.)

¹⁵⁷ 40 Cal. App. 723, 181 P. 847 (1919).

¹⁵⁸ "Kosmos Steamer" was the name of a shipping company, not the name of a ship. *Id.* at 726, 181 P. at 848. Thus, the delivery term, "F.O.B. Kosmos Steamer at Seattle" requires the seller to load the goods on board a Kosmos steamer. See U.C.C. § 2-319 (1)(a), (c) (1977).

dock, which the seller refused to do.¹⁵⁹ The seller was held not to be excused; the court found that the seller should have honored the buyer's offer of substitute delivery arrangements. Performance of the essential part of the contract, transfer of the goods to the buyer, was still possible through commercially practicable means, because the buyer offered to take delivery at the shipper's dock. Thus, under the current Code, section 2-614(1) would have applied and the seller would have been obliged to honor the buyer's demand that the goods be delivered to the dock.

The division of the contract into essential and incidental parts raises two questions. First, what happens if an incidental part fails, such as the agreed means of performance, and no commercially reasonable substitute is available? Second, what happens if an essential part of the contract fails, for example, unavailability of the specific goods or source of supply, but a commercially reasonable substitute for that part is available?

The answer to the first question is that the seller can be excused from his obligation to deliver the goods under section 2-615.¹⁶⁰ The drafting history of sections 2-614 and 2-615 makes clear that failures of incidental means of performance, such as the manner of delivery, can excuse the seller under section 2-615, if no commercially reasonable substitute is available.¹⁶¹ The text of section

¹⁵⁹ The court noted that at the time the buyer offered to take delivery on the docks, the market price had risen above the contract price. *Meyer*, 40 Cal. App. at 726, 181 P. at 848. The increased market price was probably the real reason for the seller's refusal to deliver. The seller probably wanted to claim that the contract was ended so that he could resell the goods for a higher price.

¹⁶⁰ This was the result under pre-Code law where both buyer and seller knew when they contracted that the agreed means of transportation were the only means. See, e.g., *Clarksville Land Co. v. Harriman*, 68 N.H. 374, 44 A. 527 (1895) (drop in water level caused inability to drive logs downstream); *Lovering v. Buck Mt. Coal Co.*, 54 Pa. 291 (1867) (unable to ship coal because flood swept away all the works of the navigation company); *Prescott & Co. v. Powles & Co.*, 113 Wash. 177, 193 P. 680 (1920) (inability to ship onions); RESTATEMENT OF CONTRACTS § 460 illus. 9 (1932); 18 S. WILLISTON, *supra* note 46, § 1952, at 107, n.7.

¹⁶¹ Section 2-615 began as section 42 of the January 1937 Federal Sales Bill. See H.R. 1619, 75th Cong., 1st Sess. (1937), *reprinted in* 1 U.C.C. DRAFTS, *supra* note 1, at 32. Section 42, which was entitled "Failure of Carrier to Provide Means of Transportation," excused the seller if a specific carrier designated in the contract or a specific carrier expressly or tacitly assumed by the parties failed to provide means for transporting the goods. In the "Draft for a Uniform Sales Act, 1940" that section (then numbered 65) was expanded to include a general failure of trans-

2-615 implies such, for it is expressly subject to section 2-614.¹⁶² That subordination is needed only if failures of incidental means of performance described in section 2-614 can be the basis for excuse under section 2-615.

The answer to the second question, whether a substitute must be tendered when an essential part of the contract fails, is apparently, no. Under pre-Code law, substituted performance was not required.¹⁶³ Further, neither section 2-613 nor 2-615 requires a substitute performance.¹⁶⁴ Finally, the explicit coverage of section 2-614 includes only failure of transportation or payment facilities, and the Official Comments to that section carefully distinguish between essential and incidental failures and say that the section applies only to the latter.¹⁶⁵

portation facilities where no specific carrier had been contemplated, as well as presuppositions other than those concerning transportation facilities. See 1 U.C.C. DRAFTS, *supra* note 1, at 235. In *Uniform Revised Sales Act—Proposed Final Draft No. 1* (April 27, 1944), reprinted in 2 U.C.C. DRAFTS, *supra* note 1, at 1-273 [hereinafter *Proposed Final Draft No. 1*], that section (then numbered 88) excused the seller if his performance has been made commercially impracticable by several enumerated specific events, including failure of transportation facilities when the nonoccurrence of those events was a basic assumption on which the contract was made. See 2 U.C.C. DRAFTS, *supra* note 1, at 59. In the Uniform Revised Sales Act (1948), the section (then numbered 87) had been changed by deleting the enumeration of specific events. Only the "basic assumption" test remained. See 5 U.C.C. DRAFTS, *supra* note 1, at 275.

From the foregoing, it is evident that the drafters intended that failure of transportation facilities could excuse the seller under U.C.C. § 2-615 if the requirements of that section were satisfied. Draft Comments to sections 2-614 and 2-615 also make this clear. See *Comment on Section 6-2*, *supra* note 150. Cf. *Comment on Section 87, Merchant's Excuse By Failure Of Presupposed Conditions* [hereinafter *Comment on Section 87*], n.1, in THE LLEWELLYN PAPERS, *supra* note 119, file J-VIII2c (reproduced in the Appendix of this Article).

¹⁶² U.C.C. § 2-615 (1977).

¹⁶³ 6 S. WILLISTON & G. THOMPSON, *supra* note 43, §§ 1947-1948; 6 A. CORBIN, *supra* note 12, §§ 1337, 1339.

¹⁶⁴ The Official Comments to sections 2-613 and 2-615 contain no hint that a substitute performance is required to be tendered.

¹⁶⁵ U.C.C. § 2-614, Official Comment 1 (1977). A prior draft of the comments to what is now section 2-614 required the seller to offer to deliver substitute goods, if available, where the contracted-for goods had been destroyed. See *Comment on Section 6-2*, *supra* note 150, comment 2. If this language were intended to apply to a contract for *specific* goods (e.g., "10 bales of cotton marked 1-10"), it would have changed the pre-Code law. See, e.g., *Dexter v. Norton*, 48 N.Y. 62 (1871); RESTATEMENT OF CONTRACTS § 460 (1932). If this language were intended to apply

Except as noted above, the drafting history of section 2-614 is relatively uneventful.¹⁶⁶

*C. Section 2-615 (Excuse by Failure of Presupposed Conditions)*¹⁶⁷

Section 2-615 excuses the seller for nonperformance resulting from nondelivery or delay in delivery¹⁶⁸ in two circumstances. The

only to a contract for a *quantity* of goods (e.g., "10 bales of cotton"), then it reflected pre-Code law. See, e.g., *Eskew v. California Fruit Exchange*, 203 Cal. 257, 263 P. 804 (1927) (agreement to sell five carloads of grapes enforced); RESTATEMENT OF CONTRACTS § 455 illus. 2 (1932). From the wording of the comment, it seems likely that the former interpretation was intended. In any event, this comment does not appear in the present version of the Official Comments.

¹⁶⁶ The forerunner of section 2-614 first appeared in a draft prepared for a Drafting Subcommittee meeting in March 1943. See *Preliminary Draft No. 6*, § 71, A.L.I. ARCHIVES, *supra* note 2, drawer 182, file: Conference March 7-10, 1943 [hereinafter *Preliminary Draft No. 6*]. After several minor changes, section 71 became section 87. See *Proposed Final Draft No. 1*, *supra* note 161. Section 87 was essentially the same as section 2-614 is today. By 1948, the section had become identical to the present section 2-614. See 5 U.C.C. DRAFTS, *supra* note 1, at 275 (Section 86). The 1949 draft of the Uniform Commercial Code contained the first published Official Comments to this section. They are identical to the present Official Comments except that the references in Comment 2 to specific Article 5 sections are lacking. See 6 U.C.C. DRAFTS, *supra* note 1, at 216-17.

¹⁶⁷ The text of U.C.C. § 2-615 is:

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 delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

¹⁶⁸ U.C.C. § 2-615(a), Official Comment 1 (1977). Nonperformance caused by injury to the goods is covered by sections 2-613 (Casualty to Identified Goods), 2-509 (Risk of Loss in the Absence of Breach), and 2-510 (Effect of Breach on Risk of Loss).

first, and the more easily delineated, is the traditional governmental action excuse, which has been expanded to include action by a foreign government.¹⁶⁹ The section makes the validity (or legality) of the governmental action irrelevant so long as the seller complies in good faith with that action.¹⁷⁰ The second instance in which the section excuses nonperformance is where the seller's performance has been made impracticable by the occurrence of a contingency, the nonoccurrence of which was a basic assumption upon which the contract was made.¹⁷¹

The Official Comments to section 2-615 indicate that the "failure of a basic assumption" subsection was intended to cover two pre-Code excuse theories: (1) contractual excuse clause,¹⁷² and (2) failure of particular or contemplated sources of goods or means of performance,¹⁷³ and more.¹⁷⁴

The question of whether a temporary failure of a basic assumption excuses the seller's performance entirely or only the delay

¹⁶⁹ The traditional pre-Code governmental action excuse probably did not include action by foreign governments. *See supra* note 61. The cases were in some confusion, sometimes excusing and sometimes not. *See, e.g.*, 5 W. PAGE, *LAW OF CONTRACTS* § 2701 (2d ed. 1921). Williston's view, which is reflected in the Restatement of Contracts, was that foreign governmental action was not an excuse per se, but if the foreign governmental action made unavailable a specific thing necessary for performance, then it could constitute an excuse. Williston's point seems to be that if the foreign governmental action brings about a situation in which one of the traditional excuses (other than governmental action) would apply, there is an excuse, but not otherwise. *See* 6 S. WILLISTON & G. THOMPSON, *supra* note 43, § 1938 nn.12-16, § 1951 n.4; *RESTATEMENT OF CONTRACTS* § 458 comment b, § 461 illus. 1, 3 (1932). *See also* 6 A. CORBIN, *supra* note 12, § 1351.

¹⁷⁰ U.C.C. § 2-615(a), Official Comment 10 (1977). The reason for this rule is indicated in the Comments to a prior draft of this section: "It gives no mercantile relief, when a particular government act (such as price-fixing in the last war, or N.I.R.A., or credit 'freezing' today) is effective in fact, to know that *if* it is two years later adjudged legal, then it will also be then adjudged to have excused performance." *Comment on Section 54, supra* note 1, *reprinted in* 1 U.C.C. DRAFTS, *supra* note 1, at 506.

¹⁷¹ U.C.C. § 2-615(a) (1977).

¹⁷² *Cf.* U.C.C. § 2-615, Official Comment 8 (1977). This coverage is clearer when one considers the section's purposes set forth at *infra* notes 241-53.

¹⁷³ U.C.C. § 2-615, Official Comment 5 (1977).

¹⁷⁴ Though pre-Code sales law did not generally recognize as an excuse an increase in the seller's cost of performance resulting from the failure of a nonexclusive source of supply, *see generally* 6 S. WILLISTON & G. THOMPSON, *supra* note 43, § 1963, section 2-615 does. *See* U.C.C. § 2-615, Official Comment 4 (1977).

caused by such failure is covered by section 2-616.¹⁷⁵ The remainder of this Article will concentrate on the "failure of a basic assumption" excuse contained in subsection 2-615(a).

1. *Drafting History of Subsection 2-615(a)*. The drafting history of subsection 2-615(a) began in August 1941, when Karl Llewellyn produced a "Second Draft of a Revised Uniform Sales Act" ("Second Draft of August 1941") for N.C.C.U.S.L.¹⁷⁶ That draft

¹⁷⁵ See U.C.C. § 2-616 (1977) and Official Comments thereto.

¹⁷⁶ N.C.C.U.S.L., Consideration in Committee of the Whole of the Revised Uniform Sales Act 2 (Sept. 22-27, 1941), in THE LLEWELLYN PAPERS, *supra* note 119, file J-III2c; reprinted in N.C.C.U.S.L., ARCHIVES PUBLICATIONS, microfiche 32.O-B(1)(1983) [hereinafter *1941 Conference Transcript*]. An undated copy of the "Second Draft of a Revised Uniform Sales Act" [hereinafter *Second Draft of August 1941*], is in the THE LLEWELLYN PAPERS, *supra* note 119, files J-IV2b, J-IX2b. The portion of the draft in file J-IV2b is missing pages 156-62, which contain the sections on impracticability. The missing pages are in file J-IX2b. In the microfilm collection of THE LLEWELLYN PAPERS at the University of Pennsylvania Biddle Law Library, file J-IV2b is not in its correct numerical position. It is on roll 25, the last roll of the collection.

This undated draft is the draft used at the 1941 Annual Conference. The text is identical to that of a section 49-E identified as "submitted to the Conference, 1941," and quoted in a January, 1942, law review Note. See Note, *The Emergency Provisions of the Proposed New Uniform Sales Act*, 42 COLUM. L. REV. 124, 124 n.1 (1942). I have assigned the date of August 1941 to this undated draft based upon the information in Llewellyn's U.C.C. correspondence files. See Letter from K. Llewellyn to W. Carey (Aug. 9, 1941), THE LLEWELLYN PAPERS, *supra* note 119, file J-XXV(5) (stating that the draft will be forwarded "in a week or so" to Mr. Carey, a member of the N.C.C.U.S.L. Special Committee responsible for drafting the Revised Uniform Sales Act). See also Letter from K. Llewellyn to G. Bogert (Aug. 8, 1941), THE LLEWELLYN PAPERS, *supra* note 119, file J-XXV(5) ("I have been working now for weeks over the Act.")

The First Draft of the Revised Uniform Sales Act was done in 1940 and was quite rough. See *Draft for a Uniform Sales Act, 1940*, in THE LLEWELLYN PAPERS, *supra* note 119, file J-II2a, reprinted in 1 U.C.C. DRAFTS, *supra* note 1, at 176-260 [hereinafter *1940 Draft*]. The *Second Draft of August 1941*, *supra*, was, like the *1940 Draft*, *supra*, the product of Llewellyn's pen. The only meeting of the Special Committee during 1941 was on September 19-21, just before the Annual Conference. See Letter from K. Llewellyn to W. Carey (Aug. 9, 1941), THE LLEWELLYN PAPERS, *supra* note 119, file J-XXV(5). The Special Committee meeting produced some modifications to the *Second Draft of August 1941*. See *1941 Conference Transcript supra*, at 1 (Llewellyn's references to "the results of the Committee's work after they got to Indianapolis, which presents some modification of phrasing and occasional modifications of policy," and "this longer sheet of corrected material"). On the initial involvement of N.C.C.U.S.L. in the Revised Uniform Sales Act project, see *supra* notes 114-19 and accompanying text, and Wiseman, *supra* note 115, at 477-92.

included, as section 49-E, a new provision governing failure of essential presuppositions.¹⁷⁷ The third subdivision of section 49-E stated the section's underlying principle: "[O]n failure, not due to fault, of a presupposition tacitly assumed by the parties in bargaining, exemption from liability is proper" ¹⁷⁸ Subdivisions

¹⁷⁷ The text of section 49-E was:

SECTION 49-E. (New to Sales Act. Modified and expanded from Fed. Sec. 42.) FAILURE OF FACILITIES FOR TRANSPORTATION OR OTHER PRESUPPOSITIONS.—

- (a) When the contract is based on the presupposition that the goods will be transported by carrier, or by a specific carrier, and not withstanding due request by the seller, such presupposed facilities of carriage fail, the seller is not liable for delay in performance or nonperformance of the contract caused by such failure.
 - (b) At any time during such delay the seller can by due request require the buyer to cancel (without liability) in respect of any lot or lots delayed or in respect of the contract entire, or else to remain obligated for a stated or a reasonable time.
 - (c) If the obstacle to performance is not removed within a reasonable time (or the time stated), the buyer can by due notification (and without liability) cancel in respect of any lot or lots delayed, or, in proper case, in respect of the contract entire. What is a reasonable time is judged by mercantile standards, in terms of the mercantile needs of the buyer, including his need for secure reliance on the seller's future willingness and ability to perform. Whether delay in respect of part justifies cancellation as to the rest, is judged as in the case of default in an installment under Section 45.
2. The seller is exempt from liability due to delay in delivery or complete or partial non-delivery due to strike, injury to factory or other similar causes beyond the seller's control which amount to failure of an essential presupposition of the contract for which the seller has not assumed responsibility. The provisions of Subsection 1 apply when such delay occurs.
 3. The principle which underlies this section is that on failure, without fault, of a presupposition tacitly assumed by the parties in bargaining, exemption from liability is proper; but that remedial relief afforded by the law is to be reasonably balanced; and, finally, that machinery is to be provided both to protect the exercise of mercantile judgment in a situation of uncertainty, and to make easy the re-adjustment of the situation on a basis of precise understanding.

THE LLEWELLYN PAPERS, *supra* note 119, file J-IX2b. *See also* Note, *supra* note 176, at 124.

¹⁷⁸ *See supra* note 177. The Comment to section 49-E elaborates: "The contract for sale, as envisaged by merchants, puts on the seller the risk of rise in the market, and on the buyer the risk of fall in the market. But that contract presupposes that general conditions of operation will continue in such fashion as to make the contract performable by reasonable business effort." *Section 49-E, Comment*, in THE LLEW-

(1)(a) and (2) simply set forth specific applications of this principle.¹⁷⁹ Subdivision (1)(a) concerned excuse for failure of transportation facilities,¹⁸⁰ and subdivision (2) concerned excuse for

ELLYN PAPERS, *supra* note 119, file J-IX2b, at 160. "The type of exemption concerned is so wide-spread and familiar in the contracts of *well-organized* and *well-advised* sellers, it is so reasonable and fair, it is (until buyers [sic] are consulted) so thoroughly taken for granted by lawyers [sic], as to evidence the sound base-line for *general law*." *Id.* at 161 (emphasis in original; transposition of words "buyers" and "lawyers" was corrected in *Second Draft of December 1941*, *supra* note 1).

"Subsection 2 is therefore deliberately drawn to make the question of *when* the seller is exempt free of explicit dependence on contract clauses. It is deliberately drawn to make clear that *assumption of responsibility* for delay due to failure of tacit presuppositions is what needs to be made express." *Id.* "The principle stated seeks simply to read the exemption into contracts in which they are not express." *Id.*

The section 49-E Comment became, with only insubstantial changes, the *Comment on Section 54*, *supra* note 1, reprinted in 1 U.C.C. DRAFTS, *supra* note 1, at 504-07.

¹⁷⁹ See *Second Draft of August 1941*, *supra* note 176, § 49-E(3), comment 4 ("The Principle stated in Subsection 3 states the theory of the whole section in general terms for general application.").

¹⁸⁰ See *supra* note 177. This subdivision had a more ancient drafting pedigree than the others. It had begun as section 42 of a proposed Federal Sales Act, drafted by Williston, and approved in 1922 by the American Bar Association:

Sec. 42.—[*Failure of Carrier to Provide Means of Transportation.*] In all cases where the contract provides that goods shall be transported by a specific Carrier, or is based on the express or tacit assumption that they will be so transported, if that carrier fails when duly requested, and without legal liability therefor, to furnish cars for loading the goods, or means of transporting the goods to the named place, the seller is not liable to the buyer for delay in performance or for non-performance of the contract thus caused.

47 A.B.A. ANN. REP. 307 (1922).

Williston probably included this section to settle the question of who, under an F.O.B. contract, had the risk of the rail carrier's failure to furnish cars for transportation of the goods. The law on this point was unsettled. See 1 S. WILLISTON, *THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT* 598-601 (1924). The matter was pressing, for early twentieth century judges witnessed a rash of lawsuits triggered by sporadic car shortages and consequent carrier refusals (called "embargoes") to furnish or transport cars. Much of the car shortage problem may have been attributable to poor traffic management by the railroads, and to wartime dislocation of normal traffic patterns. See R. CARSON, *MAIN LINE TO OBLIVION: THE DISINTEGRATION OF N.Y. RAILROADS IN THE TWENTIETH CENTURY* 55-72 (1971).

The Merchants' Association of New York suggested minor amendments to section 42 as part of its study of the proposed Federal Sales Act. See *Report of Special Committee on Federal Sales Bill of the Merchants' Association of N.Y.* 37 (Feb.

strikes, injury to factory, and other similar causes beyond the seller's control which amount to failure of an essential presupposition of the contract.¹⁸¹ Subdivisions (1)(b) and (1)(c) concerned

18, 1937), *reprinted in* 1 U.C.C. DRAFTS, *supra* note 1, at 89. These amendments were accepted by congressional sponsors of the Act. *See, e.g.*, H.R. 8176, 76th Cong., 3d Sess. § 42 (1940), *reprinted in* 1 U.C.C. DRAFTS, *supra* note 1, at 146.

Llewellyn broadened section 42 somewhat when he included it in the *1940 Draft*, *supra* note 176, as section 65(1)(a):

Where the contract provides that the goods shall be transported by carrier, or by a specific carrier, or is based on the express or tacit assumption that they will be so transported, and the specific carrier if any is specified, or carriers generally if none is specified, fail, when duly requested, to furnish proper means of transporting the goods pursuant to the contract, the seller is not liable to the buyer for delay in performance or nonperformance of the contract thus caused.

1940 Draft, *supra* note 176, § 65(1)(a).

From the *1940 Draft*, *supra* note 176, § 65, to the *Second Draft of August 1941*, *supra* note 176, § 49-E, the failure of transportation facilities subdivision, was not changed substantively; it was merely rephrased to emphasize the failure of presupposition principle made explicit in subdivision 49-E(3).

¹⁸¹ *See supra* note 177 for the text of this subdivision. Llewellyn's purpose here was to make the typical *force majeure* clause a part of every mercantile contract. In his view, such a clause reflected the tacit commercial understanding of the contract. *See supra* note 178. Llewellyn reiterated this purpose in the discussion of this subdivision at the 1942 Annual Conference:

There are three points that I would like to sever in your thought about this section. The one is question of whether or not it is desirable to include such a section as subsection 2, very frequently found in contracts, but as it now stands requiring to be inserted. My experience does not lead to any indication that there ever has been a bargain equivalent for the insertion of this clause, that is, I have never heard of a price being raised or lowered because this clause was or was not in the contract. It is in where sellers happen to think about it and buyers don't object to it because it makes sense. Under those circumstances, it is my belief that the clause should not require to be written into the contract. It just does make sense.

N.C.C.U.S.L., *Consideration in Committee of the Whole of the Revised Sales Act* 109 (Aug. 18-22, 1942) [hereinafter *1942 Conference Transcript*], in THE LLEWELLYN PAPERS, *supra* note 119, file J-IV2f, *reprinted in* N.C.C.U.S.L., ARCHIVES PUBLICATIONS, microfiche 32.0-B(2) (1983).

The 1942 Annual Conference approved this purpose. *Id.* at 110-11. Further evidence of this purpose can be found in *Comment on § 23 [2-9], Unconscionable Contract or Clause* 3 (Feb. 20, 1948), in THE LLEWELLYN PAPERS, *supra* note 119, file J-X2d ("Indeed while some of the commonly used form clauses are now made unnecessary by the provisions of this Act (e.g., clauses exempting from liability when commercial impossibility supervenes, now recognized as proper by this Act

excuse from liability when performance is not prevented but delayed.¹⁸²

In September 1941, Llewellyn submitted the Second Draft of August 1941 to the N.C.C.U.S.L. Annual Conference for approval as a working proposal which could be printed and publicly distributed to solicit criticism.¹⁸³ The Annual Conference had only enough time to discuss the draft through section 36,¹⁸⁴ so it did not consider section 49-E. The Conference did, however, approve proposals to print and circulate for public critique, both the revised draft ("Second Draft of December 1941") and the Report of the Special Committee accompanying that draft.¹⁸⁵ These were printed in December 1941. The "failure of essential presupposition" section was now numbered 54; it contained only minor or stylistic changes from section 49-E.¹⁸⁶

without need for express agreement under Sections 87 [6-3] and 88 [6-4]) . . .").

The 1940 Draft subdivision 65(2) mentioned *force majeure* clauses, but that subdivision did not read such a clause into every contract. It merely described the effect of such a clause, if it were already in the contract, upon performance delayed but not prevented. See 1940 Draft, *supra* note 176, at 235.

¹⁸² See *supra* note 177 for the text of these subdivisions. They trace back to Llewellyn's 1940 Draft, *supra* note 176,

If such delay continues so long as to frustrate the purpose of the contract in part or in whole by making it inequitable to hold the buyer to accept any delivery or deliveries so delayed, or to hold him to the contract entire, the buyer may at his option and without liability, cancel the delivery or deliveries, or in proper case the entire contract, for the future.

1940 Draft, *supra* note 176, § 65(1)(b).

In March, 1943, the subdivisions on delay were moved to a separate section. See Subcommittee Minutes of March 1943, *supra* note 2, §§ 69-70. Today, the delay question is covered by U.C.C. § 2-616 (1977).

¹⁸³ See Letter from K. Llewellyn to W. Schnader (Aug. 9, 1941), Letter from K. Llewellyn to W. Carey (Aug. 9, 1941), Letter from K. Llewellyn to F. Kelsey (Aug. 12, 1941), all in THE LLEWELLYN PAPERS, *supra* note 119, file J-XXV(5). See also Report of the Special Committee on a Revised Uniform Sales Act 29-30 (1941), quoted in 1941 Conference Transcript, *supra* note 176, at 2-3, reprinted in Second Draft of December 1941, *supra* note 1, at 2, reprinted in 1 U.C.C. DRAFTS, *supra* note 1, at 282.

¹⁸⁴ See Second Draft of December 1941, *supra* note 1, at 178, reprinted in 1 U.C.C. DRAFTS, *supra* note 1, at 457.

¹⁸⁵ 1941 Conference Transcript, *supra* note 176, at 2-3, 139. For the text of the Special Committee's proposals, see Report of The Special Committee on a Revised Uniform Sales Act, *supra* note 183.

¹⁸⁶ One change from section 49-E to section 54 was the new requirement of "due

In May 1942, A.L.I. agreed to participate with N.C.C.U.S.L. in the preparation of the Sales Act and the Uniform Commercial Code.¹⁸⁷ The two organizations applied to the Sales Act a general cooperation procedure established some years before, which provided for the selection of a Reporter and a joint group of Advisers, who were to consult and produce a draft to be submitted to each organization for its approval.¹⁸⁸ Llewellyn was selected as Reporter.¹⁸⁹ He held an initial meeting of the Reporter and Advisers from July 28 to August 1, 1942.¹⁹⁰ At that meeting, the

effort" rather than just "due request" by the seller if he is to be excused by a carrier's failure to furnish transportation facilities under section 54(1)(a). The comments explaining this subdivision also were changed: In his description of the case law, upon which Llewellyn said this subdivision was based, he made a change similar to that made in the text. A *Columbia Law Review* Note had recommended just such a change for the reason that it would more accurately reflect existing case law. See Note, *supra* note 176, at 129-30.

The precise date of these changes is not known. There were a number of possible opportunities for the changes between the *Second Draft of August 1941*, *supra* note 176, and the *Second Draft of December 1941*, *supra* note 1. The Special Committee meeting on September 19-21, 1941, produced some changes; see *1941 Conference Transcript*, *supra* note 176, at 1. The 1941 Annual Conference produced further changes. See N.C.C.U.S.L., *Report of the Special Committee on A Revised Uniform Sales Act* 1 (Dec. 1941), reprinted in 1 U.C.C. DRAFTS, *supra* note 1, at 281. More changes were made during a three-day meeting in November 1941 of the Special Committee and the Section on Uniform Commercial Laws, *id.* In addition, there may have been a meeting of the Special Committee on the Saturday and Sunday at the end of the Annual Conference (Sept. 27-28, 1941). See Letter from K. Llewellyn to W. Carey (Aug. 9, 1941) in THE LLEWELLYN PAPERS, *supra* note 119, file J-XXV(5) ("Unless your patience gives out, I should also like to call a meeting of the Committee for the balance of the Saturday after the Conference closes, and for the ensuing Sunday."). Llewellyn valued these Special Committee and Section meetings quite highly. See Letter from K. Llewellyn to W. Schnader, H. Goodrich, and W. Lewis (Aug. 5, 1944) in THE LLEWELLYN PAPERS, *supra* note 119, file J-VI(1)d (praising input of Section and Special Committee members at meetings held during development of Sales Act).

It should be noted that when Llewellyn prepared the *Second Draft of December 1941* for printing, he had to rely upon his own notes and recollections, because the transcript of the 1941 Annual Conference was not yet available. See *Report of the Special Committee on a Revised Uniform Sales Act*, U.C.C. DRAFTS, *supra* note 1, at 313.

¹⁸⁷ See *supra* note 121 and accompanying text.

¹⁸⁸ See *supra* note 122 and accompanying text.

¹⁸⁹ See *supra* note 123 and accompanying text.

¹⁹⁰ The Joint Committee of Reporter's Advisers consisted of members of two N.C.C.U.S.L. committees: The Section on Uniform Commercial Acts, and the Special Committee on the Revised Uniform Sales Act, as well as persons designated

Advisers selected a Drafting Subcommittee to proceed, through a series of drafting conferences, to produce a draft for the Advisers.¹⁹¹ Over the next year, in a series of meetings,¹⁹² the Drafting Subcommittee hammered out a draft complete except for the remedies sections.¹⁹³

by A.L.I., together with several officers of each organization. Representing N.C.C.U.S.L. on the joint committee were: Karl N. Llewellyn, Howard L. Barkdull, William L. Beers, George G. Bogert, Ralph T. Fuchs, Charles R. Hardin, Frank E. Horack, Jr., L. Barrett Jones, Willard B. Luther, Henry Parkman, Jr., William A. Schnader, and Sterry R. Waterman. Representing A.L.I. were: Karl N. Llewellyn, Arthur L. Corbin, Learned Hand, Thomas W. Swan, Hiram Thomas, Lawrence Vold, and John D. Wickhem. Lewis, *supra* note 123, at 41. The records of this initial meeting are in the A.L.I. ARCHIVES, *supra* note 2, drawer 182, file: Commercial Code, Conference July 28 - Aug. 1, 1942.

¹⁹¹ The members of the Drafting Subcommittee were, representing N.C.C.U.S.L.: Charles R. Hardin, Willard B. Luther, and Sterry R. Waterman; and representing A.L.I.: Arthur L. Corbin, Thomas W. Swan, and Hiram Thomas. In addition, Karl N. Llewellyn, as Reporter, and William D. Lewis, as Director of A.L.I., participated in the Drafting Subcommittee's deliberations. Llewellyn's legal assistants, Soia Mentschikoff and Charles J. Colgan, also attended the drafting conferences. Lewis, *supra* note 123, at 41-42.

Apparently, because of the press of time, the full committee of Advisers never convened to consider the draft prepared by the Drafting Subcommittee. The draft went directly to the N.C.C.U.S.L. Section and Special Committee, who met together just before the 1943 Annual Conference, and approved the draft for submission to that Conference. See *Report of the Special Committee on the Revised Uniform Sales Act* 4-5 (1943), in THE LLEWELLYN PAPERS, *supra* note 119, file J-V2(1), reprinted in N.C.C.U.S.L. HANDBOOK (1943), *supra* note 114, at 162-63.

¹⁹² The minutes of these meetings, together with the preliminary drafts considered at these meetings, is in the A.L.I. ARCHIVES, *supra* note 2, drawer 182. Table III at the end of this Article lists the dates and places of the Drafting Subcommittee meetings from the initial meeting in July 1942 to the meeting in July 1943, together with the drafts of the Sales Act considered at each meeting.

¹⁹³ Llewellyn completed the remedy sections in time for submission to the September 1943 Annual Conference. See Lewis, *Notes of W.D.L. of Interview with Llewellyn as of October 9, 1943*, in THE LLEWELLYN PAPERS, *supra* note 119, file J-V(1)b.

The draft last considered by the Drafting Subcommittee before the September 1943 Annual Conference was entitled "Preliminary Draft No. 9 - Tentative Final." See *Preliminary Draft No. 9, Third Installment*, *supra* note 139. From this draft and the changes made to it at the July 12 Drafting Subcommittee meeting, Llewellyn prepared a draft entitled "Revised Uniform Sales Act, Third Draft, 1943." See *Revised Uniform Sales Act, Third Draft, 1943*, [hereinafter *Third Draft of 1943*], in A.L.I. ARCHIVES, *supra* note 2, drawer 202. The N.C.C.U.S.L. Section and Special Committee went over the *Third Draft of 1943*, *supra*, in a meeting on August 14-16, 1943, and produced some changes. See Llewellyn, *Report of Special Committee on Revised Uniform Sales Act* 5 (1943), reprinted in N.C.C.U.S.L.

Since the Drafting Subcommittee began work too late to produce anything of substance for the Annual Conference in August 1942, N.C.C.U.S.L. continued its consideration of the Second Draft of December 1941.¹⁹⁴ Section 54 provoked a lengthy floor discussion,¹⁹⁵ and finally the Conference approved the general policies of the section, but recommitted it for redrafting.¹⁹⁶ The Conference also generally approved the entire Second Draft of December 1941, but with various instructions for changes, and referred it back to the Special Committee to produce a new draft and report.¹⁹⁷

The Drafting Subcommittee did not take up the "failure of essential presupposition" section until March 1943. For that meeting, Llewellyn proposed a redrafted section now numbered 69 instead of 54.¹⁹⁸ Apparently, the Subcommittee also discussed

HANDBOOK (1943), *supra* note 114, at 163; *Report to Joint Revising Committee on Changes made by Conference in the 1943 Northeast Harbor Text 1* (1943) [hereinafter *Changes in 1943 Harbor Text*], in A.L.I. ARCHIVES, *supra* note 2, drawer 182, file: Commercial Code: Conference Oct. 29-31, 1943. The text of the sections considered by the Annual Conference on August 17-21, 1943 can be found in the transcript of that meeting, for Llewellyn read each section to the Conference before discussing it. See *Transcript of 1943 N.C.C.U.S.L. Consideration in Committee of the Whole of the Revised Uniform Sales Act* [hereinafter *1943 Conference Transcript*], in THE LLEWELLYN PAPERS, *supra* note 119, file J-V2h.

¹⁹⁴ The 1942 Conference considered both the *Second Draft of December 1941*, *supra* note 1, and revisions to that draft contained in a document entitled, "Revised Uniform Sales Act: Supplement, Part V, Sections 41-51" [hereinafter *1942 Supplement*], a copy of which is in THE LLEWELLYN PAPERS, *supra* note 119, file J-IV2a. This *1942 Supplement*, *supra*, substituted a new subdivision 54(1)(b), which rearranged the language governing delays in delivery, and covered the circumstance where the buyer fails to cancel the contract upon request by the seller during the delay.

¹⁹⁵ The full text of section 54 except for substituted subdivision 54(1)(b), *supra* note 194, is reprinted in 1 U.C.C. DRAFTS, *supra* note 1, at 502-07.

¹⁹⁶ *1942 Conference Transcript*, *supra* note 181, at 104-11.

¹⁹⁷ *Id.* at 190.

¹⁹⁸ The text of Llewellyn's proposed section was:

SECTION 69. EXCUSE BY FAILURE OF PRESUPPOSED FACILITIES OR CONDITIONS.

Between merchants unless otherwise agreed —

(1) The seller is justified in claiming excuse pursuant to this section for delay in delivery or for partial or complete non-delivery occasioned by

(a) a failure of facilities of carriage despite due effort by the seller if the contract is based on the presupposition that the goods will be transported by carrier; and

another version of the section at that meeting.¹⁹⁹ The version of

(b) strike, injury to factory, shortage of labor, materials or supply or similar cause beyond the seller's reasonable control which amounts to failure of an essential presupposition of the contract for which the seller has not assumed responsibility.

(2) Where the failure affects only a part of the seller's total facilities, he may unless he has made contracts beyond his normal capacity pro-rate the incidence of the failure in any manner which is reasonable for a merchant in the circumstances and may include in the pro-rating the normal orders of customers whose course of dealing with him has made reasonable their reliance on his filling of spot orders. A seller who does not elect to pro-rate has the burden of establishing that the failure goes to a presupposition of the particular contract for which he is claiming excuse.

(3) To claim excuse the seller must give the buyer prompt notice that there will be delay or non-delivery and, if he pro-rates under subsection 2, of the estimated quota thus made available for the buyer.

(4) Compliance in good faith with any governmental regulation or order which is of general application in the trade or place and is of a kind in general commercial acceptance excuses any resulting delay in performance or non-performance by either party whether or not the regulation or order later proves to have been invalid.

Preliminary Draft No. 6, supra note 166, § 69.

Llewellyn's Note following this section reads:

NOTE: No explicit position is taken in regard to subcontracting. The theory of the section rests, however, on the concepts of essential presupposition and of causation; and where equivalent goods are really available in the market, the section should not apply to excuse. Contrast grey goods with airplanes or even with shoes of particular manufacture or mark.

No explicit position is taken on abnormal rise in the market for raws. The present test is de facto availability. The draftsman might prefer a test of a fixed large percentage of rise in cost; but thinks the change politically inadvisable, and perhaps also economically dubious, since careful enterprisers commonly either cover forward requirements early or embark in deliberate gamble with the market.

Subsection 4: It is part of a citizen's duty and risk to fight a discriminatory order of a Hague or Long official. It is no part of commercial law to force constitutional attack on priorities regulation or on embargo by "improperly delegated" Presidential general order. But if the mercantile community does not go along with the order it becomes a business risk like any other.

Id.

The Note requires some explanation. "Grey goods" refers to cloth as it comes from the loom in its unbleached, undyed state. The evident meaning of the sentence in which it is used is that market substitutes are readily available for unfinished cloth but not for airplanes or for shoes of a particular make. "Hague" evidently refers to Frank Hague, a politician who effectively controlled Jersey City and Hud-

Section 69 that emerged from the meeting was much changed in form from Section 54, but still true to its basic principle.²⁰⁰

son County, New Jersey from 1917 to 1947. See DICTIONARY OF AMERICAN BIOGRAPHY 265 (Supp. 1980). "Long" evidently refers to Huey Long, governor of Louisiana and later United States Senator. See DICTIONARY OF AMERICAN BIOGRAPHY 506 (Supp. 1958).

