Force majeure Clauses - Drafting Advice for the CISG Practitioner

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Contents

I. Introduction 2

II. The United Nations Convention on Contracts for the International Sale of Goods 4

A. The Doctrine of Excuse 5
1. Third Parties 6
2. Unresolved Issues 7

B. The UNIDROIT Principles 8

C. Interplay Between CISG Excuse and UNIDROIT Hardship 9

III. Excuse Doctrine in the United States and the CISG 12

A. Impracticability 12
1. Impracticable 13
2. Basic Assumption 13
3. Greater Liability 14
B. *Force majeure* 15
C. Interplay Between Impracticability and *force majeure* 16

D. How the U.S. Doctrine of Excuse Differs from the CISG Doctrine 18

IV. Force majeure Clauses and the CISG 20
A. The Need for a *Force Majeure* Clause 20
B. Drafting Advice for Practitioners 20
1. Pre-Drafting Issues 20
2. Procedural Issues 21
3. Substantive Issues 21
a. Specificity 21
b. Scope 22
c. Interpretation 23

V. Conclusion 25

APPENDIX – Sample *Force Majeure* Contracts 26
I. Bilateral Clause Designed for Construction and Supply Contracts 26
II. Take-or-pay Contract (e.g., natural gas) 26
III. United Nations Economic Commission for Europe Standard Excuse Provision 27

FOOTNOTES 28

SiSU Metadata, document information 28

1 # Force majeure Clauses - Drafting Advice for the CISG Practitioner,

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I. Introduction

One of the most challenging tasks a commercial lawyer can encounter is protecting a client who is unable or unwilling to perform onerous contractual obligations. Generally speaking, commercial contracts in the United States impose legally binding obligations and a non-performing party is liable for damages.[1] As an exception, however, the obligation to perform may be excused if extraordinary circumstances render performance literally or virtually impossible.[2] Similarly, U.S. parties engaged in international contracts can expect to be excused under certain circumstances because most foreign nations recognize a doctrine of excuse.[3] Thus, commercial lawyers can assure clients that they will receive some protection under the excuse doctrine – whether they engage in domestic or international contracts.

Although clients are protected by the doctrine of excuse, however, the degree of protection they receive may vary depending on which country's law governs their contract.[4] For example, a contract governed [page 382][5] In contrast, a contract governed by the law of a developing nation would likely be subject to a very permissive doctrine of excuse.[6]

Therefore, because the doctrine of excuse is not uniform across the globe, U.S. parties should always evaluate the scope of the excuse doctrine that governs their contracts. Furthermore, this comment argues that parties to an international contract for the sale of goods should include a carefully-negotiated and -drafted *force majeure* clause in their contract, because the excuse provisions in the law that applies to the transaction may not afford appropriate protection. By including a *force majeure* clause, parties can delineate the types of "extraordinary circumstances" that will excuse performance, thereby increasing predictability. Since most international contracts for the sale of goods are governed by the United Nations Convention on Contracts for the International Sale of Goods[7] ("CISG"), this comment focuses on the CISG doctrine of excuse and advises U.S. practitioners on the art of drafting *force majeure* clauses for CISG con-

[1] *See* Gerhard Wagner, In Defense of the Impossibility Defense, 27 Loy. U. Chi. L.J. 55, 55 (1995). *see generally* Richard Hyland, Pacta Sunt Servanda: A Meditation, 34 Va. J. Int'l L. 405 (1994) (discussing the history of *pacta sunt servando)*.

[2] *See* Restatement (Second) of Contracts §§261-65 (1979) (discussing the U.S. doctrine of excuse); Alphonse M. Squillante & Felice M. Congalton, *force majeure*, 80 Com. L.J. 4, 5 (1975) ("*force majeure* is presumed by the parties not to occur and if it does the parties would reasonably expect that the contract would not be performed."); Wagner, *supra* note 1, at 55 (discussing the rule of *pacta sunt servanda* and the impossibility defense).

[3] *See* International Chamber of Commerce, *force majeure* and Hardship 6 (1985) ("The laws of most countries have provisions which deal with *force majeure* and some laws even treat 'hardship' situations."). *see generally* G.H. Treitel, Frustration and *force majeure* (1994) (discussing English law); Lester Ross, *force majeure* and Related Doctrines of Excuse in Contract Law of the People's Republic of China, 5 J. Chinese L. 58 (1991) (discussing the law of The People's Republic of China); John D. Wladis, Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law, 75 Geo L.J. 1575 (1987) (discussing English law).

[4] *See* International Chamber of Commerce, *supra* note 3, at 6 (stating that *force majeure* provisions "vary from country to country").

[5] *See* Lisa M. Ryan, The Convention on Contracts for the International Sale of Goods: Divergent Interpretations, 4 Tul. J. Int'l & Comp. L. 99, 113 (1995).

[6] *See id.*

[7] United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, S. Treaty Doc. No. 98-9 (1983) 19 I.L.M. 668 (1980) [hereinafter CISG] (entered into force on Jan. 1, 1988), *available in* 15 U.S.C.A. app. at 49 (West Supp. 1996), 52 Fed. Reg. 6262-80, 7737 (1987), U.N. Doc. A/Conf.97/18 (1980). The CISG applies to contracts between contracting parties unless the parties expressly agree that it will not apply. *See id.* art. 6; *see also* V. Susanne Cook, The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity, 16 J.L. & Com. 257, 257 (1997) (stating that the CISG applies "[u]nless expressly opted out of by the parties").

tracts.

6 Part two of this comment discusses the CISG doctrine of excuse and illustrates the hardship provisions of the UNIDROIT Principles of International Commercial Contracts[8] ("UNIDROIT Principles"). In addition, part two examines the relationship between the CISG and the UNIDROIT Principles and suggests that the UNIDROIT hardship provisions serve a gap-filling role for the CISG doctrine of excuse. To promote a solid understanding of the CISG, part three reviews the U.S. doctrine of excuse for contracts for the sale of goods (emphasizing *force majeure* and commercial impracticability) and demonstrates the difference [page 383] between the U.S. doctrine and the excuse provision in the CISG. Part four illustrates how *force majeure* clauses relate to the CISG and recommends that practitioners draft a *force majeure* clause to avoid potential obstacles for clients. Finally, part five offers tips that practitioners can consider when drafting *force majeure* clauses for CISG contracts.

[8] *See* International Institute for the Unification of Private Law, Principles of International Commercial Contracts (1994) [hereinafter UNIDROIT Principles].

7 ## II. The United Nations Convention on Contracts for the International Sale of Goods

8 The CISG is a multinational convention that "establish[ed] uniform law for the international sale of goods."[9] In the United States, the CISG automatically applies to international contracts for the sale of goods between a U.S. party and a party from another Contracting State.[10] However, parties may agree to contract out of the CISG in whole or in part.[11] As a general rule, U.S. lawyers take advantage of the opportunity to contract out of the CISG and they advise clients to negotiate U.S. choice-of-law provisions in their contracts.[12]

9 For the most part, lawyers probably avoid the CISG because they are not familiar with its provisions. In addition, some lawyers have expressed specific concern regarding the CISG doctrine of excuse for two reasons.[13] First, the international character of CISG contracts exposes clients to more performance-related obstacles; thus, lawyers want to have experience with the applicable excuse doctrine to afford clients adequate protection.[14] Since U.S. lawyers are most familiar with the U.S. doctrine of excuse, they generally want the U.S. doctrine to govern their clients' international contracts. Second, common law lawyers have reservations about the excuse provision because under civil law systems a non-performing party only pays damages if fault (i.e., negligence) is established.[15] [page 384] Thus, common law lawyers worry that foreign parties could use the CISG doctrine of excuse as a means of imposing the civil law "fault" concept of damages. If foreign parties succeeded, then an excuse would be created every time the non-breaching party failed to establish fault.

10 Both of these reservations, however, are unwarranted. The CISG did not incorporate the civil law fault concept;[16] therefore, the performing party does not have to establish negligence in order to collect damages from the non-performing party. Moreover, the excuse provision in the CISG is not drastically different from the U.S. doctrine of excuse and by including a carefully-negotiated and -drafted *force majeure* clause in a contract, lawyers can meet their clients' needs under the CISG.[17]

[9] John Honnold, The Sales Convention: Background, Status, Application, 8 J.L. & Com. 1, 1 (1988).

[10] *See* CISG, *supra* note 7, art. 1. As of October, 1997, the following nations have adopted the CISG: Argentina, Ausralia, Austria, Belarus, Belgium, Bosnia and Herzegovena, Bulgaria, Canada, Chile, China, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Ghana, Guinea, Hungary, Iraq, Italy, Latvia, Lesotho, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Republic of Moldova, Romania, Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Uganda, Ukraine, United States of America, Uzbekistan, Venezuela, Yugoslavia, and Zambia. *See* CISG Contracting States and Declarations Table, 17 J.L. & Com. 449 (1998).

[11] *See* CISG, *supra* note 7, art. 6.

[12] *See* Peter Winship, Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners, 29 Int'l Law 525, 530-31 (1995).

[13] *See, e.g., id.* at 550 (stating that "commentators have criticized article 79 for its wording and numerous alleged ambiguities").

[14] *See id.*

[15] *See, e.g.,* E. Allan Farnsworth, Review of Standard Forms or Terms Under the Vienna Convention, 21 Cornell Int'l L.J. 439, 447 (1988) (suggesting that prudent drafters should include a clause in their contract expressly excluding article 79 of the CISG).

[16] *See* Dietrich Maskow, Hardship and *force majeure*, 40 Am. J. Comp. L. 657, 664 (1992) ("Interpretations which try to make clear that the fault principle is implemented in the CISG do not correspond to reality.").