¹⁹⁹ William Draper Lewis' annotated copy of Preliminary Draft No. 6 includes loose carbon copies of two typewritten pages containing a variant text for the section [hereinafter *Typed Insert to § 69*] with the handwritten notation "This is the copy worked on while I was out on March 8." See *Preliminary Draft No. 6, supra* note 166, § 69 (W. Lewis annotated copy). The text of *Typed Insert to 69, supra*, is:

(1) This section is applicable in transactions between merchants, unless their agreement or relevant business usage indicates a different allocation of risk and responsibility.

(2) Delay in delivery or nondelivery in whole or in part by a seller who complies with the provisions of subsections (3) (4) and (5) is not a breach of his contractual duty if it is caused by a failure, unavoidable by his reasonable effort, of transportation or manufacturing facilities the availability of which was a basic assumption on which the contract was made.

[Comment: Among the more common causes of the failure of such facilities are the inability of a common carrier to furnish transportation, action by courts and other government officers, injury to buildings and machinery, strikes, and shortage of labor and materials.]

(3) Where the failure affects only a part of the seller's total facilities, he must pro-rate delivering among his buyers in a fair and reasonable manner; in such pro-rating he may at his option include the orders of customers whose course of dealing with him has made it reasonable for them to rely upon his filling such orders, even though he is not under contract to fill them.

(4) The seller has the burden of establishing that a failure of facilities has occurred, that it unavoidably caused his delay or nondelivery, and that the contract was made on the basic assumption of its nonoccurrence.

(5) [Same as (3) omitting first 3 words.]

(6) Delay or nonperformance is likewise justified if caused by the seller's [here continue as in (4)].

Id.

²⁰⁰ Section 69(1) as approved at the March 1943 meeting was:

SECTION 69. [MERCHANTS'] EXCUSE BY FAILURE OF PRESUPPOSED FACILITIES OR CONDITIONS.

Between merchants, unless their agreement requires a different allocation of risk and responsibility —

(1) Delay in delivery or non-delivery in whole or in part by a seller who complies with the provisions of subsections 2 and 3 is not a breach of his contractual duty if performance as agreed has been made commercially impracticable by

(a) a failure, unavoidable by his reasonable effort, of transportation,

Several of the March 1943 changes deserve mention. First, the concept of "commercial impracticability" had been added: the seller was not excused from performing unless the interfering event

manufacturing or other facilities the availability of which was a basic assumption on which the contract was made; or

(b) compliance in good faith with any governmental regulation or order of a kind in general commercial acceptance, whether or not the regulation or order later proves to have been invalid.

But in either case the buyer is entitled to a proper adjustment of the price or to return of any excess part thereof already paid.

(2) Where the failure affects only a part of the seller's total facilities, he must pro-rate deliveries among his buyers [He may so prorate] in any fair and reasonable manner [in such prorating he] [and] may at his option include the orders of customers whose course of dealing with him has made it reasonable for them to rely upon his filling such orders even though he is not under contract to fill them.

(3) The seller must give the buyer prompt notice that there will be delay or non-delivery and, if he pro-rates [when he must prorate] under subsection 2, of the estimated quota thus made available for the buyer.

Subcommittee Minutes of March 1943, supra note 2, at 13-14. These minutes just recite the approved text; they give no reasons for the changes.

The basic principle that Llewellyn had succeeded in persuading the Conference to approve was that an implied exemption clause should be read into every commercial contract. *See 1942 Conference Transcript, supra* note 181, at 110. Both the Sales Act Comments and Llewellyn's statements after the March 1943 meeting indicate that this principle survived that meeting. *See Tentative Sketch of Comments, supra* note 151, *Comment to § 88* ("The exceedingly common force majeure clauses found especially in manufacturers' contracts (not responsible for any delay or deficiency caused by strike, fire, lockout, destruction of factory, etc., etc., or any other cause beyond our control) have entered into standard commercial expectations. . . . The Act therefore in subsection (1)(a) makes a part of every contract between merchants the clause now found where merchants have been well advised and careful.'). *Cf. U.C.C. § 2-207, Official Comment 5 (1977)* (stating that *force majeure* clause setting forth and perhaps slightly enlarging upon seller's exemption under § 2-615 involves no element of unreasonable surprise).

In May 1944, on the floor of the A.L.I. Annual Meeting, Llewellyn explained the section, then numbered 88, as follows:

Section 88 picks up the standard types of excuse now provided by practically every well-advised manufacturer and often by merchants who are not manufacturers, and which is so well recognized in modern commerce that it never is reflected by a decrease in the price.

It has been our feeling that the small men who do not hire expensive counsel are as properly entitled to these wise commercial provisions as the men who do have the money to hire expensive counsel, and we have therefore undertaken to provide it as a standard piece of law today-commercial law.

21 A.L.I. PROC. 189 (1944).

made his performance commercially impracticable.²⁰¹ Second, the phrase "essential presupposition" had been replaced with "basic assumption," although this seems to have been merely a change of form.²⁰² Third, the enumeration of events which could be a basis for excuse had been redrafted,²⁰³ and the events now had to

²⁰¹ The commercial impracticability concept initially appeared in section 69 set out in the *Subcommittee Minutes of March 1943*, *supra* note 2, which do not explain the reason for the addition. The doctrine of "impracticability" was well known and had been adopted in RESTATEMENT OF CONTRACTS § 454 comment a (1932). The adjective "commercially" evidently was chosen to emphasize that the impracticability question was to be judged by commercial standards. *Comment on Section 6-3*, *supra* note 127. ("[T]he other test under this Act, in terms of *commercial impracticability* (as contrasted with "impossibility," "frustration of performance," or "frustration of the venture") is a relatively unfamiliar phrasing, and is adopted here in order to call attention to the *commercial* character of the criterion chosen by this Act.'). See also U.C.C. § 2-615, Official Comment 3 (1977) (similar statement). The idea of using commercial standards pervaded the Act. See *Proposed Final Draft No. 1*, *supra* note 161, § 26(2), reprinted in 2 U.C.C. DRAFTS, *supra* note 1, at 26. ("Every contract within this Act . . . and one between merchants shall also be interpreted in accordance with commercial standards.'). It is likely that the commercial impracticability concept was added to deal with the problem of when a shortage of labor, raw materials or supply would excuse the seller, for it was in this same meeting that the list of excusing events seemingly was broadened to include these things. See *infra* note 203.

²⁰² The substitution of phrases appeared initially in the *Typed Insert to § 69*, *supra* note 199. It is likely that no change in substance was intended. "Essential presupposition" and "basic assumption" seem in this context to mean the same thing. The reason for the change probably was to use a phrase more familiar to lawyers and judges. Cf. *Comment on Section 6-3*, *supra* note 127, at 7 ("[O]n the other hand, it is repeated that the failure of same situation the continuance of which was assumed a basis of the contract *will* excuse. The one test under this Act, in terms of *basic assumption*, is thus familiar.'). See also U.C.C. § 2-615, Official Comment 3 (1977) (similar statement).

²⁰³ In the *Second Draft of December 1941*, *supra* note 1, § 54(1)(a), (2), the list mentioned failure of "facilities of carriage," "strike, injury to factory or other similar causes beyond the seller's control." The *Subcommittee Minutes of March 1943*, *supra* note 2, § 69(1), covered "failure unavoidable by [seller's] reasonable effort, of transportation, manufacturing or other facilities."

Initially, Llewellyn had proposed adding "shortage of labor, materials or supply" to the list of events. See *Preliminary Draft No. 6*, *supra* note 166, § 69(1). Then, in the *Typed Insert to § 69*, *supra* note 199, the approach of listing specific events was abandoned in favor of a more general description of excusing events. The reason for the change was probably a concern that some courts might unduly restrict the scope of the section, as they had done to express *force majeure* clauses, by the restrictive application of the *ejusdem generis* rule described at *supra* notes 100-03 and accompanying text. See also *Comment on Section 6-3*, *supra* note 127, at 5-6,

be "beyond the seller's reasonable control" rather than just "beyond the seller's control."²⁰⁴ Fourth, a subsection had been added excusing nonperformance caused by governmental regulations or orders.²⁰⁵ This addition seems to make explicit what was implicit in the Second Draft of December 1941.²⁰⁶ Fifth, the section now expressly applied only to transactions between merchants, and then only if their agreement did not indicate otherwise.²⁰⁷ This change also made explicit what had been implicit.²⁰⁸ Sixth, the seller's right to prorate among his customers was made explicit.²⁰⁹ There

stating that

Subsection 1(a) is not limited to its listed terms, which serve only as illustrations of its purpose and principle. . . . The exemption clauses just mentioned two vitally contrasting lines of decision have developed under them. The one line, which is approved and accepted by this Act, Section 1-6(S.1) and Comment, takes the reason and purpose of the clauses as dominant, and the details (the clauses varying hugely in the range and particulars of contingency recited) not as limitations but as illustrations [illustrative cases omitted]. This is the line of construction of listed contingencies which this Act adopts and approves deliberately refraining from any effort at exhaustive expression of the multiple possibilities of circumstance. On the other hand, those holdings which have cut down the meaning of exemption clauses along the lines of strict or narrow *eiusdem generis* interpretation . . . [are] rejected by this Act.

(emphasis in original).

²⁰⁴ This change may also have been motivated by a desire to minimize the potential for the restrictive interpretations of the section mentioned in *supra* note 203. The idea of "reasonable control" seems to have been implicit in *Comment to § 49-E, Second Draft of August 1941, supra* note 176, at 160 (contract as understood by merchants "presupposes that general conditions of operation will continue in such fashion as to make the contract performable by reasonable business effort").

²⁰⁵ See *Typed Insert to § 69, supra* note 199.

²⁰⁶ *Comment on § 54, supra* note 1, at 226 (discussion of "blocked payment facilities"), reprinted in 1 U.C.C. DRAFTS, *supra* note 1, at 506. Cf. *Typed Insert to § 69, supra* note 199 (omits the subsection excusing nonperformance caused by governmental regulations, but contains a comment indicating that governmental regulations can excuse).

²⁰⁷ *Subcommittee Minutes of March 1943, supra* note 2, § 69.

²⁰⁸ *Second Draft of August 1941, supra* note 176, § 49-E, was based upon a principle derived from the merchant's usual understanding of the contract. See *supra* note 178. That understanding could be displaced by agreement otherwise. See *Comment to § 49-E, supra* note 204. ("(6) *Contract to the contrary*. It is barely conceivable that, against an increment of price, a given seller may guarantee a buyer against such a failure of presupposition as is here envisaged. Such a particularized term is of course valid under Section 41.").

²⁰⁹ The seller's right to prorate first appeared in *Preliminary Draft No. 6, supra*

were several other changes as well.²¹⁰

Subsection 69(1) from the March 1943 meeting became, with minor changes,²¹¹ subsection 88(1) of the Revised Uniform Sales Act, Third Draft, 1943 ("Third Draft").²¹² After several additional minor changes,²¹³ N.C.C.U.S.L. approved this subsection along

note 166, § 69(2)(3), although the *Comment to § 49-E*, *supra* note 204, referred to prorating clauses as permissible. The explicit reference to proration in the *Subcommittee Minutes of March 1943*, *supra* note 2, probably was added both to ensure that courts permitted proration even in the absence of express agreement, and to clarify the mechanics of proration. *Cf.* Note, *supra* note 176, at 131-32.

²¹⁰ There were three other changes. First, the explicit statement of principle in section 49-E(3) was deleted. This probably did not signify a change in the principle of the section, but a decision that an explicit statement of a section's principle did not belong in its text. *See 1942 Conference Transcript*, *supra* note 181, at 105-08 (lengthy debate, without resolution, on whether statements of principle belong in text). *See also* Llewellyn, *Plans for Uniform Commercial Code 5-7* (Dec. 1944), in *THE LLEWELLYN PAPERS*, *supra* note 119, file J-VI(1)e (describing losing struggle by Llewellyn to state purpose of each Sales Act section in its text and relegation of such statements to Comments). Second, a postamble had been added to the end of section 69(1) entitling the buyer to an adjustment of the price if the seller is excused. It seems to apply when the seller properly prorates so that a buyer who receives only a portion of what he contracted for need only pay a portion of the price. Third, the subdivisions governing delay in performance were moved to a separate section entitled "Procedure on Notice Claiming Excuse." *See Subcommittee Minutes of March 1943*, *supra* note 2, § 70.

²¹¹ Compare *Subcommittee Minutes of March 1943*, *supra* note 2, § 69(1), with *Third Draft of 1943*, *supra* note 193, § 88(1). Aside from stylistic changes, the differences were few. First, the failure of "manpower" was added to the list of events which can excuse. Second, the entire section was explicitly made subject to the section on substituted performance, which was not a change of substance, but merely a movement of the statement of the relationship between the two sections from the latter to the former. Compare *Preliminary Draft No. 6*, *supra* note 166, § 71(1) (indicating that if substituted performance is possible, section 69 on failure of presupposition does not apply).

²¹² *Third Draft of 1943*, *supra* note 193, § 88(1). A tentative sketch of material for comments accompanied the draft. *See Tentative Sketch of Comments*, *supra* note 151. Llewellyn considered the Comment to this section to be "rather one of the better sketches of comments." *1943 Conference Transcript*, *supra* note 193, at 151. This Comment is reproduced in the Appendix of this Article.

²¹³ Aside from stylistic changes, there were two additional changes. First, "strike, injury to plant, riot" were added to the list of excusing events. Second, the requirement that a governmental regulation or order be "of a kind in general commercial acceptance" was deleted. No change in substance seems to have been intended by this deletion, since later versions of the Comments to this section continue to mention "general commercial acceptance." *See, e.g.*, U.C.C. § 2-615, Official Comment 10 (1977). *See also Changes in 1943 Harbor Text*, *supra* note 193, at 19 (a rather cryptic explanation of this deletion). These changes probably resulted from

with the entire Third Draft, at its Annual Conference in August 1943.²¹⁴ Subsection 88(1) evoked no discussion at that time.²¹⁵

The next step was to attain A.L.I. approval. After several meetings of the Joint Revision Committee (the renamed Drafting Subcommittee),²¹⁶ the Revised Uniform Sales Act went to A.L.I. for

the meeting of the N.C.C.U.S.L. Section Committee and its Special Committee held on August 14-16 just prior to the Annual Conference: "The Conference Section and Committee spent three days over the text, made some revisions and brought the results onto the Conference floor." *Id.* at 1.

²¹⁴ 1943 Conference Transcript, *supra* note 193, at 233. See also N.C.C.U.S.L. HANDBOOK (1943), *supra* note 114, at 116 (text of resolution approving "Uniform Revised Sales Act"). The name of the act was changed from "Revised Uniform Sales Act" to "Uniform Revised Sales Act" during the 1943 Conference. See 1943 Conference Transcript, *supra* note 193, at 234; N.C.C.U.S.L. HANDBOOK (1943), *supra* note 114, at 55 n.1, 116 n.1.

The text of section 88(1), as approved by N.C.C.U.S.L., was:

Section 88. Merchants' Excuse By Failure of Presupposed Facilities or Conditions. Between merchants unless they otherwise agree and subject to Section 87 on substituted performance

(1) Delay in delivery or non-delivery in whole or in part by a seller who complies with subsections 2 and 3 is not a breach of his duty under a contract for sale if performance as agreed has been made commercially impracticable by

(a) strike, injury to plant, riot, failure of manpower or of transportation, manufacturing or other facilities, when the non-occurrence of such contingency was a basic assumption on which the contract was made and its occurrence was not avoidable by the reasonable efforts of the seller; or

(b) compliance in good faith with any applicable governmental regulation or order, whether or not the regulation or order later proves to have been valid.

But, in either case the buyer is entitled to a proper adjustment of the price or to recover any excess part already paid.

Third Draft of 1943, *supra* note 193, § 88(1); 1943 Conference Transcript, *supra* note 193, at 150; *Printed Conference Text of the Revised Uniform Sales Act*, (prepared after the Conference approved the Sales Act) [hereinafter *1943 Printed Conference Draft*], in A.L.I. ARCHIVES, *supra* note 2, drawer 182, file: Commercial Code, Conference Oct. 29-31, 1943.

²¹⁵ 1943 Conference Transcript, *supra* note 193, at 150-51 (Llewellyn read text of section, explained subsection (2) duty to allocate, and, hearing no objection, proceeded to next section).

²¹⁶ The Drafting Subcommittee was reconstituted as a "Joint Revision Committee," and was variously referred to as the "Joint Revising Committee," the "Joint Editorial Committee," and the "Joint Advisory Committee." See Lewis, *Notes of W.D.L. of Interview with Llewellyn as of October 9, 1943*, at 1, in THE LLEWELLYN PAPERS, *supra* note 119, file J-V(1)b. This Committee held two meetings, on October 29-31, 1943, and January 14-18, 1944, prior to the February 1944 A.L.I. Council

its consideration.²¹⁷ At its Annual Meeting in May 1944, the A.L.I. membership approved, with some changes, the Sales Act.²¹⁸ Subsection 88(1) as then approved²¹⁹ differed only in very minor respects from the version approved by N.C.C.U.S.L. the previous autumn.²²⁰

meeting. The membership of the Joint Revision Committee was the same as that of the Drafting Subcommittee except that Howard Barkdull replaced Charles Hardin as a N.C.C.U.S.L. representative. *Id.*

²¹⁷ After the January 1944 meeting of the Joint Revision Committee, Llewellyn had prepared a draft of the Sales Act for the A.L.I. Council. *See Uniform Revised Sales Act, Council Draft No. 1* (Feb. 9, 1944) [hereinafter *Council Draft No. 1*], reprinted in A.L.I. ARCHIVES PUBLICATIONS IN MICROFICHE, microfiche 0004 (1985). Accompanying this draft were Comments to many sections, but none of the Comments are for the impracticability sections. *See Uniform Revised Sales Act, General Comment and Special Comments on Council Draft No. 1* (Feb. 9, 1944), reprinted in A.L.I. ARCHIVES PUBLICATIONS IN MICROFICHE, microfiche 0005 (1985). On February 22-25, 1944, the A.L.I. Council met to approve the Sales Act for submission to the A.L.I. membership. *See Proposed Final Draft No. 1, supra* note 161, at iv.

²¹⁸ *See* 21 A.L.I. PROC. 261 (1944) (text of A.L.I. resolution approving Revised Sales Act).

²¹⁹ The section 88(1) approved by A.L.I. was:

Between merchants unless they otherwise agree and subject to Section 87 on substituted performance

(1) Delay in delivery or non-delivery in whole or in part by a seller who complies with subsections 2 and 3 is not a breach of his duty under a contract for sale if performance as agreed has been made commercially impracticable by

(a) strike, damage to plant, riot, failure of manpower or of transportation, manufacturing or other facilities, when the non-occurrence of such contingency was a basic assumption on which the contract was made and its occurrence was not avoidable by the reasonable efforts of the seller; or

(b) compliance in good faith with any applicable governmental regulation or order, whether or not the regulation or order later proves to have been invalid.

Proposed Final Draft No. 1, supra note 161, § 88(1), reprinted in 2 U.C.C. DRAFTS, *supra* note 1, at 47. The section evoked no discussion. Llewellyn briefly described section 88 and then went on to the next section. *See* 21 A.L.I. PROC. 189-90 (1944).

²²⁰ There were only two differences, both insubstantial, between the version of section 88(1) approved by A.L.I. and the version approved previously by N.C.C.U.S.L. First, in the enumeration of excusing events, "damage to plant" has been substituted for "injury to plant." This change was made during the A.L.I. Council meeting. *See Council Meeting, February 22-25, 1944, Sales Sections (Sales Act)* 36, in A.L.I. ARCHIVES, *supra* note 2, drawer 182 or 183. Second, the postamble to subsection one, which requires adjustment of the price if the buyer receives only part of the goods, has been deleted in the A.L.I. version. As to this deletion, no change of substance can have been intended; if the buyer receives only

The Joint Revision Committee continued to meet to resolve differences between the N.C.C.U.S.L. and the A.L.I. Sales Act texts and to draft the Official Comments.²²¹ At some point, evidently September 1945,²²² the Joint Revision Committee

part of the goods, he should pay only an apportionable part of the price. See *Proposed Final Draft No. 1*, *supra* note 161, § 97(1) ("The buyer must pay at the contract rate for any goods accepted."). See also U.C.C. § 2-607(1), Official Comment 1 (1977) ("In cases of partial acceptance, the price of any part accepted is, if possible, to be reasonably apportioned. . . .").

²²¹ N.C.C.U.S.L., *Consideration in Committee of the Whole of the Report on Status of Uniform Revised Sales Act* 10 (Sept. 5-9, 1944) [hereinafter *1944 Conference Transcript*], in THE LLEWELLYN PAPERS, *supra* note 119, file J-VI2m (indicating that joint committee wrestling with differences in two texts and drafting Comments). The Joint Revision Committee met at least three times after the A.L.I. approved the Sales Act in May 1944. See *Memorandum for Joint Revising Committee for Use at the Meeting in Boston, July 27, 28, 29, 1944* [hereinafter *July 1944 Memorandum*], in THE LLEWELLYN PAPERS, *supra* note 119, file J-VI2c; *Meeting of Joint Advisory Committee (May 21-22, 1945)* [hereinafter *May 1945 Meeting Minutes*], in THE LLEWELLYN PAPERS, *supra* note 119, file J-VII2a; *Sales Act - Meeting of Joint Advisory Committee, Boston, Massachusetts, September 18, 19, 20 (Sept. 1945)* [hereinafter *Sept. 1945 Meeting Minutes*], in A.L.I. ARCHIVES, *supra* note 2, drawer 198, file: Sales Act, Sept. 18-20, 1945 Meeting. By the end of its September 1945 meeting, the Joint Revision Committee had resolved the textual differences and had approved all but about nine or ten Comments. The remaining Comments were to be dealt with by mail, as the September 1945 meeting was supposed to be the final meeting of the committee. See Lewis, *Report of the Director, Division 1, to the Meeting of the [A.L.I.] Executive Committee* 1-2, Appendix I at 3 (Nov. 16, 1945), in THE LLEWELLYN PAPERS, *supra* note 119, file J-VIII(1)c.

The A.L.I. representatives to the Joint Revision Committee were empowered to bind A.L.I. to Sales Act textual changes "as do not affect substantive policy matters," and to approve the Sales Act Comments for A.L.I. See 21 A.L.I. PROC. 261-62 (1944). The N.C.C.U.S.L. representatives to the Joint Revision Committee were not empowered to bind N.C.C.U.S.L. on either textual changes or the Comments. N.C.C.U.S.L. delegated that power to its Executive Committee which vested the power in a subcommittee chaired by William Schnader. See Lewis, *Report of the Director, Division I, to the Meeting of the [ALI] Executive Committee* 1-2, and Part I - Appendix I at 1-2 (Nov. 16, 1945), in THE LLEWELLYN PAPERS, *supra* note 119, file J-VIII(1)c. That subcommittee was the "Committee on Cooperation with the American Law Institute in the Preparation of the Commercial Code," usually referred to as the "Commercial Code Committee." See A.L.I. and N.C.C.U.S.L., *Program for Co-operative Preparation of the Proposed Uniform Commercial Code by the American Law Institute and the National Conference of Commissioners on Uniform State Laws*, Appendix entitled "Authority of Agents of Conference" (Dec. 1, 1944), in THE LLEWELLYN PAPERS, *supra* note 119, file J-VI(1)h.

²²² The exact date is uncertain because the document proposing the reorganization, see *infra* note 223, is undated and the minutes of the Committee meetings do not clearly indicate when these changes to subsection 88(1) were made. However, the

reorganized the text of subsection 88(1), though apparently without intending any change of substance. Tentative changes in the text of that section were set forth in an amendment to subsection 88(1) proposed by Llewellyn and his assistant Soia Mentschikoff.²²³

proposed reorganization was found in the A.L.I. Archives in drawer 198 in a stack of comments and other proposed amendments which contained a cover memo from Llewellyn dated September 18, 1945. Other evidence corroborates the September 1945 date: The proposal to reorganize cannot have been made until sometime after *Council Draft No. 1*, *supra* note 217, which was dated Feb. 9, 1944, because the proposal shows the subsection with the phrase "damage to plant," which did not appear in that Draft.

Further, the proposed reorganization was probably not considered at the July 1944 Committee meeting. *See July 1944 Memorandum*, *supra* note 221, Part III at 3 (no amendments to section 88); *see also* THE LLEWELLYN PAPERS, *supra* note 119, file J-VIII2c, containing a document which is apparently a list of the textual changes discussed at the July 1944 meeting, and which does not contain the proposed reorganization, although it is missing the first two pages. Nor was reorganization of section 88(1) considered at the May 1945 meeting. *See May 1945 Meeting Minutes*, *supra* note 221. The next meeting of the Committee was in September 1945. The reorganization cannot have been proposed after the September 1945 meeting, because the text of the subsection approved at that meeting includes the proposed reorganization. So the proposed reorganization must have been considered by the Committee sometime between July 1944 and May 1945, or at the September 1945 meeting. Because of its location in the A.L.I. Archives, the September 1945 date is the most likely choice.

²²³ The text of the document containing the proposed amendment to subsection 88(1) is:

Proposed Amendment To Section 88. Merchant's Excuse by Failure Of Presupposed Facilities Or Conditions

(Note by K.N.L. - S.M.: The effort to bring this section into "Institute form" has led

(a) to *limitation* (by the language) of the "commercial impracticability" principle, instead of to the illumination of the language by that principle;

(b) to limiting the "basic assumption" idea to Subs. 1(a), though it belongs equally to Subs. 1 (b).)

Between merchants *unless otherwise agreed* and subject to Section 87 on substituted performance

(1) Delay in delivery or non-delivery in whole or in part by a seller who complies with subsections 2 and 3 is not a breach of his duty under a contract for sale if performance as agreed has been made commercially impracticable¹ by a contingency the non-occurrence of which was a basic assumption on which the contract was made. Such contingencies include

(a) strike, damage to plant, riot, failure of manpower or of transportation, manufacturing or other facilities (d: the balance);

(b) compliance in good faith with any applicable foreign or domestic

The Committee approved these and other changes, and the subsection was redesignated 88(a).²²⁴

Four of the changes made in the reorganization are particularly worthy of note. First, the subdivision was reorganized to emphasize the commercial impracticability and basic assumption concepts.²²⁵ Second, the enumeration of specific events that excuse performance was deleted, and governmental regulation or order remained as the only event specifically mentioned.²²⁶ Third, the reference to governmental regulation or order was expanded expressly to include conduct by foreign governments. This change

governmental regulation or order, whether or not the regulation or order later proves to have been valid.

¹This lifted in substance from old 1(a).

A.L.I. ARCHIVES, *supra* note 2, drawer 198 (footnote in original). In the left hand margin opposite paragraphs (a) and (b) of the "Note by K.N.L. - S.M." there appears the handwritten notation "change in accordance with principle of R.S.," the meaning of which is unknown.

²²⁴ The text of subsection 88(a) as approved by the Committee in the September 1945 meeting was:

MERCHANTS' EXCUSE BY FAILURE OF PRESUPPOSED FACILITIES OR CONDITIONS. Between merchants unless otherwise agreed and subject to Section 87 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 commercially 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.

September 1945 Meeting Minutes, supra note 221, at 9.

²²⁵ This change accords with the stated purpose of the proposed amendment, which was to illuminate the language of the section with the commercial impracticability principle rather than to limit that principle by the language of the section. *See supra* note 223.

²²⁶ The proposed amendment would have retained the listing of events. So the deletion must have been decided at the meeting itself. The decision to delete probably was motivated by a desire to minimize the possibility of courts limiting the principle underlying the section to the specific events listed. *See Comment on Section 87, supra* note 161. *See also 1942 Conference Transcript, supra* note 181, at 109 (colloquy between Llewellyn and Hiram Thomas on narrow interpretation of exemption clauses by some courts). The unfortunate consequence of this deletion is that it obscures the intent that the subsection be a statutory *force majeure* clause reflecting the normal commercial understanding of merchants in a sales transaction. The text of the subsection is now so general that it fails to guide, though some guidance can be obtained from the Comments.

made explicit what had been implicit.²²⁷ Fourth, the requirement that the interfering event not be "avoidable by the reasonable efforts of the seller" was deleted. The deleted requirement would seem to be inherent in both the concept of commercial impracticability and the merchant's obligation of good faith.²²⁸ The draft of the Comment accompanying the proposed amendment suggests that Llewellyn intended the requirement to survive despite its deletion from the text of the section.²²⁹

The next changes appeared in the Spring 1950 draft of the Uniform Commercial Code. That draft incorporated several changes to the "failure of basic assumption" subsection which made it essentially identical to the present 2-615(a).²³⁰ The restriction of

²²⁷ See *Tentative Sketch of Comments*, *supra* note 151, *Comment to Section 88* at 40 ("Subsection 1(b) is drawn to include the effect of foreign governmental regulation. . . ."). The addition probably reflects the desire to abolish clearly the distinction between domestic government interference and foreign government interference. Traditionally, the former excused, while the latter often did not. See *supra* notes 61, 169. It is also interesting to note that in the approved text the "basic assumption" idea does not apply to governmental interference, although the proposed amendment would have had it so apply. See *supra* note 223.

²²⁸ See, e.g., *Proposed Final Draft No. 1*, *supra* note 161, § 26(2) ("Every contract within this Act imposes an obligation of good faith in its performance and one between merchants shall also be interpreted in accordance with commercial standards."); *id.* § 10(1) (" 'Good faith' means honesty in fact in the conduct or transaction concerned and in the case of a merchant includes reasonable observance of commercial standards. . . .").

²²⁹ See *Comment on Section 6-3*, *supra* note 127, comment 5, at 12 (emphasis in original):

But there can of course be no excuse under this section unless the seller has employed all due measures to assure himself that his source will not fail. Thus where molasses was to be the product of a named refinery and the refinery did not produce a sufficient supply during the contract period, the seller's failure to contract with the refinery barred any excuse, Canadian Industrial Alcohol Co., Ltd. v. Dunbar Molasses Co. (1932) 258 N.Y. 194, 179 N.E. 383; and so with a governmental stoppage of shipment of lumber, where permits were procurable and the seller had not made diligent efforts in good faith to procure one. Washington Mfg. Co. v. Midland Lumber Co. (1921) 113 Wash. 593, 194 Pac. 777.

See also *Comment on Section 6-3*, *supra* note 127, comment 7a, at 17:

[A]ny clause extending exemption into contingencies which are within the seller's control is to be regarded as out of line with reasonable expectation, and so as strongly suspect of unconscionability for surprise. See Int. Com. to II and III, pars. 6-9, and Section 2-6 (S.23).

²³⁰ See *Uniform Commercial Code: Proposed Final Draft, Text Edition*, § 2-615

the section to transactions "between merchants" disappeared.²³¹ The statement that the section was subject to agreement otherwise was replaced with the phrase, "[e]xcept so far as a seller may have assumed a greater obligation."²³²

(Spring 1950), reprinted in 9 U.C.C. DRAFTS, *supra* note 1, at 269-70 [hereinafter *Spring 1950 Draft*]. The only later changes made to this subsection's text were to capitalize the "d" in "delay" at the beginning of the subsection, and to add a punctuation mark. See 13 U.C.C. DRAFTS, *supra* note 1, at 140. The only later substantive change to the section's text was to add a clause for clarification in subsection b. See *Supplement No. 1 to the 1952 Official Draft of the Text and Comments of the Uniform Commercial Code (Jan. 1955)*, § 2-615, reprinted in 17 U.C.C. DRAFTS, *supra* note 1, at 331 (change and reason for change). Changes in the Comments to this section are described in the Appendix of this Article.

²³¹ The change may have been made because Williston criticized the section's restriction to merchants. Llewellyn's files contain a typewritten copy of a Williston article commenting upon the proposed Code and containing this criticism. See THE LLEWELLYN PAPERS, *supra* note 119, file J-XI2a; Williston, *The Law of Sales in The Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 585 (1950). In fact, this restriction may not have been intended to restrict at all. See *Uniform Commercial Code, May 1949 Draft* § 2-615, comment 9, reprinted in 7 U.C.C. DRAFTS, *supra* note 1, at 233 [hereinafter *May 1949 Draft*] (section applicable to non-merchants if circumstances bring case within reason of section).

²³² The Llewellyn Papers contain a copy of the May 1949 Code draft with Llewellyn's annotation for this change. Next to the preamble to section 2-615(a) he has written, "Except insofar as S may give up." See *May 1949 Draft*, *supra* note 231, § 2-615. Chancellor Hawkland explains that the purpose of the textual change was to make it clear that the seller could surrender his right to excuse under 2-615(a) by means other than an express agreement. See Hawkland, *The Energy Crisis and Section 2-615 of the Uniform Commercial Code*, 79 COM. L.J. 75 (1974).

Yet, more must have been at stake because this reason does not explain why the drafters substituted a phrase which decidedly limits the seller's ability to get more than that section gives him. The drafting history of this section shows that Llewellyn was chary of seller attempts to overdraft *force majeure* clauses. See *Second Draft of August 1941*, *supra* note 176, § 49-E, comment 6. ("[T]he relief provisions of the present section are remedial, within the meaning of Section 57-A, and modifications in them require to be held within reason."). See also *Tentative Sketch of Comments*, *supra* note 151, at 40:

It should be noted in the Comment that the extremely liberal provisions of this section in favor of the seller ought to be regarded as making unconscionable within the meaning of Section 24 on form clauses other clauses which without discoverable positive necessity go further by providing, for instance, that the buyer shall have no privilege to cancel for the delay or that the seller, notwithstanding the extent of the delay may entirely at his own option resume deliveries or not when the delay ceases.

See also *Comment on Section 87*, *supra* note 161, comment 6; *May 1949 Draft*, *supra* note 231, § 2-615, comment 8, reprinted in 7 U.C.C. DRAFTS, *supra* note 1,

A final change in the Spring 1950 draft was the deletion of the word "commercially" from the phrase "commercially impracticable."²³³ This change was probably not intended to alter the concept of commercial impracticability. That concept already had been approved by both organizations which sponsored the Code.²³⁴ This concept is basic to the section's purpose,²³⁵ yet there is no record of any discussion of the change at any of the relevant meetings of A.L.I. and N.C.C.U.S.L.²³⁶ A change so fundamental

at 233:

Generally express agreements as to exemptions designed to enlarge upon or supplant the provisions of this Section are to be read in the light of mercantile sense and reason, for this section itself sets up the commercial standard for normal and reasonable interpretation.

The qualification of the "unless otherwise agreed" provision of this Section applies even more strongly in regard to the consequences of exemption as laid down in paragraphs (b) and (c) and the next section on procedure on notice claiming excuse.

Contemporaneously with the change in text, the Comments to section 2-615 were changed to emphasize that agreements designed to enlarge upon or supplant the provisions of this section were suspect. *See Uniform Commercial Code: Proposed Final Draft, Text and Comments Edition*, § 2-615, Official Comment 8 (May 1950), reprinted in 10 U.C.C. DRAFTS, *supra* note 1, at 263 [hereinafter *May 1950 Draft*] (regarding agreements designed to enlarge upon or supplant section's provisions, "this section itself sets up the commercial standard for normal and reasonable interpretation and provides a minimum beyond which agreement may not go") (emphasis shows language added to Comment).

²³³ Compare *May 1949 Draft*, *supra* note 231, § 2-615(a), with *Spring 1950 Draft*, *supra* note 230, § 2-615(a).

²³⁴ See *1942 Conference Transcript*, *supra* note 181, at 110-11 (N.C.C.U.S.L. approval of general policies of the section); *1943 Conference Transcript*, *supra* note 193, at 150-51 (no objection voiced to section). See also *Discussions: Proposed Final Draft of the Uniform Revised Sales Act*, 21 A.L.I. PROC. 189-90 (1944) (no objection voiced to section).

²³⁵ See, e.g., *Comment on Section 87*, *supra* note 161; U.C.C. § 2-615, Official Comments 1, 3 (1977).

²³⁶ Traditionally, N.C.C.U.S.L. and A.L.I. each met separately from the other to discuss the Code drafts. A.L.I.'s Annual Meeting was held in the Spring, usually in May; N.C.C.U.S.L.'s Annual Conference was held in the Fall, usually in late August or early September. However, to expedite final approval of the Code, both organizations sometimes met jointly. In the years 1949 and 1950, they met jointly in both the Spring and the Fall.

The deletion of the word "commercially" from subdivision 2-615(a) occurred sometime after the *May 1949 Draft*, *supra* note 231, and before the *Spring 1950 Draft*, *supra* note 230. Thus, the meetings during which the deletion might have been discussed are the Joint Meetings of May 1949, September 1949, and May 1950. Yet none of the transcripts for these meetings contain any reference to the deletion.

would have been opposed by Karl Llewellyn, and would certainly have been discussed.²³⁷ So it is doubtful that any change was intended by deleting the adjective "commercially." The change probably was a result of the decision to include non-merchants within the express scope of the section.²³⁸ On balance, it appears that the concept of commercial impracticability was retained where the party seeking excuse was a merchant.²³⁹

Since 1950, subsection 2-615(a) has remained unchanged.²⁴⁰

See Proceedings of the Twenty-sixth Annual Meeting of the A.L.I. in Joint Session with the N.C.C.U.S.L. (May 1949) (no discussion of Article 2), reprinted in A.L.I. ARCHIVES PUBLICATIONS IN MICROFICHE, microfiches titled "A.L.I. Proceedings: 26th Annual Meeting" (1985); *Proceedings in Committee of the Whole, Uniform Commercial Code: N.C.C.U.S.L. and A.L.I.* (Sept. 1949) (no discussion of Article 2), in THE LLEWELLYN PAPERS, *supra* note 119, file J-XI9d; *Proceedings of the Twenty-seventh Annual Meeting of the A.L.I. in Joint Session with N.C.C.U.S.L.* (May 1950) (some Article 2 sections discussed, but not section 2-615), reprinted in A.L.I. ARCHIVES PUBLICATIONS IN MICROFICHE, microfiches titled "A.L.I. Proceedings: 27th Annual Meeting, 1950" (1985).

²³⁷ The fact that this change was not discussed in any of the Joint Meetings is cogent evidence that no substantive change was intended, for, at the September 1949 Joint Meeting, a resolution was passed which adopted a tentative final draft of the Code text and Comments and which also empowered the Code Editorial Board to make non-substantive changes to that draft. *See* N.C.C.U.S.L. HANDBOOK (1949), *supra* note 114, at 180-81.

²³⁸ *See supra* note 231 (indicating that Williston's criticism of narrow scope of section is likely reason for changes to section). Llewellyn's papers contain an original print of the May 1949 draft of the U.C.C. In that draft, section 2-615 contains three handwritten deletions striking out the words "Merchants" in the caption, "Between merchants" in line 1, and "commercially" in line 7. *See May 1949 Draft*, in THE LLEWELLYN PAPERS, *supra* note 119, file J-XI(1)a. These deletions were adopted and are some proof that the decision to delete the adjective "commercially" was part of the plan to expand the section to include non-merchants.

²³⁹ This theory is supported by the fact that the concept of commercial impracticability was left untouched in the companion section 2-614. U.C.C. § 2-614 (1977). Further, although the Official Comments to 2-615 were amended to reflect the first two deletions concerning merchants described in the previous footnote, Official Comments 1, 3 and 9 still retain references to commercial impracticability. U.C.C. § 2-615, Official Comments 1, 3, 9 (1977).

²⁴⁰ Several attempts to amend subdivision 2-615(a) were resisted. *See Report of Subcommittee on Article 2 to Editorial Board of Sponsoring Organizations* 26 (Sept. 30, 1954), in A.L.I. ARCHIVES, *supra* note 2, box 69; *Report No. 3 of the Subcommittee on Article 2* at 11 (Dec. 1, 1954), in THE ROBERT BRAUCHER PAPERS, file 27-2 (located in the Harvard Law School Library, Cambridge Massachusetts) [hereinafter THE BRAUCHER PAPERS]; *Comment on Criticisms of Article 2 Uniform Commercial Code: Report No. 4 of the Subcommittee on Article 2* at 111-12 (Oct. 31, 1955) in THE BRAUCHER PAPERS, *supra*, file 26-2; *Report No. 3 of the*

2. *The Purposes of Subsection 2-615(a).* The intent of the drafters of the U.C.C. was that the policy and reason of a Code section guide its application.²⁴¹ The Official Comments are an important source for ascertaining the policy and reason of a Code section.²⁴² Judging from the Official Comments to sections 2-613 through 615, and the prior drafts of those comments reproduced in the Appendix of this Article, the "failure of basic assumption" subsection has two main purposes. The first purpose is to provide a flexible basis for excuse, premised on the view that an agreement allocates only the risk of supervening general events which are anticipated when the agreement is made. The second purpose was to induce commercially reasonable interpretation of contractual excuse clauses.

The first purpose is by far the more important. To deal with the problem of risks not specifically allocated by the parties, two

Permanent Editorial Board for the Uniform Commercial Code 49 (1967), reprinted in A.L.I. ARCHIVES PUBLICATIONS IN MICROFICHE, microfiche 0900 (1985).

²⁴¹ See U.C.C. § 1-102(1), Official Comment 1 (1977); U.C.C. § 2-615, Official Comment 6 (1977) ("on the reading of all provisions in the light of their purposes"). In a memorandum on the drafting of the U.C.C., dated December 1944, Karl Llewellyn wrote:

Drafting Techniques and Policies.

1. The principle of the *patent reason*: Every provision should show its reason on its face. Every body of provisions should display on their face their organizing principle.

The rationale of this is that construction and application are intellectually impossible except with reference to *some* reason and theory of purpose and organization. Borderline, doubtful, or un contemplated cases are inevitable. Reasonably uniform interpretation by judges of different schooling, learning and skill is tremendously furthered if the reason which guides application of the same language is the same reason in all cases. A patent reason, moreover, tremendously decreases the leeway open to the skillful advocate for persuasive distortion or misapplication of the language; it requires that any contention, to be successfully persuasive, must make some kind of sense *in terms of the* reason; it provides a real stimulus toward, though not an assurance of, corrective growth rather than straitjacketing of the Code by way of caselaw.

K. Llewellyn, Plans for the Uniform Commercial Code 5 (unpublished manuscript; emphasis in original), in THE LLEWELLYN PAPERS, *supra* note 119, file J-VI(1)e. See also K. LLEWELLYN, *supra* note 103, at 183-84 (Llewellyn's theory of rules; the "Law of the Singing Reason"); W. TWINING, *supra* note 1, 321-30; McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 798-800 (1978).

²⁴² Each Comment has a section entitled "Purposes of Changes." See W. TWINING, *supra* note 1, at 326-30 (discussing function of Comments).

conflicting views have developed. The older view, "absolute obligation," treats the seller's obligation to perform as practically absolute: unless he has protected himself in the contract, the seller, with few exceptions, is said to assume the risk of any events that make his performance more expensive or even impossible, no matter how unlikely the occurrence of those events may have seemed at the time of contracting.²⁴³ The second view, "limited obligation," which developed in the nineteenth century, was that a contract allocated only those general risks that were contemplated by the parties at the time of contracting.²⁴⁴ Under the latter view, the occurrence of an unusual general event excuses the seller if his performance was thus made commercially impracticable.²⁴⁵ The limited obligation view of contractual risk allocation was adopted in subsection 2-615(a).²⁴⁶

In true realist fashion, Llewellyn justified the adoption of the limited obligation view as conforming to the implicit understanding of the parties. In Llewellyn's opinion, the limited obligation view reflected the normal assumption of the parties, that the seller would be excused if unanticipated general events beyond his

²⁴³ The case given as an illustration of this approach was *Whitman v. Anglum*, 92 Conn. 392, 103 A. 114 (1918). See *Comment on Section 6-3, supra* note 127. This approach traces back to dictum in the English case of *Paradine v. Jane*, Ayleyn 26, 82 Eng. Rep. 897 (K.B. 1647), discussed at *supra* note 44.

²⁴⁴ *Chicago, Milwaukee & St. Paul Ry. Co. v. Hoyt*, 149 U.S. 1, 14-15 (1982); *Mishara Const. Co., Inc. v. Transit-Mixed Concrete Corp.*, 365 Mass. 122, 128-29, 310 N.E.2d 363, 367 (1974); *Missouri Public Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 726 (Mo. App.), cert. denied, 444 U.S. 865 (1979); 18 S. WILLISTON, *supra* note 46, § 1931 n.19; Farnsworth, *Disputes Over Omission in Contracts*, 68 COLUM. L. REV. 860 (1968); Smit, *Frustration of Contract: A Comparative Attempt at Consolidation*, 58 COLUM. L. REV. 287 (1958); RESTATEMENT OF CONTRACTS § 457 (1932) (excusing promisor for facts which he had "no reason to anticipate"). This approach traces back to *Baily v. De Crespigny*, L.R.-4 Q.B. 180 (1869). The view that risks under a contract are limited by what the parties contemplated is not only a basis for determining whether there has been a breach, but also is used to limit the recovery of consequential damages caused by a breach. See *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854); U.C.C. § 2-715(2)(a) (1977).

²⁴⁵ *Comment on Section 54, supra* note 1, comments 1, 3; *Comment on Section 6-3, supra* note 127, comment 1; *Comment on Section 87, supra* note 161, comment 1; U.C.C. § 2-615, Official Comment 1 (1977).

²⁴⁶ *Comment on Section 54, supra* note 1, comments 3-4; *Tentative Sketch of Comments, supra* note 151, Comment to Section 88; *Comment on Section 6-3, supra* note 127, Introductory comment and comments 1, 3; *Comment on Section 87, supra* note 161, Introductory comment and comments 1, 3.

control made his performance impracticable.²⁴⁷ Llewellyn based his conclusion about the parties' normal assumptions upon the fact that seller excuse clauses covering such events are common in sales contracts, and buyers agree to such clauses without trying to negotiate price concessions in return for the clauses.²⁴⁸ Llewellyn believed that an excuse to the seller for unanticipated supervening general causes beyond his control was so taken for granted by parties in a sales contract that it was the seller's assumption of responsibility for such causes that needed to be made express, not the seller's disclaimer of responsibility.²⁴⁹

²⁴⁷ Thus, Llewellyn wrote, "[t]he type of exemption concerned is so wide-spread and familiar in the contracts of *well-organized* and *well advised sellers*; it is so reasonable and fair, it is (until lawyers are consulted) so thoroughly taken for granted by buyers, as to evidence the sound base-line for *general law*." *Comment to Section 54, supra* note 1, at 226, *reprinted in* 1 U.C.C. DRAFTS, *supra* note 1, at 506. "[C]ontract presupposes that general conditions of operation will continue in such fashion as to make the contract performable by reasonable business effort." *Id.* See also *Comment on Section 87, supra* note 161, at 1 ("such protection for the seller has come to be a normal assumption underlying sales contracts"). Cf. U.C.C. § 2-615, Official Comment 8 (1977) ("the exemption otherwise present through usage of trade . . .").

²⁴⁸ Llewellyn stated on the floor of the 1942 N.C.C.U.S.L. Annual Conference: My experience does not lead to any indication that there ever has been a bargain equivalent for the insertion of this clause, that is, I have never heard of a price being raised or lowered because this clause was or was not in the contract. It is in where sellers happen to think about it and buyers don't object to it because it makes sense. Under those circumstances, it is my belief that the clause should not require to be written into the contract. It just does make sense.

1942 Conference Transcript, *supra* note 181, at 109. See also *Tentative Sketch of Comments, supra* note 151, Comment to Section 88 (Llewellyn's statement that excuse clauses are so well recognized as not to be accompanied by decrease in price); *Discussions: Proposed Final Draft of the Uniform Revised Sales Act*, 21 A.L.I. PROC. 189 (1944) (same). There is evidence that Llewellyn's opinion was correct. See Letter from E. Fiedler to H. Goodrich at 3 (Sept. 6, 1950), in A.L.I. ARCHIVES, *supra* note 2, ("Sec. 2-1615 [sic] will be welcomed by businessmen in that it sets up as part of the law of Sales a *force majeure* provision that many had supposed they already possessed as of right.")

²⁴⁹ *Comment on Section 54, supra* note 1, at 226, *reprinted in* 1 U.C.C. DRAFTS, *supra* note 1, at 506. The excuse gives way to an agreement otherwise. U.C.C. § 2-615, Official Comment 8 (1977). See also *Comment on Section 87, supra* note 161, comment 6, at 82. By making explicit what was implicit, Llewellyn sought to protect the small business. See *Discussions: Proposed Final Draft of the Uniform Revised Sales Act*, 21 A.L.I. PROC. 189 (1944); *Comment on Section 87, supra* note 161, at 1 (reproduced in the Appendix of this Article) ("[F]or the protection [of

The second purpose of the "failure of basic assumption" subsection was to promote reasonable commercial interpretation of excuse clauses by courts.²⁵⁰ Indeed, this is a purpose which pervades Article 2.²⁵¹ This purpose was made explicit in the Official Comments probably for two reasons. The first reason was to discourage the narrow *ejusdem generis* interpretation which often cut the heart out of excuse clauses.²⁵² The second reason was to discourage sellers from overdrafting such clauses and so provide for unreasonably broad protection.²⁵³ In both cases, the remedy is

the excuse clause] must operate without need for any clause at all lest the law discriminate on an important point of normal commercial understanding against small businesses which do not happen to employ skilled counsel.'').

²⁵⁰ *Comment on Section 87, supra* note 161, comment 2, at 78 (describing two lines of decisions interpreting excuse clauses, one commercial and flexible, the other narrow and inelastic; Act rejects second line); *id.*, comment 6, at 82 (explicit language of assumption of risk as well as of exemption must be given reasonable commercial interpretation; this section sets up commercial standard for normal and reasonable interpretation). *Cf.* U.C.C. § 2-615, Official Comment 8 (1977):

Generally, express agreements as to exemptions designed to enlarge upon or supplant the provisions of this section are to be read in the light of mercantile sense and reason, for this section itself sets up the commercial standard for normal and reasonable interpretation and provides a minimum beyond which agreement may not go.

²⁵¹ See U.C.C. § 1-205(3), Official Comments (1977); *id.* § 2-301, Official Comments; U.C.C. § 2-202, Official Comments 1(b), 2. See also *Selected Comments To Uniform Revised Sales Act, General Comment On Parts II and IV Formation and Construction* 1-2, in THE LLEWELLYN PAPERS, *supra* note 119, file J-IX2a (footnotes omitted) [hereinafter *Selected Comments*]:

The principles of good faith, protection of commercially reasonable conduct, reading of language and conduct against the background of the commercial sense of the contract, avoidance of surprise and technical traps run throughout this Act applying both to the formation and the construction of the contract. They are made express in specific instance after specific instance in which a conflict, confusion or lag in the case law has indicated that such explicit reference is necessary but whether or not they are expressed specifically in any particular passage they pervade each section and group of sections. To these principles, particularly, the full language of Section 1 directing application of the whole Act in terms of its underlying principles and purposes must be applied.

²⁵² See *supra* note 250. Fear of narrow interpretation was apparently the reason the drafters dropped the enumeration of specific excusing events contained in earlier drafts. See *supra* notes 100-03, 203. *Cf.* U.C.C. § 2-615, Official Comment 2 (1977). For an example of commercially reasonable interpretation of an excuse clause, see *Ford & Sons, Ltd. v. Henry Leatham & Sons, Ltd.*, 84 K.B.L.J. 2101; 31 T.L.R. 522, 21 Com. Cas. 55 (1915), *cited in* U.C.C. § 2-615, Official Comment 4 (1977).

²⁵³ U.C.C. § 2-615, Official Comment 8 (1977), indicates that there are limits to

the same: commercially reasonable interpretation of the language contained in the excuse clause.

3. *Fundamental Concepts of Subsection 2-615(a)*. The concepts of "failure of basic assumption" and "impracticability" are fundamental to an understanding of subsection 2-615(a). Therefore, it is necessary to develop the meaning of these terms.

a. *Failure of Basic Assumption*. The first concept is that of "failure of basic assumption." To excuse, there must be a failure of a basic assumption on which the contract was made.²⁵⁴ The Official Comments state, rather laconically, that "[t]he first test for excuse under this Article in terms of basic assumption is a familiar one."²⁵⁵ A prior draft of the comment provides a bit more insight: "[the cases have] often repeated that performance will be excused by the failure of some situation the continuance of which was assumed as a basis of the contract."²⁵⁶ Prior to the

the extent to which an agreement can enlarge the protection of this section. A prior draft of the comment indicates what the drafters had in mind:

A clause which extends the exemption to contingencies which are within the seller's control must be regarded as out of line with reasonable expectation, and thus as strongly suspect for unconscionability due to surprise. [See General Comments to Parts II and IV, paragraphs 7-9 on surprise and unconscionability, and Section 23 on unconscionable contracts or clauses.]

Comment on Section 87, supra note 161, comment 6, at 83. See also *Tentative Sketch of Comments, supra* note 151, Comment to Section 88.

From the change to the present wording of the comment, one might conclude that such agreements are unconscionable even in the absence of surprise. Cf. U.C.C. § 2-719, Official Comment 1 (1977) (referring to requirement of at least minimum adequate remedies); *Selected Comments, supra* note 251, comment 8, at 13:

Unconscionability may be found in the pure content of a clause or set of clauses as applied to a given situation. (For example, see Section 33 [now 2-309(3)] on arbitrary termination by one party, Section 11 [now 1-204(2)] on arbitrary time fixing, and Section 121 [now 2-718(1)] on arbitrary fixing of limitation of damages).

Indeed, the substitution of the phrase "[e]xcept so far as a seller may have assumed a greater obligation" for the phrase "unless otherwise agreed" in 1949-50 may well have been designed to prevent the seller from overdrafting his excuse clause. This is so because at the same time that this substitution was made, comment 8 was amended to add the words "and provides a minimum beyond which agreement may not go" to the end of the first paragraph. On the process by which this section was amended in 1949-50, see Hawkland, *supra* note 232, at 77-78.

²⁵⁴ U.C.C. § 2-615(a) (1977).

²⁵⁵ *Id.*, Official Comment 3.

²⁵⁶ *Comment on Section 87, supra* note 161, comment 3, at 79 (reproduced in the Appendix of this Article).

Code, this standard was commonly employed in impossibility cases, though rarely in sales cases.²⁵⁷

The cases employing this standard tend to involve unusual general events which the parties did not discuss and probably did not even think about when they contracted. Under these circumstances, if a court is to find the nonoccurrence of the event to have been a basic assumption, that finding must be based upon a presumed assumption. Presumed assumptions tend to rest upon what reasonable persons in the position of the parties would have assumed had they thought about the interfering event when they contracted.²⁵⁸ This standard effectively permits a court to consider many factors other than the parties' states of mind.²⁵⁹ As such, the "failure of basic assumption" test was, in effect, not a rule, but a general standard enabling the court to do what was fair under the circumstances. Yet the standard is so broad that it fails to guide. Apparently Llewellyn opted for such a general

²⁵⁷ See 6 S. WILLISTON & G. THOMPSON, *supra* note 43, § 1950 n.2 (a selection of cases). The standard traces back to the English case of *Taylor v. Caldwell*, 3 B. & S. 826, 122 Eng. Rep. 309 (Q.B. 1863). See also *Blackburn Bobbin Co., Ltd. v. T.W. Allen & Sons, Ltd.* [1918] 2 K.B. 467, 469 (C.A.) ("The underlying ratio is the failure of something which was at the basis of the contract in the mind and intention of the contracting parties.") (quoting Lord Shaw in *Horlock v. Beal*, [1916] 1 A.C. 486, 512 (Pickford, L.J.)); *id.* at 471 (same) (Warrington, L.J.). This case was well known to Llewellyn, for he discussed it in the draft comments to sections 87 (now § 2-614) and 88 (now § 2-615). See *Comment on Section 6-2*, *supra* note 150, at 4-5; *Comment on Section 87*, *supra* note 161, comment 3, at 79; *Comment on Section 6-3*, *supra* note 127, comment 3, at 8.

Similar language had been used in the RESTATEMENT OF CONTRACTS § 454 comment b (1932) ("Generally it is the object of only one of the parties that is frustrated, but it is essential in order to preclude a duty on his part, that this purpose is understood by both parties as his basic purpose in entering into the contract (see § 288)"); *id.* § 288 (requiring for excuse that object of party frustrated form "the basis on which both parties enter into [the contract]"); *id.* § 288 comment b ("The object or effect to be gained must be so completely the basis of the contract. . . .").

²⁵⁸ *Taylor v. Caldwell*, 3 B. & S. 826, 834, 122 Eng. Rep. 309, 312 (Q.B. 1863); Williams, *Language and the Law-IV*, 61 L.Q. REV. 384, 398-406 (1945).

²⁵⁹ 18 S. WILLISTON, *supra* note 46, § 1937 nn.11-12; Patterson, *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 903, 946 (1942). The courts have not been blind to what they do. See *Duff v. Trenton Beverage Co.*, 4 N.J. 595, 606-07, 73 A.2d 578, 581 (1950); *Davis Contractors, Ltd. v. Fareham Urban Dist. Council*, [1956] A.C. 696, 728-29; *Hirji Mulji v. Cheong Yue S.S. Co.*, [1926] A.C. 497, 511 (P.C.).

description in order to emphasize a common thread running through the pre-Code excuse theories.²⁶⁰

The task is now to isolate in the drafting history a more workable test for identifying basic assumptions. The analysis starts with two premises: (1) that the basic assumption concept is based upon the normal commercial understanding of parties to a sales contract;²⁶¹ and (2) that this understanding, and thus also the basic assumption concept, embraces the "limited obligation" view of contractual risk allocation.²⁶² What emerges from the analysis is a test for "basic assumption" far different from what courts now employ in their opinions.

The Official Comments contain what seem to be various "basic assumption" tests requiring that the contingency be "unforeseen."²⁶³ A key to Llewellyn's thinking can be found in an early draft of the comment to what is now Section 2-615:

The sound answer [to the question of when to excuse for supervening events] turns under this Act on what assumption of risks the terms of the agreement fairly import when it is read commercially against the background of the dicker. Thus a contingency clearly envisaged, or one which as a business matter was fairly in the offing at the time of dealing is not within the exemption, see par. 6 below.²⁶⁴

In the paragraph cross-referenced in this quote, Llewellyn gave two case illustrations of contingencies clearly envisaged or fairly in the offing.²⁶⁵ The first illustration was an English case,

²⁶⁰ Cf. *Comment on Section 87*, *supra* note 161, at Comment 1 ("This Act draws all these lines of development together and unifies them under a single principle and criterion of excuse—unforeseen and supervening commercial impracticability.").

²⁶¹ See *supra* notes 247-49 and accompanying text.

²⁶² See *supra* notes 243-46 and accompanying text.

²⁶³ U.C.C. § 2-615, Official Comment 1 (1977) ("unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting"); *id.*, Official Comment 4 ("unforeseen contingency which alters the essential nature of the performance"; "unforeseen shutdown of major sources of supply or the like"); *id.*, Official Comment 8 (section does not apply to "contingency . . . sufficiently foreshadowed at the time of contracting . . .").

²⁶⁴ *Comment on Section 6-3*, *supra* note 127, at para. 3.

²⁶⁵ *Id.* at para. 6.

*Bolckow, Vaughan & Co. Ltd. v. Compagnia Minera de Sierra Minera.*²⁶⁶ In that case, there was a one year installment contract for a quantity of iron ore at a fixed price. The Spanish seller agreed to deliver the ore to England, and apparently, the fixed price included freight. This contract was made in November 1914, several months after the First World War had commenced and after the British Government had declared iron ore to be contraband. The contract contained a clause permitting suspension of deliveries if the North Sea became closed to Spanish tonnage. When freight rates increased, the seller sought to suspend its deliveries. Under these circumstances, the seller was held not to have that right. Llewellyn agreed with this result, concluding, "the general contingency of war and its effects had been envisaged at contracting."²⁶⁷

The second illustration given by Llewellyn was an American case, *Madeirense do Brasil, S.A. v. Stulman-Emrick Lumber Co.*²⁶⁸ That case involved two C & F²⁶⁹ contracts for the sale of lumber to be shipped by the seller from Brazil to the buyer in the United States. The first contract was made in October 1940, over a year after the commencement of the Second World War. The seller experienced difficulty obtaining a carrier for that contract primarily because of scarcity of shipping caused by wartime conditions. It managed eventually to obtain shipping space but only for a minimum shipment larger than that called for by the first contract. The seller then successfully persuaded the buyer to enter into a second contract in December 1940 so that, together with the first contract, the minimum shipment could be met. Subsequently, the shipper refused to carry below the decks of the ship, the second contract lumber. Consequently only the first contract lumber was shipped. Litigation followed in which the buyer claimed damages for breach of the second contract. The seller argued that it was excused from its obligation to deliver under the second contract, because no vessels were available to ship the lumber for

²⁶⁶ 33 T.L.R. 111 (C.A. 1916); *aff'ing* 32 T.L.R. 404 (K.B. 1915).

²⁶⁷ *Comment on Section 6-3*, *supra* note 127, at para. 6.

²⁶⁸ 147 F.2d 399 (2d Cir. 1945).

²⁶⁹ C & F, or "cost and freight," means that the purchase price includes the cost of both the goods, and the freight to the named destination. *Id.* at 402; *see also* U.C.C. § 2-320(1) (1977).

that contract. The Second Circuit concluded that even if that were so, the seller would not be excused from performance. The court stated that the seller had been aware of the shipping scarcity when it made the second contract and had, in fact, sought that contract because of the scarcity. Furthermore, stated the court, there had been no startling change of conditions after the contract had been made. In the court's view, the scarcity of shipping was a foreseeable risk which the seller willingly took upon itself.²⁷⁰ Llewellyn agreed with this reasoning.²⁷¹

In both cases, sellers sought excuse based on rise in freight costs caused by wartime conditions;²⁷² yet in both cases, the war and its general effects on freight costs were well known when the contracts were made. When the seller in each case contracted for a fixed price, including freight, in the face of the virtual certainty that freight rates would increase, it was held to have assumed that risk. Llewellyn's use of these cases as illustrations thus suggests that his "contingencies clearly envisaged or fairly in the offing" encompassed contingencies that at the time of contracting appeared to be virtually certain to occur. In effect, these are contingencies which have been foreseen by the parties at the time of contracting. There is no indication that Llewellyn intended to adopt a looser standard, such as foreseeability of the contingency, as a test for what is a basic assumption.²⁷³ Thus, there is no basis in the drafting history of section 2-615 for the foreseeability standard which is so popular in the courts as a test of basic assumption.²⁷⁴

²⁷⁰ *Madeirense*, 147 F.2d at 403.

²⁷¹ See *Comment on Section 6-3*, *supra* note 127, at para. 6.

²⁷² In *Bolckow*, 32 T.L.R. at 405, the freight rates almost tripled from 5 shillings 9 pence to about 16 shillings. In *Madiereuse*, 147 F.2d at 401, the rise was from \$14 to about \$33.

²⁷³ When Llewellyn described contingencies that would excuse, he consistently used the adjective "unforeseen" not "unforeseeable." See *supra* note 263. This is more consistent with the "virtual certainty" test described in the text than with the foreseeability standard.

²⁷⁴ The foreseeability standard was popular prior to the Code. See 6 S. WILLISTON & G. THOMPSON, *supra* note 43, § 5475 n.7; Annotation, *Modern Status of the Rules Regarding Impossibility of Performance as a Defense in Action for Breach of Contract*, 84 A.L.R.2d 12, 39-41 (1962). It has also been popular under the Code. See, e.g., *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 441-42 (S.D. Fla. 1975); *Northern Illinois Gas Co. v. Energy Coop. Inc.*, 122 Ill. App. 3d 940, 954-55, 461 N.E.2d 1049, 1058 (1984); *Helms Constr. & Dev. Co. v. State*, 97 Nev.

The view that the seller assumes the risk of only contingencies that were foreseen (or virtually certain to occur) is consistent with the limited obligation view of contractual risk assumption intended to be adopted by section 2-615.²⁷⁵ It is a relatively narrow basis for risk assumption, yet it has much to recommend it. If the seller has not protected himself with a contract clause against this kind of contingency, the reasonable expectation is that his promise to deliver is not conditioned on the nonoccurrence of the contingency. Further, the narrow view avoids much of the criticism leveled against the looser standard of foreseeability.²⁷⁶ The narrow view is also consistent with traditional excuse theories based on injury to the goods and governmental action, for in the usual case, these are events which are not perceived at the time of contracting to be virtually certain to occur.

One might object that this narrow view permits a seller to escape too easily from contractual obligations. The response to this objection is that the seller is not automatically excused under 2-615(a) if the contingency were unforeseen. First, the contingency must also have rendered the seller's performance commercially impracticable.²⁷⁷ The effect of the narrow view of risk allocation, therefore, is to shift the emphasis in many disputes from the question of basic assumption, the content of which is often quite elusive and unpredictable,²⁷⁸ to the question of what effect the contingency has had on the seller's performance, which can be quantified to produce workable rules of thumb that will guide the resolution of disputes.

Second, even if the contingency were unforeseen and did render the seller's performance commercially impracticable, the seller is

500, 502-03, 634 P.2d 1224, 1225 (1981). See also Note, *Doctrine of Impossibility of Performance and the Foreseeability Test*, 6 LOYOLA L.J. 575 (1975).

²⁷⁵ See *supra* notes 243-46.

²⁷⁶ The foreseeability standard as a test for risk assumption has been repeatedly criticized. See, e.g., the authorities cited in Note, *supra* note 274, at 577-78 n.12. See also RESTATEMENT (SECOND) OF CONTRACTS, ch. 11, at 311 (1981) (Introductory Note); R. McELROY, IMPOSSIBILITY OF PERFORMANCE 242-46 (1940).

²⁷⁷ U.C.C. § 2-615(a) and Official Comments 1 and 3 (1977). For a discussion of this concept, see *infra* notes 309-23.

²⁷⁸ In the absence of agreement or custom, Corbin could only advise the court to "pray for the wisdom of Solomon." 6 A. CORBIN, *supra* note 12, § 1333 n.84. See also Farnsworth, *Disputes Over Omission in Contracts*, 68 COLUM. L. REV. 860, 877-79 (1968) (suggesting resort to "basic principles of fairness or justice").

not excused under subsection 2-615(a) if the contingency were a "business risk."²⁷⁹ This concept of "business risk" is best understood through what Llewellyn intended subsection 2-615(a) to accomplish. Llewellyn wished to liberalize excuse in primarily two areas. The first area concerned events causing failure of a specific source of production or supply assumed by both parties but not made an explicit contract term.²⁸⁰ The second area covered events causing general changes in business conditions. Though the point is more implicit than explicit, the drafts of comments to Section 2-615 indicate that Llewellyn intended to liberalize excuse only for events that affected sellers generally, and not for events that affect just an individual seller. Thus, for example, he would excuse a cannery from a contract to sell canned salmon if an event, such as war, caused a general shortage of cans, but he would not excuse a cannery if its inability to perform were caused by its having obtained from a reliable source, cans which later were found to be defective and thus unusable for canning.²⁸¹ Other examples of non-excusing events given by Llewellyn also seem to be events affecting only the individual seller seeking excuse,²⁸² while examples given of events that excuse are those that affect sellers generally.²⁸³ The idea that sellers are responsible for their own singular misfortunes is not new.²⁸⁴ It probably reflects a tacit commercial understanding that these risks are business risks of the seller, even if they were unforeseen and beyond his reasonable

²⁷⁹ The term is Llewellyn's. See *Comment on Section 6-3, supra* note 127, para. 4, illus. 1, case (a); *id.*, para. 5, illus. 2.

²⁸⁰ U.C.C. § 2-615, Official Comment 5 (1977). See also *Comment on Section 6-3, supra* note 127, Introductory para. and paras. 1, 5. Pre-Code law was not in agreement on this area of excuse. See *supra* notes 46, 63-64 and accompanying text.

²⁸¹ *Comment on Section 6-3, supra* note 127, para. 5, illus. 2.

²⁸² Disruption of seller's executive personnel by death or resignation, see *Tentative Sketch of Comments, supra* note 151, *Comment to* § 88.

²⁸³ See U.C.C. § 2-615, Official Comment 4 (1977), which refers to such general phenomena as "war, embargo, local crop failure, unforeseen shutdown of major sources of supply"; see also *Comment on Section 6-3, supra* note 127, at para. 3.

²⁸⁴ The "business risk" concept is similar to the pre-Code concept of "subjective" as distinguished from "objective" impossibility. See 6 S. WILLISTON & G. THOMPSON, *supra* note 43, § 1932, at 5411-12 ("It is the difference between 'the thing cannot be done' and 'I cannot do it.'"); RESTATEMENT OF CONTRACTS § 455 and comments thereto (1932) (same). The pre-Code distinction may well reflect the "business risk" concept.

control. The only exceptions to this view seem to be injuries to production facilities or sources of supply, assumed by both parties at the time of contracting.²⁸⁵

Further, even if the event is general in effect, it will not excuse unless it directly affects an essential part of the seller's performance; events interfering with incidental parts of the performance will not necessarily excuse.²⁸⁶ Similarly, events that cause only indirect interference with the performance of the seller, such as failure of his credit facilities, are business risks and will not excuse him.²⁸⁷

It remains to consider several specific issues arising under the "failure of a basic assumption" test. First, that test can be satisfied by a contingency, the effect of which, is to increase the cost of the seller's performance (such as governmental requisition of supplies which drives up the seller's cost of materials); it is not limited to contingencies which make the seller's performance physically more difficult or impossible (such as governmental requisition of the seller's factory). Official Comment 4 to Section 2-615 makes this quite clear: "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."²⁸⁸

²⁸⁵ On failure of production facilities of a manufacturer or producer, see *Comment on Section 6-3*, *supra* note 127, Introductory para. and para. 1. On failure of a dealer's source of supply, see *id.*, para. 5, and U.C.C. § 2-615, Official Comment 5 (1977).

²⁸⁶ See *supra* notes 152-65 (discussing excuse for incidental interference with performance); see also U.C.C. § 2-615, Official Comment 7 (1977); *Comment on 6-3*, *supra* note 127, at para. 4.

²⁸⁷ See *Comment on Section 6-3*, *supra* note 127, para. 4, illus. 1, case (a) (discussing failure of seller's credit facilities and concluding that "[s]uch a contingency is too remote from the contract for sale to excuse the seller, and is too closely within properly contemplated business risks to fall within Subsection 1(a)"); *id.*, case (b); see also *Tentative Sketch of Comments*, *supra* note 151, *Comment on* § 88 (giving "failure of seller's credit facilities" as example of risk "fall[ing] within the field of normal enterpriser's risks and not within the scope of subsection 1(a)") Compare the seller's situation here with the circumstance of the buyer who finds himself without the necessary credit to fulfill his contractual obligations; he, also, is not excused. See Wladis, *supra* note 2, at 1584 n.46.

²⁸⁸ U.C.C. § 2-615, Official Comment 4 (1977). See also *Comment on Section 6-3*, *supra* note 127, para. 3: "Severe shortage of raws or supplies due to a particular contingency such as war, embargo, local crop failure, unforeseen shutdown of major

The real question is when the increase in cost of performance shall excuse. As with contingencies that physically interfere with performance, Llewellyn intended to subject contingencies that only increase cost to the same requirements for excuse: failure of a basic assumption and commercial impracticability.²⁸⁹ As to the first requirement, failure of a basic assumption, one must ascertain whether the contingency causing the increased cost was “unforeseen” or not.²⁹⁰ As discussed previously this requirement is satisfied if the contingency was not perceived at the time of contracting to be virtually certain to occur.²⁹¹ Since this requirement is relatively easy to satisfy,²⁹² the real question in an increased cost case will be whether the increased cost has been so great that it “alters the essential nature of the performance.”²⁹³

sources of supply, or the like, is thus within the purpose of ‘failure’ of ‘facilities,’ and is of the same nature as failure of manpower, within the meaning of Subsection 1(a) of the present section.” The subsection reference is probably to the *Proposed Amendment to Section 88*, quoted at *supra* note 223, or to the *Proposed Final Draft No. 1*, *supra* note 161. In either case, the meaning of the quoted sentence is the same: contingencies that only increase the seller’s cost of performance can be a basis for excusing the seller.

²⁸⁹ The text of subsection 2-615(a) applies the basic assumption and commercial impracticability tests to contingencies generally, and does not differentiate between contingencies that physically interfere with performance and those that interfere by increasing the cost of performance. *See also Comment on Section 6-3*, *supra* note 127, para. 3:

3. *Shortage of supply and rise in price; casualty versus business conditions.* The language of the opinions runs steadily along two lines: on the one hand, it is repeated that *mere* rise in costs or market, *mere* unprofitability of the contract, constitutes no excuse; on the other hand, it is repeated that the failure of some situation the continuance of which was assumed a basis of the contract *will* excuse. The one test under this Act, in terms of *basic assumption*, is thus familiar; the other test under this Act, in terms of *commercial impracticability* (as contrasted with “impossibility,” “frustration of performance,” or “frustration of the venture”) is a relatively unfamiliar phrasing, and is adopted here in order to call attention to the *commercial* character of the criterion chosen by this Act. (emphasis as in the original).

²⁹⁰ U.C.C. § 2-615, Official Comment 4 (1977). The Official Comments to section 2-615 consistently describe contingencies that excuse as “unforeseen.” *See supra* note 263. This adjective can hardly refer to the commercial impracticability requirement. Therefore, it must refer to the failure of basic assumption requirement.

²⁹¹ *See supra* notes 272-73 and accompanying text.

²⁹² *See supra* notes 274-78 and accompanying text.

²⁹³ U.C.C. § 2-615, Official Comment 4 (1977).

This is apparently just another way of saying that the increased cost must render performance commercially impracticable, for in several discussions of excuse for increased cost, Llewellyn used that requirement in place of the "alters the essential nature" terminology.²⁹⁴ Llewellyn's reason for using this latter terminology was to place excuse for increased cost within the general scope of a well-known line of precedent.²⁹⁵

Next, there cannot be a failure of basic assumption unless the contingency for which the seller seeks excuse is beyond his reasonable control. Though the text of section 2-615 nowhere explicitly states this requirement, it is obvious from the comments²⁹⁶ and the drafting history²⁹⁷ that this is an element of the failure of basic assumption excuse. This element may be viewed as part of the normal commercial understanding that the seller shall use all reasonable means to prevent the interfering event, or as within the general obligation of good faith in the performance of contracts.²⁹⁸

Finally, since the notion that the seller is excused for unusual general events beyond his reasonable control rests upon the normal commercial understanding, it yields to a showing of agreement otherwise.²⁹⁹ There are several means by which it can be

²⁹⁴ *Comment on Section 6-2, supra* note 150, para. 1 ("The question is not one merely of increased expense, for each party contracts with the knowledge that the market may turn against him. The question is rather whether unforeseen circumstances have rendered the agreed performance commercially impracticable."); *Comment to Section 6-3, supra* note 127, para. 3 ("When, however, some *particular unusual contingency* destroys some tacit and basic commercial assumption of the deal, the cases and the clauses show a different line of understanding; and there is then no sound escape from reckoning commercial impracticability partly in terms of increased costs."). See also Llewellyn's discussion of the increased cost aspects of the *Blackburn Bobbin* and *International Paper* cases in terms of commercial impracticability, *Comment on Section 87, supra* note 161, para.3.