[17] *See* Henry Gabriel, Practitioner's Guide to the Convention on Contracts for the International Sale of Goods (CISG) and the Uniform Commercial Code (UCC) 242 (1994) ("The differences are not as great as a literal reading of the two codes would suggest."); Joseph Lookofsky, Understanding the CISG in the USA: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods 77 (1995) (stating that "the possibility of an Article 79 'exemption' does not

11 Incidentally, U.S. practitioners have a professional responsibility to educate themselves about the CISG doctrine of excuse for several reasons.[18] The CISG was ratified by the United States and is an integral part of U.S. commercial law.[19] The CISG has the status of a treaty and, therefore, preempts state and federal statutes.[20] In addition, article 6 states that "*parties* may exclude the application of this Convention or . . . derogate from or vary the effect of any of its provisions."[21] Thus, unless both parties agree to derogate from the CISG, the CISG applies to their transaction. Accordingly, although practitioners can sometimes avoid the CISG by advising their clients to opt out of the Convention,[22] they may not be able to avoid the Convention in situations where the foreign party has enough leverage to insist on its application. For example, "competitive reasons"[23] such as low supply (coupled with the U.S. party's need for the [page 385] goods) may enable foreign parties to demand application of the CISG. Accordingly, U.S. practitioners must be familiar with the CISG doctrine of excuse.

12 ## A. The Doctrine of Excuse

13 Under the CISG, any party that fails to perform its contractual obligations may be liable to the other party for damages.[24] However, under certain extraordinary circumstances, a party's obligation to perform may be excused if an unforeseen and unavoidable impediment, beyond the non-performing party's control, obstructed performance.[25] To determine whether a party's obligation to perform should be excused, courts apply article 79 of the CISG.[26]

14 In order to be excused pursuant to article 79, the non-performing party must establish that performance was obstructed by: (1) an impediment; (2) beyond the party's control; (3) that could not reasonably have been taken into account, avoided or overcome.[27] In addition, to qualify for article 79 exemption, the non-performing party must also notify the other party of "the impediment and its effect on his ability to perform" within a reasonable time.[28] If excused, the non-performing party is not liable for damages; however,

water down Convention liability to a fault based rule").

[18] *See* Winship, *supra* note 12, at 531.

[19] *See id.* at 527, 531.

[20] *See id.* at 527 (citing U.S. Const. art. VI).

[21] CISG, *supra* note 7, art. 6 (emphasis added).

[22] *See id.* art. 6.

[23] B. Blair Crawford, Drafting Considerations Under the 1980 United Nations Convention on Contracts for the International Sale of Goods, 8 J.L. & Com. 187, 190 (1988) (noting that "our clients may not always have th[e] choice [of opting out] for . . . competitive reasons").

[24] A broad discussion of the CISG is beyond the scope of this comment. For further discussion on the CISG *see generally* John Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention (2d ed. 1991); B. Blair Crawford & Janet L. Rich, New Rules for Contracting in the Global Martketplace: The United Nations Convention on Contracts for the International Sale of Goods, C395 ALI-ABA 115 (1989) and Winship, *supra* note 12.

[25] *See* CISG, *supra* note 7, art. 79.

[26] *See id.*

[27] *See id.* Although article 79 governs the doctrine of excuse for CISG contracts, practitioners should also consider article 80 when involved in an excuse situation. *See* Honnold, *supra* note 24, §436.1 ("The legislative history of Article 80 links it closely to the rules on exemption in Article 79"); *see also* CISG, *supra* note 7, art. 80 ("A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.").

[28] CISG, *supra* note 7, art. 79(4) ("If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt."). The CISG drafters apparently placed more emphasis on the notice requirement for excuse than they did for other CISG issues. For example, under article 79, if the other party does not receive notice "within a reasonable time," the non-performing party is liable for damages related to the non-receipt, *id.*; whereas, under article 27 "a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication." *Id.* art. 27.

the other party retains the right to "avoid" the contract upon a "fundamental breach" pursuant to other provisions in the CISG.[29] Furthermore, the other party retains additional rights such as [page 386] the right to: (1) seek interest; (2) reduce the purchase price; and (3) seek restitution.[30]

15 Once invoked, the article 79 excuse remains in effect throughout "the period during which the impediment exists."[31] In other words, if an impediment is temporary, article 79 does not allow a permanent excuse.[32] Accordingly, if the other party has not avoided the contract the non-performing party's obligation to perform may be reinstated once the impediment disappears.

16 The CISG drafters chose the term "impediment" to denote an objective, outside force that interferes with performance.[33] According to Professor John Honnold, article 79 includes a causation element – the impediment must actually *prevent* performance.[34] Other commentators, however, have noted that article 79 also encompasses the U.S. notion of "frustration of purpose."[35] Thus, article 79 may excuse performance where an impediment either renders performance impossible or frustrates the purpose of the contract. Notably, however, article 79 does not include the Uniform Commercial Code's ("U.C.C.") doctrine of "commercial impracticability."[36] In addition, it is not entirely clear that frustration of purpose falls within the scope of article 79. Indeed, the plain language of article 79 suggests that it does not cover frustration of purpose because a frustration "impediment" does not obstruct performance. Instead, frustration merely makes a party not want to perform. Therefore, in order to protect clients engaging in CISG contracts, practitioners should consider including a carefully-drafted and -negotiated *force majeure* clause that covers frustration of purpose, commercial impracticability, or both.

1. Third Parties

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18 Under certain circumstances, article 79 excuses the obligation to perform if a party's non-performance arose from "the failure by a third [page 387] person whom he . . . engaged to perform the whole or a part of the contract."[37] However, the party will only be excused from liability if the non-performing party would be excused under article 79(1), and the third party would be excused if article 79(1) was applied to him.[38] Article 79(2) does not illustrate the type of third party that was intended. In addition, the article does not explain the meaning of "engaged to perform the whole or a part of the contract."[39] Thus, the scope of article 79 as applied to third parties is not entirely clear.

19 Indeed, there are several reasonable interpretations of article 79(2).[40] The reference to third parties may not include general suppliers of goods or raw materials because such preliminary steps (e.g., the supply of thread to a suit manufacturer) may not qualify as performing "the whole or a part of the con-

[29] *See id.* arts. 25, 49, 79(5); *see also* Honnold, *supra* note 24, §435.1 ("If the month's delay in delivery consistuted a 'fundamental breach' (Art. 25), Buyer may avoid the contract (Art. 49)."); Winship, *supra* note 12, at 549-50.

[30] *See* CISG, *supra* note 7, arts. 50, 78, 79(5), 81(2).

[31] *Id.* art. 79(3).

[32] *See id.*; *see also* Gabriel, *supra* note 17, at 241 (stating that "the [CISG] may not allow a total exemption if the condition is temporary").

[33] *See* Honnold, *supra* note 24, §427.

[34] *See id.* §432.1.

[35] *See, e.g.,* Henry D. Gabriel, A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code, 7 Ind. Int'l & Comp. L. Rev. 279, 280 (1997) ("Article 79 embodies the CISG's provisions for frustration of purpose and impossibility.").

[36] *See* U.C.C. §2-615 (1997).

[37] CISG, *supra* note 7, art. 79(2).

[38] *See id.* art. 79(2)(a),(b); *see also* Lookofsky, *supra* note 17, at 86-87.

[39] CISG, *supra* note 7, art. 79(2).

[40] *See* International Chamber of Commerce, *supra* note 3, at 13-14.

tract."[41] Rather, the contracting party may have to actually delegate performance – in whole or in part – to a third party such as a sub-contractor.[42] Alternatively, however, a general supplier of goods could be construed as being "engaged to perform . . . a *part* of the contract."[43] For example, even a thread supplier performs *part* of a contract for the sale of suits.

2. Unresolved Issues

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21 In drafting article 79, the drafters failed to resolve several important issues. For example, article 79 does not state whether an impediment excuses performance entirely if partial performance is possible. Logically, however, if a party can perform in part, then it should not be wholly excused from its obligation to perform; it should only be excused for the part of the contract it *cannot* perform. Also, the excuse of "any obligation" by article 79 rather than excuse of "contract performance" suggests that performance is required to the extent possible.[44] Furthermore, the CISG drafters dealt with partial performance explicitly in several other provisions; thus, the drafters probably did not intend an "all or [page 388] nothing" approach for article 79.[45]

22 In addition, article 79 does not state whether a party must accept performance once the impediment passes and the excused party's obligation to perform is reinstated. For example, suppose that a seller was excused from the obligation to perform because of an impediment – but seven months later the seller is capable of performing.[46] Article 79 makes it clear that the seller must perform, but is the buyer still obligated to perform?[47] Article 79 does not resolve this issue directly. Under article 79(5), however, the buyer retains the right to avoid the contract for a fundamental breach.[48] If the buyer avoids the contract, then its duty to take delivery should be discharged.[49] However, if the buyer does not avoid the contract, the seller could point out that the duty to take delivery impliedly is not discharged. Thus, the buyer is obligated to perform unless the seller's delay amounts to a fundamental breach.

Finally, the CISG drafters did not expressly address the doctrine of "hardship," which is related to, yet distinguishable from, the doctrine of excuse. A party faced with onerous contractual obligations may seek renegotiation of the contract by invoking the doctrine of hardship.[50] The UNIDROIT Principles incorporated the doctrine of hardship; therefore, it is worthwhile to review the UNIDROIT Principles in resolving the issue of whether hardship applies to transactions governed by the CISG. 23

[41] CISG, *supra* note 7, art. 79(2); *see also* Lookofsky, *supra* note 17, at 86-87.

[42] *See* CISG, *supra* note 7, art. 79(2); *see also* Lookofsky, *supra* note 17, at 86-87.

[43] CISG, *supra* note 7, art. 79(2) (emphasis added).

[44] *See* Honnold, *supra* note 24, §435.2 ("Article 79 does not speak of nullity of 'the contract' but instead provides that a party is not liable for failure to perform *'any'* of its *'obligations'* - language that permits exemption to the extent that the impediment applies.").

[45] *See, e.g.,* CISG, *supra* note 7, arts. 51(1) (partial delivery of goods), 73 (installment contracts); *see also* Honnold, *supra* note 24, §435.2.

[46] *See* John E. Murray & Harry M. Fletchner, Sales and Leases 80 (1994).

[47] Under the UCC, the buyer's obligation to accept performance is excused after a reasonable amount of time. *See* U.C.C. §2-616 (1997).

[48] *See* CISG, *supra* note 7, art. 79(5); *see also id.* art. 25 (defining fundamental breach).

[49] If the parties negotiated a *force majeure* clause wherein the buyer agreed to take delivery once the seller was able to perform, then the buyer would be obligated to take performance. Under these circumstances, the *force majeure* clause and article 79(5) conflict. However, the *force majeure* clause would control since the buyer contractually agreed to surrender the right to avoid the contract. *See* Murray & Fletchner, *supra* note 46, at 80.

[50] *See* generally Maskow, *supra* note 16 (discussing procedural and substantive aspects of hardship).

B. The UNIDROIT Principles

The UNIDROIT Principles are a set of commercial law principles that "set forth general rules for international commercial contracts."[51] [page 389]

While they are not part of a treaty or other binding legislative act, the Principles can be very persuasive. In essence, the Principles mirror the U.S. "Restatements," which are also non-binding. The UNIDROIT Principles may apply to international commercial contracts under a variety of circumstances, and they serve a gap-filling role for the interpretation of CISG contracts.[52] The UNIDROIT Principles include an excuse provision that parallels article 79 of the CISG.[53] In addition, however, the UNIDROIT Principles also contain provisions dealing with the civil law concept of hardship.[54]

To some extent, the concepts of excuse and hardship overlap. However, they are implemented in different ways.[55] Essentially, if a non-performing party is "excused" it is relieved of its obligation to perform without incurring liability for damages; whereas, a party facing "hardship" is entitled to request renegotiation of the contract (or even have a court impose modifications), but is not entitled to withhold performance.[56] In addition, a primary distinction between excuse and hardship is that excuse is invoked *after* non-performance, while hardship is invoked *in advance of* non-performance.

Under the UNIDROIT Principles generally, parties must perform their contractual obligations even if a change in circumstances renders performance more onerous than the parties originally anticipated.[57] Thus, the UNIDROIT Principles encompass the concept of *pacta sunt servanda* – the maxim that contractual promises must be kept.[58] As an exception, however, the UNIDROIT Principles address the concept of hardship in articles 6.2.1 through 6.2.3. Pursuant to hardship, a party may [page 390] request renegotiation of the contract if a change in circumstances is "fundamental" and will cause the party to suffer hardship absent renegotiation.[59]

Hardship occurs where "the occurrence of events fundamentally alters the equilibrium of the contract."[60] The equilibrium of a contract is altered if: (1) the cost of a party's performance has increased; or (2) the value of a party's performance has dimin-

[51] *See* UNIDROIT Principles, *supra* note 8, preamble. The UNIDROIT Principles were prepared by the International Institute for the Unification of Private Law (UNIDROIT). *See* generally *id.* UNIDROIT is an "independent intergovernmental organisation . . . [with] headquarters . . . in Rome." Michael Joachim Bonnell, An International Restatement of Contract Law 5 n.13 (1994).

[52] *See* UNIDROIT Principles, *supra* note 8, preamble. *See* generally Alejandro M. Garro, The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG, 69 Tul. L. Rev. 1149 (1995). The UNIDROIT Principles apply: (1) if the parties agreed that the principles should govern their contract; (2) if the parties agreed that general principles of law or *lex mercatoria* should govern their contract; (3) if "[t]hey may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law"; (4) to interpret or supplement international uniform law instruments; or (5) to serve as a model for legislation. UNIDROIT Principles, *supra* note 8, preamble.

[53] *See* UNIDROIT Principles, *supra* note 8, art. 7.1.7.

[54] *See id.* arts. 6.2.1-6.2.3.

[55] For an excellent discussion of the UNIDROIT Principles' *force majeure* and hardship provisions *see generally* Joseph M. Perillo, *force majeure* and Hardship Under the UNIDROIT Principles of International Commercial Contracts, 5 Tul. J. Int'l & Comp. L. 5 (1997).

[56] *See* UNIDROIT Principles, *supra* note 8, arts. 6.2.1-6.2.3, 7.1.7.

[57] *See id.* art. 6.2.1 ("Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform . . . subject to [arts. 6.2.2 and 6.2.3].").

[58] "[E]ven if a party experiences heavy losses instead of the expected profits or the performance has become meaningless for that party the terms of the contract must nevertheless be respected." *Id.* art. 6.2.1 cmt. 1.

[59] *See id.* art. 6.2.3.

[60] *Id.* art. 6.2.2.

ished.[61] However, to avoid undermining the foundations of a market economy, the reference to cost and value "should [not] lead to the result that normal economic risks can be shifted to the other party."[62] As the UNIDROIT drafters noted:

30 > "Whether an alteration is "fundamental" in a given case will of course depend upon the circumstances. If, however, the performances are capable of precise measurement in monetary terms, an alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a "fundamental" alteration."[63]

31 Thus, only substantial increases or decreases will trigger the doctrine of hardship. Furthermore, to invoke hardship a party must also show that it: (1) became aware of the events after the conclusion of the contract; (2) could not reasonably have taken the events into account when the contract was concluded; (3) did not have control of the events; and (4) did not assume the risk of the events, expressly or impliedly.[64]

32 Once hardship is established, the disadvantaged party may request renegotiation of the contract. In requesting renegotiation, the party must act "without undue delay" and must "indicate the grounds on which [the request] is based."[65] To reiterate, a party that has requested renegotiation is not entitled to withhold performance. Rather, the party must continue to perform pending renegotiation; then, if renegotiation fails, the parties can resort to the judicial system.[66] Upon a showing of hardship, the court may either: (1) enter a declaratory judgment terminating the agreement; [page 391] or (2) adapt the contract in an attempt to restore equilibrium.[67]

Thus, under the UNIDROIT Principles, a court can either terminate the parties' contract or actually re-write the contract with terms the court deems equitable. However, a judge can only terminate or adapt a contract where it is reasonable under the circumstances. Where adaptation or termination is unreasonable, "the only reasonable solution will be for the court either to direct the parties to resume negotiations with a view to reaching agreement on the adaptation of the contract, or to confirm the terms of the contract as they stand."[68] In addition, where adaptation is reasonable, the judge must use the original equilibrium of the contract "as a yardstick for adaptation."[69] 33

C. Interplay Between CISG Excuse and UNIDROIT Hardship 34

The UNIDROIT Principles serve a gap-filling role for the interpretation of CISG contracts. In sum, the UNIDROIT Principles can be used to: (1) interpret the CISG; (2) answer unresolved questions that fall within the scope of the CISG; or (3) resolve issues that are not addressed in the CISG.[70] The purpose of the UNIDROIT Principles' gap-filling role is to "preclude an easy 35

[61] *See id.*

[62] Maskow, *supra* note 16, at 662.

[63] UNIDROIT Principles, *supra* note 8, art. 6.2.2 cmt. 2.

[64] *See id.* art. 6.2.2.

[65] *Id.* art. 6.2.3.

[66] A party may not request renegotiation if the contract already includes a clause that automatically adapts the contract, e.g., a clause that automatically adjusts price upon certain circumstances. *See* UNIDROIT Principles, *supra* note 8, art. 6.2.3 cmt. 1. However, "even in such a case renegotiation on account of hardship would not be precluded if the adaptation clause incorporated in the contract did not contemplate the events giving rise to hardship." *Id.*

[67] *See id.* art. 6.2.3. Allowing a court to re-write a contract violates traditional common law views. *See* Steven R. Salbu, Evolving Contract as a Device for Flexible Coordination and Control, 34 Am. Bus. L.J. 329, 335 n.26 (1997) ("Courts rarely adjust contractual allocation of risk to coverage upon some middle ground.").

[68] Maskow, *supra* note 16, at 663.

[69] *Id.*

[70] *See* Garro, *supra* note 52, at 1155.

resort to the domestic law indicated by the conflict of law rule of the forum."[71] Thus, when the CISG does not adequately resolve a given issue, a court may look to the UNIDROIT Principles (which are international in character) rather than resort to domestic law.[72]

36 Courts have not yet decided whether the hardship provisions of the UNIDROIT Principles serve a gap-filling role for article 79 of the CISG. Arguably, however, the hardship provisions could come into play during a CISG excuse controversy since the CISG does not address the concept of hardship.[73] Although the CISG drafters opted not to include hardship provisions, their omission should not compel the conclusion that the [page 392] drafters were opposed to the concept of hardship.[74] More than likely, the delegates did not include hardship provisions because they were unable to agree on the appropriate language for the doctrine of hardship – a doctrine that is more amorphous than the impossibility-type standard in article 79.[75]

[71] *Id.* at 1152.

[72] *See* CISG, *supra* note 7, art. 7(1) (stating that "[i]n the interpretation of this Convention, regard is to be had to its international character").

[73] *See* Perillo, *supra* note 55, at 9 ("The [CISG] is silent on the question of hardship. Therefore, the UNIDROIT Principles can be used to supplement the Convention.").

[74] During negotiation of the CISG, at least one attempt was made to introduce a hardship provision. *See* Maskow, *supra* note 16, at 658 n.2 (citing the Norwegian Proposal (A/CONF.97/C.1/L.191/Rev.1 in United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, New York 1981, p. 134 and the discussion on p. 381)).

[75] *See* Garro, *supra* note 52, at 1156 ("It is conceivable to interpret the failure to address a given issue as an intention of the drafters to exclude it from the scope of application of the CISG. A more realistic explanation of the omission is the absence of consensus in UNCITRAL as to whether a particular rule or set of rules should have been incorporated into the text of the CISG."); Maskow, *supra* note 16, at 659 (noting that the concept of hardship is a political issue between developed and developing nations); *see also* Garro, *supra* note 52, at 1183 ("Because CISG article 79 provides for an exemption of liability only on account of 'impossibility' or *force majeure*, one wonders whether an alteration in the fundamental equilibrium of the contract could be construed as an impediment to performance of a contract. . . .").

37 Therefore, U.S. practitioners should realize that the UNIDROIT Principles' hardship provisions could come into play under certain circumstances. For example, a party might try to invoke hardship if the party's performance has been rendered "impracticable" but not impossible, e.g., increased costs of 70%. Thus, to avoid this potential ambiguity, practitioners should draft a *force majeure* clause that expressly addresses situations of hardship or "impracticability." Furthermore, practitioners should understand the differences between CISG excuse and UNIDROIT hardship for several reasons. First, practitioners must understand the difference between the two doctrines so they can draft their *force majeure* clauses accordingly. Second, in certain factual scenarios both excuse and hardship may apply to a party's situation.[76] When both doctrines potentially apply, the affected party chooses which remedy it would like to pursue;[77] thus, in order to make an informed choice a party must recognize the difference between the two doctrines.