²⁹⁵ See *Comment on Section 6-3, supra* note 127, para. 3, quoted at *supra* note 289.

²⁹⁶ U.C.C. § 2-615, Official Comment 5 (1977) ("There is no excuse, under the section, however, unless the seller has employed all due measures to assure himself that his source will not fail.").

²⁹⁷ See *supra* notes 176-240 and accompanying text (discussing drafting history of U.C.C. § 2-615(a)).

²⁹⁸ U.C.C. § 1-203 (1977) (obligation of good faith); *id.* § 2-103(1)(b) (definition of "good faith").

²⁹⁹ *Id.* § 2-615, Official Comment 8 (1977).

shown that the normal commercial understanding does not apply in a particular transaction. The buyer might prove a contrary usage of trade.³⁰⁰ The buyer might also prove that the seller had assumed the risk of the contingency by an express term of the agreement.³⁰¹

Thus, to summarize, the basic assumption concept includes primarily events that affect sellers generally, not just an individual seller.³⁰² Beyond this, events that affect only an individual seller can be a basic assumption if they are failures of either production facilities or sources of supply, assumed by both parties at the time of contracting.³⁰³ Further, the events must have been beyond the reasonable control of the seller seeking excuse.³⁰⁴ They must directly interfere with an essential part of the seller's performance,³⁰⁵ and they must not have been perceived at the time of contracting to be virtually certain to occur.³⁰⁶ Such events can

³⁰⁰ "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." *Id.* See also Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413, 1416 (1963) (asserting that in international trade transactions, understanding is that obligor takes risk of all events he does not expressly disclaim).

³⁰¹ U.C.C. § 2-615, Official Comment 8 (1977). See also *Comment on Section 87, supra* note 161, comment 6, at 82 ("So where a canning contract provides '80 percent' or '100 percent delivery guaranteed,' a crop failure will not excuse the seller."). Of course, any such terms are to be interpreted in a commercially reasonable fashion. See U.C.C. § 2-615, Official Comment 8 (1977).

Llewellyn also recognized that some risks were implicitly assumed. *Id.* See also *Comment on Section 6-3, supra* note 127, para. 6. Thus, for example, in a fixed price contract, the risk of a rise or collapse of the market unrelated to a particular unusual event is a risk allocated by fixing the price. An example of a market shift not caused by a particular unusual event might be a financial panic arising from overspeculation. *Comment on Section 87, supra* note 161, comment 5, at 81. See also *In Re Comptoir Commercial Anverso v. Power, Son & Co.*, [1920] 1 K.B. 882, 900 (C.A. 1919) (Scrutton, J.). Still, as Llewellyn recognized, implicit assumption of risk adds nothing new to the analysis, for that concept "can be dealt with as well in terms of there being no basic assumption of non-occurrence of the contingency as in terms of an 'otherwise agreement' which rests in the circumstances or in the language or both." *Comment on Section 6-3, supra* note 127, para. 6.

³⁰² See *supra* notes 280-85 and accompanying text.

³⁰³ See *supra* notes 280, 285 and accompanying text.

³⁰⁴ See *supra* notes 296-98 and accompanying text.

³⁰⁵ See *supra* notes 286-87 and accompanying text.

³⁰⁶ See *supra* notes 263-76 and accompanying text.

excuse if they interfere with performance physically or by increasing the cost of performance.³⁰⁷ Finally, the foregoing rules can be varied by an agreement otherwise.³⁰⁸

b. Impracticability. The second concept fundamental to subsection 2-615(a) is the concept of "impracticability." The term is used consistently in preference to "impossibility," indicating that excuse is appropriate where the changed circumstances have made the performance unreasonably difficult, and not just where performance is physically impossible.³⁰⁹ Given the narrowness of the "failure of a basic assumption" concept as a device to allocate risk, the real function of the impracticability requirement is to allocate the risk of unusual general contingencies not covered by the agreement, according to their effects on the seller's performance.

The level of difficulty necessary to establish impracticability was quite high under pre-Code law. The Restatement of Contracts defined impossibility as including "impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved,"³¹⁰ but added that "[m]ere unanticipated difficulty, however, not amounting to impracticability is not within the scope of the definition."³¹¹ The Restatement impracticability standard derived from two main lines of cases:³¹² (1) cases in which fear

³⁰⁷ See *supra* notes 288-95 and accompanying text.

³⁰⁸ See *supra* notes 299-301 and accompanying text.

³⁰⁹ See *supra* notes 288-95.

³¹⁰ RESTATEMENT OF CONTRACTS § 454 (1932). See also *id.* § 467. The concept of impracticability predates the Restatement. It appears in a case as early as 1850. See *Moss v. Smith*, 9 C.B. 94, 103, 137 Eng. Rep. 827, 831 (C.P. 1850). Speaking of whether a ship was lost by "perils of sea" under an insurance policy, Maule, J., said:

[I]t may be physically possible to repair the ship, but at an enormous cost: and there the loss also would be total; for, in matters of business, a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost.

Id. This concept was cited with approval by Lord Blackburn in *Dahl v. Nelson*, 6 App. Cas. 38, 52 (1881), but has been said to have generally been rejected by English courts. See R. McELROY, *supra* note 276, at 194-96; but see the English authorities collected in Note, *supra* note 176, at 128 n.24.

³¹¹ RESTATEMENT OF CONTRACTS § 454 comment a (1932).

³¹² *Id.* § 454, Explanatory Notes (Mar. 28, 1932). Proposed Final Draft No. 11; reprinted in A.L.I. ARCHIVES PUBLICATIONS IN MICROFICHE, microfiche 1130, at 189-91 (1985).

of life rather than physical impossibility excused nonperformance,³¹³ and (2) mining lease cases in which lessees are excused from making lease payments when there remain only minerals which it is not commercially feasible to extract.³¹⁴ No sales cases appear in the Explanatory Notes of this section of the Restatement.³¹⁵

The drafting history of subsection 2-615(a) reveals that the term "commercially impracticable" did not appear in the section until March 1943,³¹⁶ although the requirement that the seller use reasonable business effort to perform despite a change in circumstances was always Llewellyn's intent: "But that contract presupposes that general conditions of operation will continue in such fashion as to make the contract performable by reasonable business effort."³¹⁷ The first Official Comments to the section elaborate: "The additional test of commercial impracticability . . . has been adopted in order to call attention to the commercial character of the criterion chosen by this Article."³¹⁸ The intent here is manifest: if the changed circumstances make performance no longer possible by reasonable commercial effort, the performance is commercially impracticable.

³¹³ *Sibery v. Connelly*, 22 T.L.R. 174, 175 (K.B. 1905) (seaman not required to serve on ship carrying contraband to a foreign port); *Hanford v. Connecticut Fair Ass'n.*, 92 Conn. 621, 624, 103 A. 838, 840 (1918) (infantile paralysis epidemic excuses performance of a baby pageant); *Lakeman v. Pollard*, 43 Me. 463, 467 (1857) (lumberjack excused from contract on account of a cholera epidemic); *Walsh v. Fisher*, 102 Wis. 172, 179-80, 78 N.W. 437, 439 (1899) (non-union worker not required to work because of violent threats of striking workers).

³¹⁴ *Clifford v. Watts*, L.R.- 5 C.P. 576 (1870) (removal of clay); *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 292, 156 P. 458, 459 (1916) (removal of gravel); *Brick Co. v. Pons*, 38 Ohio St. 65, 75 (1882) (removal of fine clay); *Virginia Iron, Coal & Coke Co. v. Graham*, 124 Va. 692, 706, 98 S.E. 659, 664 (1919) (removal of iron ore); *see also* *Cosden Oil Co. v. Moss*, 131 Okla. 49, 54, 267 P. 855, 858-59 (1928) (failure to complete drilling of well because of obstruction in the subsoil).

³¹⁵ *See* RESTATEMENT OF CONTRACTS § 454, Explanatory Notes (Mar. 28, 1932) (Proposed Final Draft No. 11); *reprinted in* A.L.I. ARCHIVES PUBLICATIONS IN MICROFICHE, microfiche 1130, at 189-91.

³¹⁶ *See supra* note 201 and accompanying text.

³¹⁷ *Comment on Section 54, supra* note 1, at 226, *reprinted in* 1 U.C.C. DRAFTS, *supra* note 1, at 506.

³¹⁸ *Uniform Commercial Code, 1949 Draft*, § 2-615, Official Comment 3, *reprinted in* 6 U.C.C. DRAFTS, *supra* note 1, at 219. This comment is identical to the present Official Comment.

Some idea of what Llewellyn meant by reasonable commercial effort can be gleaned from his drafts of various comments. In his draft of a comment to what is now section 2-614 he discussed an English case in which the First World War blocked the normal method of water transportation leaving available only rail shipment at doubled cost.³¹⁹ Llewellyn wrote that this case "is on the very borderline of commercial impracticability as envisaged by this section"³²⁰ Llewellyn also discussed an American case in which there was a contract to sell timber, but most of the timber on the tract from which the parties assumed the timber would come, was destroyed by fire.³²¹ Llewellyn noted, "[i]n this case the seller was held excused except as to the timber standing on a small inaccessible tract which was not harmed by the fire. Under this Act the more than trebled cost of removing this timber would spell commercial impracticability and the holding of the case on this point is rejected."³²² Thus, Llewellyn's view was that an increase in the cost of performance of two to three times the normal cost was the threshold of commercial impracticability. This is a fairly high standard.

The Code case law has taken a very strict view of the impracticability requirement even beyond what Llewellyn seems to have intended. Only extreme and unreasonable cost, the courts have said, will constitute impracticability.³²³

³¹⁹ The case was *Blackburn Bobbin Co. v. Allen*, [1918] 1 K.B. 540, *aff'd*, [1918] 2 K.B. 467 (C.A.).

³²⁰ *Comment on Section 87*, *supra* note 161, comment 3, at 79. See also *Comment on Section 6-2*, *supra* note 150, comment 1, at 4-5 (discussion of *Blackburn Bobbin* case).

³²¹ The case was *International Paper Co. v. Rockefeller*, 161 A.D. 180, 146 N.Y.S. 371 (1914).

³²² *Comment on Section 87*, *supra* note 161, comment 4, at 80 n.3. See also *Comment on Section 6-2 (S 86) Substituted Performance*, comment 2, at 5 (describing same case and reaching same conclusion, but describing increase in cost as tenfold) in *THE LLEWELLYN PAPERS*, *supra* note 119, file J-IX2b (another draft of *Comment on Section 6-2*, *supra* note 150). The court's opinion states that the contract price was \$5.50 per cord, and that the cost to remove the remaining wood was \$20 per cord. *International Paper*, 161 A.D. at 180, 146 N.Y.S. at 372.

³²³ *International Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879, 886 (10th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986); *Gulf Oil Corp. v. Federal Power Comm'n*, 563 F.2d 588, 599 (3d Cir. 1977), *cert. denied sub nom. Gulf Oil Corp. v. Federal Energy Regulatory Comm'n*, 434 U.S. 1062 (1978); *Louisiana Power and*

4. *Case Law Under Subsection 2-615(a)*.³²⁴ It is no secret that the hopes of the drafters of subsection 2-615(a) have not been fulfilled.³²⁵ In deciding cases under the Code, courts have often adhered to pre-Code attitudes and doctrine. This is illustrated in Table I, which combines both pre-Code and Code case law, and displays few differences between the two. The same fact patterns which generated excuse under pre-Code law continue to do so, and fact patterns for which there was no excuse in the pre-Code cases still, for the most part, continue to generate decisions not to excuse. The fact patterns that stimulated disagreement under pre-Code law still do.³²⁶

Table II illustrates the extent to which the Code cases have followed pre-Code excuse theory. This Table collects the Code cases granting excuse and arranges them by theory of excuse. There are thirty case entries in the Table.³²⁷ Eight cases grant excuse because of an escape clause in the contract. Seven grant excuse because of the unavailability of a specific thing or an

Light Co. v. Allegheny Ludlum Indus., Inc., 517 F. Supp. 1319, 1324 (E.D. La. 1981); Helms Const. and Dev. Co. v. State, 97 Nev. 500, 502, 634 P.2d 1224, 1225 (1981); Northern Illinois Gas Co. v. Energy Coop., Inc., 122 Ill. App. 3d 940, 956, 461 N.E.2d 1049, 1061 (1984); Lawrance v. Elmore Bean Warehouse, Inc., 108 Ida. 892, 894, 702 P.2d 930, 933 (1985).

³²⁴ The cases are collected in *Uniform Commercial Code Case Digest* § 2615 (1985 & Supp 1987). See also Annotation, *Impracticability of Performance of Sales Contract as Defense Under U.C.C. § 2-615*, 93 A.L.R.3d 584 (1979).

³²⁵ See, e.g., Stroh, *Failure of the Doctrine of Impracticability*, 5 CORP. L. REV. 195 (1982); Wallach, *Excuse Defense in the Law of Contracts: Judicial Frustration of the U.C.C. Attempt to Liberalize the Law of Commercial Impracticability*, 55 NOTRE DAME L. REV. 203 (1979).

³²⁶ Thus, for example, the disagreement about whether to admit parol evidence of a supply source contemplated by the parties but not mentioned in the contract continues under the Code. See *supra* notes 77-78 and accompanying text for a discussion of pre-Code cases. Under the Code, consider the crop failure cases. Some permit parol evidence. See, e.g., Low's Ezy-Fry v. J.A. Wood Co., 26 Agri. Dec. 583, 4 U.C.C. Rep. Serv. (Callaghan) 483 (1967); Michigan Bean Co. v. Senn, 93 Mich. App. 440, 448, 287 N.W.2d 257, 261 (1980); Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652, 657 (Miss. 1975); Campbell v. Hostetter Farms, Inc., 251 Pa. Super. 232, 238, 380 A.2d 463, 466 (1977). Some courts do not permit parol evidence. See, e.g., Bunge Corp. v. Recker, 519 F.2d 449, 451 (8th Cir. 1975); Semo Grain v. Oliver Farms, Inc., 530 S.W.2d 257, 260 (Mo. 1975); Renner Elevator v. Schuer, 267 N.W.2d 204, 205-06 (S.D. 1978).

³²⁷ The *Eastern Airlines* case is listed twice because the court there applied two theories of excuse, escape clause and governmental action.

agreed or contemplated source. Three cases grant excuse because of governmental action. Two grant excuse on the ground that the risk of loss had passed to the buyer. Thus, of the thirty case entries, twenty grant excuse on traditional pre-Code theories.

Of the remaining ten cases not clearly determinable upon one of the traditional excuse theories, two might be contemplated source cases,³²⁸ but it is not possible to tell from the opinions. One, on a summary judgment motion, assumed excuse for purposes of argument only.³²⁹ One is consistent with traditional maritime insurance law,³³⁰ and one may have support in pre-Code case law.³³¹ One case, *Aluminum Co. of America v. Essex Group, Inc.*,³³² which has been much discussed, is in fact no longer binding precedent.³³³

³²⁸ *Cosden Oil & Chem. Co. v. Karl O. Helm Aktiengesellschaft*, 736 F.2d 1064, 1075-76 (5th Cir. 1984); *Goddard v. Ishikawajima-Harima Heavy Indus. Co.*, 29 A.D.2d 754, 287 N.Y.S.2d 901 (1968), *aff'd mem.*, 24 N.Y.2d 842, 300 N.Y.S.2d 851 (1969).

³²⁹ *Harvey v. Fearless Ferris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979).

³³⁰ *Asphalt Int'l. Inc. v. Enterprise Shipping Corp., S.A.*, 667 F.2d 261, 265 (2d Cir. 1981). The rule in maritime insurance law is that a ship is considered to be a constructive total loss if it would cost more to repair the ship than it would be worth after being repaired. *Id.* at 263-64. See *Kulukundis v. Norwich Union Fire. Ins. Soc'y*, [1937] 1 K.B. 1, 20 (C.A.); *Assicurazioni Generali and Schenker & Co. v. S.S. Bessie Morris Co.*, [1892] 2 Q.B. 652, 658 (C.A.); *Moss v. Smith*, 9 C.B. 94, 103, 137 Eng. Rep. 827, 831 (C.P. 1850).

³³¹ *Mishara Const. Co. v. Transit-Mixed Concrete Corp.*, 365 Mass. 122, 130, 310 N.E.2d 363, 368 (1974) (strike at buyer's work site interfered with delivery; the fact that the strike was apparently the result of the buyer's labor troubles may have influenced the result). Pre-Code law apparently was not consistent in its treatment of strikes. See 6 S. WILLISTON & G. THOMPSON, *supra* note 43, § 1951A, at 5466.

³³² 499 F. Supp. 53 (W.D. Pa. 1980).

³³³ Conversation with Professor Fairfax Leary, Jr., who had spoken with judges of the United States Court of Appeals for the Third Circuit. The *Alcoa* opinion was characterized as having the precedential value of a law review article. The procedural developments in the case after the District Court opinion were as follows: The case was appealed to the United States Court of Appeals for the Third Circuit. Before the appeal was decided, the parties reached settlement. Joint Motion Requesting Voluntary Dismissal of appeal at 2-3, *Aluminum Co. of Am. v. Essex Group, Inc.*, No. 80-1604 (3d Cir. Feb. 5, 1981). They made a joint motion requesting voluntary dismissal of the appeal, vacation of the district court's judgment, and remand of the case with directions to dismiss. *Id.* at 3-4. The Third Circuit granted this relief. By order dated March 4, 1981, District Court Judge Teitelbaum dismissed the action. See also Macaulay, *An Empirical View of Contract*, 1985 Wis. L. REV. 465, 476.

Only four cases excuse the seller under circumstances in which pre-Code law would not have excused him. One case, *Waldinger Corp. v. CRS Group Engineers, Inc.*,³³⁴ excuses on the ground of interference by a third party with the seller's performance.³³⁵ The final three cases excuse the seller where unusual general contingencies increased his costs of performance,³³⁶ a ground of excuse that was previously quite rare.³³⁷

On the bright side, there is some indication that courts have perceived and carried out the drafter's intent to incorporate an excuse clause into the contract in accordance with the commercial understanding,³³⁸ but this effort has not been uniform.³³⁹ The case

³³⁴ 775 F.2d 781 (7th Cir. 1985), *aff'ing in part and rev'ing in part* *Waldinger Corp. v. Ashbrook-Simon-Hartley, Inc.*, 564 F. Supp. 970 (C.D. Ill. 1983).

³³⁵ The seller agreed to manufacture and supply sludge dewatering machinery for the buyer, who had a subcontract to supply machinery for two waste water treatment facilities. The seller was unable to perform because the engineer for the sanitary district interpreted the contract specifications in such a way that the seller was unable to comply. The buyer covered, and sued both the seller for breach of contract and the engineer for interference with contract. The seller pleaded impracticability as a defense, based upon the engineer's interpretation of the specifications. The district court excused the seller, and held the engineer liable to the buyer. On appeal, the Court of Appeals for the Seventh Circuit affirmed the district court's determination that the seller's performance was impracticable, and it reversed and remanded that portion of the district court's decision on the engineer's liability to the buyer for interference with contract. The case is unusual because third party interference or failure to perform generally is not a ground for excuse. *See Waldinger*, 775 F.2d at 793 (Pell, J., dissenting). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 261 comment e (1981).

³³⁶ *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 826 F.2d 239 (4th Cir. 1987) (contract to remove and dispose of spent nuclear fuel; contemplated reprocessing of fuel not available; alternative method impracticable where it would result in \$80 million loss on contract in which planned profit was \$18-20 million); *Alimenta (USA), Inc. v. Gibbs Nathaniel (Canada) Ltd.*, 802 F.2d 1362 (11th Cir. 1986) (peanuts; drought; market price increase; performance by seller impracticable where it would cost seller \$3.8 million on contract in which planned profit was \$18,000); *Gay v. Seafarer Fibreglass Yachts, Inc.*, 14 U.C.C. Rep. Serv. (Callaghan) 1335 (N.Y. Sup. Ct. 1974) (yacht; oil embargo caused price increases on materials; court assumed seller excused).

³³⁷ The only case authority cited by Llewellyn in his Official Comment 4 discussion of excuse for increased cost was a lower English court case, *Ford & Sons (Oldham) Ltd. v. Henry Leetham & Sons*, 84 L.J.K.B. 2101; 31 T.L.R. 522; 21 Com. Cas. 55 (1915).

³³⁸ *See supra* notes 247-49 and accompanying text for discussions of this intent. *See also* *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 10-11 (4th Cir. 1971) (admitting evidence of trade usage to provide an excuse clause).

³³⁹ *See* *Cosden Oil & Chem. Co. v. Karl O. Helm Aktiengesellschaft*, 736 F.2d

law also indicates some attempts to interpret excuse clauses in a commercially reasonable manner.³⁴⁰

Additionally, there is some indication that courts may actually have begun to grant excuse for large unforeseen increases in the cost of performance. Previously, though it was commonly conceded that increased cost could excuse if extreme hardship were shown,³⁴¹ the cases consistently refused to find that test to be satisfied.³⁴² However, two recent cases, *Alimenta (U.S.A.), Inc. v. Gibbs Nathaniel (Canada) Ltd.*³⁴³ and *Florida Power & Light Co. v. Westinghouse Electric Corp.*³⁴⁴ have granted excuse for drastic cost increases.³⁴⁵ Time will tell whether these cases represent the beginnings of a revolution or only an insurrection.

The excuse for failure of the agreed or contemplated source of supply continues to be effective,³⁴⁶ although the pre-Code case

1064, 1076 (5th Cir. 1984) (evidence that sellers of polystyrene generally included *force majeure* clauses in their contracts was insufficient to add the term to the present contract in order to excuse seller's nonperformance).

³⁴⁰ See *Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957, 988-92 (5th Cir. 1976) (excuse clause to be interpreted according to standard of "mercantile sense and reason") (quoting U.C.C. § 2-615, Official Comment 8 (1977)); *Stinnes InterOil, Inc. v. Apex Oil Co.*, 604 F. Supp. 978, 983 (S.D.N.Y. 1985) (same); cf. *International Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879, 885 n.2 (10th Cir. 1985) (quoting U.C.C. § 2-615, Official Comment 8 (1977)), *cert. denied*, 475 U.S. 1015 (1986).

³⁴¹ See *supra* note 323 and the cases cited therein.

³⁴² *Louisiana Power & Light Co. v. Allegheny Ludlum Indus.*, 517 F. Supp. 1319, 1324 (E.D. La. 1981) (cost increase of 38% over original contract price of \$1.1 million, producing loss on contract of \$428,000, insufficient to constitute impracticability); *Florida Power & Light Co. v. Westinghouse Elec. Co.*, 597 F. Supp. 1456 (E.D. Va. 1984) (total losses of just under 50% of total contract revenues insufficient to constitute impracticability), *aff'd in part and rev'd in part*, 826 F.2d 239 (4th Cir. 1987); *Iowa Elect. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129 (N.D. Iowa 1978) (cost increase over contract of 52.2% resulting in \$2.6 million loss insufficient to constitute impracticability), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); *Publicker Indus. Inc. v. Union Carbide Corp.*, 17 U.C.C. Rep. Serv. (Callaghan) 989, 992 (E.D. Pa. 1975) (doubled cost of performance leading to projected loss on contract of \$5.8 million not sufficient to excuse); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 726 (Mo. App.) (discussing cases in which drastic price increases held no excuse), *cert. denied*, 444 U.S. 865 (1979).

³⁴³ 802 F.2d 1362 (11th Cir. 1986).

³⁴⁴ 826 F.2d 239 (4th Cir. 1987).

³⁴⁵ *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980), *vacated*, No. 80-1604 (3d Cir. Feb. 5, 1981).

³⁴⁶ See Table II, the section entitled "Specific Subject-Matter or Source Unavailable."

law divergence of opinion on contemplated sources continues.³⁴⁷

Finally, it should be mentioned that courts seem to be allocating the risk of changed circumstances under legal theories other than impracticability. This is not surprising, since risk allocation underlies many contract rules.³⁴⁸ Also, since relief is not often granted upon the theory of impracticability, one would expect that a seller seeking excuse, and a court willing to excuse, might rely upon another doctrine of contract law. For example, allocation of the risk of changed circumstances has been accomplished using contract formation rules,³⁴⁹ measure of damages,³⁵⁰ and the duty to mitigate damages.³⁵¹

It is too early to say that courts have broken free from the fetters of the past, and have begun to grant excuse with the regularity intended by the drafters of the Code. Yet as very recent case law shows, there is evidence of some movement in that direction. Like the inhabitants of Plato's cave,³⁵² judges have begun dimly to perceive the shadowy shapes of normal commercial understanding. There is hope that they will succeed in freeing themselves and finding their way out of the darkness and into the sunlight.

III. SOME THOUGHTS ON RISK ALLOCATION FOR CHANGED CIRCUMSTANCES

At the outset, it is important to articulate the policies at stake in determining whether to excuse a party from contractual obligations because of changed circumstances. On the one hand is the policy of *pacta sunt servanda*—contracts are to be enforced.³⁵³ This is a principle fundamental to a society such as ours, in

³⁴⁷ See *supra* note 326 and accompanying text.

³⁴⁸ See, e.g., E. MURPHY & R. SPEIDEL, *STUDIES IN CONTRACT LAW* 782 (3d ed. 1984).

³⁴⁹ *Bethlehem Steel Corp. v. Litton Indus. Inc.*, 507 Pa. 88, 99-100, 488 A.2d 581, 587 (1985), *aff'd*, 321 Pa. Super. 357, 468 A.2d 748 (1986) (by evenly divided court).

³⁵⁰ *Allied Cannery & Packers, Inc. v. Victor Packing Co.*, 162 Cal. App. 3d 905, 912-14, 209 Cal. Rptr. 60, 64-65 (1984).

³⁵¹ 5 A. CORBIN, *supra* note 12, § 1043.

³⁵² Plato, *THE REPUBLIC* 227-35 (F. Cornford trans., paperback ed. 1945).

³⁵³ See, e.g., F. KESSLER & G. GILMORE, *CONTRACTS: CASES AND MATERIALS* 742-43 (2d ed. 1970); *RESTATEMENT (SECOND) OF CONTRACTS*, ch. 11, at 309 (1981) (Introductory Note).

which democracy, individual autonomy, and free market economic systems are important. Yet, every principle has limits. There are situations in which most would concede that excuse for changed circumstances is the proper result.

For example, assume a sales contract is made between two citizens of then-friendly nations. Later, those nations go to war, and the respective nations make the contract illegal because it involves trading with the enemy. The seller should be excused. The state should not tell the seller he must perform (by withholding excuse) and simultaneously tell the seller he must not perform (by making the contract illegal). The better solution is to grant excuse so that the seller will not be tempted to evade the law and undermine the war effort by going forward with the deal.

Thus, even a principle so fundamental as that of *pacta sunt servanda* has limits, and the legal system's response to changed circumstances is an attempt to define those limits. Whether one perceives the contract as covering every kind of changed circumstance, except to the extent that express or implied terms excuse the seller,³⁵⁴ or whether one views the contract as not covering unforeseen general changes of circumstances,³⁵⁵ the question is one of risk allocation.

It probably is wise to retain the traditional excuse theories accepted by the Code. These include governmental action,³⁵⁶ the unavailability of the specific goods sold,³⁵⁷ and failure of an agreed upon or contemplated source of the goods,³⁵⁸ and they are all effective unless the seller causes the interfering event.³⁵⁹ Though the policy bases for these rules have not been fully articulated,

³⁵⁴ This is the "absolute obligation" view of contractual risk allocation, discussed *supra* note 243 and accompanying text. It was the primary approach of the English courts from *Taylor v. Caldwell*, 3 B. & S. 826, 833-34, 122 Eng. Rep. 309, 312 (Q. B. 1863), to the First World War frustration cases, and is the basis of the "implied condition" theory of excuse.

³⁵⁵ This is the "limited obligation" view of contractual risk allocation, discussed *supra* notes 244-46 and accompanying text. In support of this view, see the authorities cited at *supra* note 244.

³⁵⁶ U.C.C. § 2-615(a) (1977).

³⁵⁷ U.C.C. § 2-613 (1977).

³⁵⁸ U.C.C. § 2-615, Official Comment 5 (1977).

³⁵⁹ See, e.g., U.C.C. § 2-615, Official Comment 5 (1977) and cases cited therein.

they are consistent with normal commercial understanding that unusual events which make performance impracticable do excuse. They are recognized throughout the Western world, and they are relatively easy to administer.

Situations not within the traditional excuse theories present a more difficult problem. There are a number of policies to be effected in allocating the risk. Ability to control the interfering event is important; the seller should not be excused if the interfering event is within his reasonable control.³⁶⁰ Allocation of risks by agreement is also important; if one party has expressly assumed or disclaimed a risk, that agreement should be respected, and such express agreements should be interpreted in a commercially reasonable manner.³⁶¹ Beyond explicit risk assumption, there is implicit risk assumption: if particular interfering events are known at the time of contracting to have occurred³⁶² or to be virtually certain to occur, the seller has implicitly assumed the risk of these events unless the parties have agreed otherwise.³⁶³

³⁶⁰ See, e.g., *Canadian Indus. Alcohol Co. v. Dunbar Molasses Co.*, 258 N.Y. 194, 198, 179 N.E. 383, 384 (1932) (failure to deliver molasses not excused where defendant dealer failed to make necessary arrangements with refinery); *DeGrasse Paper Co. v. Northern N.Y. Coal Co.*, 190 A.D. 227, 231, 179 N.Y.S. 788, 790-91 (1919) (miner's strike did not excuse dealer from supplying coal under contract where it failed to make necessary arrangements with mine); *Washington Mfg. Co. v. Midland Lumber Co.*, 113 Wash. 593, 597, 194 P. 777, 778 (1921) (failure to deliver lumber not excused where no attempt was made to secure necessary transportation permits).

³⁶¹ See *supra* notes 250-51 and accompanying text (stating that one purpose of U.C.C. § 2-615 is to ensure commercially reasonable interpretation of language). See also *The Kronprinzessin Cecilie*, 244 U.S. 12, 24 (1917) ("Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs.") (Holmes, J.). Cf. Farnsworth, *supra* note 278, at 860, 874. See also Farnsworth, "Meaning" in the Law of Contracts, 76 YALE L.J. 939, 951 (1967).

³⁶² For a case refusing to excuse the seller where the contingency in question had occurred before the contract was made, see *Madieros v. Hill*, 8 Bing. 231, 235, 131 Eng. Rep. 390, 391 (C.P. 1832) (blockade in existence at time of contracting held not to excuse failure of carrier to enter blockaded port).

³⁶³ See *supra* notes 263-78 (seller assumes risks of contingencies perceived at time of contracting as virtually certain to occur). See also Farnsworth, *supra* note 278, at 868-72; R. McELROY, *supra* note 276, at 242-44; Williams, *supra* note 258, at 401 ("[T]erms that the parties . . . probably had in mind but did not trouble to express . . ."); cf. 3A A. CORBIN, *supra* note 12, §§ 631, 632, 653; Corbin, *Conditions in the Law of Contract*, 28 YALE L.J. 739, 743-44 (1919) (agreements may be either express or implied).

What remains are events that: (1) are beyond the reasonable control of the seller, (2) were not dealt with in the contract, and (3) were not seen at the time of contracting as virtually certain to occur. There are three potential solutions in these circumstances: (1) always excuse the seller, (2) never excuse the seller, and (3) sometimes excuse the seller. The first two have the virtue of simplicity, but entail significant problems and are not supported by either the pre-Code or Code case law. With the third solution, the task is one of line drawing. The precedent and the commentators tell us to pray for the wisdom of Solomon³⁶⁴ and to seek guidance in the principles of fairness and justice.³⁶⁵ With leeway as broad as this, it is little wonder that judges might shrink from the task, and that law professors produce a cornucopia of legal scholarship.³⁶⁶

Karl Llewellyn sought the solution to this problem in the normal commercial understanding of merchants in sales transactions. That understanding is that if an unforeseen general event beyond the seller's reasonable control makes the performance of the seller commercially impracticable, the seller is to be excused.³⁶⁷ In effect, this understanding reverses the *Paradine* rule upon which is based so much of our law of changed circumstances.³⁶⁸ Llewellyn's solution makes more commercial sense. Llewellyn's solution benefits all merchants, for merchants are both sellers and buyers. The typical merchant buyer of goods, though he may buy for resale, does not resell the goods until he has received them from

³⁶⁴ 6 A. CORBIN, *supra* note 12, § 1333 n.84.

³⁶⁵ Farnsworth, *supra* note 278, at 877-79; 6 A. CORBIN, *supra* note 12, §§ 1324, 1328; Note, *supra* note 104, at 98-102 (mere impossibility of performance does not require exculpation of promisor; other considerations exist, namely, who can better bear the loss, effect of alternative allocations and the conduct of the parties). Cf. Patterson, *supra* note 104, at 347-48.

³⁶⁶ For a fairly complete listing of impracticability law review articles over the last 25 years, see Prance, *Commercial Impracticability: A Textual and Economic Analysis of Section 2-615 of the Uniform Commercial Code*, 19 IND. L. REV. 457 n.3 (1986). The listing comprises a footnote of approximately one and one-half complete pages.

³⁶⁷ See *supra* notes 247-49 and accompanying text (discussing Llewellyn's adoption of normal commercial understanding). The normal commercial understanding, as viewed by Llewellyn, did not include events classified as "business risks." See *supra* notes 279-87 and accompanying text.

³⁶⁸ See *supra* note 44 (discussing *Paradine* rule).

the seller.³⁶⁹ If the seller is excused by an unforeseen event, both buyer and seller lose their expected profits on the deal. The buyer suffers no further loss because he has not yet resold. Dividing the loss this way seems preferable to refusing to excuse the seller, and thus saddling him with the entire loss caused by an unusual event which he could not control. Further, the typical merchant buyer or seller does not speculate; he does not wish to "risk much to gain much." Merchants intend that the typical contract allocate reasonable risks, not unusual risks. Therefore, the normal commercial sales understanding is that, should an unusual general risk occur and make the seller's performance commercially impracticable, the deal is off.

It is true that not all contracts are typical contracts. Sometimes patterns of business have buyers reselling before the seller has delivered, and in other business patterns the contracts are speculative. In some business patterns, the *Paradine* rule may reflect the commercial understanding.³⁷⁰ However, if these patterns are sufficiently well established to be known to sellers and buyers alike, Llewellyn's approach is still valid, because the normal commercial understanding for that business pattern is still the best guideline. Thus, a trade usage contrary to the commercial understanding reflected in section 2-615 would prevail.³⁷¹

There may also be cases in which the normal commercial understanding in a trade is not evident.³⁷² In these cases, course of

³⁶⁹ If a buyer does intend to resell before the seller delivers, and that is not the usual way of doing business, then the buyer should be required to so inform the seller, and negotiate a protective term.

³⁷⁰ See Berman, *supra* note 300.

³⁷¹ The trade usage has the effect of an "agreement otherwise" under section 2-615. See U.C.C. § 2-615, Official Comment 8 (1977). See also *id.* § 1-201(3) ("agreement" includes usage of trade); and *id.* § 1-205 (definition and effect of "usage of trade").

³⁷² Llewellyn recognized that courts had difficulty with these kinds of understandings. See *Second Draft of December 1941*, *supra* note 1 comment to § 1-D, at 55, reprinted in 1 U.C.C. DRAFTS, *supra* note 1, at 335. His proposed solution was to submit these questions to a jury composed of merchant experts, *id.* at 534-37, but that proposal was rejected in 1942-43; 1942 *Conference Transcript*, *supra* note 181, at 158 (lengthy debate over merchant jury proposals). Nothing replaced these proposals, and so the courts continue to have difficulty with usages. See generally Kirt, *Usage of Trade and Course of Dealing: Subversion of the U.C.C. Theory*, 1977 U. ILL. L. REV. 811.

dealing and course of performance may guide the court's decision.³⁷³ If these should fail to guide, the court must consider other factors. It should inquire whether the seller has a claim against a defaulting supplier. If so, the seller should not be excused.³⁷⁴

If the seller does not have a claim over, or if that question has no clear resolution,³⁷⁵ the court should then balance the effects of excuse on the buyer and the effects of non-excuse on the seller. Though it is difficult to find cases which explicitly weigh these effects, this is a process in which many judges probably engage.³⁷⁶ In weighing the relative effects, the court should

³⁷³ See *Kentucky Lumber & Millwork Co. v. George H. Rommell Co.*, 257 Ky. 371, 376-78, 78 S.W.2d 52, 54-55 (1934) (conduct of parties after destruction of seller's mill demonstrated that contract not conditioned upon continued existence of mill); *Davis v. Columbia Coal Mining Co.*, 170 Mass. 391, 396, 49 N.E. 629, 629-30 (1898) (contract to sell coal; seizure of coal by shipper excuses seller where parties treated contract as ended); *Barbarossa & Sons, Inc. v. Iten Chevrolet, Inc.*, 265 N.W.2d 655, 659 (Minn. 1978) (failure of seller to follow its standard practice to use order form including escape clause making obligation to deliver contingent upon ability to procure vehicle from manufacturer, rendered dealer's obligation absolute); *Campbell v. Hostetter Farms, Inc.*, 251 Pa. Super. 232, 240, 380 A.2d 463, 467 (1977) (evidence properly admitted that specified quantities in contract were only estimates); *Hayward Bros. v. James Daniel and Son*, 91 L.T.R. 319, 320 (K.B. 1904) (seller not excused, in part because in previous contracts with same buyer he paid damages under circumstances similar to case at bar). "Course of dealing" and "course of performance" are part of the parties' agreement under the Code. U.C.C. §§ 1-201(3), 1-205, 2-208 (1977).