38 The most critical distinction between excuse and hardship is that hardship is geared toward fulfillment of the contract; whereas, excuse is geared toward non-performance of the contract.[78] Moreover, in stark contrast to article 79 of the CISG, the UNIDROIT hardship provisions expressly address economic issues.[79] Article 6.2.2 of UNIDROIT states that [page 393] hardship is basically a "fundamental change in the

[76] *See* UNIDROIT Principles, *supra* note 8, art. 6.2.2 cmt. 6. But see Garro, *supra* note 52, at 1183 (stating that "CISG's provisions on exemption of liability for nonperformance contemplate different factual situations . . . than those envisioned by the [UNIDROIT] hardship provisions").

[77] *See* UNIDROIT Principles, *supra* note 8, art. 6.2.2 cmt. 6.

[78] *See* Maskow, *supra* note 16, at 664.

[79] *Compare* CISG, *supra* note 7, art. 79 *with* UNIDROIT Principles, *supra* note 8, art. 6.2.2.

equilibrium of the contract." In addition, article 6.2.2 states that the equilibrium of a contract is altered if the cost of performance has increased or the value of performance has diminished.[80] Thus, hardship comes into play when a disadvantaged party's obligation to perform has become more onerous, yet not impossible.

39 Conversely, article 79 of the CISG does not address economic difficulties. Instead, it requires an outside "impediment" that obstructs performance.[81] Furthermore, article 79 requires that an impediment render performance impossible (at least temporarily) or frustrate the purpose of the contract; it does not govern performance that has merely become more onerous or "impracticable."[82]

40 Finally, there are procedural distinctions that can be drawn between hardship and excuse. As mentioned previously, excuse comes into play after non-performance while hardship is invoked in advance of non-performance. In addition, when excuse is established by a party the contract may essentially end (if avoided); whereas, for hardship, the contract may be renegotiated by the parties or adapted by a judge with the intent of carrying out the contract. In the United States, "courts have not traditionally intervened to rewrite contractual allocation of risks according to equitable precepts";[83] thus, the possibility of judicial adaptation in an international contractual dispute raises concern for U.S. commercial lawyers. [page 394]

[80] *See* UNIDROIT Principles, *supra* note 8, art. 6.2.2. Article 6.2.2 does not state what percentage increase or decrease is sufficient to alter the equilibrium of a contract. However, Dietrich Maskow has suggested that an alteration of at least 50% should be required. Mr. Maskow, a German attorney, was a member of the Working Group of UNIDROIT and participated in the preparation of the UNIDROIT Principles. *See* Maskow, *supra* note 16, at 657.

[81] *See* CISG, *supra* note 7, art. 79. For discussion regarding economic difficulties and article 79 of the CISG, *see* Honnold, *supra* note 24, §432.2 (stating that article 79(1) may have left room for exemption due to economic circumstances).

[82] *See supra* Part II.A; *see also* Maskow, *supra* note 16, at 662 (discussing the UNIDROIT excuse provisions which essentially parallel article 79 of the CISG).

[83] Salbu, *supra* note 67, at 335-36 n.26. "Courts rarely adjust contractual allocation of risk to converge upon some middle ground." *Id.* at 335 n.26. But *See* U.C.C. §2-615 cmt. 6 (1997) (stating that under certain circumstances adjustment of the contract may be necessary). "Civil law systems are much more willing to adjust the obligations of contracts on account of unforeseen supervening events." Daniel J. Bussel, Liability for Concurrent Breach of Contract, 73 Wash. U. L.Q. 97, 131 n.115 (1995). One exception is *Aluminum Co. of America v. Essex Group, Inc.,* 499 F. Supp. 53 (W.D. Pa. 1980), where a federal district court in Pennsylvania reformed the price terms of a long-term agreement for the supply of alumina because of considerable increase in price. *See id.* at 73; Bussel, *supra*, at 131 n.116.

III. Excuse Doctrine in the United States and the CISG

In order to fully understand the CISG doctrine of excuse and UNIDROIT hardship, it is helpful to compare the CISG to the U.S. doctrine of excuse. Thus, a brief review of U.S. commercial law is warranted. In the United States, commercial contracts impose legally binding obligations on contracting parties. As a result, any party that fails to perform its contractual obligations may be liable for damages.[84] Under the doctrine of excuse, however, a party's obligation to perform can be excused where unforeseen obstacles render performance impracticable, impossible or frustrate the purpose of the contract.[85] Essentially, when performance is excused, the non-performing party is relieved from its obligation to perform without incurring liability for damages. In general, courts will excuse a party's obligation to perform in a contract for the sale of goods if performance has become "commercially impracticable." In order to determine whether performance is commercially impracticable in a contract for the sale of goods, U.S. courts apply section 2-615 of the U.C.C.[86]

[84] *See, e.g.,* U.C.C. §§2-703 to 2-715 (1997) (governing damages in contracts for the sale of goods).

[85] *See, e.g.,* Wagner, *supra* note 1, at 55 (discussing the rule of *pacta sunt servanda* and the impossibility defense). The doctrine of excuse collectively refers to three separate concepts: impossibility, impracticability and frustration of purpose. Broad discussion of the concepts of impossibility and frustration of purpose are beyond the scope of this paper. For further discussion on these doctrines, *see generally* P.J.M. Declercq, Modern Analysis of the Legal Effect of *Force Majeure* Clauses in Situations of Commercial Impracticability, 15 J.L. & Com. 213 (1995) and Susan E. Wuorinen, Comment, Northern Indiana Public Service Company v. Carbon County Coal Company; Risk Assumption in Claims of Impossibility, Impracticability, and Frustration of Purpose, 50 Ohio St. L.J. 163 (1989). *see also* Restatement (Second) of Contracts §§261-65 (1979).

[86] *See* U.C.C. §2-615 (1997). Article two of the U.C.C. applies to contracts for the sale of goods. *See id.* §2-102. As a general rule, courts apply the commercial law doctrines of impossibility, commercial impracticability and frustration of purpose to non-U.C.C. contracts in order to determine whether a party's performance should be excused. *See* Restatement (Second) of Contracts §§261-65 (1979).

[87] *See* U.C.C. §2-615 (1997). The U.C.C. drafters deliberately chose the term "commercial impracticability" as the standard for excuse rather than the more traditional concepts of "impossibility" and "frustration" to emphasize the commercial nature of the criteria in section 2-615. *See id.* cmt. 3; *see also* Murray & Flechtner, *supra* note 46, at 272. Section 2-615 states in pertinent part that:

"Except so far as a seller may have assumed a greater obligation . . .:
(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 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 also 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. . . ." *Id.*

[88] Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966); *see also* U.C.C. §2-615 (1997); Declercq, *supra* note 85, at 218.

A. Impracticability

Under section 2-615 of the U.C.C., a seller may be excused, in whole or in part, for late or non-delivery if the seller's performance has become "commercially impracticable."[87] In order to successfully invoke [page 395] section 2-615, the seller must establish that: (1) an unexpected event or a "contingency" occurred; (2) the nonoccurrence of the contingency was a basic assumption of the contract, i.e., "the risk of the unexpected occurrence must not have been allocated either by agreement or by custom"; and (3) the occurrence rendered performance impracticable.[88] In addition, the seller must show that it did

not by agreement assume "greater liability" than the law imposes.[89]

1. Impracticable

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46 The drafters of section 2-615 declined the opportunity to provide an exhaustive list of contingencies that would render performance commercially impracticable. Instead, the drafters enunciated a framework for courts and instructed them to consider the "the underlying reason and purpose" of section 2-615 in deciding whether performance has become impracticable.[90] However, although the framework is not clearly defined, the comments to section 2-615 set broad parameters for courts to employ in deciding whether performance is impracticable. For example, comment 4 states that "[i]ncreased 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."[91] Similarly, market changes alone will not render performance impracticable in long-term, fixed-price contracts, because the risk of market changes is the exact risk that fixed-price contracts are intended to cover.[92] Conversely, "a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, [page 396] . . . or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies" will render performance impracticable.[93] Thus, increased price or costs only give rise to impracticability if the increase was triggered by an unanticipated contingency, such as war, rather than factors such as decreased demand for a product or other market fluctuations.

[89] U.C.C. §2-615 cmt. 8; Declercq, *supra* note 85, at 218.

[90] U.C.C. §2-615 cmt. 2.

[91] *Id.* cmt. 4.

[92] *See id.*

[93] *Id.*

2. Basic Assumption

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48 The requirement that the non-occurrence of a contingency be a "basic assumption" of the contract is essentially an evaluation of risk allocation. In order to determine whether the non-occurrence of a contingency was a basic assumption, courts generally consider whether the contingency was foreseeable to the parties.[94] As a general rule, a party assumes the risk of any contingency that was foreseeable at the time of contracting if that party failed to allocate the risk of the foreseeable contingency to the other party. The assumption of the risk rule is based on the presumption that it is unreasonable for a party to rely on the nonoccurrence of a foreseeable event. Instead, parties are expected to allocate the risk of foreseeable events when drafting their contract. Conversely, however, "[c]ertain events such as death, acts of God, war, revolution, destruction of subject matter of the contract, and intervening government action prohibiting performance are commonly considered events 'the non-occurrence of which' are assumed by the parties."[95] Thus, it is reasonable for parties to rely on the nonoccurrence of unlikely events, e.g., war, and the occurrence of such an event will often excuse performance.

49 Notably, section 2-615 does not explicitly state that a contingency must be unforeseeable in order to render performance impracticable. Furthermore, comment 1 to section 2-615 states

[94] *See id.* cmt. 1 ("This section excuses a seller from . . . [performing] where his performance has become commercially impracticable because of *unforeseen* supervening circumstances not within the contemplation of the parties at the time of contracting.") (emphasis added); *see also* Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 318-19 (D.C. Cir. 1966) (discussing foreseeability); Declercq, *supra* note 85, at 219 (discussing three different groups of basic assumptions).

[95] Bussel, *supra* note 83, at 130 (footnotes omitted).

that a seller's obligation to perform may be excused if an *"unforeseen* supervening contingency" renders performance commercially impracticable.[96] Therefore, by requiring that a contingency be unforeseeable, some courts have twisted the drafters' explicit requirement that a contingency be unforeseen.[97] Arguably, [page 397] to some extent every imaginable event is somewhat foreseeable;[98] thus, applying the objective concept of foreseeability may restrict the availability of section 2-615 more than the drafters intended. For example, the drafters noted that "a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, [or] local crop failure is within the contemplation of [section 2-6l5]."[99] Arguably, even these unlikely events are somewhat foreseeable, yet not every party would reasonably foresee such events.

50 ## 3. Greater Liability

51 The provisions of section 2-615 "are made subject to assumption of greater liability by agreement."[100] Thus, section 2-615 will not excuse performance for a seller that has assumed the risk of the occurrence that the seller is claiming should excuse performance.[101] To determine whether the parties have reached an agreement regarding greater liability, courts will consider: (1) the express terms of the contract; (2) the circumstances surrounding the contract; and (3) trade usage.[102]

52 Whether a seller agreed to greater liability is an issue of risk allocation. If the non-performing party assumed the risk of the event that makes performance more difficult, the party will not be excused. For example, parties often agree to assume the risk of market price changes or fluctuating exchange rates.[103] Assuming greater liability by agreement differs from the basic assumption element, which also deals with risk allocation, because the non-performing party assumes the risk of a contingency pursuant to an agreement, rather than foreseeability. For example, in *Bernina Distributors, Inc. v. Bernina Sewing Machine Co.,*[104] the court [page 398] refused to excuse an importer's performance when fluctuating exchange rates decreased its anticipated profit margin.[105] Under the parties' contract, the importer could only increase the price of the machines that it resold to American distributors to the extent that the importer's own costs increased.[106] In reaching its decision, the court stated that refusing to excuse the importer was proper because the importer had assumed the risk of currency fluctuations by not mentioning this risk as one that would justify

[96] *See* U.C.C. §2-615 cmt. 1.

[97] *Compare* Christopher J. Constantini, Comment, Allocating Risk in Take or Pay Contracts: Are *force majeure* and Commercial Impracticability the Same Defense?, 42 Sw. L.J. 1047, 1058 (1989) ("Courts generally view the occurrence of a foreseeable contingency on the presumption that the burdened party implicitly agreed to bear the risk occasioned by the event.") *with* Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129, 134-35 (N.D. Iowa 1978), *rev'd on other grounds,* 603 F.2d 1301 (8th Cir. 1979) (stating that new regulations were somewhat *unforeseen*).

[98] *See* Murray & Flechtner, *supra* note 46, at 273 ("In one sense, almost anything is foreseeable. Perhaps the standard should be 'unexpected' rather than 'unforeseen.'").

[99] *See* U.C.C. §2-615 cmt. 4 (1997).

[100] *Id.* cmt. 8.

[101] *Id.*; *see also* Constantini, *supra* note 97, at 1059 (discussing assumption of greater liability).

[102] U.C.C. §2-615 cmt. 8 (1997) (stating that an agreement can be found "not only in the expressed terms of the contract but in the circumstances surrounding the contracting, in trade usage and the like").

[103] *See, e.g.,* Bernina Distrib., Inc. v. Bernina Sewing Mach. Co., 646 F.2d 434 (10th Cir. 1981).

[104] 646 F.2d 434 (10th Cir. 1981).

[105] *See id.* at 439; Constantini, *supra* note 97, at 1059 (discussing the *Bernina* decision).

[106] *See* Bernina Distrib. Inc., 646 F.2d at 436, 439; Constantini, *supra* note 97, at 1059.

a price increase.[107] Thus, the court did not base its decision solely on foreseeability; instead, the court also looked to the parties' contract.

B. *Force majeure*

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54 The concept of *force majeure* resembles commercial impracticability and generally refers to "superior force[s]"[108] or circumstances that are "beyond the control and without the fault or negligence" of the non-performing party.[109] When *force majeure* circumstances obstruct performance, a party may be excused from performing without incurring liability for damages.[110] As a general rule, the obligation to perform is suspended throughout the duration of the *force majeure* event, and if performance becomes "essentially impossible" the contract may terminate.[111]

55 While it is undisputed that *force majeure* applies to contracts governed by the U.C.C., determining which events qualify as *force majeure* can be very challenging for courts.[112] However, contracting parties can [page 399] define the scope of *force majeure* by including *force majeure* clauses in their contracts. In sum, *force majeure* clauses define the circumstances sufficient to excuse performance under the contract and the degree to which those circumstances must interfere with performance.[113] Common examples of *force majeure* include: (1) Acts of God; (2) unforeseen circumstances; (3) governmental or judicial actions; and (4) epidemics.[114] Thus, *force majeure* clauses provide a specific, negotiated framework that courts can use when applying the doctrine of excuse.[115] Therefore, by including

[107] *See* Bernina Distrib. Inc., 646 F.2d at 439; Constantini, *supra* note 97, at 1059.

[108] Squillante & Congalton, *supra* note 2, at 5 ("'There is no ground for damages and interest, when by consequence of a superior force or of a fortuitous occurrence, the debtor has been prevented from [performing] . . . .'") (quoting §1148 of the French Civil Code from which the concept of *force majeure* is derived).

[109] United States v. Brooks-Callaway Co., 318 U.S. 120, 123-24 (1943); *see also* John S. Kirkham, *force majeure* - Does it Really Work?, 30 Rocky Mtn. Min. L. Inst. §6.01, §6.02 (1984) (noting the "literal translation of the French term '*force majeure*' and other related French phrases into the English equivalent of 'superior force,' 'unforeseen event,' . . . and 'a fact or accident' which human prudence can neither foresee nor prevent.").

[110] Originally, *force majeure* only excused performance when Acts of God rendered performance literally impossible. However, the concept of *force majeure* has evolved and now includes events that render performance "impracticable" or extremely burdensome. *See* Declercq, *supra* note 85, at 214.

[111] Monroe Leigh, *force majeure*-Frustration of Contract-Monetary Consequences, 79 Am. J. Int'l L. 148, 148 (1985) (discussing Gould Mktg., Inc. v. Ministry of Defense of Iran, a decision of the Iran-U.S. Claims Tribunal).

[112] *See* Squillante & Congalton, *supra* note 2, at 4-5. Arguably, a non-performing party could claim that *force majeure* automatically applies to a contract because section 1-103 of the U.C.C. states that general principles of law apply "[u]nless displaced by the particular provisions of this Act." U.C.C. §1-103 (1997). However, in certain situations, *force majeure* may be displaced by section 2-613, the section governing casualty to identified goods. *See* U.C.C. §2-613; Squillante & Congalton, *supra* note 2, at 4-5 (discussing §2-613). For example, if identified goods are completely destroyed (e.g., by fire) without the fault of either party, then section 2-613 applies rather than *force majeure*.

[113] A *force majeure* clause can be drafted in two different ways. Under the traditional framework, performance would only be excused if a *force majeure* event actually prevented performance. However, a drafter may state that performance may be excused if a *force majeure* event rendered performance impracticable. *See* Declercq, *supra* note 85, at 242 (discussing "the actual prevention-approach" and "the so called unable - impracticable approach").

[114] *See, e.g.,* Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc., 729 F.2d 1530, 1539 (5th Cir. 1984); Harris Corp. v. National Iranian Radio & Television, 691 F.2d 1344, 1347 n.5 (11th Cir. 1982); Kirkham, *supra* note 109, §6.03. Notably, some *force majeure* clauses are written in more general terms and, therefore, do not delineate specific circumstances. *See, e.g.,* Sabine Corp. v. ONG Western Inc., 725 F. Supp. 1157, 1166 (W.D. Oka. 1989).

[115] *See* Kirkham, *supra* note 109, §6.02(2) ("The fundamental purpose of the *force majeure* concept in legal relationships is to provide an established

force majeure clauses in their contracts, parties enhance their ability to predict when performance will be excused.

56 However, even if a contract has a *force majeure* clause and a *force majeure* event stated in the clause occurs, a court will not automatically excuse performance. Rather, in order to invoke a *force majeure* clause a party must establish that the excusing event: (1) actually prevented performance; and (2) was not reasonably within the control of the non-performing party.[116] The term "reasonable control" involves two separate aspects. First, "a party may not affirmatively cause the event that prevents his performance."[117] Second, the non-performing party must have taken "reasonable steps" to prevent the excusing event.[118] Thus, to invoke a *force majeure* clause the non-performing party must establish that [page 400] it neither caused the *force majeure* event nor sat back and watched the *force majeure* event occur while neglecting effective countermeasures.

57 Once *force majeure* is invoked, courts will enforce a *force majeure* clause unless it is "manifestly unreasonable."[119] However, comment 8 states that where *force majeure* clauses are drafted to "enlarge upon or supplant" section 2-615 of the U.C.C., they are "read in the light of mercantile sense and reason."[120] Thus, based on one interpretation of comment 8, if a *force majeure* clause will excuse performance in situations where §2-615 would not (or vice versa) then the clause could be subject to greater scrutiny. "[S]ection [2-615] itself sets up the commercial standard for normal and reasonable interpretation and provides a minimum beyond which an agreement may not go."[121]

C. Interplay Between Impracticability and *force majeure* 58

59 The doctrine of commercial impracticability codified in section 2-615 of the U.C.C. does not prevent parties from agreeing to a broader *force majeure* clause.[122] Parties can adopt a lower standard for excuse by negotiating a *force majeure* clause that excuses performance under circumstances where performance would not be excused under section 2-6l5.[123] For example, parties may agree that performance is excused although the

legal standard by which the doctrine of excuse can be implemented and the risks inherent in everyday life can be allocated and managed.").

[116] *See* Kirkham, *supra* note 109, §6.05(2) (citing *Nissho-Iwai,* 729 F.2d at 1540 (interpreting California's version of U.C.C. §2-615)). But *see* PPG Indus., Inc. v. Shell Oil Co., 919 F.2d 17, 18-19 (5th Cir. 1990) (stating that a reasonable control requirement does not exist unless state law requires or unless explicitly stated in a *force majeure* clause).

[117] *Nissho-Iwai,* 729 F.2d at 1540.

[118] *Id.*

[119] *PPG Indus.,* 919 F.2d at 19 (discussing U.C.C. §1-102, reasonableness and good faith).

[120] U.C.C. §2-615 cmt. 8 (1997). What the drafters intended by "mercantile sense and reason" is not entirely clear. For example, the drafters did not specify "[w]hose 'mercantile sense and reason' is decisive: that of the drafters of the U.C.C., that of courts . . . or that of the parties." Declercq, *supra* note 85, at 224-25. At least one court has held that the parties' mercantile sense and reason controls. *See PPG Indus.,* 919 F.2d at 19.