³⁷⁴ The importance of this factor is recognized in U.C.C. § 2-615, Official Comment 5 (1977). See also *Comment on Section 6-3*, *supra* note 127, para. 5.

³⁷⁵ For example, the defaulting supplier may be asserting his own defense of impracticability to his obligation to the seller.

³⁷⁶ See *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 826 F.2d 239, 278 (4th Cir. 1987) (weighing "equities of the parties"). Code cases almost always discuss the effect on the seller of not granting excuse as part of their discussion of the impracticability element of U.C.C. § 2-615(a). See, e.g., *Gulf Oil Corp. v. Federal Power Comm'n*, 563 F.2d 588, 600 (3d Cir. 1977) (increased cost for delivery of natural gas would reduce net profit to only \$190,000,000), *cert. denied*, *Gulf Oil Corp. v. Federal Energy Regulatory Comm'n*, 434 U.S. 1062 (1978); *Louisiana Power & Light v. Allegheny Ludlum Indus. Inc.*, 517 F. Supp. 1319, 1324 (E.D. La. 1981) (fulfillment of contract would result in a \$428,500 loss, leaving yearly profits at \$589,500); *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 140 (N.D. Iowa 1978) (increased price of uranium yellowcake resulted in a net loss of \$2,673,125 for the defendant), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 723 (Mo. App. 1979) (loss of \$3,400,000

consider both losses and gains caused by the changed circumstances. For example, in several cases of drastic price increase the seller already owned the goods or was in the process of producing them. The price increase might cause the seller a substantial loss on the contract in question, yet he could expect to recoup that loss on later contracts because the price increase would also increase the value of his unsold inventory.³⁷⁷ Courts might also consider whether the seller or buyer is better able to spread the loss.³⁷⁸

under contract to supply coal to a utility), *cert. denied*, 444 U.S. 865 (1979). Sometimes courts also refer to the extent of the buyer's reliance on the contract. *See, e.g.*, *Sunflower Elec. Coop. v. Tomlinson Oil Co.*, 7 Kan. App. 2d 131, 638 P.2d 963 (1981) (cost to buyer of pipeline constructed in order to take delivery of oil from seller).

Westinghouse Corporation's contracts for the supply of uranium to various utilities have generated a significant amount of impracticability litigation which perhaps illustrates the point in the text. Westinghouse had agreed to supply certain utility companies with uranium for nuclear power plants which Westinghouse had sold them. When the price of uranium skyrocketed, Westinghouse repudiated those agreements. Westinghouse was denied excuse. *See Speidel, Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U.L. REV. 369, 413 n.181 (1981) (summary of the unpublished bench opinion by the judge for the United States District Court for the Eastern District of Virginia). *See also Eagan, The Westinghouse Uranium Contracts: Commercial Impracticability and Related Matters*, 18 AM. BUS. L.J. 281, 300 (1981) (indicating that the ruling against Westinghouse on October 27, 1978 encouraged out of court settlements in most claims against Westinghouse). The decision not to excuse Westinghouse may well have been influenced by several factors. First, Westinghouse had made substantial profits on the construction and sale of nuclear power plants to the utilities. Second, the utilities had incurred expenses to acquire those plants in reliance upon the fuel supply. Third, Westinghouse apparently had antitrust claims against various uranium producers for driving up the price of uranium. *See generally* J. STEWART, *THE PARTNERS* 152-200 (1983).

³⁷⁷ *See, e.g.*, *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 726 (Mo. App.) ("A business trend affecting a contract's value . . . would be less harmful [to a party with ample inventory] than to a party without. . . ."), *cert. denied*, 444 U.S. 865 (1979).

³⁷⁸ *Iowa Elec. Light and Power Co. v. Atlas Corp.*, 467 F. Supp. 129 (N.D. Iowa 1978) ("Atlas has successfully spread the risk of its losses through highly profitable contracts subsequent to the one at issue."), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); *see also* the following articles which apply principles of economic analysis to the doctrine of commercial impracticability: Birmingham, *A Second Look at the Suez Canal Cases: Excuse for Nonperformance of Contractual Obligations in Light of Economic Theory*, 20 HASTINGS L.J. 1393 (1969); Bruce, *An Economic Analysis of the Impossibility Doctrine*, 11 J. LEGAL STUD. 311, 312 (1982); Joskow, *Commercial Impossibility, the Uranium Market and the Westinghouse Case*, 6 J. LEGAL STUD. 119, 175 (1977); Posner &

If the court still has no clear resolution after applying all the standards above, then it might try one more approach. Though courts never do it explicitly,³⁷⁹ a daring judge might consider dividing the loss between the parties on some equitable basis.³⁸⁰

Rosenfeld, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 89-90 (1977); Note, *The Economic Implications of the Doctrine of Impossibility*, 26 HASTINGS L.J. 1251, 1258-70 (1975).

³⁷⁹ One suspects that courts occasionally divide the loss implicitly. Cf. McLouth Steel Corp. v. Jewell Coal & Coke Co., 570 F.2d 594, 608 (6th Cir.) (court found supplier obligated to provide 26,643 tons of coke per month under a requirements contract where buyer demanded up to 40,000 tons per month), *cert. dismissed*, 439 U.S. 801 (1978); Bunge Corp. v. Recker, 519 F.2d 449, 451 (8th Cir. 1975) (farmer not excused from contract permitted to raise question of whether buyer extended time to perform in bad faith so as to increase damages); Ralston Purina Co. v. McNabb, 381 F. Supp. 181, 184 (W.D. Tenn. 1974) (damages accruing from failure to deliver soybeans calculated from price at time originally due, not from expiration of an extension after the market price had risen); S.A. Gunheim & Co. v. Southwestern Shipping Corp., 124 N.Y.S.2d 303, 308 (Sup. Ct. 1953) (buyer made two offers for purchase of trucks; seller held to have accepted only one offer); Leavenworth State Bank v. Cashmere Apple Co., 118 Wash. 356, 364, 204 P. 5, 8 (1922) (discussed *supra* note 85) (fire excused supplier from providing 125,000 apple boxes to be manufactured, but not an additional 75,000 boxes from existing inventory); cf. also *Losecco v. Gregory*, 108 La. 648, 675, 32 So. 985, 996 (1901) (discussed *supra* note 75) (on first rehearing, loss divided between parties).

³⁸⁰ The Official Comments to section 2-615 have been said to sanction court imposed adjustment of the contract or splitting of the loss. See U.C.C. § 2-615, Official Comment 6 (1977) ("In situations in which neither sense nor justice is served by either answer when the issue is posed in flat terms of 'excuse' or 'no excuse,' adjustment . . . is necessary . . ."). Nothing in the drafts of that comment or the drafting history of section 2-615 suggests that Llewellyn had these approaches in mind. In a prior draft, the content of what is now Official Comments 6 and 7 was part of one comment entitled "Incidental Contingencies." See *Comment on Section 87*, *supra* note 161, comment 5, at 21-23. In that context, Official Comment 6 appears to mean that if an incidental obligation of the seller has become commercially impracticable, it makes no sense to say that either the seller is entirely excused from that obligation or not excused at all. Rather, since the obligation is not a vital part of the contract, the parties must readjust the incidental obligation so that the deal can go forward.

Courts have rejected the argument that the buyer has a good faith duty to modify a contract vitally impaired by changed circumstances. See *Louisiana Power & Light v. Allegheny Ludlum Indus.*, 517 F. Supp 1319, 1329 (E.D. La. 1981); *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 139 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 725 (Mo. App. 1979). See generally Gillette, *Limitations on the Obligation of Good Faith*, 1981 DUKE L.J. 619, 635 (discussing failure of the Code to obligate "commercial Good Samaritanism"); Birmingham, *Extending Good Faith: Does the U.C.C. Impose a Duty of Good Faith Negotiation*

For example, if the contract is a long-term installment contract, a judge might consider adjusting the price of future installments to divide the loss.³⁸¹

Ultimately, what is needed is an approach that avoids extensive reliance on elusive concepts like failure of basic assumption, for they have failed to guide and thus are useless in all but the clearest cases. What is needed is an approach that focuses on the effect of unforeseen changed circumstances upon both the cost

under Changed Circumstances, 61 ST. JOHN'S L. REV. 217 (1987) (answering question posed in title in the negative). *But see* Speidel, *The New Spirit of Contract*, 2 J.L. & COM. 193, 202-08 (1982) (finding a "new spirit of contract" in *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980), which mandates price adjustments in cases of severe economic hardship). Yet if the parties do modify the contract, courts will hold the modification to be binding even if there is no consideration or promissory estoppel to support the modification. *See, e.g.*, U.C.C. § 2-209(1), Official Comment 2 (1977); RESTATEMENT (SECOND) OF CONTRACTS § 89(a) illus. 4 (1981).

There is considerable scholarly literature recommending that courts divide losses between the parties. *See* Coons, *Compromise as Precise Justice*, 68 CAL. L. REV. 250 (1980); Coons, *Approaches to Court Imposed Compromise - The Uses of Doubt and Reason*, 58 NW. U.L. REV. 750 (1964); Harrison, *A Case for Loss Sharing*, 56 S. CAL. L. REV. 573 (1983); Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 471 (1985); Young, *Half Measures*, 81 COLUM. L. REV. 19 (1981); Note, *Apportioning Loss After Discharge of a Burdensome Contract: A Statutory Solution*, 69 YALE L.J. 1054 (1960); Comment, *Loss Splitting in Contract Litigation*, 18 U. CHI. L. REV. 153 (1950). The loss dividing approach was, however, considered and rejected by the English Law Revision Committee that recommended the Law Reform (Frustrated Contracts) Act, 1943, 6 & 7 Geo. 6 Ch. 40. *See* Law Revision Committee, Seventh Interim Report, Cmd. 6009 of 1939, at 7-8, reprinted in 12 REPORTS FROM COMMISSIONERS, INSPECTORS, AND OTHERS (1938-39).

³⁸¹ The only case to adopt this approach, *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 78-80 (W.D. Pa. 1980), vacated, No. 80-1604 (3d Cir. Feb. 5, 1981), is no longer law. *See supra* note 333 and accompanying text. Note that in that case the court had the benefit of the parties' advance agreement to the price adjustment. There is a lively debate in the academic literature about whether courts should adjust long-term contracts. *See generally* Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CALIF. L. REV. 2005 (1987) Favoring adjustment, *see* Gillette, *Commercial Rationality and the Duty to Adjust Long-Term Contracts*, 69 MINN. L. REV. 521 (1985); Goldberg, *Price Adjustment in Long-Term Contracts*, 1985 WIS. L. REV. 527 (1985); Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U.L. REV. 369 (1981). Against adjustment, *see, e.g.*, Dawson, *Judicial Revision of Frustrated Contracts: The United States*, 64 B.U.L. REV. 1 (1984); Halpern, *Application of the Doctrine of Commercial Impracticability: Searching for "The Wisdom of Solomon,"* 135 U. PA. L. REV. 1123 (1987).

of the seller's performance and the cost to the buyer if the seller is excused. Such a focus can produce rules of thumb in the forms of mathematical cost ratios that will guide the resolution of future disputes.³⁸²

IV. CONCLUSION

There has been some movement in the case law toward the doctrine of impracticability intended by the drafters of the Code. The movement may, however, be more apparent than real. The pre-Code law of impossibility usually is characterized as one in which the seller is not excused unless his case fits one of a few narrow, traditional fact patterns. In fact, the pre-Code law was not as rigid as it has been portrayed. There are indications that the pre-Code excuse theories were applied inconsistently to similar fact patterns. This circumstance indicates that the courts were manipulating a legal theory on the basis of factors other than those on which the theory explicitly is based. Thus, it is likely that many pre-Code judges were actually allocating risks, not just fitting the cases to prescribed excuse theories.

The Uniform Commercial Code attempted to liberalize the law of impossibility. It sought to introduce commercial standards of excuse. Some of this attempt was obscured in the drafting process, and what remains appears to give courts great leeway in determining cases. Although some Code cases have made creative use of that leeway, the promise of section 2-615 remains unfulfilled. Most judges, like mariners before the Age of Exploration,

³⁸² Even now, courts often rely on such rules of thumb; *see, e.g.*, *Louisiana Power & Light Co. v. Allegheny Ludlum Industries*, 517 F. Supp. 1319 (E.D. La. 1981); *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 597 F. Supp. 1456, 1477-78 (E.D. Va. 1984), *aff'd in part, rev'd in part*, 826 F.2d 239 (4th Cir. 1987). A word of caution about the use of cost ratios, is, however, in order. Care must be taken not to apply cost ratios derived from one type of business transaction to another type in which the trade usages and other factors may be different. Thus, for example, it is said that in international trade transactions the seller assumes the risk of any event not specifically included in an excuse clause. *See Berman, supra* note 300. Therefore, cost ratios devised from international trade cases, such as the Suez Canal closing cases, should not be used in domestic sales cases where Llewellyn's articulated commercial understanding is the norm. *Cf. Florida Power & Light Co.*, 826 F.2d at 276 (distinguishing Suez Canal closing cases). Similarly, cost ratios derived from one-shot contract cases probably should not be applied to long-term contracts.

tend to hug the charted shoals of pre-Code excuse theory. This Article has attempted to uncover the astrolabe and compass which Karl Llewellyn sought to provide for those timid mariners, by explicating the drafting history of both Code sections and comments so that judges will have a better idea of the drafters' intent. Armed with these navigational aids, perhaps judicial mariners will begin to explore new seas and discover new lands. In this new Age of Exploration, commerce can only flourish.

Table I: Selected Sales Impossibility and Impracticability Cases Arranged by Interfering Event, With U.C.C. Cases Capitalized¹

INDEX

- I. PROBLEMS WITH SELLER GETTING, MANUFACTURING, GROWING, OR KEEPING GOODS UNTIL DELIVERY TO BUYER
 - A. *Problems with Plant of Seller or Supplier*
 - 1. *Plant Damaged or Destroyed*
 - 2. *Plant Machinery Problems*
 - 3. *Plant Power Failure*
 - 4. *Miscellaneous Plant Problems*
 - B. *Crop Failure*
 - C. *Miscellaneous Events Affecting Seller's Production*
 - D. *Governmental Action*
 - E. *Labor Problems*
 - F. *Increased Cost*
 - G. *Technological Impossibility*
 - H. *Third Party Hinders or Prevents Performance (including theft of goods)*
 - I. *Supplier Breaches Contract With Seller*

¹ The Table contains only cases in which the seller sought excuse. It contains all of the cases in the Uniform Commercial Code Reporting Service in which the seller sought excuse and the court ruled on this question. Cases decided under the U.C.C. are capitalized. For a description of the process used to obtain the pre-U.C.C. cases, see note 69 to the text. The research produced in this table is current up to and including the cases in General Digest, Sixth Series, Vol. 53, and in 4 U.C.C. Rep. Serv. 2d (Callaghan). Within each section the cases are arranged chronologically.

A word of caution about the use of this Table is in order. The Table organizes recurring fact patterns and how courts allocated the risks. Commonly, however, the facts given in the case are sketchy, and the reasoning conclusory, so that it is often difficult to know precisely why the court allocated the risk as it did.

- J. Supplier Fails to Perform But Does Not Breach Any Contract With Seller*
- K. Goods or Supply Source Destroyed, Damaged, or Ceases to Exist*
- L. Supply Source Does Not Come Into Existence*
- M. Miscellaneous Events Causing Supply Shortages or Delays*
- N. Seller Mistaken about Kind, Quality, or Quantity of Goods*
- O. Miscellaneous Events*

II. PROBLEMS TRANSPORTING GOODS TO BUYER

- A. Shortage of Transportation*
- B. Carrier Embargo*
- C. Weather*
- D. Labor Problems*
- E. Governmental Action*
- F. Miscellaneous Events*

I. PROBLEMS WITH SELLER GETTING, MANUFACTURING, GROWING, OR KEEPING GOODS UNTIL DELIVERY TO BUYER

A. Problems With Plant of Seller or Supplier

1. Plant damaged or destroyed

(a) Excused:

1. *Western Hardware Mfg. Co. v. Bancroft-Charnley Steel Co.*, 116 F. 176 (7th Cir. 1902) (iron forms; seller's mill fire; producer/manufacturer; excuse: escape clause & specific source).

2. *Leavenworth St. Bank v. Cashmere Apple Co.*, 118 Wash. 356, 204 P. 5 (1922) (apple boxes; mill burned down; producer/manufacturer; excuse: specific source).

3. *GODDARD v. ISHIKAWAJIMA-HARIMA HEAVY INDUS. CO.*, 29 A.D.2d 754, 287 N.Y.S.2d 901 (1968), *aff'd mem.*,

24 N.Y.2d 842, 248 N.E.2d 600, 300 N.Y.S.2d 851 (1969) (boats; seller's factory burned; producer/manufacturer; excuse: specific source).

(b) Not Excused:

1. *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N.Y. 487 (1875) (rails; seller's rolling mill destroyed; producer/manufacturer; no excuse).

2. *Jones v. Unites States*, 96 U.S. 24 (1878) (uniform cloth; seller's mill destroyed; producer/manufacturer; no excuse).

3. *Hottellet v. American Corn Milling Co.*, 160 Ill. App. 58 (1911) (feed; seller's mill burned; producer/manufacturer; no excuse).

4. *Heffernan v. Neumond*, 198 Mo. App. 667, 201 S.W. 645 (1918) (feed; fire; producer/manufacturer; no excuse).

5. *C.R. Garner & Co. v. Beaumont Cotton Oil Mill Co.*, 212 S.W. 690 (Tex. Civ. App. 1919) (cotton seed cake; seller's mill burned; producer/manufacturer; no excuse).

6. *Kentucky Lumber & Millwork Co. v. George H. Rommell Co.*, 257 Ky. 371, 78 S.W.2d 52 (1934) (wooden millwork; mill burned; producer/manufacturer; no excuse).

2. *Plant Machinery Problems*

(a) Excused:

1. *Greco Canning Co. v. P. Pastene & Co.*, 277 F. 877 (9th Cir. 1922) (tomato paste; machinery failure at seller's plant; producer/manufacturer; excuse: escape clause).

2. *Maxwell v. Zenith Limestone Co.*, 142 Okla. 286, 286 P. 879 (1930) (crushed stone; machinery failure at seller's plant; producer/manufacturer; excuse: escape clause).

3. *NOONAN CONSTR. CO. v. WARREN BROS. CO.*, 632 F.2d 1189 (5th Cir. 1980) (gravel; machinery breakdown at seller's plant; producer; excuse: escape clause).

(b) Not Excused:

1. *Summers v. Hibbard, Spencer, Bartlett & Co.*, 153 Ill. 102, 38 N.E. 899 (1894) (bundles of iron; machinery breakage at seller's mill; producer/manufacturer; no excuse).

2. Porto Rico Sugar Co. v. Lorenzo, 222 U.S. 481 (1912) (cane grinding services; machinery breakdown at grinding plant; producer/manufacturer; no excuse).

3. CHEMETRON CORP. v. MCLOUTH STEEL CORP., 381 F. Supp. 245 (N.D. Ill. 1974), *aff'd*, 522 F.2d 469 (7th Cir. 1975) (nitrogen/oxygen; compressor problems at seller's plant; producer/manufacturer; no excuse).

4. COSDEN OIL & CHEM. CO. v. KARL O. HELM AK-TIENGESELLSCHAFT, 736 F.2d 1064 (5th Cir. 1984), (polystyrene; defective machine; producer/manufacturer; lost excuse-failure to allocate).

3. *Plant Power Failure*

(a) *Excused*: None

(b) *Not Excused*:

1. Kingsville Cotton Oil Co. v. Dallas Waste Mills, 210 S.W. 832 (Tex. Civ. App. 1919) (linters; power failure at plant; manufacturer; no excuse).

2. Port Aux Quilles Lumber Co. v. Meigs Pulp Wood Co., 204 A.D. 541, 198 N.Y.S. 563 (1923) (woodpulp; drought caused water power failure at seller's plant; producer/manufacturer; no excuse).

4. *Miscellaneous Plant Problems*²

(a) *Excused*: None

(b) *Not Excused*:

1. Eddy & Davis v. Clement, 38 Vt. 486 (1866) (lumber; drought caused supplier mill delays; dealer; no excuse).

2. Isaacson v. Starrett, 56 Wash. 18, 104 P. 1115 (1909) (boat engine; supplier's plant destroyed in earthquake; producer/manufacture; no excuse).

3. ROBBERSON STEEL, INC. v. J.D. ABRAMS, INC., 585 S.W.2d 558 (Tex. Civ. App. 1979) (structural steel; supplier mill breakdown; producer/manufacturer; no excuse).

² See also Gulf Oil Corp. v. Federal Energy Reg. Comm'n, 706 F.2d 444 (3d Cir. 1983), *cert. denied*, 464 U.S. 1038 (1984) (gas; shutdowns of existing oilfields; producer; not proved to have caused nonperformance).

*B. Crop Failure*³*(a) Excused:*

1. *Howell v. Coupland*, 1 Q.B. 258 (C.A. 1876) (potatoes; blight; producer; excuse: specific land).

2. *Rice & Co. v. Weber*, 48 Ill. App. 573 (1893) (seed potatoes; rot; producer; excuse: specific crop).

3. *Losecco v. Gregory*, 108 La. 648, 32 So. 985 (1901) (oranges; freeze; producer; excuse: buyer assumed risk by contract).

4. *Ontario Deciduous Fruit Growers Ass'n v. Cutting Fruit-Packing Co.*, 134 Cal. 21, 66 P. 28 (1901) (peaches; drought; producer; excuse: specific land).

5. *Whipple v. Lyons Beet Sugar Ref. Co.*, 64 Misc. 363, 118 N.Y.S. 338 (Sup. Ct.), *aff'd mem.*, 137 A.D. 881, 118 N.Y.S. 1150 (1909), *aff'd mem.*, 202 N.Y. 522, 95 N.E. 1141 (1911) (sugar beets; drought; producer; excuse: specific crop).

6. *Pearson v. McKinney*, 160 Cal. 649, 117 P. 919 (1911), *re'aff'd*, 173 Cal. 336, 159 P. 1173 (1916) (budded trees; insufficient number raised; producer; excuse: specific crop).

7. *St. Joseph Hay & Feed Co. v. Brewster*, 195 S.W. 71 (Mo. App. 1917) (wheat; rain; producer; excuse: specific crop).

8. *C.G. Davis & Co. v. Bishop*, 139 Ark. 273, 213 S.W. 744 (1919) (cotton; insufficient quantity raised; producer; excuse: specific crop).

9. *Matousek v. Galligan*, 104 Neb. 731, 178 N.W. 510 (1920) (hay; storms; producer; excuse: specific crop).

10. *Ranney-Davis Mercantile Co. v. Shwano Canning Co.*, 111 Kan. 68, 206 P. 337 (1922) (canned beans/beets; unfavorable weather caused suppliers to tender insufficient quantities; producer and dealer; excuse: escape clause).

³ See also *Ryley-Wilson Grocery Co. v. Seymour Canning Co.*, 129 Mo. App. 325, 108 S.W. 628 (1908) (canned tomatoes; wet weather; producer/manufacture; scope of escape clause a question of fact for jury); *Clay Grocery Co. v. Kenyon Canning Corp.*, 198 Minn. 533, 270 N.W. 590 (1936) (canned corn; drought; producer/manufacture; excuse under escape clause, but excuse lost for failure to allocate); *MICHIGAN BEAN CO. v. SENN*, 93 Mich. App. 440, 287 N.W.2d 257 (1979) (navy beans; weather; producer; question of fact whether specific crop to be source of goods).

11. *Barkemeyer Grain & Seed Co. v. Hannant*, 66 Mont. 120, 213 P. 208 (1923) (seed; erroneous estimate of output; producer; excuse: specific crop).

12. *Snipes Mountain Co. v. Benz Bros. & Co.*, 162 Wash. 334, 298 P. 714 (1931) (potatoes; crop failure; producer; excuse: specific crop).

13. *Squillante v. California Lands, Inc.*, 5 Cal. App.2d 89, 42 P.2d 81 (1935) (grapes; heat damage; producer; excuse: specific crop).

14. *Pearce-Young-Angel Co. v. Charles R. Allen, Inc.*, 213 S.C. 578, 50 S.E.2d 698 (1948) (blackeye peas; rain ruined crop; producer; excuse: specific crop).

15. *Mitchell Canneries, Inc. v. United States*, 111 Ct. Cl. 228, 77 F. Supp. 498 (1948) (canned blackberries; weather damaged suppliers' crops; producer/manufacturer; excuse: escape clause).

16. *LOW'S EZY-FRY POTATO CO. v. J.A. WOOD CO.*, 26 Ag. Dec. 583, 4 U.C.C. Rep. Serv. (Callaghan) 483 (Agric. Dept. 1967) (potatoes; weather; producer; excuse: specific crop).

17. *PAYMASTER OIL MILL CO. v. MITCHELL*, 319 So. 2d 652 (Miss. 1975) (soybeans; drought; excuse: specific crop).

18. *CAMPBELL v. HOFSTETTER FARMS, INC.*, 251 Pa. Super. 232, 380 A.2d 463 (1977) (corn, wheat; wet weather; producer; excuse: specific crop).

19. *SALINAS v. FLORES*, 583 S.W.2d 813 (Tex. Civ. App. 1979) (melons; hailstorm; producer; buyer assumed risk of loss).

20. *ALIMENTA (USA), INC. v. GIBBS NATHANIEL (CANADA) LTD.*, 802 F.2d 1362 (11th Cir. 1986) (peanuts; drought; producer; excuse: drought not foreseeable).

(b) *Not Excused:*

1. *M'Gehee v. Hill*, 4 Port. 170 (Ala. 1836) (corn and fodder; drought; producer; no excuse).

2. *Anderson v. May*, 50 Minn. 280, 52 N.W. 530 (1892) (beans; frost; producer; no excuse).

3. *Newell v. New Holstein Canning Co.*, 119 Wis. 635, 97 N.W. 487 (1903) (canned tomatoes; frost damaged suppliers' crops; producer/manufacturer; no excuse).

4. *Hayward Bros. Ltd. v. James Daniel & Son*, 91 L.T.R. (n.s.) 319 (Comm. Ct. 1904) (gherkins; cold weather; producer; no excuse).

5. *A.L. Jones & Co. v. Cochran*, 33 Okla. 431, 126 P. 716 (1912) (onion sets; insufficient number raised; producer; no excuse).
6. *Whitman v. Anglum*, 92 Conn. 392, 103 A. 114 (1918) (milk; quarantined; producer; no excuse).
7. *Taylor Cotton Oil Co. v. Early-Foster Co.*, 204 S.W. 1179 (Tex. Civ. App. 1918) (cotton linters; drought apparently caused suppliers to tender insufficient cotton; producer/manufacturer; no excuse).
8. *Nelligan v. Knutsen*, 38 Cal. App. 1, 175 P. 18 (1918) (white corn; rain made suppliers' corn moldy; dealer; no excuse).
9. *Kansas Milling Co. v. Edwards*, 108 Kan. 616, 197 P. 1113, *modified*, 109 Kan. 194, 197 P. 1115 (1921) (wheat; fire; producer; no excuse).
10. *Davis v. Davis*, 266 S.W. 797 (Tex. Civ. App. 1924) (cotton; crop failure; producer; no excuse).
11. *Eskew v. California Fruit Exchange*, 203 Cal. 257, 263 P. 804 (1927) (grapes; weather caused insufficient suppliers' crop; dealer; no excuse).
12. *Sunseri v. Garcia & Maggini Co.*, 298 Pa. 249, 148 A. 81 (1929) (garlic; partial suppliers' crop failure; dealer; no excuse).
13. *Ross Seed Co. v. Sturgis Implement & Hardware Co.*, 297 Ky. 776, 181 S.W.2d 426 (1944) (seed; flood caused insufficient supplier crop; dealer; no excuse).
14. *Haley v. Van Lierop*, 64 F. Supp. 114 (W.D. Mich.), *aff'd mem.*, 153 F.2d 212 (6th Cir. 1945) (bulbs; weather and disease; producer; no excuse).
15. *United Sales Co. v. Curtis Peanut Co.*, 302 S.W.2d 763 (Tex. Civ. App. 1957) (peanuts; drought may have caused insufficient supplier crop; producer; no excuse).
16. *Tomlinson v. Wander Seed & Bulb Co.*, 177 Cal. App. 2d 462, 2 Cal. Rptr. 310 (1960) (seed; crop failure; dealer; no excuse).
17. *BUNGE CORP. v. MILLER*, 381 F. Supp. 176 (W.D. Tenn. 1974) (soybeans; flooding; producer; no excuse).
18. *RALSTON PURINA CO. v. MCNABB*, 381 F. Supp. 181 (W.D. Tenn. 1974) (soybeans; flooding; producer; no excuse).
19. *BUNGE CORP. v. RECKER*, 519 F.2d 449 (8th Cir. 1975) (soybeans; severe winter; producer; no excuse).
20. *SEMO GRAIN v. OLIVER FARMS, INC.*, 530 S.W.2d 256 (Mo. Ct. App. 1975) (soybeans; rain; producer; no excuse).

21. *BLISS PRODUCE CO. v. A.E. ALBERT & SONS, INC.*, 35 Ag. Dec. 742, 20 U.C.C. Rep. Serv. (Callaghan) 917 (Agric. Dec. 1976) (potatoes; poor weather caused partial crop failure of suppliers; dealer; no excuse).

22. *GOLD KIST, INC. v. STOKES*, 138 Ga. App. 482, 226 S.E.2d 268 (1976) (soybeans; fire; producer: no excuse).

23. *RALSTON PURINA CO. v. ROOKER*, 346 So. 2d 901 (Miss. 1977) (soybeans; rain, floods; producer; no excuse).

24. *COLLEY v. BI-STATE, INC.*, 21 Wash. App. 769, 586 P.2d 908 (1978) (wheat; dry weather; producer; no excuse).

25. *RENNER ELEVATOR CO. v. SCHUER*, 267 N.W.2d 204 (S.D. 1978) (corn; drought, hail; producer; no excuse).

26. *WICKLIFFE FARMS, INC. v. OWENSBORO GRAIN CO.*, 684 S.W.2d 17 (Ky. App. 1984) (corn; drought; producer; no excuse).

C. Miscellaneous Events Affecting Seller's Production

(a) Excused:

1. *Stallings v. DeBardeleben Coal Co.*, 22 Ga. App. 597, 96 S.E. 708 (1918) (coal; flood at mine curtailed output; producer; excuse: escape clause).

2. *North Am. Oil Co. v. Globe Pipe Line Co.*, 6 F.2d 564 (8th Cir. 1925) (oil; well depleted; producer; excuse: specific source).

(b) Not Excused:

1. *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 285, 38 S.E. 141 (1901) (ice; delay in placing machine in service; producer/manufacture; no excuse).

2. *Seligman v. Beecher*, 36 Pa. Super. 475 (1908) (timber; weather, acceptance of too many orders; producer; no excuse).

3. *Davison Chem. Co. v. Baugh Chem. Co.*, 134 Md. 24, 106 A. 269 (1919) (sulphuric acid; delay in expanding production capacity, acceptance of too many orders; producer/manufacture; no excuse).

4. *Penick & Ford, Ltd. v. C. Lagarde Co.*, 146 La. 511, 83 So. 787 (1919) (molasses; seller failed to produce sufficient quantity; producer; no excuse).

5. *Spanish Rush Broom Co. v. Dobbartin*, 203 App. Div. 247, 196 N.Y.S. 770 (A.D.), *appeal dismissed*, 196 N.Y.S. 953 (1922)

(rush; weather, acceptance of too many orders; producer; no excuse).

6. CHEMETRON CORP. v. MCLOUTH STEEL CORP., 381 F. Supp. 245 (N.D. Ill. 1974), *aff'd*, 522 F.2d 469 (7th Cir. 1975) (liquid nitrogen, oxygen; for various reasons insufficient quantity produced; producer/manufacturer; no excuse).

7. GULF OIL CORP. v. FEDERAL POWER COMM'N, 563 F.2d 588 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978) (natural gas; seller overestimate of gas reserves; producer; no excuse).

8. SUNFLOWER ELEC. COOP., INC. v. TOMLINSON OIL CO., 7 Kan. App. 2d 131, 638 P.2d 963 (1981) (natural gas; well depleted; producer; no excuse).

9. ROTH STEEL PRODS. v. SHARON STEEL CORP., 705 F.2d 134 (6th Cir. 1983) (steel sheets; seller overaccepted orders, raw material shortage; producer/manufacturer; no excuse).

D. Governmental Action⁴

(a) Excused:

1. Atlantic Steel Co. v. R.O. Campbell Coal Co., 262 F. 555 (N.D. Ga. 1919) (coal; seller's mines requisitioned by government; producer: excuse: escape clause).

2. Mawhinney v. Millbrook Woolen Mills, Inc., 231 N.Y. 290, 132 N.E. 93 (1921) (woolens; governmental requisition of seller's cloth and machines; producer/manufacturer; excuse: governmental action).

3. Nitro Powder Co. v. Agency of Canadian Car & Foundry Co., 233 N.Y. 294, 135 N.E. 507 (1922) (salvaged TNT; government requisitioned seller's goods; dealer; excuse: governmental action, escape clause).

⁴ See also *Salembier, Levin & Co. v. North Adams Mfg. Co.*, 178 N.Y.S. 607 (Sup. Ct. 1919) (woolen cloth; governmental action; producer/manufacturer; not proved to be cause of nonperformance); *Tipler-Grossman Lumber Co. v. Forrest City Box Co.*, 148 Ark. 132, 229 S.W. 17 (1921) (lumber; governmental requisition; producer/manufacturer; not proved); *Heidelberg Brewing Co. v. E.F. Prichard Co.*, 297 Ky. 788, 180 S.W.2d 849 (1944) (ale; governmental regulation alleged to have limited production; producer/manufacturer; not proved); *MCLOUTH STEEL CORP. v. JEWELL COAL & COKE CO.*, 570 F.2d 594 (6th Cir.), *cert. denied*, 439 U.S. 801 (1978) (coke; governmental air pollution order to shut down plant; producer/manufacturer; not proved to be cause of nonperformance).

4. *Lippman v. Rice Miller's Distrib. Co.*, 156 La. 471, 100 So. 685 (1924) (rice; government requisitioned seller's goods; dealer; excuse: escape clause).

5. *Hamilton Rubber Mfg. Co. v. Greater N.Y. Carpet House, Inc.*, 47 N.Y.S.2d 210 (Sup. Ct. 1944), *aff'd mem.*, 269 A.D. 681, 53 N.Y.S.2d 954 (1945) (unnamed goods; government prohibited completion of goods by seller; producer/manufacturer; excuse: governmental action).

6. *EASTERN AIR LINES, INC. v. MCDONNELL-DOUGLAS CORP.*, 532 F.2d 957 (5th Cir. 1976) (jets; unofficial governmental action persuaded suppliers to favor military contracts; producer/manufacturer; excuse: escape clause, governmental action).

7. *PARAMOUNT SUPPLY CO. v. SHERLIN CORP.*, 16 Ohio App. 3d 176, 475 N.E.2d 197 (1984) (turbochargers; seized from seller by U.S. customs; dealer; excuse: governmental action).

(b) *Not Excused:*

1. *Dwight v. Callaghan*, 53 Cal. App. 132, 199 P. 838 (1921) (oil cases; government requisitioned suppliers' materials; producer/manufacturer; no excuse).

2. *Vernon Lumber Corp. v. Harcen Constr. Co.*, 60 F. Supp. 555 (D.C.N.Y. 1945), *aff'd*, 155 F.2d 348 (2d Cir. 1946) (lumber; government requisitioned supplier's materials; dealer; no excuse).

3. *NEAL-COOPER GRAIN CO. v. TEXAS GULF SULPHUR CO.*, 508 F.2d 283 (7th Cir. 1974) (potash; governmental price regulation; producer; no excuse).

*E. Labor Problems*⁵

(a) *Excused:*

1. *Delaware, Lackawanna & Western R.R. v. Bowns*, 58 N.Y. 573 (1874) (coal; strike at seller's mine; producer; excuse: escape clause).

⁵ See also *Hesser-Milton-Renahan Coal Co. v. La Crosse Fuel Co.*, 114 Wis. 654, 90 N.W. 1094 (1902) (coal; strike; producer; scope of escape clause a question of fact for jury); *GLASSNER v. NORTHWEST LUSTRE CRAFT CO.*, 390 Or. App. 175, 591 P.2d 419 (1979) (china and glassware; strike at producer/manufacturer; dealer; question of fact whether this strike excuses).

2. Metropolitan Coal Co. v. Billings, 202 Mass. 457, 89 N.E. 115 (1909) (coal; strikes at suppliers' mines; dealer; excuse: escape clause).

3. Stewart-Warner Corp. v. Remco, Inc., 205 F.2d 583 (7th Cir. 1953) (televisions, radios; strike at chassis supplier; producer/manufacturer; excuse: escape clause).

(b) *Not Excused:*

1. Puget Sound Iron & Steel Works v. Clemmons, 32 Wash. 36, 72 P. 465 (1903) (repair of engine; strike at seller's plant; producer/manufacturer; no excuse).

2. Samuel H. Cottrell & Son v. Smokeless Fuel Co., 129 F. 174 (C.C.E.D. Va. 1904), *rev'd*, 148 F. 594 (4th Cir. 1906), *cert. denied*, 205 U.S. 544 (1907) (coal; strike at seller's mine; dealer; no excuse).

3. Rudolph Saenger Co. v. Giant Silk Mfgs. Inc., 172 N.Y.S. 667 (App. Div. 1918) (georgette crepe; strike at seller's plant; producer/manufacturer; no excuse).

4. DeGrasse Paper Co. v. Northern N.Y. Coal Co., 190 A.D. 227, 179 N.Y.S. 788 (1919) (coal; strike at supplier's mines; dealer; no excuse).

5. Universal Coal Co. v. Old Ben Coal Corp., 32 Ohio App. 254, 167 N.E. 904 (1929) (coal; labor troubles; producer; no excuse).

6. S.A. Ghuneim & Co. v. Southwestern Shipping Corp., 124 N.Y.S.2d 303 (Sup. Ct. 1953) (trucks; strike at steel suppliers; dealer; no excuse).

7. Oliver-Elec. Mfg. Co. v. I.O. Teigen Constr. Co., 177 F. Supp. 572 (D.C. Minn. 1959), *motion denied*, 183 F. Supp. 768 (N.D. Minn. 1960) (spacer fittings; strike at steel suppliers; producer/manufacturer; no excuse).

8. RECORD CORP. v. LOGAN CONSTR. CO., 22 Pa. D. & C. 3d 358 (Ct. Comm. Pl. 1982) (sluice gates; strike at brass supplier; producer/manufacturer; no excuse).

*F. Increased Cost*⁶

(a) *Excused:*

1. GAY v. SEAFARER FIBERGLASS YACHTS, INC., 14 U.C.C. Rep. Serv. (Callaghan) 1335 (N.Y. Sup. Ct. 1974) (custom

⁶ See also TENNESSEE VALLEY AUTH. v. WESTINGHOUSE ELEC.

yacht; increased cost of raw materials; producer/manufacturer; excuse: embargo).

2. *ALUMINUM CO. OF AM. v. ESSEX GROUP, INC.*, 499 F. Supp. 53 (W.D. Pa. 1980), *vacated*, No. 80-1604 (3d Cir. Feb. 5, 1981) (aluminum smelting services; production cost increase; producer/manufacturer; excuse: hardship).

3. *IN RE WESTINGHOUSE ELEC. CORP. URANIUM CONTRACTS LITIGATION*, 517 F. Supp. 440 (E.D. Va. 1981), *reconsidered*, 597 F. Supp. 1456 (E.D. Va. 1984), *aff'd in part & rev'd in part sub nom. FLORIDA POWER & LIGHT CO. v. WESTINGHOUSE ELEC. CORP.*, 826 F.2d 239 (4th Cir. 1987) (removal and disposal of spent nuclear fuel; contemplated means of disposal did not come into existence; excuse: failure of contemplated means of performance and no reasonable alternative).

(b) *Not Excused*:

1. *Stewart v. Marvel*, 101 N.Y. 357, 4 N.E. 743 (1886) (blooms; increased cost of coal supplies; producer/manufacturer; no excuse).

2. *Samuel H. Cottrell & Son v. Smokeless Fuel Co.*, 148 F. 594 (4th Cir. 1906), *rev'g* 129 F. 174 (C.C.E.D. Va. 1904), *cert. denied*, 205 U.S. 544 (1907) (coal; increased cost of production; dealer; no excuse).

3. *Sturges & Burn Mfg. Co. v. American Separator Co.*, 171 A.D. 429, 156 N.Y.S. 872 (1916) (cream separator covers; apparently increased cost of raw materials; producer/manufacturer; no excuse).

4. *Downey v. Shipston*, 206 A.D. 55, 200 N.Y.S. 479 (1923) (coal; increased cost to acquire goods; dealer; no excuse).

5. *Goldstein v. Old Dominion Peanut Corp.*, 177 Va. 716, 15 S.E.2d 103 (1941) (burlap bags; increased cost of burlap; producer/manufacturer; no excuse).

6. *Wilson & Co. v. Fremont Cake & Meal Co.*, 153 Neb. 160, 43 N.W.2d 657 (1950), *cert. denied*, 342 U.S. 812 (1951) (soybean oil; increased cost of soybeans; producer/manufacturer; no excuse).

7. *Shedd-Bartush Foods of Illinois v. Commodity Credit Corp.*, 231 F.2d 555 (7th Cir. 1956) (margarine; increased cost of raw materials; producer/manufacturer; no excuse).

CORP., 69 F.R.D. 5 (E.D. Tenn. 1975) (nuclear fuel; price increase for uranium; producer/manufacturer; scope of escape clause a question of fact).

8. PUBLICKER INDUS., INC. v. UNION CARBIDE CORP., 17 U.C.C. Rep. Serv. (Callaghan) 989 (E.D. Pa. 1975) (ethanol; increase in cost of raw materials; producer/manufacturer; no excuse).

9. EASTERN AIR LINES, INC. v. GULF OIL CORP., 415 F. Supp. 429 (S.D. Fla. 1975) (aviation fuel; increase in crude oil prices and oil embargo; producer and dealer; no excuse).

10. Bank of Louisiana v. Campbell, 329 So. 2d 235 (La. App.), *cert. denied*, 322 So. 2d 866 (La. 1976) (printed forms; increased cost of supplies; dealer; no excuse).

11. IOWA ELEC. LIGHT & POWER CO. v. ATLAS CORP., 467 F. Supp. 129 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980) (uranium yellow cake; increased cost; producer; no excuse).

12. MISSOURI PUB. SERV. CO. v. PEABODY COAL CO., 583 S.W.2d 721 (Mo. Ct. App.), *cert. denied*, 444 U.S. 865 (1979) (coal; increase in seller's production cost; producer; no excuse).

13. LOUISIANA POWER & LIGHT CO. v. ALLEGHENY LUDLUM INDUS., 517 F. Supp. 1319 (E.D. La. 1981) (condenser tubing; increased production cost; producer/manufacturer; no excuse).

14. BERNINA DISTRIB., INC. v. BERNINA SEWING MACH. CO., 646 F.2d 434 (10th Cir.), *clarified*, 689 F.2d 903 (10th Cir. 1981) (sewing machines; increased cost due to devaluation of dollar; dealer; no excuse).

G. *Technological Impossibility*

(a) *Excused*: None

(b) *Not Excused*:

1. Carnegie Steel Co. v. United States, 240 U.S. 156, *aff'g* 49 Ct. Cl. 403 (1916) (armor plate; technological problems in production; producer/manufacturer; no excuse).

2. UNITED STATES v. WEGEMATIC CORP., 360 F.2d 674 (2d Cir. 1966) (computer; not technologically possible to develop promised computer; producer/manufacturer; no excuse).

3. Government of Republic of China v. Compass Communication Corp., 473 F. Supp. 1306 (D.C. 1979) (battery chargers; unstated technological problems; producer/manufacturer; no excuse).

H. Third Party Hinders or Prevents Performance (including theft of goods)

(a) *Excused:*

1. *CONWAY V. LARSEN JEWELERS, INC.*, 104 Misc. 2d 872, 429 N.Y.S.2d 378 (Civ. Ct. 1980) (necklace; stolen; dealer; excuse: unique goods).

2. *EMERY ESTATE v. WEED*, 40 Bucks Cty. L. Rep. 131, 36 U.C.C. Rep. Serv. (Callaghan) 827 (Pa. Ct. Com. Pl. 1982) (car; stolen; dealer; excuse: specific car).

3. *WALDINGER CORP. v. ASHBROOK-SIMON-HARTLEY, INC.*, 564 F. Supp. 970 (C.D. Ill. 1983), *aff'd in part sub nom. Waldinger Corp. v. CRS Group Eng'rs*, 775 F.2d 781 (7th Cir. 1985) (sludge dewatering machine; engineer unreasonably interpreted specifications; producer/manufacturer; excuse: improper interference).

(b) *Not Excused:*

1. *Bradley v. McHale*, 19 Pa. Super. 300 (1902) (building; seller could not get permit to move building; no excuse).

2. *NISSHO-IWAI CO. v. OCCIDENTAL CRUDE SALES, INC.*, 729 F.2d 1530 (5th Cir. 1984) (crude oil; government quota imposed on seller; producer; no excuse).

I. Supplier Breaches Contract With Seller⁷

(a) *Excused:*

1. *Mosby v. Smith*, 194 Mo. App. 20, 186 S.W. 49 (1916) (cattle; seller's supplier may have failed to make full delivery of goods; dealer; excuse: specific source).

2. *Scialli v. Correale*, 97 N.J.L. 165, 117 A. 255 (1922) (grapes; seller's supplier did not deliver goods; dealer; excuse: specific source).

⁷ See also *ZIDELL EXPLORATIONS, INC. v. CONVAL INT'L, LTD.*, 719 F.2d 1465 (9th Cir. 1983) (valves; agreed supplier breached; dealer; question of fact whether seller acted in bad faith, and therefore not excused, for failing to turn over to buyer its rights against breaching supplier).

3. INTERPETROL BERMUDA, LTD. v. KAISER ALUMINUM INT'L CORP., 719 F.2d 992 (9th Cir. 1983) (refined oil products; supplier breached by diverting oil; dealer; excuse: escape clause).

(b) *Not Excused:*

1. McDonald v. Gardner, 56 Wis. 35, 13 N.W. 689 (1882) (lumber; seller's supplier failed to deliver; dealer; no excuse).

2. Cannistraci v. James Chieves & Co., 165 N.Y.S. 933 (App. Div. 1917) (tomato sauce; seller's supplier of goods made only partial delivery; dealer; no excuse).

3. Ellis Gray Milling Co. v. Sheppard, 359 Mo. 505, 222 S.W.2d 742 (1949) (corn; seller's supplier refused to deliver; dealer; no excuse).

4. Jesse R. McNames, Inc. v. Henry C. Bergmann, Inc., 175 Cal. App. 2d 263, 346 P.2d 57 (Dist. Ct. App. 1959) (milk tank; seller's supplier refused to deliver; dealer; no excuse).

5. SWIFT TEXTILES, INC. v. LAWSON, 135 Ga. App. 799, 219 S.E.2d 167 (1975) (cotton; seller's suppliers did not fully deliver; dealer; no excuse).

6. LURIA BROS. & CO. v. PIELET BROS. SCRAP IRON & METAL, INC., 600 F.2d 103 (7th Cir. 1979) (scrap steel; seller's suppliers failed to deliver goods; dealer; no excuse).

7. MORIN BLDG. PRODS. CO. v. VOLK CONSTR., INC., 500 F. Supp. 82 (D. Mont. 1980) (metal siding; seller's suppliers and subcontractors did not properly perform; dealer; no excuse).

J. Supplier Fails to Perform But Does Not Breach Any Contract With Seller

(a) *Excused:*

1. Gutman v. Sal-Vio Masons, Inc., 72 Misc. 2d 729, 339 N.Y.S.2d 562 (Sup. Ct.), *aff'd mem.*, 45 A.D.2d 988, 359 N.Y.S.2d 766 (1972) (brick masonry; supplier discontinued doing business with seller; producer/manufacturer; excuse: escape clause).

2. FEDERAL PANTS, INC. v. STOCKING, 762 F.2d 561 (7th Cir. 1985) (shoes; supplier ceased to sell to seller; dealer; excuse: specific source).

(b) *Not Excused:*

1. *Johnson v. Colonial Buick, Inc.*, 334 So. 2d 453 (La. Ct. App. 1976) (new auto; delay at supplier's factory; dealer; no excuse).

2. *CENTER GARMENT CO. v. UNITED REFRIGERATION CO.*, 396 Mass. 633, 341 N.E.2d 669 (1976) (acetate; seller unable to get good quality goods; dealer; no excuse).

3. *BARBAROSSA & SONS, INC. v. ITEN CHEVROLET, INC.*, 265 N.W.2d 655 (Minn. 1978) (special order truck; manufacturer canceled seller's order, dealer; no excuse).

4. *Miller v. Titeca*, 628 P.2d 670 (Mont. 1981) (cattle; cattle owned by seller's wife who refused to sell; dealer; no excuse).

5. *Huntington Beach Union High School Dist. v. Continental Information Systems Corp.*, 621 F.2d 353 (9th Cir. 1980) (computer; seller unable to acquire goods; dealer; no excuse).

*K. Goods or Supply Source Destroyed, Damaged, or Ceases to Exist*⁸

(a) *Excused:*

1. *Dexter v. Norton*, 47 N.Y. 62 (1871) (cotton bales; destroyed by fire; dealer; excuse: specific goods).

2. *Seckel v. Scott*, 66 Ill. 106 (1872) (firkins of butter; destroyed by fire; dealer; excuse: specific goods, title passed).

3. *McMillan v. Fox*, 90 Wis. 173, 62 N.W. 1052 (1895) (lumber; destroyed by fire at seller's plant; dealer; excuse: specific goods).

4. *Wunderlich v. Palatine Fire Ins. Co.*, 104 Wis. 395, 80 N.W. 471 (1899) (lumber; destroyed by fire; producer/manufacturer; excuse: specific goods).

5. *International Paper Co. v. Rockefeller*, 161 A. D. 180, 146 N.Y.S. 371 (1914) (green spruce timber; fire destroyed wood lot; producer; excuse: specific source).

6. *SELLAND PONTIAC-GMC, INC. v. KING*, 384 N.W.2d 490 (Minn. Ct. App. 1986) (school bus bodies; supplier went out of business; dealer; excuse: specific source of supply).

⁸ See also *CARLSON v. NELSON*, 204 Neb. 765, 285 N.W.2d 505 (1979) (combine; damaged; dealer; remand to determine whether or not seller at fault).

(b) *Not Excused:*

1. *Cunningham Iron Co. v. Warren Mfg. Co.*, 80 F. 878 (D.R.I. 1897) (second-hand boilers; insignificant damage; dealer; no excuse).

2. *Smith v. Callaway*, 157 Ga. 727, 121 S.E. 684 (1924) (nitrate; supply destroyed en route; dealer; no excuse).

3. *VALLEY FORGE FLAG CO. v. N.Y. DOWEL & MOULDING IMPORT CO.*, 90 Misc. 2d 414, 395 N.Y.S.2d 138 (Civ. Ct. 1977) (dowels; goods destroyed en route; dealer; no excuse).

4. *BENDE AND SONS, INC. v. CROWN RECREATION, INC.*, 548 F. Supp. 1018 (E.D.N.Y. 1982), *aff'd mem.*, 722 F.2d 727 (2d Cir. 1983) (combat boots; goods destroyed en route; dealer; no excuse).

L. Supply Source Does Not Come Into Existence

(a) *Excused:* None

(b) *Not Excused:*

1. *S.L. Jones & Co. v. Bond*, 191 Cal. 551, 217 P. 725 (1923) (steel bars; steel source never commenced production; dealer; no excuse).

2. *Beatty v. Oakland Sheet Metal Supply Co.*, 111 Cal. App. 2d 53, 244 P.2d 25 (Dist Ct. App. 1952) (sheet steel; source of supply never set up; dealer; no excuse).

*M. Miscellaneous Events Causing Supply Shortages or Delays*⁹

(a) *Excused:*

1. *TERRY v. ATLANTIC RICHFIELD CO.*, 72 Cal. App. 3d 962, 140 Cal. Rptr. 510 (1977) (gasoline; shortage caused by oil embargo; producer/manufacturer; excuse: escape clause).

⁹ See also *Union Trust Co. v. Webber-Seely Hardware Co.*, 73 Ark. 584, 84 S.W. 784 (1905) (axes; supply shortage; producer/manufacturer; not proved to be cause of nonperformance); *STINNES INTEROIL, INC. v. APEX OIL CO.*, 604 F. Supp. 978 (S.D.N.Y. 1985) (oil; supply delayed by adverse weather; dealer; scope of escape clause a question of fact).

2. *OLSON v. SPITZER*, 257 N.W.2d 459 (S.D. 1977) (combine; scarcity of component parts; dealer; excuse: escape clause).

(b) *Not Excused*:

1. *Gilpins v. Consequa*, 10 F. Cas. 420 (C.C.D. Pa. 1813) (No. 5,452) (tea; tea unavailable; dealer; no excuse).

2. *Youqua v. Nixon & Walker*, 30 F. Cas. 887 (C.C.D. Pa. 1816) (No. 18,189) (tea; tea unavailable; dealer; no excuse).

3. *DeGrasse Paper Co. v. Northern N.Y. Coal Co.*, 190 A.D. 227, 179 N.Y.S. 788 (1919) (coal, supply shortage; dealer; no excuse).

4. *Lang & Gros Mfg. Co. v. Ft. Wayne Corrugated Paper Co.*, 278 F. 483 (7th Cir. 1921) (cloth tape; scarcity of raw materials; producer/manufacturer; no excuse).

5. *Gross v. Exeter Mach. Works, Inc.*, 277 Pa. 363, 121 A. 195 (1923) (silk throwing machine; scarcity of necessary materials; producer/manufacturer; no excuse).

6. *Canadian Indus. Alcohol Co. v. Dunbar Molasses Co.*, 258 N.Y. 194, 179 N.E. 383 (1932), (molasses; agreed refinery produced insufficient quantity; dealer; no excuse).

7. *Hauswirth v. Rosenberg*, 180 Misc. 945, 43 N.Y.S.2d 206 (City Ct. 1943) (eels; shortage of eels; dealer; no excuse).

8. *DEARDORFF-JACKSON CO. v. NATIONAL PRODUCE DISTRIBS., INC.*, 26 Ag. Dec. 1309, 4 U.C.C. Rep. Serv. (Callaghan) 1164 (Agric. Dec. 1967) (potatoes; shortage of supply; dealer; no excuse).

9. *HEAT EXCHANGERS, INC. v. MAP CONSTR. CORP.*, 34 Md. App. 679, 368 A.2d 1088 (Ct. Spec. App. 1977) (air conditioner; inability to obtain component parts; producer/manufacture; no excuse).

10. *FRANK B. BOZZO, INC. v. ELECTRIC WELD DIV. OF FORT PITT.*, 283 Pa. Super. 35, 423 A. 2d 702 (1980), *aff'd per curium*, 495 Pa. 617, 435 A.2d 176 (1981) (steel mesh; scarcity of goods; dealer; no excuse).

N. Seller Mistaken About Kind, Quality, or Quantity of Goods

(a) *Excused*:

1. *Switzer v. Pinconning Lumber Co.*, 59 Mich. 488, 26 N.W. 762 (1886) (lumber; insufficient quantity on hand; producer/manufacture; excuse: specific source).

2. McCaull-Webster Elevator Co. v. Steele, 43 S.D. 485, 180 N.W. 782 (1921) (corn; mistake as to quality of goods; producer; excuse: mutual mistake).

3. Unke v. Thorpe, 75 S.D. 65, 59 N.W.2d 419 (1953) (seed; overestimate of yield; producer; excuse: specific source).

(b) *Not Excused:*

1. Lampson v. Cumings, 52 Mich. 491, 18 N.W. 232 (1884) (2 full top buggies; seller had no goods fitting contract description; dealer; no excuse).

2. Holmes v. Cameron, 267 Pa. 90, 110 A. 81 (1920) (noils; seller had no goods of proper grade; dealer; no excuse).

3. Leavenworth St. Bank v. Cashmere Apple Co., 118 Wash. 356, 204 P. 5 (1922) (apple boxes; seller overestimated quantity on hand; producer/manufacturer; no excuse).

4. Trans World Airlines, Inc. v. Skyline Air Parts, Inc., 193 A.2d 72 (D.C. Ct. App. 1963) (boost pumps; seller had already sold goods to another; dealer; no excuse).

O. *Miscellaneous Events*¹⁰

(a) *Excused:* None

(b) *Not Excused:*

1. Bates Mach. Co. v. Norton Iron Works, 113 Ky. 372, 68 S.W. 423 (1902) (machine to manufacture wire nails; seller's machine incapable of producing wire nails; producer/manufacturer; no excuse).

2. Western Drug Supply & Speciality Co. v. Board of Admin., 106 Kan. 256, 187 P. 701 (1920) (drugs; seller shut down by creditors; producer/manufacturer; no excuse).

3. Dallas Cooperage & Woodenware Co. v. Creston Hoop Co., 161 La. 1077, 109 So. 844 (1926) (elm hoops; weather; producer/manufacturer; no excuse).

¹⁰ See also *Usrey Lumber Co. v. Huie-Hodge Lumber Co.*, 135 La. 511, 65 So. 627 (1914) (logs; wet weather; producer; not proved to have prevented performance); *J.N. Pharr & Sons, Ltd. v. C.D. Kenny Co.*, 272 F. 37 (5th Cir.), cert. denied, 257 U.S. 648 (1921) (sugar; weather alleged to have limited production; producer/manufacturer; not proved).

4. *Stiles v. Van Briggles*, 196 Ark. 1179, 118 S.W.2d 588 (1938) (veneer; weather; producer/manufacturer; no excuse).

5. *S.C.A. INT'L, INC. v. GARFIELD & ROSEN INC.*, 337 F. Supp. 246 (D. Mass 1971) (shoes; flooding; dealer; no excuse).

6. *ALAMO CLAY PROD., INC. v. GUNN TILE CO. OF SAN ANTONIO, INC.*, 597 S.W.2d 388 (Tex. Civ. App. 1980) (paving tiles, seller could not produce tiles of sufficient size; producer/manufacturer; no excuse).

7. *HARPER & ASSOCIATES v. PRINTERS, INC.*, 46 Wash. App. 417, 730 P.2d 733 (1986) (posters; seller had difficulty attaching foil to posters; producer/manufacturer; no excuse).

II. PROBLEMS TRANSPORTING GOODS TO BUYER

A. *Shortage of Transportation*¹¹

(a) *Excused*:

1. *Consolidated Coal Co. v. Mexico Fire Brick Co.*, 66 Mo. App. 296 (1896) (coal; car shortage; producer; excuse: escape clause).

2. *Stallings v. De Bardeleben Coal Co.*, 22 Ga. App. 597, 96 S.E. 708 (1918) (coal; car shortage; producer; excuse: escape clause).

3. *Krug Coal Co. v. C.G. Blake Co.*, 218 Ill. App. 85 (1920) (coal; car shortage; producer; excuse: escape clause).

¹¹ See also *Jessup & Moore Paper Co. v. Piper*, 133 F. 108 (C.C.E.D. Pa. 1902) (coal; car shortage; producer; scope of escape clause question of fact for jury); *Tradewater Coal Co. v. Lee*, 24 Ky. 215, 68 S.W. 400 (1902) (coal; car shortage; producer; not proved to have caused nonperformance); *Haff v. Pilling*, 134 F. 294 (C.C.E.D. Pa. 1905) (coal; car shortage; producer; not proved to have caused nonperformance); *Garfield & Proctor Coal Co. v. Pennsylvania Coal & Coke Co.*, 199 Mass. 22, 84 N.E. 1020 (1908) (coal; car shortage; producer; not proved to have caused nonperformance); *Consolidated Coal Co. v. Jones & Adams Co.*, 232 Ill. 326, 83 N.E. 851 (1908) (coal; car shortage not proved; producer; apparently no excuse); *Seligman v. Beecher*, 36 Pa. Super. 475 (1908) (timber; car shortage; producer; not proved to have caused nonperformance); *Burt v. Garden City Sand Co.*, 237 Ill. 473, 86 N.E. 1055 (1908) (cement; car shortage; producer/manufacturer; excuse: law of case was that only reasonable efforts required); *Bernhardt Lumber Co. v. Metzloff*, 113 Misc. 288, 184 N.Y.S. 289 (Sup. Ct. 1920) (box shooks; car shortage; producer/manufacturer; not proved to have caused nonperformance); *FRATELLI GARDINO S.P.A. v. CARRIBBEAN LUMBER CO.*, 587 F.2d 204 (5th Cir. 1979) (lumber; insufficient shipping space; dealer; not proved to have caused nonperformance).

4. Consolidated Coal Co. v. Peninsular Portland Cement Co., 272 F. 625 (6th Cir.), *cert. denied*, 257 U.S. 641 (1921) (coal; car shortage; producer; excuse: escape clause).

(b) *Not Excused*:

1. Hesser-Milton-Renahan Coal Co. v. LaCrosse Fuel Co., 114 Wis. 654, 90 N.W. 1094 (1902) (coal; car shortage; producer; no excuse).

2. R.J. Menz Lumber Co. v. E.J. McNeeley & Co., 58 Wash. 223, 108 P. 621 (1910) (shingles; car shortage; producer/manufacturer; no excuse).

3. Pierson-Lathrop Grain Co. v. Barker, 223 S.W. 941 (Mo. App. 1920) (grain; car shortage; dealer; no excuse).

4. Pilsen Coal Co. v. W. Chicago Park Comm'r., 221 Ill. App. 162 (1921) (coal; car shortage; dealer; no excuse).

5. Tallahatchie Lumber Co. v. Cecil Lumber Co., 124 Miss. 897, 87 So. 449 (1921) (lumber, car shortage; dealer; no excuse).

6. Haigh Hall S.S. Co. v. Anderson, 246 Mass. 34, 140 N.E. 302 (1923) (coal; vessel shortage; dealer; no excuse).

7. Minneapolis v. Republic Creosoting Co., 161 Minn. 178, 201 N.W. 414 (1924) (paving blocks; car shortage; producer/manufacture; no excuse).

8. Virginia Iron, Coal, & Coke Co. v. Woodside Cotton Mills Co., 6 F.2d 442 (4th Cir. 1925) (coal; car shortage; producer; no excuse).

9. Companhia de Navegacao Lloyd Brasileiro v. C.G. Blake Co., 34 F.2d 616 (2d Cir. 1929) (coal; steamer scarcity; dealer; no excuse).

10. Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co., 147 F.2d 399 (2d Cir.), *cert. denied*, 325 U.S. 861 (1945) (lumber; shipping shortage; dealer; no excuse).

11. Williams Grain Co. v. Leval & Co., 277 F.2d 213 (8th Cir. 1960) (soybeans; car shortage; dealer; no excuse).

12. Milton Pilalas & Co. v. First Nat'l City Bank, 19 A.D.2d 30, 240 N.Y.S.2d 79 (1963) (bailing wire; unavailability of vessel; dealer; no excuse).

13. NORA SPRINGS COOP. CO. v. BRANDAU, 247 N.W.2d 744 (Iowa 1976) (corn; car shortage; producer; no excuse).

14. JON-T FARMS, INC. v. GOODPASTURE, INC., 554 S.W.2d 743 (Tex. Civ. App. 1977) (sorghum; car shortage; producer; no excuse).

*B. Carrier Embargo*¹²*(a) Excused:*

1. *A. Collins Lumber Co. v. Kingsdale Lumber Co.*, 176 N.C. 500, 97 S.E. 483 (1918) (lumber; railroad embargo; producer/manufacture; excuse: escape clause).

2. *Miller and Sons Co. v. E.M. Sergeant Co.*, 191 A.D. 814, 182 N.Y.S. 382, *appeal dismissed*, 229 N.Y. 609, 129 N.E. 927 (1920) (soda ash; railroad embargo; dealer; excuse: buyer had obligation to furnish transportation).

3. *Wellington Piano Case Co. v. Garfield & Proctor Coal Co.*, 236 Mass. 544, 129 N.E. 285 (1920) (coal; railroad embargo; producer; excuse: escape clause, agreed means of transportation impossible).

4. *Reid-Murdock Co. v. Alton Mercantile Co.*, 287 F. 460 (8th Cir. 1923) (sugar; railroad embargo; dealer; excuse: escape clause).

5. *Canadian Steel Foundries, Ltd. v. Thomas Furnace Co.*, 186 Wis. 557, 203 N.W. 355 (1925) (pig iron; ore shipment embargo; producer/manufacture; excuse: escape clause).

6. *JON-T CHEM, INC. v. FREEPORT CHEM. CO.*, 704 F.2d 1412 (5th Cir. 1983) (phosphoric acid; railroad embargo; producer/manufacture; excuse: escape clause).

(b) Not Excused:

1. *Story v. Stokes*, 178 N.C. 409, 100 S.E. 689 (1919) (lumber; railroad embargo; producer/manufacture; no excuse).

2. *Standard Scale & Supply Co. v. Baltimore Enamel & Novelty Co.*, 136 Md. 278, 110 A. 486 (1920) (handtrucks; railroad embargo; producer/manufacture; no excuse).

3. *Washington Mfg. Co. v. Midland Lumber Co.*, 113 Wash. 593, 194 P. 777 (1921) (lumber; lumber embargo; producer/manufacture; no excuse).

4. *National Wholesale Grocery Co. v. Simon Rice Milling Co.*, 152 La. 1, 92 So. 713 (1922) (rice; steamship line embargo; producer/manufacture; no excuse).

¹² See also *Hess Bros. v. Great Northern Pail Co.*, 175 Wis. 465, 185 N.W. 542 (1921) (candy pails; carrier embargo; dealer; not proved to be cause of non-performance), and the cases listed under Shortage of Transportation, because the cause of a carrier embargo is often shortage of cars or vessels.

5. *Brevard Tannin Co. v. J.F. Mosser Co.*, 288 F. 725 (4th Cir. 1923) (chestnut wood extract; government embargo; producer/manufacturer; no excuse).

6. *Burlington Grocery Co. v. Heaphy's Est.*, 98 Vt. 122, 126 A. 525 (1924) (Java sugar; transportation embargo; dealer; no excuse).

7. *Herx & Eddy, Inc. v. Carlson*, 210 A.D. 417, 206 N.Y.S. 179 (1924) (cotton yarn; freight embargo; producer/manufacturer; no excuse).

8. *Vanetta Velvet Corp. v. Kakunaka & Co.*, 256 A.D. 341, 10 N.Y.S.2d 270 (1939) (Japanese merchandise; embargo effective under foreign law; dealer; no excuse).

9. *Williams Grain Co. v. Leval & Co.*, 277 F.2d 213 (8th Cir. 1960) (soybeans, railroad embargo; dealer; no excuse).

*C. Weather*¹³

(a) *Excused*:

1. *White v. Kearney*, 9 Rob. 495 (La. 1845) (lime; ship delayed by weather; dealer; excuse: construction of contract).

2. *Lovering v. Buck Mt. Coal Co.*, 54 Pa. 291 (1867) (coal; flood; producer; excuse: sole means of transportation destroyed).

3. *Durden-Coleman Lumber Co. v. William H. Wood Lumber Co.*, 221 Mass. 564, 109 N.E. 648 (1915) (lumber; stormy weather; producer/manufacturer; excuse: escape clause).

4. *Stallings v. De Bardeleben Coal Co.*, 22 Ga. App. 597, 96 S.E. 708 (1918) (coal; floods; producer; excuse: escape clause).

5. *JON-T CHEM., INC. v. FREEPORT CHEM. CO.*, 704 F.2d 1412 (5th Cir. 1983) (phosphoric acid; bad weather; producer/manufacturer; excuse: escape clause).

(b) *Not Excused*:

1. *Dodge v. Van Lear*, 5 Cranch C.C. 278 (D.C. Ct. Cl. 1837) (flour; breach in canal; producer/manufacturer; no excuse).

2. *Eugster & Co. v. Joseph West & Co.*, 35 La. Ann. 119, 48 Am. Rep. 232 (1883) (corn; frozen river; dealer; no excuse).

¹³ See also *Kitzinger v. Sanborn*, 70 Ill. 146 (1873) (hogs; inclement weather; producer; not proved to be cause of nonperformance).

3. *Shores Lumber Co. v. Claney*, 102 Wis. 235, 78 N.W. 451 (1899) (lumber; ice; dealer; no excuse).

4. *Fleishman v. Meyer*, 46 Or. 267, 80 P. 209 (1905) (bark; sand bar blockage; dealer; no excuse).

5. *R.J. Menz Lumber Co. v. E.J. McNeeley & Co.*, 58 Wash. 223, 108 P. 621 (1910) (shingles; storms; producer/manufacturer; no excuse).

D. Labor Problems

(a) Excused:

1. *INTER HARVEST, INC. v. AFFILIATED FOOD DISTRIBUTION, INC.*, 32 Ag. Dec. 916, 14 U.C.C. Rep. Serv. (Callaghan) 396 (Agric. Dept. 1973) (lettuce; teamster's strike; dealer; excuse: risk of loss on buyer).

2. *MISHARA CONSTR. CO. v. TRANSIT-MIXED CONCRETE CORP.*, 365 Mass. 122, 310 N.E.2d 363 (1974) (concrete; strike; producer/manufacturer; excuse: U.C.C. 2-615).

(b) Not Excused:

1. *Indianapolis Abattoir Co. v. Penn Beef Co.*, 83 Ind. App. 144, 144 N.E. 573 (1924) (steers; strike; dealer; no excuse).

2. *CARUSO-RINELLA-BATTAGLIA CO. v. DELANO CORP. OF AM.*, 25 Ag. Dec. 1028, 3 U.C.C. Rep. Serv. (Callaghan) 863 (Agric. Dept. 1966) (onions; shipping strike; dealer; no excuse).

E. Governmental Action

(a) Excused:

1. *Roessler & Hasslacher Chem. Co. v. Standard Silk Dyeing Co.*, 254 F. 777 (2d Cir. 1918), *cert. denied*, 250 U.S. 663 (1919) (imported German prussiate of soda; British governmental embargo; dealer; excuse: escape clause).

2. *PROCESS SUPPLY CO. v. SUNSTAR FOODS, INC.*, 38 Ag. Dec. 747, 27 U.C.C. Rep. Serv. (Callaghan) 122 (Agric. Dept. 1979) (potatoes; police action; dealer; excuse: U.C.C. 2-615).

3. *Morris N. Palmer Ranch Co. v. Campesi*, 487 F. Supp. 1062 (M.D. La. 1980), *aff'd in part and modified in part*, 647 F.2d 608 (5th Cir. 1981) (cattle; government embargo prevented delivery; producer; excuse: governmental action).

4. MCDONNELL-DOUGLAS CORP. v. ISLAMIC REPUBLIC OF IRAN, 591 F. Supp. 293 (E.D. Mo. 1984), *aff'd*, 758 F.2d 341 (8th Cir.), *cert. denied*, 474 U.S. 948 (1985) (aircraft parts; government action; producer/manufacturer; excuse: escape clause).

(b) *Not Excused*:

1. Mobile Fruit & Trading Co. v. Boero, 55 S.W. 361 (Tex. Civ. App. 1900) (bananas; quarantine; dealer; no excuse).

2. Thomson & Stacy Co. v. Evans, Coleman & Evans, Ltd., 100 Wash. 277, 170 P. 578 (1918) (imported grain sacks; Canadian governmental embargo; dealer; no excuse).

3. P.N. Gray & Co. v. Cavalliotis, 276 F. 565 (E.D.N.Y. 1921), *aff'd*, 293 F. 1018 (2d Cir. 1923) (sugar; Canadian governmental embargo; dealer; no excuse).

4. Krulewitch v. National Importing & Trading Co., 195 A.D. 544, 186 N.Y.S. 838 (1921) (tapioca flour; Java governmental embargo; dealer; no excuse).

F. *Miscellaneous Events*¹⁴

(a) *Excused*:

1. Oakman v. Boyce, 100 Mass. 477 (1868) (coal; Confederate invasion; producer and dealer; excuse: escape clause).

2. Davis v. Columbia Coal-Mining Co., 170 Mass. 391, 49 N.E. 629 (1898) (coal; railroad seized coal and used it; producer; excuse: escape clause).

3. Carvel v. John Kellys (London) Ltd., 53 N.Y.S.2d 640 (Sup. Ct. 1945), *aff'd mem.*, 270 A.D. 999, 63 N.Y.S.2d 829 (1946) (sage leaves; transportation problems; dealer; excuse: escape clause).

(b) *Not Excused*:

1. Braddock Glass Co. v. Irwin, 153 Pa. 440, 25 A. 490 (1893) (goods; railroad detained goods; producer/manufacturer; no excuse).

¹⁴ See also Winborne & Co. v. Fulton Mills, 171 N.C. 62, 87 S.E. 953 (1916) (burlap bags; lost at sea; dealer; not proved that loss beyond seller's control); Rader v. Northrup-Williams Co., 269 F. 592 (4th Cir. 1920) (barrel staves; government permits not obtained; producer/manufacturer; not proved to be cause of nonperformance).

2. *Eppens, Smith & Wiemann Co. v. Littlejohn*, 164 N.Y. 187, 58 N.E. 19 (1900) (coffee; transportation problems; dealer; no excuse).

3. *Western Indus. Co. v. Mason Malt Whiskey Distilling Co.*, 56 Cal. App. 355, 205 P. 466 (1922). (waste resulting from distillation process from which potash could be extracted; lack of suitable transportation; producer/manufacturer; no excuse).

4. *Douglas Fir Exploitation & Export Co. v. Comyn*, 279 F. 203 (9th Cir. 1922) (fir; vessel not available; producer/manufacturer; no excuse).

5. *Boehmer Coal Co. v. Burton Coal Co.*, 2 F.2d 526 (8th Cir. 1924) (coal; railroad refused to furnish cars; producer; no excuse).

Table II: U.C.C. Cases Granting Excuse, Arranged By Excuse Theory

A. *Escape Clause*

1. *International Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 1196 (1986) (natural gas; environmental regulations; producer and producer/manufacture; excuse: escape clause).

2. *Interpetrol Bermuda Ltd. v. Kaiser Aluminum Int'l Corp.*, 719 F.2d 992 (9th Cir. 1984) (refined oil products; supplier breach; dealer; excuse: escape clause).

3. *Jon-T Chem., Inc. v. Freeport Chem. Co.*, 704 F.2d 1412 (5th Cir. 1983) (phosphoric acid; railroad embargo and bad weather; producer/manufacture; excuse: escape clause).