[121] U.C.C. §2-615 cmt. 8 (1997).

[122] *See, e.g., PPG Indus.,* 919 F.2d at 18-19; Interpetrol Bermuda Ltd. v. Kaiser Aluminum Int'l Corp., 719 F.2d 992, 999-1000 (9th Cir. 1984); Jon-T Chems., Inc. v. Freeport Chem. Co., 704 F.2d 1412, 1414-15 (5th Cir. 1983). Although the concept of *force majeure* now includes situations of impracticability, as originally adopted the concept was more strict than section 2-615 because it required that performance be impossible. *See* Declercq, *supra* note 85 at 214 ("It is far from unusual for the text of a *force majeure* clause to contain a reference to commercial impracticability or to include situations of 'hardship' in the definition.") *But see* Constantini, *supra* note 97, at 1048 (arguing that a *force majeure* clause should not excuse performance that is merely "impracticable").

[123] Under these circumstances, the *force majeure* clause would probably be subject to greater judicial scrutiny. *See supra* notes 115-16 and accompanying text.

excusing event was not beyond the non-performing party's control.[124] In addition, parties may agree that performance is excused although the *force majeure* event was foreseeable.[125] [page 401]

60 In *PPG Industries, Inc. v. Shell Oil Company,* the Fifth Circuit Court of Appeals excused Shell Oil Company from its obligation to perform under an ethylene delivery contract with PPG Industries, Inc.[126] A *force majeure* clause in the parties' contract stated that "[e]ither seller or buyer will be excused from [performance] to the extent that the performance is delayed or prevented by any of circumstances . . . *reasonably beyond its control or by*. . . *explosion*."[127] The Fifth Circuit held that Shell's performance was excused due to an explosion although the explosion was not "beyond the reasonable control" of Shell.[128] In reaching its decision, the Fifth Circuit noted that section 2-615 of the U.C.C. did not impose a control requirement on *force majeure* clauses.[129] Therefore, since the *force majeure* clause did not explicitly state that an explosion must be beyond the party's control to excuse performance, the court refused to impute such a restriction.[130]

61 Notably, if the parties did not have a *force majeure* clause, section 2-615 probably would not have excused performance in *PPG Industries* because the clause was more broad (i.e., excused performance under more circumstances) than §2-615. In particular, the clause applied irrespective of whether the *force majeure* event was reasonably beyond the party's control; indeed, the fire was not reasonably beyond Shell's control.[131] Conversely, §2-615 would only apply if Shell proved that the explosion was an unforeseen contingency and that the nonoccurrence of an explosion was a basic assumption of the contract – a daunting task.

62 In *Sabine Corporation v. ONG Western, Inc.,* a federal district court held that ONG Western, Inc. was excused from performing under its take-or-pay contract with Sabine Corporation although the excusing event was foreseeable.[132] In reaching its decision, the court reasoned that foresecability was irrelevant since the parties' *force majeure* clause did not require that an event be unforeseeable to excuse performance.[133] As in *PPG Industries,* if the parties had not included a *force majeure* clause in their contract, section 2-615 probably would not have excused performance because the contingency was foreseeable. [page 402]

63 Thus, in drafting *force majeure* clauses, parties have numerous issues to negotiate including *force majeure* events, foreseeability and control. Furthermore, parties must decide whether the clause will be the "exclusive" excuse doctrine or whether commercial impracticability will still apply.[134] For example, rather than drafting a *force majeure* clause to supplement section 2-615, contracting parties can agree to opt out of section 2-615 altogether and displace it with a contractual *force majeure* provision – provided that their intentions are explicitly stated in the

[124] *See PPG Indus.,* 919 F.2d at 18.
[125] *See* Sabine Corp. v. ONG Western, Inc., 725 F. Supp. 1157, 1170 (W.D. Okla. 1989); *see also* Declercq, *supra* note 85, at 237 ("[I]t has been stated that if it is not specified anywhere in the *force majeure* clause that an event or cause must be unforeseeable to be a *force majeure* event, the foreseeability test should not be applied to the clause.").
[126] *See* PPG Indus., 919 F.2d at 19.
[127] *Id.* at 18 n.1 (emphasis added).
[128] *Id.*
[129] *See id.*
[130] *See id.*
[131] *See* PPG Indus., Inc. v. Shell Oil, Inc., 727 F. Supp. 285, 287-88 (E.D. La. 1989), *aff'd,* 919 F.2d 17 (5th Cir. 1990) (noting that the explosion occurred at the Shell oil refinery).
[132] Sabine Corp. v. ONG Western, Inc., 725 F. Supp. 1157, 1191 (W.D. Okla. 1989).
[133] *See id.* at 1170.
[134] *See* Declercq, *supra* note 85, at 227-29.

contract.[135] Since section 2-615 does not provide a laundry list of excusing events, contracting parties may prefer this approach, because they could negotiate a *force majeure* clause that delineates acceptable excuses.[136] Accordingly, only the listed excuses would relieve a party from its obligation to perform.

64 ## D. How the U.S. Doctrine of Excuse Differs from the CISG Doctrine

65 Section 2-615 of the U.C.C. differs from article 79 of the CISG in several ways. First, the CISG is much closer to the civil law approach to excuse and in some ways is more permissive than the common law approach in section 2-615 of the U.C.C.[137] On its face, section 2-615 only provides an excuse for sellers.[138] In addition, section 2-615 only excuses two aspects of performance – delayed delivery and non-delivery.[139] In stark contrast, article 79 of the CISG excuses all aspects of either party's performance.[140] [page 403]

66 Second, the extent of the excuse afforded by article 79 differs from section 2-6l5. For example, article 79 does not explicitly state whether an impediment excuses the entire obligation to perform where partial performance would be possible. In contrast, section 2-615 specifically states that "[a]n excused seller must fulfill his contract to the extent which the supervening contingency permits."[141]

67 Third, article 79 is restricted to situations of impossibility or frustration of purpose – it does not excuse performance that has become more difficult than originally anticipated.[142] Section 2-615, however, does excuse performance that has become more difficult or "impracticable." An Italian decision that discussed article 79 of the CISG illustrates this distinction. In *Nuova Fucinati S.P.A. v. Fondmetall International A.B.,*[143] an Italian seller sought to be excused from an international contract for the sale of ironchrome "Lumpy."[144] The seller argued that it was impossible to deliver the Lumpy, in part, because "the price on the international market rose remarkably and un-

[135] *See* U.C.C. §1-102(3) (1997); *see also* Squillante & Congalton, *supra* note 2, at 7.

[136] *See* Squillane & Congalton, *supra* note 2, at 8.

[137] *See* Gabriel, *supra* note 17, at 241; *see also* Barry Nicholas, *force majeure* and Frustration, 27 Am. J. Comp. L. 231 (1979). Joseph Lookofsky has suggested that the "[c]ivilian view surely prevailed as regards the *effect* of a 'legal' excuse." Lookofsky, *supra* note 17, at 77.

[138] *See* U.C.C. §2-615 (1997) ("Except so far as a *seller* may have assumed a greater obligation . . . [d]elay in delivery or non-delivery in whole or in part by a *seller*. . . is not a breach . . . if performance as agreed has been made impracticable . . . .") (emphasis added); *see also* Gabriel, *supra* note 17, at 241. *But see* Lookofsky, *supra* note 17, at 96 (noting that under certain circumstances buyers may qualify for exemption due to comment 9 to section 2-615).

[139] *See* U.C.C. §2-615 (stating that a seller's "[d]elay in delivery or non-delivery in whole or in part" may be excused).

[140] *See* CISG, *supra* note 7, art. 79(1) ("A *party* is not liable for a failure to perform *any of his obligations* if . . . [the party is excused].") (emphasis added); *see also* Gabriel, *supra* note 17, at 242. "Article 79 of the Convention follows the approach of most civil law systems in extending the rules on excuse to all aspects of a party's performance. Either party may be excused from liability 'for a failure to perform any of his obligations.'" Gabriel, *supra* note 35, at 308 (quoting CISG, *supra* note 7, art. 79(1)).

[141] U.C.C. §2-615 CMT. 11 (1997).

[142] *See* Gabriel, *supra* note 35, at 307 ("Article 79 embodies the CISG's provisions for frustration of purpose and impossibility.").

[143] Tribunale Di Monza, 14 Gennaio 1993, Laudisio Presidente, Lapertosa Estensore, Nuova Fucinati S.P.A. (Avv. Bassi, Santamaria) C. Fondmetall International A.B. (Avv. Bianchi, Ginelli, Rossi), 15 J.L. & Com. 153 (1995) [hereinafter *Nuova*] (case translation by Alessandra Michelini) (stating that article 79 excuses performance rendered impossible by a supervening impediment but does not excuse performance that has become excessively onerous).

[144] *Id.* at 154; *see* also Todd Weitzmann, Recent Development Relating to CISG: Validity and Excuse in the U.N. Sales Convention, 16 J.L. & Com., 265, 286-89 (1997) (discussing the *Nuova* decision).

foreseeably" and caused "excessive onerouness."[145] The court rejected his argument on the ground that "the excessive onerousness doctrine [e.g., an impracticability-type standard] does not fit within the structure of the Convention."[146] Incidentally, the parties' contract apparently did not include a *force majeure* clause.[147] Presumably, if the contract included a *force majeure* clause that excused performance on the ground of impracticability, the seller may have been excused.

68 Finally, the civil law concept of "hardship" could arise in an article 79 situation if a court decided that the UNIDROIT Principles' hardship provisions serve a gap-filling role for the CISG. Therefore, if hardship [page 404] was invoked, the parties' contract could be terminated or adapted if renegotiation between the parties was unsuccessful. In contrast, U.S. parties typically do not renegotiate contracts and U.S. courts typically do not adapt or "re-write" contracts pursuant to section 2-615.

69 Nevertheless, although article 79 of the CISG and section 2-6l5 of the U.C.C. appear to differ dramatically, "[t]he differences are not as great as a literal reading of the two codes would suggest."[148] Thus, the overall results may be substantially similar under both doctrines. For example, under the U.C.C., a buyer would be able to invoke the frustration of purpose doctrine contained in the Restatement (Second) of Contracts.[149] Furthermore, by including a carefully-negotiated and -drafted *force majeure* clause, practitioners can meet their clients' needs under the CISG doctrine of excuse. However, to protect clients, practitioners must understand how *force majeure* clauses relate to the CISG.

[145] *Nuova, supra* note 143, at 154.

[146] *Id.* at 156. The court ultimately held that the CISG did not apply to the dispute, however, the court stated: "It is clear that, if the Convention applied to the contract in this case, one could not as a matter of law defend on the basis of the supervening excessive onerousness of the seller's obligation to deliver . . . ." *Id.*

[147] *See* Weitzmann, *supra* note 144, at 287.

[148] Gabriel, *supra* note 35, at 280.

[149] *See* Restatement (Second) of Contracts §265 (1979); Gabriel, *supra* note 17, at 242. The doctrine of frustration of purpose could be incorporated into a U.C.C. contract under section 1-103 of the Code. In addition, courts often excuse buyers' performance pursuant to section 2-615 although the section does not explicitly mention buyers. *See, e.g.,* Constantini, *supra* note 97, at 1057 n.89 ("Most courts, however, have determined that §2-615 does apply to buyers.") (citing Northern Indiana Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 277 (7th Cir. 1986); International Minerals & Chem. Corp. v. Llano, Inc., 770 F.2d 879 (10th Cir. 1985)).

IV. Force majeure Clauses and the CISG

In general, *force majeure* clauses that parties include in their CISG contracts either supplement article 79 or "limit or supplant the [a]rticle 79 default rule."[150] Therefore, if a party's performance is not excused pursuant to an event delineated in the *force majeure* clause, it could still be excused pursuant to article 79 (and vice versa). Under most circumstances, parties should include a *force majeure* clause in their contract to provide greater predictability and more appropriate protection than the doctrine of excuse governing the transaction – usually article 79.

A. The Need for a *Force Majeure* Clause

force majeure clauses can provide increased protection for clients in several ways. For example, article 79 does not explicitly state whether an impediment excuses performance if partial performance is possible. Thus, the parties could draft a *force majeure* clause that explicitly states that a party must perform to the extent possible. By negotiating the issue of [page 405] partial performance in advance, parties can avoid expensive litigation down the road.

Similarly, parties could include a *force majeure* clause to overcome the obstacle of foreseeability. To some extent, every impediment is foreseeable;[151] and where certain situations or "impediments" are foreseeable, parties generally assume their risk unless explicitly allocated in the contract.[152] Therefore, since a *force majeure* clause in a CISG contract may limit or supersede the applicability of article 79, parties could negotiate *force majeure* excuses without regard to foreseeability.[153] Thus, even if a party could not claim excuse under article 79 – because the impediment was foreseeable the party could be excused by an event delineated in the *force majeure* clause.

The illustrations provided above do not exhaust the benefits that *force majeure* clauses provide for international contracts for the sale of goods. *force majeure* clauses can be tailored to meet the needs of parties, to account for exceptional circumstances, and to compensate for inadequate protection by the applicable doctrine of excuse. However, in order to protect clients, practitioners should negotiate and draft the clauses very carefully. In particular, practitioners should consider the following tips when drafting *force majeure* clauses.

B. Drafting Advice for Practitioners

1. Pre-Drafting Issues

In general, drafters should fight the urge to "read the patterns of their domestic law" into the clause.[154] For example, drafters should avoid using U.S. "terms of art" and should remember that the English version is only one of six official versions of the CISG.[155]

Also, before drafting a *force majeure* clause in a CISG contract,

[150] Lookofsky, *supra* note 17, at 84, 85 (stating that article 79 is a "gap-filling rule" and that parties can draft a "more lenient *force majeure* clause").
[151] *See* Lookofsky, *supra* note 17, at 85 (stating that "nearly all potential impediments to performance - even wars, fires and embargoes (let alone late trains and defective goods) - are 'forseeable' to some degree").
[152] *See* CISG, *supra* note 7, art. 79(1) (stating that a party is only excused for an impediment that the party "could not reasonably be expected to have taken . . . into account at the time of the conclusion of the contract"); *see also* Declercq, *supra* note 85, at 236-37 (advising drafters to eliminate foreseeability).
[153] *See* Lookofsky, *supra* note 17, at 84.
[154] Honnold, *supra* note 24, §429.
[155] *See* Crawford, *supra* note 23, at 190 (noting that "the English version of the Convention is only one of six equally authentic versions (the others being Arabic, Chinese, French, Russian and Spanish)").

the drafter should evaluate the specific purpose that the clause is intended to [page 406] serve.[156] If article 79 of the CISG would serve that purpose a *force majeure* clause may be unnecessary and would waste valuable time and money.[157] However, if article 79 would not serve the purpose, the drafter should proceed to draft a specially-tailored *force majeure* clause.

80 In addition to considering purpose, drafters should assess the impact that the international character of the contract might have on perfomance, e.g., longer distances, the involvement of two separate governments, currency exchange, and diplomacy. The international character may dictate a need for greater protection, i.e., a broader excuse provision.

81 Finally, drafters should avoid using "fine print" *force majeure* clauses hidden within the contract because they may raise issues of fairness and good faith.[158] Instead, drafters should make sure that a negotiated clause "looks like an element of the bargain which the parties at arm's length did arrive at."[159] Along the same lines, both parties should participate equally in drafting a *force majeure* clause to promote "[p]rinciples of efficiency and fairness."[160] By negotiating the clause together at the outset, the parties may avoid litigation later.

82 ## 2. Procedural Issues

83 The *force majeure* clause should explicitly state what the performing party must do in order to properly invoke the clause.[161] For example, the clause may require that the non-performing party give notice of its inability to perform to the other party.[162] Where notice is required, the drafter should state whether notice becomes effective on dispatch or upon receipt. In addition, the drafter should address other notice issues, including: (1) time limits; (2) whether notice must be written; (3) the consequences of failure to give notice; and (4) when the excusing event is deemed to have occurred, i.e., when the duty to give notice arises. [page 407]

3. Substantive Issues 84

a. Specificity 85

Drafters must decide whether to list specific *force majeure* 86 events, include a "catchall" category, or both.[163] Courts may be more willing to give effect to "laundry list" *force majeure* clauses that contain specific events, rather than to a catchall or combination-type clause for several reasons.[164] First, a clause that merely lists general categories leaves judges discretion and, in certain situations, they could refuse to excuse performance since they are not bound by specified events. For example, if a clause states that "severe weather" will excuse the obligation to deliver, a judge could find that an "ice storm" does not amount to severe weather (although it might freeze the wings of the seller's airplane, thereby obstructing delivery).

[156] *See* Kirkham, *supra* note 109, §6.05(2).
[157] *See* Declercq, *supra* note 85, at 225 (suggesting that a *force majeure* clause that does not differ from the applicable doctrine of excuse "adds nothing to the contract").
[158] *See* Squillante & Congalton, *supra* note 2, at 43.
[159] *Id.*
[160] Honnold, *supra* note 24, §424.
[161] *See* Kirkham, *supra* note 109, §6.05(2)(a). Incidentally, a party seeking to invoke a *force majeure* clause should be prepared to establish all of the procedural elements stated in the clause before invoking the clause.
[162] *See, e.g.,* CISG, *supra* note 7, art. 79(4); U.C.C. §2-615(c) (1997).
[163] *See, e.g.,* Declercq, *supra* note 85, at 232.
[164] *See, e.g., id.* at 225 (noting that when a contract "includes only a standard, boilerplate, catch-all *force majeure* provision, it might be hard to distinguish the contract term from the legal [impracticability] doctrine" and that judges will assume "that the language of the excuse clause only duplicates the standards found in U.C.C. Section 2-615").

Second, under rules of construction, namely *ejusdem generis,* courts have refused to excuse performance for events that are dissimilar to events specifically listed in the clause (e.g., economic factors).[165] Including a general catchall provision, therefore, may be a wasted effort.

87 Fortunately, there are ways to counteract these obstacles. The drafter could state that the catchall provision covers "any other event, *whether or not similar to* the causes specified above."[166] Similarly, the drafter could avoid leaving room for judicial discretion in the laundry list approach by listing very precise events. For example, rather than stating "government actions" – when the parties intend that only government actions affecting the quantity of permissible exports will excuse performance – the clause could state "governmental actions affecting export quantity" or "governmental actions other than those affecting price." However, when the laundry list approach is utilized, the drafier should consider phrasing it as "including, but not limited to . . ." Otherwise, a court could interpret the clause as excluding any event not specifically listed in the clause. [page 408]

88 In addition to defining *force majeure* events, the drafter should resolve any uncertainty left by article 79. For example, the parties could define what they mean by "third parties." The clause should also explicitly state whether a *force majeure* event excuses performance permanently or only temporarily.[167] Moreover, the clause should address timing issues. For instance, if performance is only excused temporarily, the clause could state in general terms when the obligation will be reinstated. Finally, the clause should state whether the civil law concept of hardship applies to the parties' contract.[168]

b. Scope

89

90 Drafters should define the scope of the *force majeure* clause to avoid leaving a gap in the clause. For example, if the parties intend for the *force majeure* clause to be broader (i.e., excuse performance more often) than article 79 of the CISG, then the clause should explicitly state their intention.[169] In addition, drafters should explicitly state whether the parties intend for the *force majeure* clause to be exclusive, or whether it should supplement article 79.[170] Similarly, drafters should state whether a clause is meant to be "unilateral" (applicable to only one party) or "bilateral" (applicable to both parties).[171]

91 Drafters should also specity whether a *force majeure* event must actually interfere with performance or whether prospective impracticability will be sufficient. Drafters should be aware that courts often interpret vague terms such as "unable" as setting an impracticability standard.[172] Thus, drafters should clearly state what degree of interference with performance is

[165] *See, e.g.,* Langham-Hill Petroleum, Inc. v. Southern Fuels Co., 813 F.2d 1327, 1329-30 (4th Cir.), *cert. denied,* 108 S. Ct. 99 (1987); Declercq, *supra* note 85, at 234.

[166] Nissho-Iwai, Co., Ltd. v. Occidental Crude Sales, 729 F.2d 1530, 1539 (5th Cir. 1984) (emphasis added) (excusing performance pursuant to the parties' *force majeure* clause).