4. *McDonnell-Douglas Corp. v. Islamic Republic of Iran*, 591 F. Supp. 293 (E.D. Mo. 1984), *aff'd*, 758 F.2d 341 (8th Cir.), *cert. denied*, 474 U.S. 948 (1985) (aircraft parts; U.S. government ban on shipment of parts to Iran; producer/manufacture; excuse: escape clause).

5. *Noonan Constr. Co. v. Warren Bros. Co.*, 632 F.2d 1189 (5th Cir. 1980) (gravel; machinery breakdown; producer; excuse: escape clause).

6. *Olson v. Spitzer*, 257 N.W.2d 459 (S.D. 1977) (combine; scarcity of component parts; dealer; excuse: escape clause).

7. *Terry v. Atlantic Richfield Co.*, 72 Cal. App. 3d 962, 140 Cal. Rptr. 510 (1977) (gasoline; shortage caused by oil embargo; producer/manufacture; excuse: escape clause).

8. *Eastern Air Lines, Inc. v. McDonnell-Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976) (jets, unofficial government priority schedule favoring military contracts; producer/manufacture; excuse: escape clause).

B. *Specific Subject-Matter or Source Unavailable*

1. *Campbell v. Hostetter Farms, Inc.*, 251 Pa. Super. 232, 380 A.2d. 463 (1977) (grains; crop failure; producer; excuse: specific crop).

2. *Conway v. Larsen Jewelers, Inc.*, 104 Misc. 2d 872, 429 N.Y.S.2d 378 (Civ. Ct. 1980) (necklace; stolen; dealer; excuse: specific jewelry).

3. *Emery Estate v. Weed*, 40 Bucks Cty. L. Rep. 131, 36 U.C.C. Rep. Serv. (Callaghan) 827 (Pa. Ct. Com. Pl. 1982) (car; stolen; dealer; excuse: specific car).

4. *Federal Pants, Inc. v. Stocking*, 762 F.2d 561 (7th Cir. 1985) (shoes; supplier ceased to sell to seller; dealer; excuse: specific source).

5. *Low's Ezy-Fry Potato Co. v. J.A. Wood Co.*, 26 Ag. Dec. 583, 4 U.C.C. Rep. Serv. (Callaghan) 483 (Agric. Dept. 1967) (potatoes; crop failure; producer; excuse: specific crop).

6. *Paymaster Oil Mill Co. v. Mitchell*, 319 So. 2d 652 (Miss. 1975) (soybeans; crop failure; producer; excuse: specific crop).

7. *Selland Pontiac-GMC, Inc. v. King*, 384 N.W.2d 490 (Minn. Ct. App. 1986) (school bus bodies; supplier went out of business; dealer; excuse: specific source of supply).

C. Government Action

1. *Eastern Air Lines v. McDonnell-Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976) (jets; unofficial governmental priority schedule; producer/manufacturer; excuse: governmental action).

2. *Paramount Supply Co. v. Sherlin Corp.*, 16 Ohio App. 3d 176, 475 N.E.2d 197 (1984) (turbochargers; U.S. customs seized goods; dealer; excuse: governmental action).

3. *Process Supply Co. v. SunStar Foods, Inc.*, 38 Ag. Dec. 747, 27 U.C.C. Rep. Serv. (Callaghan) 122 (Agric. Dept. 1979) (potatoes; truck arrived late; dealer; excuse: governmental action).

D. Risk of Loss on Buyer

1. *Inter Harvest Inc. v. Affiliated Food Distrib., Inc.*, 32 Ag. Dec. 916, 14 U.C.C. Rep. Serv. (Callaghan) 396 (Agric. Dec. 1973) (lettuce; transportation problems due to strike; excuse: risk of loss on buyer).

2. *Salinas v. Flores*, 583 S.W.2d 813 (Tex. Civ. App. 1979) (melons; destroyed by hailstorm; producer; excuse: risk of loss on buyer).

E. Court Assumed Excuse

1. *Gay v. Seafarer Fiberglass Yachts, Inc.*, 14 U.C.C. Rep. Serv. (Callaghan) 1335 (N.Y. Sup. Ct. 1974) (custom yacht; increased cost; producer/manufacturer; excuse: court assumed excuse).

2. *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979) (gasoline; shortage of gasoline; dealer; excuse: court assumed excuse for purposes of summary judgment motion).

F. Miscellaneous

1. *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980), *vacated*, No. 80-1604 (3d Cir., Feb. 5, 1981) (aluminum smelting services; production cost increase; producer/manufacturer; excuse: hardship).

2. *Asphalt Int'l, Inc. v. Enterprise Shipping Corp.*, 667 F.2d 261 (2d Cir. 1981) (charter of tanker; tanker destroyed; dealer; excuse: unreasonable expenditure).

3. *Cosden Oil & Chem. Co. v. Karl O. Helm Aktiengesellschaft*, 736 F.2d 1064 (5th Cir. 1984), (polystyrene; plant difficulty; producer/manufacturer; excuse: jury found plant trouble an excuse, but seller lost excuse for failure to allocate).

4. *Goddard v. Ishikawajima-Harima Heavy Indus. Co.*, 29 A.D. 2d 754, 287 N.Y.S.2d 901 (1968), *aff'd mem.*, 24 N.Y.2d 842, 248 N.E.2d 600, 300 N.Y.S.2d 851 (1969) (boats; factory destroyed; producer/manufacturer; excuse: parties treated contract as ended).

5. *Mishara Constr. Co. v. Transit-Mixed Concrete Corp.*, 365 Mass. 122, 310 N.E.2d 363 (1974) (concrete; strike at construction site; producer/manufacturer; excuse: jury found strike an excuse).

6. *Waldinger Corp. v. Ashbrook-Simon-Hartley, Inc.*, 564 F. Supp. 970 (C.D. Ill. 1983), *aff'd in part sub nom. Waldinger Corp. v. CRS Group Eng'rs*, 775 F.2d 781 (7th Cir. 1985) (sludge dewatering machine; engineer unreasonably interpreted specifications; producer/manufacturer; excuse: improper interference by third party).

7. *Alimenta (USA), Inc. v. Gibbs Nathaniel (Canada) Ltd.*, 802 F.2d 1362 (11th Cir. 1986) (peanuts; drought; producer; excuse: drought not foreseeable).

8. *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 826 F.2d 239 (4th Cir. 1987) (removal and disposal of spent nuclear fuel; contemplated disposal method did not come into existence; dealer; excuse: failure of contemplated means of performance and no reasonable alternative).

Table III: Sales Act Drafting Subcommittee Meetings, July 1942 - July 1943

<u>Meeting Date and Place</u>	<u>Drafts Considered</u>
1. July 28-Aug. 1, 1942 Northeast Harbor, Maine	a) Second Draft of Dec. 1941 b) "Substituted Sections for Discussion at Northeast Harbor, July 28-Aug. 1, 1942"
2. Oct. 16-18, 1942 New York City	Prelim. Draft No. 1
3. Nov. 22-24, 1942 New York City	a) Prelim. Draft No. 2 b) "Substitute and Supplement for Prelim. Draft No. 2" c) Prelim. Draft No. 3
4. Dec. 27-30, 1942 New York City	Prelim. Draft No. 4
5. Jan. 29-Feb. 1, 1943 New York City	a) Prelim. Draft No. 5 b) "Sections not revised but Text approved at December meeting" ("Jan. Green")
6. Mar. 7-10, 1943 New York City	a) Prelim. Draft No. 6 b) "Sections Considered and Approved by Subcommittee, New York, January, 1943 Meeting, as Slightly Revised by Staff and Committee Suggestions" ("Jan. Blue")
7. Apr. 10-13, 1943 New York City	Prelim. Draft No. 7
8. May 17-20, 1943 New York City	Prelim. Draft No. 8
9. July 19-23, 1943 Northeast Harbor, Maine	Prelim. Draft No. 9 - "Tentative Final"

For a discussion of subsequent Subcommittee Meetings, see notes 216 and 221 to the text.

Appendix: Drafts of Official Comments to U.C.C. §§ 2-613, 614, 615

I. U.C.C. § 2-613. CASUALTY TO IDENTIFIED GOODS.

A. Comment on Section 6-1 (S. 85) Casualty to Unique Goods

[Source: THE LLEWELLYN PAPERS, file J-IX2b]

[Date: Undated, but post-Sept. 1945 and before U.C.C. 1949 Draft]

[Pagination in original indicated by numbers in brackets]

This section continues the basic policy expressed in Sections 7 and 8 of the Original Act that where goods whose continued existence is presupposed by the agreement are destroyed without fault of either party, the buyer is relieved from his obligation but may at his option take the surviving goods at a fair adjustment. This section departs from the Original Act in that the "due allowance from the contract price" contemplates an adjustment in business terms and does not depend on whether, under any artificial legal tests, the contract is held to be "divisible" or "indivisible." This section also makes explicit the buyer's right to inspect the goods in order to determine whether he wishes to avoid the contract entirely or to take the goods with a price adjustment.

* * *

1. Application of this Section. The provisions of the present section apply whether the unique goods were already destroyed at the time of contracting without the knowledge of either party or whether they are subsequently destroyed, but before the risk of loss passes to the buyer. The classic case for avoidance of a contract under these circumstances is where a prize bull or race horse contracted for is dead at the time the agreement is entered into. The more common commercial situation is where identified goods have been contracted to be sold "rolling," "afloat," or "to arrive." [Compare Section 3-23 (S. 48) on "To arrive" term.] The essential question in determining whether or not the rules of this section are to be applied is whether the seller has or has not undertaken the responsibility for the continued existence of the goods in proper

condition through the time of agreed or expected delivery. Where under the agreement, including of course usage of trade, the risk has passed to [2] the buyer before the casualty the section has no application. [Compare Section 6-2 (S. 86) on substituted performance and Section 3-20 (S. 45) on warranty of condition on arrival, and Comments thereon.]

It is to be noted that the buyer has an insurable interest in any goods which may fall within the present section under Section 5-2 (3) (S. 71) on effects of appropriation. It is also clear under the principle of Section 3-23 (S. 48) on "To arrive" term, that delay in arrival or delivery, quite as much as physical change in the goods, may be a "casualty" which produces a "partial loss" in the commercial sense and within the meaning of this section. [See Section 6-3 (S. 87) and Comment on supervening causes which delay performance.]

II. U.C.C. § 2-614. SUBSTITUTED PERFORMANCE.

A. *Comment on Section 6-2 (S. 87) Substituted Performance*

[Source: THE KARL LLEWELLYN PAPERS, file J-IX2b]

[Date: Undated, but probably Sept. 1945]

[Pagination in original indicated by numbers in brackets]

[Emphasis, blanks, and footnotes as in original]

This Act proceeds upon the basis that the normally essential feature of a contract for sale is the expected movement of goods and payment therefor and that subsidiary engagements are undertaken with a view to furthering this dominant engagement. Hence Section 5-13(4) (S. 83) on inspection disregards the failure of any inspection term not clearly intended as an indispensable condition to the contract; and Sections 8-19(2) (S. 122) and 8-20 (S. 123) prefer the essential purpose of giving a remedy to any particular clause which fails of that purpose. So here, following the more commercial case-law, this Act leaves on seller and buyer their essential duties where a commercially reasonable line of substituted

performance is available, although the agreed manner of performance may in some detail have failed.

(1) Subsection 1: General. The present section is placed between two sections on excuse because of failure of a basic assumption of the contract by virtue of which the expected performance becomes impossible. The differing lines of solution [2] appear when one contrasts International Paper Co. v. Rockefeller (1914) 161 App. Div. 180, 146 N.Y. Supp. 371 with Meyer v. Sullivan (1919) 40 Calif. App. 723. In the first of these cases a contract was made for pulp wood to be cut from a particular tract of land, and fire destroyed the spruce growing on the tract; the seller was held excused. In the California case the contract was for delivery of wheat f.o.b. Kosmos steamer at Seattle, and war led to cancellation of that line's sailing schedule after the buyer had duly engaged space. The buyer was held entitled to demand substituted delivery at the warehouse on the line's loading dock. Under this Act the seller would also be entitled, had the market gone the other way, to tender at that point. Compare also Sections 3-19 (§ 44) on f.o.b. and f.a.s. terms and 5-4 (§ 74) on shipment, which are duly modified when the present section comes into application.

The preference of this Act is definitely for a substituted performance where that is both needed and commercially feasible. But there must be a true commercial impracticability to excuse the agreed performance at all. Thus this Act approves and adopts the holding in Canadian Industrial Alcohol Co. v. Dunbar Molasses Co. (1932) 258 N.Y. 194, 179, N.E. 383, denying excuse where the molasses contracted for was to come from a named refinery which did not produce during the contract period, but the dealer-seller failed to show due effort on his own part to secure molasses from that refinery; and this Act likewise [3] approves and adopts the result in Washington Mfg. Co. v. Midland Lumber Co. (1921) 113 Wash. 593, 194 Pac. 777, where although an embargo interfered with delivery of the lumber contracted for, the seller failed to show good faith and diligence in endeavoring to obtain permits available despite the embargo, and so was held for non-delivery. Per contra, when the expected particular shipping facilities fail, as when a "through" bill of lading from inland proves unavailable, though "immediate" shipment is required, this Act rejects the rigid and uncommercial ruling of Commonwealth Title Ins. & Trust Co. v. Gregson, (1922) 303 Ill. 458, 135 N.E. 715, which treated the

shipment to seaboard under domestic bill of lading as non-conforming, and so as leaving the risk on the seller; though of course in such a case under the present section the policy of Sections 2-9 (S. 26-2) on good faith and 5-4(1)(c) (S. 74) on shipment would call for speedy notification to the buyer of what substituted performance the seller contemplates or undertakes. And prompt good faith inquiry by the seller with regard to what substitute the buyer prefers or whether a specific proposed substitute will be satisfactory must be held to excuse at least any delay needed for the inquiry and answer. Compare the general policies of this Act encouraging the good faith working out of amicable adjustment, Sections 6-3 and 6-4 (§§ 87, 88), 7-3 through 7-5 (§§ 93-95), and the provisions of Section 3-10(3) (§ 35) where cooperation is required in order to work out performance.

[4] A borderline case under this Act is presented by Blackburn Bobbin Co. v. Allen (1918) 1 K.B. 540; (C.A.)(1918) 2 K.B. 467. There was a 1914 contract for Finland birch timber, free on rail Hull; war blocked the customary water transport on the Baltic. The buyer extended the time for delivery and the contract was not abandoned. In 1916 the buyer heard of Finland timber coming in, and demanded delivery. Rail shipment and other conditions had more than doubled the market price. The seller was held in damages for refusing delivery. So far as concerns the delay, the result - but not the reasoning - is approved by Sections 6-3 and 6-4 (§§ 87-88) of this Act. So far as concerns possible total excuse, the availability of rail shipment through Sweden goes to the edge of the idea of a commercially practicable substitute within the present section, the basic policy of this section materially relaxing the stringency of the "old law" which was taken as basic in that case.¹

¹ It did not appear that the buyer knew either that English dealers in Finland timber did not carry stocks or that water was the customary mode of shipment. But under this Act both are matters on which a merchant buyer should have informed himself. Compare Int. Com. to II and III, par. ____ and Section 2-11 (S 21) and Comment. And compare also Int. Com. to II and III, par. 3, note 1, on Filley v. Pope.

The question is not one merely of increased expense, for each party contracts with the knowledge that the market may turn against

him. The question is rather whether unforeseen circumstances have rendered the agreed performance commercially impracticable. If so (subject to described conditions), excuse is provided under the preceding and follow- [5] ing sections of this Part, unless a substitute and commercially reasonable performance is available within the present section; and a sufficient discrepancy in expense may bar such availability.

(2) Substitution of goods. Where a supervening casualty has prevented the seller from supplying the goods contracted for but he still has available a reasonable substitute for them, the principles of the preceding section on casualty to specific goods, of the present section, and of Sections 6-3 and 6-4 (SS. 88 and 89) on pro-rata and buyer's option require to be merged to provide a solution, much as the various portions of Original Act, Sec. 44 were merged in Portfolio v. Rubin to provide a solution of a case not explicitly covered. See Comment on Section 1-6 (S. 1), Illustration 2. The buyer cannot be forced to accept any goods which do not fit the contract; on the other hand, good faith requires a seller who is claiming excuse to do what he can to reduce the casualty to the buyer, by due notice and offer of the substitution with (according to the principle of Section 6-1 (S. 86) any appropriate reduction of price. Even though the proposed substitution and offer are reasonable and fair, failure of the buyer to dissent should have the effect provided in Section 6-4(3) (S. 89), the contract lapsing.

(3) The substitution provided in this section as between buyer and seller does not however carry over into the obligation of a financing agency under a letter of credit, since (subject [6] to usage of trade interpreting the terms of the letter) such an agency is entitled to a performance plainly adequate on its face, and without need to look into commercial evidence dehors the documents. Compare Int. Com. to II and III, par. 3; and Section 4-14 (S. 68) and Comment on excuse of a financing agency.

(4) Subsection 2 cuts into the vexed problem of currency regulation and control. Under modern experience with manipulated currency and exchange, "blocked" deposits and the like, the traditional legal principles are not commercially adequate. On the one hand, a very material degree of control must today be recognized as serving legitimate interests of foreign governments, requiring appropriate adjustment by commercial men and properly to be recognized by the law governing the contract: compare our own devaluation

of the dollar. On the other hand, the motivation or effect of foreign governmental regulation has been shown repeatedly to require policing before it is recognized; and the test of "discriminatory, oppressive or predatory" here laid down gives commercial body and guidance to a policy in regard to foreign legislation or regulation which, while recognizing every legitimate flexibility, refuses to allow mere color of law the standing of substantial due process. Where the contract is still executory on both sides, the test here laid down is that of commercially equivalent return. Where only the debt for the price remains due, a larger leeway must be admitted, and is.

[7] (5) Moratory legislation is not directly treated in this Act, but the principle of the present section combines with that of the succeeding one on excuse for delay in delivery to negate such a ruling as that of Slaughter v. C.I.T. Corp. (1934) 229 Fla. 411, 157 So. 463. There a debt due on March 4 was blocked from payment by the governor's closing of all banks in the state on March 1 and by the president's ensuing closing of all banks in the nation on March 4. The debtor was solvent and ready to give either his own check or checks of other solvent parties. Under the good faith and commercial standards principles of this Act, Section 2-9 (§ 26(2)) there is here solid ground not for discharge, but for excuse for the delay in payment. A general temporary failure, by governmental action, of the commercial medium of exchange stands on wholly different footing from the individual risk of having a debtor's funds tied up in a particular closed bank.

III. U.C.C. § 2-615. EXCUSE BY FAILURE OF PRESUPPOSED CONDITIONS.

A. *Aug. 1941 Second Draft, Comment on Section 49-E, and Dec. 1941 Second Draft, Comment on Section 54*

[A copy of the Aug. 1941 Comment can be found in THE LLEWELLYN PAPERS, file J-IX2b. Copies of the Dec. 1941 Comment can also be found in THE LLEWELLYN PAPERS, files J-III2a and 2b. Since the Comment to Section 49-E is virtually identical to the Comment to Section 54, and since the latter is reprinted in 1 A.L.I. & N.C.C.U.S.L., UNIFORM COMMERCIAL CODE DRAFTS 504-07 (E. Kelly, comp. 1984), neither Comment is reproduced here.]

*B. Third Draft, 1943, Informal Sketch of Material for Comment
on Section 88 (Aug. 1943)*

[Source: A.L.I. ARCHIVES, drawer 202]

[Pagination in original indicated by numbers in brackets]

[Errors as in original]

Section 88. Merchants' Excuse by Failure of Presupposed Facilities or Conditions. The exceedingly common force majeure clauses found especially in manufacturers' contracts ("not responsible for any delay or deficiency caused by strike, fire, lockout, destruction of factory, etc., etc., or any other cause beyond our control") have entered into standard commercial expectations. They represent a needed adjustment of the over-strict 16th to 19th century law of contract. The fact that the adjustment is recognized on all hands as proper and normal is evidence by the fact that no reduction of price is demanded because of the presence of such clauses. Sales law has already worked out substantially the same result in regard to failure of facilities for carriage in inland commerce (as distinct from the overseas F.A.S. contract).

The Act therefore in subsection 1 (a) makes a part of every contract between merchants the clause now found where merchants have been well advised and careful. The Act takes no position in regard to the effects of "economic hardship" in general or with regard to the problem of "frustration of purpose". A true shortage of raw materials involving nor merely expense but definite inability to get the raw materials falls plainly within subsection 1 (a) as being the failure of a facility the availability of which was a basic assumption of the contract. On the other hand failure of the seller's credit [40] facilities or disruption of his executive personnel by death or resignation, or mechanical difficulties in his plant due not to unforeseeable accident but to bad management, fall within the field of normal enterpriser's risks and not within the scope of subsection 1 (a).

Subsection 1 (b) is drawn to include the effect of foreign governmental regulations and to do away with any uncertainty resting in the possible unconstitutionality of regulations or orders, but it is not intended that single arbitrary or discriminatory orders should

be made an excuse. Such orders are capable of "procurement" in improper and unprovable manner; and where not so procured one of the burdens of society is that discriminatory action peculiar to a small group shall be fought by that group. Again, as in the entire Act, "commercial standards shall govern" and the test of recognition of a governmental order or regulation as an excuse lies in its "general" commercial acceptance.

Subsection 2 on allocation of the seller's reduced output as a condition of his excuse is intended to leave him all possible reasonable discretion in the handling of the allocation, but on the other hand to avoid his arbitrary throwing of the burden of his production shortage either on an unprofitable contract or for any other reason on a particular buyer. The problem presented to the court under subsection 2 is never "What is the reasonable manner of allocation?". The problem presented is exclusively: "Is the manner of allocation or a total failure to allocate so utterly unreasonable as to be arbitrary discrimination against this buyer?"

Thus, for example, if a buyer has expressly contracted for the product of a specific plant, (a) incapacitation of that plant is an excuse to the seller; but (b) if another plant is incapacitated the buyer who has contracted for specific output cannot be subjected to allocation in the interests of buyers in general.

Again, if the seller has two plants and one is incapacitated but the plants were making different types of goods, and the product of the one is still sold to capacity, the mere fact that it is possible to devote a portion of the going plant's facilities to produce the product hitherto produced by the incapacitated plant (a) does not force the seller to undertake the inconvenience and difficulties of converting a portion of the facilities; but (b) permits him to do so if that seems to him a reasonable way of serving his customers as an entire group.

Again, if a producer of coal with curtailed facilities should decide to deliver to hospitals, schools and dealers serving primarily domestic customers with the consequent reduction in deliveries falling entirely upon manufacturing concerns, that would fall entirely within the field of "reasonable allocation".

In substance the problem is one closely similar to that of what is a reasonable and non-arbitrary division of persons made by a legislature for purposes of differential treatment.

It should be noted in the Comment that the extremely liberal provisions of this section in favor of the seller ought to be regarded as making unconscionable within the meaning of Section 24 on form clauses other clauses which without discoverable positive necessity go further by providing, for instance, that the buyer shall have no privilege to cancel for the delay or that the seller, notwithstanding the extent of the delay may entirely at his own option resume deliveries or not when the delay ceases/

C. Comment on Section 6-3 (S.88) Merchant's Excuse by Failure of Presupposed Facilities or Conditions

[Sources: A.L.I. ARCHIVES, drawer 198; THE LLEWELLYN PAPERS, file J-IX2b]

[Date: Undated, but probably Sept. 1945]

[Pagination in original indicated by numbers in brackets]

[Emphasis, blanks, errors, and footnotes as in original]

This and the following section (which have no counterpart in the Original Act) accept and develop that current of case-law the need for which on the side of mercantile practice is reflected in the now standard "seller's exemption" clauses. Such clauses are today matters of course, and not alone in manufacturers' contracts. They have no effect upon price; the tacit understanding on which they rest has come to constitute a normal assumption underlying contracts for sale. Law designed to fit modern conditions must reflect this; nor is it enough to provide for commercial as contrasted with adverse construction of exemption clauses (compare Int. Com. to II and III, par.) for the rule must operate without need for a clause, lest little businesses which do not happen to employ skilled counsel be discriminated against on an important point of normal commercial understanding.

The need for the section is well illustrated by the reasoning and result in Whitman v. Anglum (1918) 92 Conn. 392, 103 A. 114. There a contract was made for "at least" 175 quarts of milk daily to be picked up by the buyer at the seller's premises. Thereafter

the seller and his herd were quarantined, and the herd was condemned and destroyed. This was held no excuse to the seller in an action for non-delivery, because delivery "of milk" remained both legally and physically possible with a substituted place of delivery. [2] Such reasoning and result are not law under this Act, the substantial availability of the seller's dairy herd being an obvious presupposition of the contract. True, the "at least" undertaking might well leave the seller responsible despite any normal casualty to either the herd or its milk production; but the casualty here goes far beyond any fair commercial intent of that language.

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C O N T E N T S

1. The basic principle: Supervening commercial impracticability.
2. Subsection 1(a) not limited to listed terms: construction in terms of purpose.
3. Shortage of supply and rise in price; casualty versus business conditions.
4. Incidental contingencies.
5. Failure or default in seller's source of supply.
6. Risks contemplated and assumed: the business circumstances at the time of contracting.
7. "Unless otherwise agreed."
8. Exemption of buyers and non-merchant sellers.
9. Governmental regulations as excuse.
10. Prorating: Subsections 2 and 3.

1. The basic principle of these sections is excuse for supervening commercial impracticability of the agreed performance. Subsection 1. For half a century and more our commercially minded [3] courts have been moving away from the rigid rule described and rejected in the introduction. Excuse for non-delivery, which rested at first in the death of a specific animal or destruction of other specific thing contracted for, Section 6-1 (S. 86) and Comment, has been extended to crops to be grown in the future on agreed land, Ontario Deciduous Fruit- Growers' Assn. v. Cutting Fruit-Packing Co. (1901) 134 Cal. 21, 66 Pac. 28; and then to particular means of production which the contract presupposed: thus a contract for wood to be supplied from a particular tract has been soundly read as resting on an assumption of excuse when that wood on that tract is destroyed by fire, International Paper Co. v. Rockefeller, (1914) 161 App. Div. 180, 146 N.Y. Supp. 371; cf. Leavenworth

State Bank v. Cashmere Apple Co., (1922) 118 Wash. 356, 204 Pac 5 (application of clause to particular plant). Such results this Act approves and adopts, rejecting the refusal in Anderson v. May (1892) 50 Minn. 280, 52 N.W. 530, to apply a similar construction to a contract for sale by a market gardener of beans to be grown by him, when after due planting an unexpected frost had cut down the yield below the agreed quantity.

In similar fashion, failure by casualty of a named vessel has been held to excuse shipment thereon, Huni & Wormser, Ltd. v. E. D. Sassoon & Co. (1920, C.A.) 5 Le. L.R. 199 (though under this Act Section 6-2(1) (S. 87) would raise questions of possible substitution and Section 6-4(1) (S. 88) and 6-5 (S. 89) would raise questions of excuse for delay and of a buyer's option as contrasted with absolute excuse); and in inland contracts which involve ship-[4] ment a supervening railroad embargo or other general failure of facilities for transportation has been rightly recognized as excusing the seller from delay or non-delivery. (Utah case)

Again, the excuse which once was formalistically limited to flat prohibition of the contract or the performance by local law has been extended to cases of local governmental action lacking the full force of "law," Mawhinney v. Millbrook Woolen Mills, Inc. (1921) 231 N.Y. 290, N.E. ; (1922) 234 N.Y. 244, 137 N.E. 318 (a "requested" priority of government orders recognized as if it constituted the compulsion which was, perhaps, available under the law); and the de facto equally effective action of foreign governments has for two decades been known to be, commercially in fact and properly in law, on a similar footing. Scrutton, L.J., in Ralli Bros. v. Compania Naviera Sota y Aznar (1920) 2 K.B. 287, and in Kursell v. Timber Operators and Contractors, Ltd. (1926, C.A.) 135 L.T.R. 223.

This Act draws all these lines together and develops them into a single principle and criterion of excuse: that of unforeseen and supervening commercial impracticability. The commercial soundness of so doing is evidenced not only by the steady [5] development of the better cases in a single direction but by the increasing spread of exemption clauses in the contracts both of manufacturers and of other suppliers.

2. Subsection 1(a) is not limited to its listed terms, which serve only as illustrations of its purpose and principle. The exemption clauses just mentioned represent commercial efforts over more than

fifty years to bring the less commercially minded courts abreast of their commercially minded brethren. But the clauses have been only partly successful; two vitally contrasting lines of decision have developed under them. The one line, which is approved and accepted by this Act, Section 1-6 (S. 1) and Comment, takes the reason and purpose of the clauses as dominant, and the details (the clauses varying hugely in the range and particulars of contingency recited) not as limitations but as illustrations. Thus "strike" is held to cover not only a strike directly affecting the seller, but also "confiscation" by a railroad of the seller's shipment of coal to the buyer, due to the railroad's shortage of coal because of a strike, Davis v. Columbia Coal Mining Co. (1898) 170 Mass. 391, 49 N.E. 629, but not to cover a lockout, Mahoney v. Smith (1909) 132 App. Div. 291, 116 N.Y. Supp. 1091 (construction contract). A railroad embargo, though not within the language of the clause, has been recognized as excusing, Canadian Steel Foundries Co. v. Thomas Furnace Co. (1925) 186 Wis. 557, 203 N.W. 355. "Prohibition of export preventing shipment or delivery to this country" has been seen as exist- [6] ing though the three chief sources were still open, if "either a considerable source of supply to this country is shut up thereby or . . . a very considerable rise in the price of wheat in this country should be occasioned by the prohibition," Ford & Sons (Oldham)(Ltd.) v. Henry Leetham & Sons (Ltd.) (1915, K.B. D.) 21 Com. Cas. 55. This is the line of construction of listed contingencies which this Act adopts and approves, deliberately refraining from any effort at exhaustive expression of the multiple possibilities of circumstance. On the other hand those holdings which have cut down the meaning of exemption clauses along the lines of strict or narrow eiusdem generis interpretation spring from the same rigid attitude toward excuse in the absence of clause which is represented by the Whitman case, supra, and which is rejected by this Act: so Davids Co. v. Hoffman-La Roche Chemical Works (1917) 78 App. Div. 855, 166 N.Y. Supp. 179 (carbolic acid normally procured from Europe, and there embargoed; the clause opened with "contingencies beyond our control"; embargo was not specifically mentioned; eiusdem generis applied; no excuse; rejected); Geo. Wills & Sons, Ltd. v. R. S. Cunningham & Co., Ltd. (1924) 2 K.B. 220 (facts much as in the foregoing, with French occupation of the Ruhr disrupting industry at the expected source of supply; "U.C.E." i.e., "unforeseen contingencies

excepted" limited to absolute impossibility; no excuse; rejected); Sunseri v. Garcia & Maggini Co. (1929) 298 Pa. 249, 148 Atl. 81 (dealer's contract for garlic from [7] a specified district; an elaborate clause - including that borrowing of "force majeure" (quoted in the clause) from French law which is typical of the English clauses - and also including "crop damage" and "crop failure" was held nonetheless not to excuse although the crop was only 10 percent of normal; rejected by this Act).

3. Shortage of supply and rise in price; casualty versus business conditions. The language of the opinions runs steadily along two lines: on the one hand, it is repeated that mere rise in costs or market, mere unprofitability of the contract, constitutes no excuse; on the other hand, it is repeated that the failure of some situation the continuance of which was assumed a basis of the contract will excuse. The one test under this Act, in terms of basic assumption, is thus familiar; the other test under this Act, in terms of commercial impracticability (as contrasted with "impossibility", "frustration of performance", or "frustration of the venture") is a relatively unfamiliar phrasing and is adopted here in order to call attention to the commercial character of the criterion chosen by this Act. The sound answer turns under this Act on what assumption of risks the terms of the agreement fairly import when it is read commercially against the background of the dicker. Thus a contingency clearly envisaged, or one which as a business matter was fairly in the offering at the time of dealing, it is not within the exemption, see par. 6, below. Neither is a rise in the market or a collapse [8] of the market, in itself; for that is the exact type of business risk which business contracts made at a fixed price are intended to cover; and this is the meaning to be given under this Act to the frequent judicial language about mere rise in costs and the like.

When, however, some particular unusual contingency destroys some tacit and basic commercial assumption of the deal, the cases and the clauses show a different line of understanding; and there is then no sound escape from reckoning commercial impracticability partly in terms of increased cost. The problem is not one of mere profitableness; it is rather one of so large a shift (whether in cost or otherwise) due to the contingency as to make performance a commercial venture of an essentially different character. The Blackburn Bobbin Case, end of Comment on Section 6-2 (S. 87) presents

the problem. Like many cases of discrepancy in quality, or of whether a breach in a part goes to the value of the whole, the question is one of degree.

It will be noted in this connection that at this point the present section partly overlaps Section 6-2 (S. 87) on substitute performance. Both involve an excuse from the agreed performance. And the present section also, when it concerns either delay or proration, involves what is in logic one type of "substitute" performance, although one sufficiently different in kind to warrant the special treatment given it under this section and the following.

[9] Severe shortage of raws or supplies due to a particular contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply, or the like, is thus within the purpose of "failure" of "facilities," and is of the same nature as failure of manpower, within the meaning of Subsection 1 (a) of the present section; and this Act accepts the reason and result of Ford & Sons v. Henry Leatham, above. On the facts of Vale v. Sinter (1905) 58 W. Va. 353, 52 S.E. 313 (was failure of manpower due to quitting of employees because of an outbreak of small pox an "unavoidable accident"?) this Act would pose the issue in terms of the degree of the resulting failure of manpower.

4. Incidental contingencies. There are a number of situations which do not yield sense and justice by either answer when the issue is posed in flat terms of "excuse" or "no excuse." In such cases the flexible machinery of adjustment provided by this Act is called for: especially by use of Section 2-9 (S. 26-2) on good faith, of Section 7-10 (S. 99) on insecurity and assurance, of Section 1-6 (S. 1) on the reading of all provisions in the light of their purposes, and of the general policy of this Act to use equitable principles in furtherance of commercial standards and good faith.

Thus the failure of matters which go to convenience or collateral values rather than to commercial practicability of the main performance amounts certainly to no complete excuse; yet good faith and the reason of Section 6-2 (S. 87) and of the present [10] section may properly be held to justify any needed delay involved in a good faith inquiry which seeks a readjustment, and even to require such inquiry and delay.

Illustration 1. A c.i.f. contract is made for wheat to be shipped from a United States port to Rotterdam,

shipment July or August. The common practice of the seller's market is to make contracts for sale of the exchange on such contracts in advance of shipment, and to sell such exchange at the latest immediately after shipment. The seller has relied on this.

Case (a). A financial stringency hits the American market, and bankers cease buying exchange or accepting delivery of exchange under prior contracts. - Such a contingency is too remote from the contract for sale to excuse the seller, and is too closely within properly contemplated business risks to fall within Subsection 1(a). Contrast the excuse for delay in shipment which would attend an official closing of all the banks. Compare the Slaughter case, comment on Section 87, par. 5; compare also the reason underlying Subsection 1(b) of this section.

Case (b). War breaks out on August 1, before loading; a vigorous submarine campaign is feared, with its range and effectiveness as yet unknown; marine underwriters refuse to write war risk insurance; and bankers [11] refuse to buy or accept exchange on the shipments. The seller is not entitled to cancel. Compare In Re Comptoir Commercial Anversois and Power, Son & Co. (C.A.) (1920) 1 K.B. 868 (Scrutton's opinion also touches Case (a). The seller has no duty under Section 3-20 (2) (c) (S.45) (on c.i.f. contracts) to procure war risk insurance, none being "current"; but nonetheless the reason of that provision requires him, in good faith (and quite apart from coverage of any interest of his own) to seek to notify the buyer that no coverage is available and to request instructions on whether to delay shipment or to ship uncovered; this at peril of being held in view of the unforeseen circumstances, to have shipped improperly within the reason of Section 5-4 (i) (a) and (c) (S.74). Instructions to ship uncovered would have to be honored by the seller, his own interest being too minor to interfere with the buyer's right; but the seller should properly be entitled in such case to call for further and adequate assurance of payment, as by a N.Y. letter of credit, since the buyer, by demanding shipment, would be forcing upon him a risk

somewhat greater than was originally contemplated by the contract. Compare Sections 7-10 (S. 99) (on insecurity) and 2-9 (S. 26-2) (on good faith) and Comments.

5. Failure or default in the seller's source of supply. Where a particular source of supply is exclusive under the agreement [12] and fails through casualty, the present section applies, rather than Section 6-1 (S. 86) on destruction or deterioration of specific goods. The same holds where a particular source of supply is shown by the circumstances to have been contemplated or assumed as in Dauids Co. v. Hoffman-La Roche Chemical Works and in Geo. Wills & Sons, Ltd. v. R. S. Cunningham & Co., Ltd., above in par. 2; or in International Paper Co. v. Rockefeller, par. 1. (most of the contemplated timber tract from which wood was to be cut was there destroyed by fire; seller held excused except as to a small inaccessible remaining portion. Under this Act the more than trebling of costs as to this remainder would, contrary to the holding on that branch of the case, spell commercial impracticability.)

But there can of course be no excuse under this section unless the seller has employed all due measures to assure himself that his source will not fail. Thus where molasses was to be the product of a named refinery and the refinery did not produce a sufficient supply during the contract period, the seller's failure to contract with the refinery barred any excuse, Canadian Industrial Alcohol Co., Ltd. v. Dunbar Molasses Co. (1932) 258 N.Y. 194, 179 N.E. 383; and so with a governmental stoppage of shipment of lumber, where permits were procurable and the seller had not made diligent efforts in good faith to procure one. Washington Mfg. Co. v. Midland Lumber Co. (1921) 113 Wash. 593, 194 Pac. 777.

[13] The problem becomes difficult, and the introductory language of par. 4 becomes applicable, when the seller has made due arrangements with his source and the source then fails to produce not by reason of unavoidable casualty but by reason of human error for which there is a legal remedy. Under the rigid approach rejected by this Act it has been held (despite an exemption clause which under reasonable construction would give a contrary result) that the seller remains liable, being left to any remedy over which he may have, Lebeaupin v. Richard Crispin & Co. (1920) 2 K.B. 714 (facts indicated in Illustration 2 which immediately follows), though sufficiently careful drafting could produce a contrary result,

cf. *Lamborn v. Seggerman Bros.* (1925) 240 N.Y. 118, 147 N.E. 607 (agreed that seller is "reselling" only what he gets under a described contract with a third party; liability limited accordingly; recourse, if any, against original seller for account of buyer). Under this Act, however, production by the agreed source is a basic assumption of the contract, and failure thereof for causes beyond the seller's control should if possible be made to excuse him. On the other hand, such excuse should result neither in relieving his defaulting supplier from liability nor in dropping into the seller's lap an unearned bonus of damages over. Section 2-9 (S. 26-2) on the obligation of good faith provides a solution: it is not good faith for the seller at the same time to claim an excuse and to seek to profit by the very contingency which bases [14] the claim of excuse. A condition to making good the claim of excuse is thus the turning over to the buyer of the seller's rights against the defaulting source of supply, so far as concerns the buyer's contract on which excuse is being claimed.

Illustration 2. A dealer in canned salmon closes a contract for the delivery of the first 2500 half-pound "flats" of pink salmon to be packed during the coming season at a named cannery. The dealer closes appropriate contracts with each cannery. The run of salmon is not abnormally short. The cannery, on beginning its pack, finds its half-pound flats defective, they burst under cooking pressure. The cans have been procured from a reliable source and are not in current course tested before use. Before the cans can be replaced, the run of salmon is over. The original seller is excused on turning over to the buyer his rights against the cannery. But the cannery is not excused. The procurement of such materials as cans, in proper shape to use, is a normal portion of the cannery's business risks, unless the failure (as in the case of general shortage of materials) is connected with the type of peculiar supervening casualty dealt with in this section. See par. 3 of this Comment.

6. Risks contemplated and assumed: the business circumstances at the time of contracting. As appears from the foregoing, [15] mere language of general engagement is in any normal situation to be read commercially as subject to the exemptions covered by this

section. Compare Int. Com. to II and III, pars. 1, 2. But the situation is quite different when the contingency in question is sufficiently fore-shadowed at the time of contracting to belong properly among the business risks which are fairly to be regarded as included in the dickered terms, either consciously or as a matter of reasonable, commercial interpretation. Thus where a contract in November, 1914, for delivery of Spanish iron ore to England was made after the British had already declared iron ore contraband, and where it contained an exemption if the North Sea should be closed to Spanish tonnage, it was properly held that refusal to sail on the part of the carriers with whom the seller had contracted was no excuse, when other space was available, though at higher rates: the general contingency of war and its effects had been envisaged at contracting, Bolckow, Vaughan & Co., Ltd. v. Compania Minera de Sierra Minera (1916, C.A.) 33 L.T.R. 111. And see Madeirerse Do Brasil, S.A. v. Stulman-Emrick Lumber Co. (1945, C.C.A. 2) 147 F. 2d 399 (contract c.a.f. made with an eye on a shipping shortage assumes the risk of any such shortage and of any consequent rise in rates).

Such cases can be dealt with as well in terms of there being no basic assumption of non-occurrence of the contingency as in terms of an "Otherwise agreement" which rests in the circumstances or in the language or in both. Equally excepted from the [16] exemption otherwise present under usage of trade under the present section are the cases in which the language directly negates such an exemption. So where a canning contract provides "80 percent" or "100 percent delivery guaranteed," in which situation crop failure can be no excuse. Yet explicit language of assumption as well as of exemption must be given reasonable commercial interpretation: thus, in Illustration 2, "the first 2500 cases of half-pound flat pinks packed by . . ." does not mean "2500 cases of half-pound flat pinks which shall be the first salmon packed by. . ."; and on the other side, an exemption for "change in tariff," though found between "damage to plant" and "failure of transportation," must still be read as excusing the seller only from shipment at a price which does not include any rise in tariff; it does not make a change in tariff into an excuse from performing on a rising market.

7. "Unless otherwise agreed," so far as concerns assumption of the risk in question, thus has its normal meaning under this Act,

Section 1-12(2) (S. 9), although with a somewhat particular weight resting on the circumstances. See par. 6.

On two points, however, "unless otherwise agreed" is a qualification to be watched with caution.

(a) As in the case of Section 3-19 (S. 44) on the f.o.b. term, this section itself sets up the commercial standard for normal and reasonable interpretation. Thus, as pointed out in par. 6, an exemption by clause for "change in tariff" should [17] be limited in effect to permitting the seller to make an appropriate increase in price but at the buyer's option to take or leave the contract so modified. Thus, again, any clause extending exemption into contingencies which are within the seller's control is to be regarded as out of line with reasonable expectation, and so as strongly suspect of unconscionability for surprise. See Int. Com. to II and III, pars. 6-9, and Section 2-6 (S. 23).

(b) Even more strongly does such a qualification of "unless otherwise agreed" apply in regard to the consequences of exemption as laid down in Subsections 2 and 3 and Section 6-4 (S.89). Here this Act has worked out with deliberation the lines of the fair and balanced result. Clauses which for instance undertake to reserve to the seller power regardless of circumstances to resume deliveries at his option when the contingency passes have rightly been eviscerated by the courts.

It is indeed an entirely legitimate thing, within the lines of the policies laid down by this Act, to make a risk precise (as by conditioning the delivery on contingencies at a particular one of the seller's plants) or to make clear in advance the [18] details of a reasonable substitute for proration (as by providing that in the event of shortage orders shall be filled in the order of receipt or acceptance rather than by proration.) It is a wholly different thing, verging even in the absence of surprise on the unconscionable, to seek to deprive the buyer of his option to get out when his whole contract is altered - an option under Section 6-4 (S. 89) which is not made subject to agreement otherwise.

8. Exemption of buyers and non-merchants. The case of the non-merchant seller is commonly well enough cared for by Section 6-1

(S. 86) on destruction of specific goods and by the application of the reason of that rule to the situation of crops to be grown on designated land, par. 1, above. But if the circumstances bring a non-merchant's case within the reason of this section, the section is properly to be applied, Section 1-6 (3) (S. 1) on the construction of this Act.

Application of the section, under the same principle, to exemption of the buyer is not so simple. The case of a "requirements" contract is covered by Section 3-5 (S. 30), in regard to both assumption and allocation of the relevant risks. But when the contract has no specific reference to a particular venture or destination and no such reference is given in the circumstances, commercial understanding sees a contract by a manufacturer to buy fuel or raws as a general deal in the general market, not conditioned by assumption of the continuing [19] operation of his plant. Neither, even when notice is given that the supplies are needed for a specific and favorable further contract of a normal commercial kind, does commercial understanding view the supply-contract of a dealer as conditioned on the business - continuance of that further contract for outlet, - even though the law may impose on the supplying seller consequential damages for failure to perform, Section 8-14 (2) (a) (S. 117). It is indeed a partial compensation for this liability of the seller to consequential damages when this Act follows commercial understanding in recognizing damage to a seller's plant as an excuse, but not damage to a buyer's. On the other hand, where the buyer's contract is by commercial assumption conditioned on a definite and specific venture or assumption, the reason of the section does apply, and with it the section, as, for instance, in war procurement subcontracts, known to be based on a prime contract subject to termination, or where a contract is made for supplies for a particular construction venture.¹

¹ (Note: This is left open for discussion at the meeting.)

[20] 9. Governmental regulations as excuse. With commercial practicability as a test, it will not do either to disregard foreign regulation or to insist upon technical legal distinctions between "law", "regulation", "order" and the like, nor yet to make action in the present depend upon an eventual judicial determination in the future that the particular governmental action has been without

full legal force. Good faith is the test, and general commercial acceptance of the regulation is a prime test of good faith. But any governmental interference, to excuse, must so “supervene” as to be beyond the scope of the seller’s assumption of risk. Compare par.

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 (Note: The development here depends on discussion at the meeting.)
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[21] And of course any action of the party claiming excuse in causing or colluding in inducing governmental action to excuse his performance would be in breach of good faith.

10. Prorating: Subsections 2 and 3. Excuse to avoid a hardship cannot be allowed to work hardship on the other side. The cases have thus soundly required that the seller supply what the contingency leaves him able to, and that when supplying one customer he must take account of others, Diamond Alkali Co. v. Henderson Coal Co. (1926) 287 Pa. 232, 134 A. 386; Mawhinney v. Millbrook Woolen Mills (1922) 234 N.Y. 244, 137 N.E. 318. But there is much uncertainty under the cases in regard to what allocations are permissible, and a seller should not be forced to gamble on uncertain subsequent judicial rulings. The Act explicitly permits in any proration a fair and reasonable attention to the needs of regular customers who may properly be supposed to be relying on supply by spot order; a fortiori the seller may take account of contracts later in date than the one in question. The fact that such spot orders may be closed at an advanced price causes no difficulty, since plainly prorating to them will not be reasonable in any measure which exceeds their normal past requirements; but it is to be noted that good faith requires real care by the excused seller, when prices have advanced, to weigh his allocations in case of doubt favorably to his contract customers, and evenly among them regardless of price. [22] Save for such disturbance by change in the market, this Act seeks to leave every reasonable business leeway to the seller. Thus, for example, it would within the meaning of this Act be “fair and reasonable” in a coal shortage to give, in good faith, full preference over industrial consumers to hospitals or schools, or to suppliers of domestic consumers for purposes of purely domestic consumption.

D. Comment on Section 87 Merchant's Excuse by Failure of Presupposed Conditions

[Source: THE LLEWELLYN PAPERS, file J-VIII2c]

[Date: Undated but post-Sept. 1945 and before U.C.C. 1949 Draft]

[Pagination in original indicated by numbers in brackets]

[Emphasis, footnotes, and errors as in original]

[76] This section and the following one have no counterpart in the Original Act but follow that current of sound case law which recognizes the need for excusing a seller from timely delivery of goods contracted for where his performance has become commercially impracticable because of supervening circumstances not within the contemplation of the parties at the time of contracting. The need for such a section as this one is well illustrated by the reasoning and result in *Whitman v. Anglum* (1918) 92 Conn. 392; 103 A. 114, where a contract was made for "at least" 175 quarts of milk daily to be picked up by the buyer on the seller's premises. Thereafter the seller's herd was condemned and destroyed and the seller himself quarantined. In an action brought by the buyer for non-delivery, the seller was held liable since he could legally perform the contract with a substituted place of delivery. Under this Act the substantial availability of the seller's herd would be considered an obvious presupposition of the contract and the reasoning and result of this case are expressly rejected.

There have been two major lines of development seeking the results now obtained by this section. First, the courts in the better cases have long sought to excuse the seller where his performance had become impossible or unduly burdensome but the result in any given case remained uncertain. This Act, in addition to eliminating this element of uncertainty, introduces a practical, commercial approach to the problem which has not yet been generally recognized even by the sounder cases. Secondly, the parties themselves have attempted to achieve the desired results by including "seller's exemption" clauses in sales agreements. This has become a prevalent mercantile practice and law designed to fit modern commercial conditions must recognize that such protection for the seller has come

to be a normal assumption underlying sales contracts. Nor is it enough to provide merely for "commercial" as contrasted with "adverse to the party drafting" construction of exemption clauses for the protection must operate without need for any clause at all lest the law discriminate on an important point of normal commercial understanding against small businesses which do not happen to employ skilled counsel.

The present section deals with the seller's excuse for delay in delivery or non-delivery in whole or in part by reason of supervening events, but does not contemplate the destruction of specific goods which is covered by Section 85. The section must also be distinguished from Section 86 which deals with the use of substituted performance on points other than delay or quantity. Insofar as this section concerns either delay in delivery or proration, it may be said to involve, in logic, one type of "substituted" performance but it is sufficiently different in kind to warrant the special treatment given it under this section and the following one.

* * *

1. Supervening Commercial Impracticability is the Basis for Excuse Under This Section. For the last half century or longer the more commercially minded courts have been moving away from the rigid rule of the *Whitman* case discussed above. Excuse for non-delivery, which rested at first in [77] the death of the specific animal or destruction of the specific thing contracted for (Section 85 and compare Original Act Sections 7 and 8) was next extended to include crops to be grown in the future on agreed land. Thus in *Ontario Deciduous Fruit-Growers' Assn. v. Cutting Fruit-Packing Co.* (1901) 134 Cal. 21; 66 Pac. 28, it was held that the seller was not required to fill his contract by supplying a different variety when the peaches in the orchards contemplated by the agreement were destroyed by drought. And a contract for wood to be supplied from a particular tract has been soundly construed as resting on the assumption that the seller should be excused when that wood on that tract was destroyed by fire in *International Paper Co. v. Rockefeller* (1914) 161 App. Div. 180; 146 NY Supp. 371. Similarly, the seller has been held excused when the particular means of production presupposed by the contract are damaged or destroyed, as in *Leavenworth State Bank v. Cashmere Apple Co.* (1922) 118 Wash. 356; 204 Pac. 5, where the mill in which apple boxes were to be manufactured was destroyed. Such results are

approved and adopted by this Act which rejects the refusal in *Anderson v. May* (1892) 50 Minn. 280; 52 NW 530, to apply a similar type of construction to a contract by a market gardner for the sale of beans to be grown by him when after due planting an unexpected frost had cut down the yield below the agreed quantity.

Failure of agreed shipping facilities have been treated in similar fashion by the sounder cases. Thus in *Huni & Wormser, Ltd. v. E. D. Sassoon & Co.* (1920, CA) 5 Ll. L.R. 199, a casualty to the vessel named in the agreement was held to excuse shipment thereon.⁽¹⁾

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(1) Under this Act, however, such circumstances would raise questions as to possible substitution of facilities under Section 86 and of excuse for delay with buyer's option to terminate or modify the contract under this section and Section 88 rather than absolute excuse from performance.

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Also in inland shipment contracts a supervening railroad embargo or other general failure of facilities for transportation has been rightly recognized as excusing the seller from delay or non-delivery. [See *Reid-Murdock Co. v. Alton Mercantile Co.* (1923) 287 F. 460, excusing seller for delay in delivery of sugar because of his inability to secure railroad cars promptly and also railroad's refusal to divert cars, when loaded, to buyer's plant in a strike-bound city.]

Again, the formalistic limitation of excuse to those cases where the contract or its performance was flatly prohibited by local law has been extended to situations involving local governmental action lacking the full force of "law." In *Mawhinney v. Millbrook Woolen Mills, Inc.* (1921) 231 NY 290, 132 NE 93; 234 NY 244, 137 NE 318, the court recognized a "requested" priority of government orders for woolens as if the priority were compulsory, such compulsion perhaps being available under the law. The defacto, equally effective, action of foreign governments has for two decades been known to be, commercially in fact and properly in law, on a similar footing. So in *Ralli Bros. v. Compania Naviera Sota y Aznar* (1920) 2 KB 287, where the agreed freight charges in a contract made in England exceeded those permitted by law in Spain where delivery was to be made and charges paid, *Scrutton, L.J.* stated, ". . . where a contract requires an act to be done in a

foreign country, it is the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country.” [See also *Kursell v. Timber Operators and Contractors, Ltd.* (1926, CA) 135 L.T.R. 223.]

[78] This Act draws all these lines of development together and unifies them under a single principle and criterion of excuse—unforeseen and supervening commercial impracticability. The commercial soundness of this policy is evidenced not only by the steady trend of the better cases in this direction but also by the increasing use of exemption clauses in the contracts of manufacturers and other suppliers.

2. Exemption Clauses. As the more mercantile courts have been moving towards a less rigid approach to the matter of excuse for delay or non-performance, commercial men have resorted to exemption clauses in an effort to bring the less commercially minded courts abreast of this trend. These clauses have been only partially successful, however, since the same type of divergence has arisen in the judicial construction of these clauses. The one line of decisions views the reason and purpose of the clauses as dominant and the details (for the clauses vary greatly in the range and particulars of the contingencies recited) as illustrations and not as limitations.(2)

(2) Thus a clause excusing the seller from responsibility for damage from strikes has been held to cover not only a strike directly affecting the seller, but also a “confiscation” by a railroad of the seller’s shipment of coal to the buyer, due to the railroad’s shortage of coal caused by a strike. [*Davis v. Columbia Coal Mining Co.* (1898) 170 Mass. 391; 49 NE 629]. A railroad embargo, though not within the language of the clause - “strikes, accidents, or other causes incident to manufacture or delivery beyond seller’s control” - has been recognized as excusing the seller. [*Canadian Steel Foundries Co. v. Thomas Furnace Co.* (1925) 186 Wis. 557; 203 NW 355] “Prohibition of export preventing shipment or delivery to this country” sufficient to excuse the seller has been recognized though the three chief supply sources were still open if “either a considerable source of supply to this country is shut up thereby or . . . a very considerable rise in the price of wheat in this country should

be occasioned by the prohibition." [Ford & Sons (Oldham) (Ltd.) v. Henry Leetham & Sons (Ltd.) (1915, K.B.D.) 21 Com. Cas. 55, 60.]

This is the policy adopted and approved by this Act with regard to its own provisions generally. [See Section 1 on purpose and construction] and in particular with regard to the present section which deliberately refrains from any effort at an exhaustive expression of contingencies but is to be interpreted in terms of its underlying reason and purpose.

The other line of decision springs from the narrow and inelastic attitude toward excuse and has cut down the scope of exemption clauses by insisting upon a strict eiusdem generis interpretation. So this Act rejects both the reasoning and result of such cases as *Dauids Co. v. Hoffman-La Roche Chemical Works* (1917) 178 App. Div. 885; 166 NY Supp. 179, which refused to excuse the seller under a clause opening with "contingencies beyond our control" when the carbolic acid normally procured from Europe was embargoed there by war because embargo was not specifically mentioned in the clause; *George Wells & Sons, Ltd. v. R. S. Cunningham & Co., Ltd.* (1924) 2 K.B. 220, where a "U.C.E." clause ("unforeseen contingencies excepted") was held limited to absolute impossibility which did not include the disruption of industry at the source of supply by the French occupation of the Ruhr; and *Sunseri v. Garcia & [79] Maggini Co.* (1929) 298 Pa. 249; 148 Atl. 81, where a dealer was held bound by his contract calling for garlic from a specified district although the crop was only ten per cent of normal and despite a clause including "force majeure", "crop damage", "crop failure", and "any other unavoidable cause other than the seller's own negligence."

3. Shortage of Supply and Rise in Price; Casualty Versus Business Conditions. Although the cases have frequently restated the proposition that a mere rise in costs or mere unprofitability of the contract will not justify non-performance, they have also often repeated that performance will be excused by the failure of some situation the continuance of which was assumed as a basis of the contract. Thus the first test for excuse under this Act in terms of basic assumption is a familiar one. The additional test of commercial impracticability (as contrasted with "impossibility", "frustration of performance" or "frustration of the venture") is phrased

in relatively unfamiliar language which has been adopted in order to call attention to the commercial character of the criterion chosen by this Act. However, it follows the trend of the sounder cases in refusing to permit increased cost alone to excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance.

The sound answer to any individual problem arising under this Act turns on what assumption of risks the terms of the agreement fairly import when they are read commercially against the background of the dicker. Thus a contingency clearly envisaged, or one which as a business matter was fairly in the offing at the time the deal was made, is not within the exemption. (See paragraph 6 below). Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. This is the meaning to be given under this Act to the frequent judicial references to "mere" rises in costs and the like.

When, however, a particular unusual contingency destroys some tacit and basic commercial assumption on which the deal rested, a different viewpoint must be adopted, and has been by the better cases. In such circumstances there is no sound escape from reckoning commercial impracticability partly in terms of increased cost. The situation in *Blackburn Bobbin Co. v. Allen* (1918) 1 K.B. 540 (CA) 2 K.B. 467, discussed at length in the Comment to Section 86 presents the problem. In that case the war blocked the normal method of water transportation leaving available only rail shipment at doubled cost. This case is on the very borderline of commercial impracticability as envisaged by this section for the question is fundamentally one of degree.

A severe shortage of raws or supplies due to a particular contingency such as war, embargo, local crop failure, unforeseen shut-down of major sources of supply, or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is similarly within the contemplation of this section. In this connection this Act accepts the reasoning and result of *Ford & Sons (Oldham) (Limited) v. Henry Leetham & Sons (Ltd.)* (1915, K.B.D) 21 Com. Cas. 55, noted in footnote (2) of this Comment. In a situation such as arose in *Vale v. Suiter & Dunbar* (1905) 58 W. Va. 353; 52 S.E. 313, where a large number of employees quit because of an outbreak

of smallpox, whether or not performance is excused depends, under this Act, upon the degree of the failure of manpower.

[80] 4. Failure or default in exclusive source of supply. Where a particular source of supply is exclusive under the agreement and fails through casualty, the present section applies rather than Section 85 on destruction or deterioration of specific goods. The same holds true where a particular source of supply is shown by the circumstances to have been contemplated or assumed by the parties at the time of contracting, as in *Dauids Co. v. Hoffman-La Roche Chemical Works* (1917) 178 App. Div. 855; 166 NY Supp. 179, involving carbolic acid normally procured from Europe, or in *International Paper Co. v. Rockefeller* (1914) 161 App. Div. 180; 146 NY Supp. 371, in which most of the contemplated timber tract from which wood was to be cut was destroyed by fire.(3)

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(3) In this case the seller was held excused except as to the timber standing on a small inaccessible tract which was not harmed by the fire. Under this Act the more than trebled cost of removing this timber would spell commercial impracticability and the holding of the case on this point is rejected.

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There can, of course, be no excuse under this section unless the seller has employed all due measures to assure himself that his source will not fail. Thus where the molasses contracted for was to be the product of a named refinery and that refinery did not produce a sufficient supply during the contract period, the seller's failure to contract with the refinery for his needs barred any excuse. [*Canadian Industrial Alcohol Co., Ltd. v. Dunbar Molasses Co.* (1932) 258 NY 194; 179 NE 383.] Similarly, where non-performance was due to stoppage of lumber shipments, the seller was not excused since he had not made diligent efforts in good faith to procure a shipping permit which was obtainable. [*Washington Mfg. Co. v. Midland Lumber Co.* (1921) 113 Wash. 593, 194 Pac. 777.]

The problem becomes more difficult, however, when the seller has made due arrangements with his source and that source then fails to produce, not by reason of unavoidable casualty, but by reason of human error for which there is a legal remedy. Under the rigid approach rejected by this Act it has generally been held that under such circumstances the seller remains liable under his

contract and is left to any remedy over which he may have. So in *Lebeaupin v. Richard Crispin & Co.* (1920) 2 K.B. 714, a dealer under contract to deliver canned salmon from a named cannery closed an appropriate contract with the cannery. The cannery's cans proved defective and before more could be obtained the salmon run was over. The dealer was held liable for performance under his contract despite the presence of an exemption clause which under any reasonable construction would give a contrary result. Occasionally sufficiently careful drafting of exemption clauses will save a seller who finds himself in such a position as in *Lamborn v. Seggerman Bros.* (1925) 240 NY 118; 147 NE 607, where the agreement provided that the seller was "reselling" only what he got under a described contract with a named third party. His liability was limited accordingly and his recourse, if any, was against the third party for the account of the buyer.

Under this Act, however, production by the agreed source is, without more, a basic assumption of the contract, and failure thereof for causes beyond the seller's control should, if possible, be made to excuse him. On the other hand, such excuse should not result in relieving the defaulting supplier from liability nor in dropping into the seller's lap an unearned bonus of damages over. The flexible adjustment machinery of this Act provides the solution under [81] Section 26 on the obligation of good faith. It is not good faith for the seller to claim an excuse and at the same time seek to profit by the very contingency upon which the claim of excuse is based. A condition to his making good the claim of excuse is the turning over to the buyer his rights against the defaulting source of supply to the extent of the buyer's contract in relation to which excuse is being claimed. Thus in the *Lebeaupin* case, above, under this Act the dealer would be excused on turning over to the buyer his rights against the cannery. But the cannery would not be excused since the procurement of such materials as cans, in proper shape for use, is a normal part of the cannery's business risks, unless the failure (as in the case of general shortage of materials) is connected with the type of peculiar supervening casualty dealt within this section.

5. Incidental Contingencies. It is evident that there are a number of situations in which neither sense nor justice is served by either answer when the issue is posed in flat terms of "excuse" or "no excuse". In such cases adjustment under the various provisions

of this Act is necessary, especially by use of Section 26 on good faith, Section 98 on insecurity and assurance, Section 1 on the reading of all provisions in the light of their purposes, and the general policy of this Act to use equitable principles in furtherance of commercial standards and good faith.

The failure of conditions which go to convenience or collateral values rather than to the commercial practicability of the main performance certainly does not amount to a complete excuse; yet good faith and the reason of Section 86 and of the present section may properly be held to justify, and even require any needed delay involved in a good faith inquiry seeking a readjustment of the contract terms to meet the new conditions.

The familiar situation where a c.i.f. contract is made for goods to be shipped from a United States port to an overseas destination, illustrates the principle. A common practice is to make contracts for the sale of the exchange on such contracts in advance of shipment and to sell such exchange immediately after shipment. Should a financial stringency cause bankers to cease buying exchange, or accepting delivery of exchange under prior contracts, such a contingency would be too remote from the contract and too clearly within properly contemplated business risks to excuse the seller. Such a case must be distinguished from the excusable delay in shipment which would attend the official closing of the banks which would fall within the underlying reason of the provisions of paragraph (a) on applicable governmental regulations. [compare comment to Section 86 on substituted performance which discusses this Act's rejection of such holdings as that in *Slaughter v. C.I.T. Corp.* (1934) 229 Fla. 411; 157 So. 463, which held the buyer liable for a delay in payment occasioned by the general bank holiday in 1933.]

If, however, as in *In Re Comptoir Commercial Anversoils and Power, Son & Co.* (1920), C.A.) 1 K.B. 868, involving a c.i.f. contract, a war should break out before shipment, causing marine underwriters to refuse to write war insurance and bankers to refuse to buy or accept exchange on shipments because of a feared submarine campaign, a different approach is necessary. The seller is not entitled to cancel the contract. However, his obligation under Section 44 (2) (c) on c.i.f. contracts, to procure war risk is excused by the supervening impossibility. Nonetheless, good faith, quite apart from coverage of any [82] interest of his own in the shipment,

requires him to notify the buyer that no coverage is available and to request instructions on whether to delay shipment or to ship uncovered. Of course, any delay in shipment pending receipt of such instructions is excused. The seller would be forced to honor the buyer's instructions to ship uncovered since his own interest in the shipment is too minor to interfere with the buyer's rights. However, in such a case the seller would properly be entitled to call for further and adequate assurance of payment, as by a New York letter of credit, since the buyer's demand for shipment without coverage would place upon him a somewhat greater risk than originally contemplated by the contract.[Section 98 on insecurity; Section 26 on good faith.]

6. Risks contemplated and Assumed; "Agreement Otherwise." As appears from the foregoing, mere language of general engagement is in any normal situation to be read commercially as subject to the exemptions covered by this section. [Compare General Comment on Parts II and IV, paragraphs 1 and 2.] But the provisions of this section are made subject to agreement otherwise by the parties and such agreement is to be found not only in the expressed terms of the contract but in the circumstances surrounding the contracting, trade usage, and the like. [Section 9 defining agreement.] Thus the exemptions of this section have no applicability when the contingency in question is sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as part of the dickered terms, either consciously or as a matter of reasonable commercial interpretation from the circumstances. So in *Bolokow, Vaughan & Co., Ltd. v. Compania Minera de Sierra Minera* (1916, C.A.) 33 T.L.R. 111, a contract for delivery of Spanish iron ore to England which contained a seller's exemption if the North Sea should be closed to Spanish tonnage was made in November, 1914, after the British had already declared iron ore contraband. It was properly held that the refusal to sail on the part of the carriers with whom the seller had contracted was no excuse to the seller since other space was still available, though at higher rates, and the general contingency of war and its effects had been envisaged at the time of contracting. Similarly in *Madeirense Do Brasil, S.A. v. Stulman-Emrick Lumber Co.* (1945, C.C.A. 2) 147 F. 2d 399, where a c.a.f. contract was made with an eye on a prevailing shipping shortage and the seller was held to bear the risk of such shortage and of any

consequent rise in rates. Such cases as the above can be dealt with as well in terms of there being no basic assumption of non-occurrence of the contingency as in terms of an "otherwise" agreement.

The exemption otherwise present through usage of trade under the present section may also be expressly negated by the language of the agreement. So where a canning contract provides "80 percent" or "100 percent delivery guaranteed," a crop failure will not excuse the seller. Yet such explicit language of assumption of risk as well as of exemption must be given its reasonable commercial interpretation. Thus as in *Lebeaupin v. Richard Crispin & Co.* discussed above in paragraph (5), a contract calling for "the first 2500 cases of half-pound flat pinks packed by . . ." should not be construed to mean that the first salmon packed by that cannery should be placed in half-pound tins and allocated to the contract. On the other hand, express agreements as to exemptions designed to enlarge upon or supplant the provisions of this section are to be similarly read in the light of mercantile sense and reason. As in the case of Section 43 on the f.o.b. terms, this section itself sets up the commercial standard for normal and reasonable interpretation. Thus an exemption clause covering "change in tariff" should be limited in effect to excusing the seller only from shipment at a price which does not include the increase in tariff. It is not an excuse [83] for non-performance in a rising market. In such a situation, also, the buyer must be given the option to take or leave the contract at the modified price. Any clause which extends the exemption to contingencies which are within the seller's control must be regarded as out of line with reasonable expectation, and thus as strongly suspect for unconscionability due to surprise. [See General Comment to Parts II and IV, paragraphs 7-9 on surprise and unconscionability, and Section 23 on unconscionable contracts or clauses.]

Such a qualification of the "unless otherwise agreed" provision of this section applies even more strongly in regard to the consequences of exemption as laid down in paragraphs (b) and (c) and Section 88 on procedure on notice claiming excuse. Here this Act has worked out with deliberation the lines of the fair and balanced result. Clauses which, for instance, undertake to reserve to the seller, regardless of the circumstances, the power to resume deliveries at his option when the contingency passes have rightly been eviscerated by the courts. So in *Edward Maurer Co., Inc. v.*

Tubeless Tire Co. (1922, C.C.A. 6th) 285 Fed. 713, where a contract for the sale of rubber to a manufacturer in war time was made subject to all governmental regulations, the seller was not permitted to force deliveries upon the buyer after the end of the war when the price had declined greatly. The court held that the regulations which prevented the deliveries during the war operated to terminate the contract and not merely to excuse the seller's delay. [See also *General Commercial Co., Ltd. v. The Butterworth-Judson Corp.* (1921) 198 App. Div. 799; 191 NYS 64, holding that a typical strike exemption clause in a contract for July-August deliveries merely excused the seller's non-performance but did not prevent the buyer from cancelling the contract when deliveries were not made by the end of August.]

It is indeed entirely legitimate and within the lines of policy laid down by this Act, to make a risk precise by agreement (as by conditioning delivery on contingencies at a particular one of the seller's plants) or to make clear in advance the details of a reasonable substitute for proration (as by providing that in the event of shortage orders shall be filled in the order of receipt or acceptance rather than by proration). It is a wholly different thing, verging even in the absence of surprise on the unconscionable, to seek to deprive the buyer of his option to reject entirely a contract which has been wholly altered—an option which is not made subject to agreement otherwise under Section 88.

7. Exemption of buyers and non-merchants. The provisions of the present section are applied "between merchants". Normally, the case of the non-merchant seller can be adequately handled under Section 85 on casualty to unique goods. However, if the circumstances bring a non-merchant's case within the reason of this section, its rules are properly to be applied under Section 1 (3) on purpose and construction of this Act. The case of a farmer who has contracted to sell crops to be grown on designated land may be regarded as falling either within Section 85 or this Section and he may be excused, when there is a failure of the specific crop, either on the basis of the destruction of unique goods or because of the failure of a basic assumption of the contract. (See paragraph 1 above).

The application of this section, under the same principle, to exempt the buyer is not so simple however. The case of a "requirements" contract is covered by Section 30 both as to

assumption and allocation of the relevant risks. But when a contract by a manufacturer to buy fuel or raws makes no specific reference to a particular venture and no such reference may be drawn from the circum- [84] stances, commercial understanding views it as a general deal in the general market, and not conditioned on any assumption of the continuing operation of the buyer's plant. Even when notice is given by the buyer that the supplies are needed to fill a specific contract of a normal commercial kind, commercial understanding does not see such a supply-contract as conditioned on the continuance of the buyer's further contract for outlet. This is true even though the law, under such circumstances, may impose consequential damages on the supplying seller for failure to perform. [Section 116 (2)(a) on buyer's incidental and consequential damages.] It is thus a partial compensation for the seller's liability for such consequential damages, when this Act follows the commercial understanding and recognizes damage to a seller's plant as a normal excuse for non-performance but does not so recognize damage to buyer's.

On the other hand, where the buyer's contract is in reasonable commercial understanding conditioned on a definite and specific venture or assumption as, for instance, a war procurement subcontract known to be based on a prime contract which is subject to termination, or a supply contract for a particular construction venture, the reason of the present section obviously does apply and such a buyer is properly entitled to the exemption.

8. Governmental Regulations as Excuse. Following its basic policy of using commercial practicability as a test for excuse, this section recognizes as of equal significance either a foreign or domestic regulation and disregards any technical distinctions between "law", "regulation", "order" and the like. Nor does it make the present action of the seller depend upon the eventual judicial determination of the legality of the particular governmental action. The seller's good faith belief in the validity of the regulation is the test under this Act and the best evidence of his good faith is the general commercial acceptance of the regulation. Thus if the commercial community as a whole is abiding by local governmental "requests" which have less than the force of law or by de facto actions of foreign governments, any individual seller will be excused under this section for following a similar course. (See paragraph 1 above). However, such governmental interference cannot excuse

unless it truly “supervenes” in such a manner as to be beyond the seller’s assumption of risk. (Compare paragraph 6 above). And, of course, any action by the party claiming excuse which caused, or colluded in inducing, the governmental action preventing his performance, would be in breach of good faith and would destroy his exemption.

9. Prorating: Paragraphs (a) and (b). An exemption designed to avoid hardship to one party cannot be allowed to work hardship on the other. The cases have thus soundly required that an excused seller must fulfill his contract to the extent which the supervening contingency permits, and if the situation is such that his customers are generally affected he must take account of all in supplying one. [Diamond Alkali Co. v. Henderson Coal Co. (1926) 287 Pa. 232; 134 A. 386, where the production and shipment of coal by the seller was curtailed; and Mawhinney v. Millbrook Woolen Mills (1922) 234 NY 244; 137 NE 318, where government priorities consumed most of seller’s textile output.]

However, there is much uncertainty under the cases as to what allocations are permissible, and a seller should not be forced to gamble on uncertain subsequent judicial rulings in making prorations among his customers. This Act, therefore, explicitly permits in any proration a fair and reasonable attention to the needs of regular customers who are probably relying on spot orders for [85] supplies. A fortiori, the seller may also take account of contracts later in date than the one in question. The fact that such spot orders may be closed at an advanced price causes no difficulty since any allocation which exceeds normal past requirements will not be reasonable. It is to be noted, however, that good faith requires when prices have advanced, that the seller exercise real care in making his allocations, and in case of doubt his contract customers should be favored and supplies prorated evenly among them regardless of price. Save for the extra care thus required by changes in the market, this section seeks to leave every reasonable business leeway to the seller. Thus, for example, it would be “fair and reasonable” in a severe coal shortage for a seller to give, in good faith, full preference to hospitals, schools, and domestic consumers.

E. Uniform Commercial Code (1949), Comment to Section 2-615

[These are the first printed Comments to the Section. They are

reprinted in 6 A.L.I. & N.C.C.U.S.L., UNIFORM COMMERCIAL CODE DRAFTS 218-23 (E. Kelly comp. 1984).]

*F. Uniform Commercial Code, Proposed Final Draft (Spring 1950),
Comments to Section 2-615*

[The text of these Comments is reprinted in 10 A.L.I. & N.C.C.U.S.L., UNIFORM COMMERCIAL CODE DRAFTS 260-65 (E. Kelly comp. 1984).

The changes made between the 1949 and 1950 Comments primarily affected Comments 8 and 9, and resulted from a change in the section's preamble from "unless otherwise agreed" to "except so far as a seller may have assumed a greater obligation." Also in Comment 9, the first paragraph was deleted to reflect the textual change in the preamble which deleted the words "between merchants."]

*G. Uniform Commercial Code, Official Draft (1952), Comments
to Section 2-615*

[The text of these Comments is reprinted in 14 A.L.I. & N.C.C.U.S.L., UNIFORM COMMERCIAL CODE DRAFTS 251-55 (E. Kelly comp. 1984). The only change from the Spring 1950 Comments is in Comment 9, last sentence. The conclusion of this sentence that the section "obviously does apply" was weakened.]

*H. Uniform Commercial Code, 1957 Official Text With
Comments, Comments to Section 2-615*

[The text of these Comments is reprinted in 19 A.L.I. & N.C.C.U.S.L., UNIFORM COMMERCIAL CODE DRAFTS 214-48 (E. Kelly comp. 1984). There were two changes in these comments. In Comment 9 the two references to "unique" goods were replaced with references to "identified" goods. In Comment 11, a sentence was added stating that the seller can consider his own manufacturing requirements in allocating his production or deliveries. Since the 1957 draft, the Comments have remained unchanged.]