[167] *See* Squillante & Congalton, *supra* note 2, at 8.

[168] *See supra* Part II.B, C.

[169] *See Nissho-Iwai,* 729 F.2d at 1541 n.19 ("There is some dispute about whether §2-615 provides specific boundaries to the breadth of *force majeure* clauses.").

[170] *See* Declercq, *supra* note 85, at 227-29.

[171] On its face section, §2-615 of the U.C.C. only applies to sellers and is essentially "unilateral." *See* U.C.C. §2-615 (1997); *see also* Declercq, *supra* note 85, at 231 ("[I]t is advisable to specify whether or not the *force majeure* clause is intended to provide a remedy for both parties."). In addition, *force majeure* clauses in construction and supply contracts are generally unilateral - protecting only the builder or supplier. *See, e.g.,* Peter Siviglia, *force majeure*, 68 N.Y. St. B.J. 52, 52 (1996).

[172] *See* International Minerals & Chem. Corp. v. Llano, Inc., 770 F.2d 879, 886 (10th Cir. 1985); Declercq, *supra* note 85, at 240-43 (discussing impossibility versus impracticability).

required to excuse performance. Finally, drafters should specify whether foreseeability will preclude a party from invoking the *force majeure* clause. [page 409]

92 **c. Interpretation**

93 Drafters should consider basic principles of contract construction when they draft *force majeure* clauses. For example, rules of construction dictate that contracts are construed as a whole; thus, courts may read *force majeure* clauses in light of other contractual provisions.[173] Therefore, contracts containing both a warranty provision and a *force majeure* clause could be construed as ambiguous because a warranty sometimes guarantees future performance, whereas, *force majeure* excuses performance. To illustrate, if a contract includes a warranty that goods are fit for a particular purpose and a *force majeure* event renders the goods "unfit," a court might find that it would be "manifestly unreasonable"[174] to allow the seller to escape its obligation to pay damages. Therefore, to avoid this potential problem, drafters should consider limiting warranty provisions by stating that: "This warranty is subject to the *force majeure* clause."

94 Similarly, contracts containing both a "take-or-pay" provision and a *force majeure* clause may also be problematic.[175] A take-or-pay contract is a long-term agreement for the supply of goods (e.g., oil) wherein the buyer agrees to either take the goods or pay for a minimum amount of the goods – even if the buyer does not need them.[176] Accordingly, a buyer in a take-or-pay contract may have trouble invoking *force majeure* because even if a *force majeure* event makes it impossible to "take," presumably the buyer could still "pay."

95 Thus, drafters should read the entire contract to ensure that it is internally consistent.[177] In addition, drafters should remember that under the *ejusdem generis* rule of construction "general words following specific ones will be given a limited meaning."[178] Therefore, if the *force majeure* [page 410] clause enumerates contingencies (i.e., a laundry list), the drafter must be very comprehensive.[179] As an alternative, the *force majeure* clause could delineate excusing *effects* rather than excusing *events*.[180]

96 Finally, because courts have a tendency to construe *force majeure* clauses narrowly,[181] drafters should use very clear language when defining the events that will excuse perfor-

[173] *See* UNIDROIT Principles, *supra* note 8, art. 4.4; Declercq, *supra* note 85, at 228 ("A *force majeure* clause cannot be read in isolation but should be seen in light of the whole contract."); *see also* Garro, *supra* note 52, at 1171 ("UNIDROIT Principles article 4.4 sets forth the principle that there is no hierarchy among contractual terms, in the sense that the terms and expressions of a contract should be read as a whole.").

[174] *See PPG Indus.,* Inc. v. Shell Oil Co., 919 F.2d 17, 18-19 (5th Cir. 1990) (discussing U.C.C. §1-102, reasonableness and good faith).

[175] *See generally* Constantini, *supra* note 97; Declercq, *supra* note 85. But see Sabine Corp. v. ONG Western, Inc., 725 F. Supp. 1157, 1169 (W.D. Okla. 1989) (rejecting plaintiff's argument that an act of *force majeure* did not relieve the defendant of its alternative obligation to pay for gas rather than take it).

[176] *See, e.g.,* Northern Illinois Gas Co. v. Energy Coop. Inc., 461 N.E.2d 1049, 1060, 1060-61 (Ill. App. Ct. 1984) (holding that purchaser in take-or-pay contract guaranteed performance without regard to need for the goods).

[177] *See* Kirkham, *supra* note 109, §6.05(2)(c).

[178] Ludwig Mandel, The Preparation of Commercial Agreements 11, 48 (7th ed. 1978).

[179] An exhaustive list should be comprehensive even if there is a "catch all" provision because courts construe such provisions narrowly. *See* Declercq, *supra* note 85, at 234.

[180] *See id.* at 235 ("In defining *force majeure* on an effect basis, rather than an event basis, the need for a limiting *ejusdem generis* interpretation of the catch-all provision disappears.").

[181] *See* Squillante & Congalton, *supra* note 2, at 9.

mance.[182] Furthermore, when imposing conditions, the drafter should explicitly state whether the conditions apply to all, or only certain events. Recall that in *PPG Industries, Inc. v. Shell Oil Company,* Shell Oil was excused from its obligation to perform under a ethylene delivery contract with PPG Industries, Inc.[183] The *force majeure* clause in the parties' contract stated that "[e]ither seller or buyer will be excused from [performance] to the extent that the performance is delayed or prevented by any of circumstances . . . *reasonably beyond its control or by . . . explosion.*"[184] The Fifth Circuit held that Shell's performance was excused due to an explosion; although the explosion was not "beyond the reasonable control" of Shell, performance was excused because the reasonable control condition did not apply to explosions.[185]

[182] *See supra* part IV.B.3.a.
[183] *See* PPG Indus. Inc. v. Shell Oil Co., 919 F.2d 17, 19 (5th Cir. 1990).
[184] *Id.* at 18 (emphasis added).
[185] *Id.*

97 ## V. Conclusion

98 In general, U.S. parties will receive protection from the doctrine of excuse whether they engage in domestic or international contracts. However, while U.S. parties are protected by the doctrine of excuse, the degree of protection may vary depending on the law that applies to the transaction. Therefore, U.S. practitioners must be familiar with the CISG doctrine of excuse and the UNIDROIT Principles' hardship provisions. In addition, practitioners should advise their clients to include carefully-negotiated and -drafted *force majeure* clauses in their CISG contracts, because the CISG excuse provision may not afford adequate protection under certain circumstances. By drafting *force majeure* clauses, practitioners can afford clients greater protection than article 79 of the CISG, because the clauses will be tailored to meet their needs. [page 411]

99 ## APPENDIX – Sample *Force Majeure* Contracts

100 ### I. Bilateral Clause Designed for Construction and Supply Contracts

101 *Force majeure* clauses are very common in construction and supply contracts. Although the clauses are generally unilateral – protecting only the builder or supplier – they can also be bilateral. The following *force majeure* clause is a bilateral clause that can be adapted to a unilateral format.[186] The clause can also be adapted to meet clients' specific needs in CISG contracts.

102 A. Neither party will incur any liability to the other if its performance of any obligation under this agreement is delayed or prevented by any of the following events: a change in any law, rule, regulation or ordinance; any new law, rule, regulation or ordinance; the requirements of any government or governmental entity or authority; war, riot, civil disorder or other hostilities; hurricanes, typhoons or other severe weather conditions; fire; earthquakes, floods and other natural disasters; epidemics and quarantines; damage to or destruction of a party's facilities or those of any of its sub-contractors or suppliers; interruption of electricity or of the supply of oil or gas; any other event or circumstance beyond the control of the party affected – provided, however, that neither party will be excused, for any reason whatsoever, from any obligation to make any payment in accordance with the terms of this agreement.

103 B. If either party's performance under this agreement is delayed or prevented by any of the events described in paragraph A above, that party will notify the other in writing of the event, of its expected effect on that party's performance, and of when that party resumes its performance under and in accordance with the terms of this agreement.

[186] Siviglia, *supra* note 171, at 52.

104 C. If the performance by a party of any [material] obligation under this agreement is delayed by any of the events described in paragraph A above, then (i) if the total of all delays so caused exceeds a period of x days, the other party may terminate this agreement by giving written notice of termination to the affected party at any time prior to the affected party's notifying the other party in writing that it has resumed its performance under and in accordance with this agreement; and (ii) if the total of all delays so caused exceeds a period of x + y days, either party may terminate this agreement by giving written notice of termination to the other prior to the affected party's giving written notice that it has resumed its performance under and in accordance with this agreement.[187] [page 412]

II. Take-or-pay Contract (e.g., natural gas)

105

106 If either party is rendered unable by *force majeure* or any other cause of any kind not reasonably within its control, wholly or in part, to perform or comply with any obligation or condition of this Agreement, upon such party's giving timely notice and reasonably full particulars to the other party such obligation or condition shall be suspended during the continuance of the inability so caused and such party shall be relieved of liability and shall suffer no prejudice for failure to perform the same during such period; . . . The "*force majeure*" shall include, without limitation by the following enumeration, acts of God, and the public enemy, the elements, fire, accidents, breakdowns, strikes, differences with workmen, and any other industrial, civil or public disturbance, or any act or omission beyond the control of the party having the difficulty, and any restrictions or restraints imposed by laws, orders, rules, regulations or acts of any government or governmental body or authority. . . .[188]

[187] *Id.*

[188] Langham-Hill Petroleum, Inc. v. Southern Fuels Co., 813 F.2d 1327,

107 ## III. United Nations Economic Commission for Europe Standard Excuse Provision

108 The following shall be considered as cases of relief if they intervene after the formation of the Contract and impede its performance: industrial disputes and any other circumstances (e.g., fire mobilization, requisition, embargo, currency restrictions, insurrection, shortage of transport, general shortage of materials and restrictions in the use of power) when such other circumsiances are beyond the control of the parties.

109 . . .[I]f, by any reason of any of the said circumstances, the performance of the Contract within a reasonable time becomes impossible, either party shall be entitled to terminate the Contract by notice in writing to the other party without requiring the consent of any court.[189] [page 413]

1329 n.1 (4th Cir. 1987).

[189]Honnold, *supra* note 24, §431 (citation omitted).

FOOTNOTES

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