

Exemptions of Contract Liability Under the 1980 United Nations Convention

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I. Introduction

A difficult problem in the field of contracts, especially in international sales contracts, frequently arises when an unexpected event hinders performance of the contract. Traditionally, this problem occurs "when unforeseen occurrences, subsequent to the date of the contract, render performance either legally or physically impossible, or excessively difficult, impracticable or expensive, or destroy the known utility which the stipulated performance had to either party."¹

Many theories on this problem have been developed in different countries under the labels of impossibility, Act of God, frustration, *force majeure*, and failure of presupposed conditions. But none has yet been generally accepted. This is because the theory of frustration always produces some kind of conflict with the well-established rule *pacta sunt servanda* (agreements to a contract must be observed) which "is so axiomatic a rule that any doctrine, purporting or seeming to encroach upon it and to offer relief from an express promise, meets with resistance, distrust, and after with rejection."²

But under some circumstances, the non-performance of contractual obligation is excused under the laws of most countries. There are some general characteristics which are found in these laws in all national jurisdictions; these include: (1) the circumstance arises after the conclusion of the contract; (2) for which neither party is responsible; and (3) is regarded by the law as a valid excuse of performance.³ There has been an effort in the last few decades to unify the laws of various jurisdictions. The United Nations Convention on

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1. Smit, *Frustration of Contract: A Comparative Attempt at Consolidation*, 58 COLUM. L. REV. 287 (1958) [hereinafter Smit].

2. *Id.* at 288.

3. Schmitthoff, *Frustration of International Contracts of Sale in English and Comparative Law*, in SOME PROBLEMS OF NON-PERFORMANCE AND FORCE-MAJEURE ON INTERNATIONAL CONTRACTS OF SALE 127, 128 (Int'l Ass'n of Legal Science, ed. 1961) [hereinafter Schmitthoff].

Contracts for the International Sale of Goods in 1980 is the most important result of such efforts.

There are many inherent problems in interpreting and applying the Convention. Therefore, most international trade contracts contain a clause which excuses the parties' non-performance if it occurred by some circumstances which are "beyond their control" and unforeseeable at the time the contract is made.⁴

This article will primarily discuss the United Nations Sales Convention. In interpreting the Convention, the central problem is to what extent Article 79 of the Convention will apply to the various cases. Does it apply only to cases of "force majeure" or "impossibility," i.e., cases in which there is a barrier that prevents performance or makes it impracticable? Or does it apply to cases of "frustration" or "imprévision," i.e., cases in which there is no barrier but the circumstances are radically changed because of a contingency contrary to the basic assumption on which the contract was made? Even if Article 79 does not deal with the latter cases, a question still arises: Does Article 79 exclude such grounds for excuses, or is this problem left to domestic laws or liberal contract construction? The interpretation of concepts such as "impediment," "beyond his control," and "unforeseen" is also a problem.

The Suez Cases will also be examined because the losses resulting from the blocking of the Canal led to important and difficult litigation about the exemption of contract obligations. Since these cases were originally decided under British and United States laws, the theories of frustration in those countries will initially be discussed.

II. British Law

In Britain, the origin of the law of frustration can be traced to the seventeenth century decision of *Paradine v. Jane*⁵ which expands the rule of absolute liability for performance. At that early stage of contract law, the court refused any modification of the obligations which had been set in the original contract in consequence of supervening events beyond control of the parties.⁶ The court held that the duties created by a party in his own contract could not be excused in spite of any contingency because he might have protected himself by providing some special clause in his own contract. This strict view was changed in the 1863 decision of *Taylor v. Caldwell*.⁷ In this

4. Berman, *Non-performance and Force Majeure in International Trade Contracts*, in *SOME PROBLEMS OF NON-PERFORMANCE AND FORCE-MAJEURE ON INTERNATIONAL CONTRACTS OF SALE* 31, 32 (Int'l Ass'n of Legal Science, ed. 1961) [hereinafter Berman].

5. 82 Eng. Rep. 897 (K.B. 1647).

6. Schmitthoff, *supra* note 3, at 31.

7. (1863) 3 B. & S. 826.

case, the court refused to apply the absolute contract theory and instead, established an "implied condition" theory which excuses the parties if the "implied condition" at the time of making the contract has been changed. The attitude of the *Taylor* court to restrict the doctrine of frustration to physical impossibility of performance was changed to extend to legal impossibility.⁸ In 1944, Lord Wright challenged the "implied condition" theory stating:

[t]he court has formulated the doctrine by virtue of its inherent jurisdiction, just as it has developed the rules of liability for negligence, or for the restitution or repayment of money where otherwise there would be unjust enrichment The doctrine is invented by the court in order to supplement the defects of the actual contract.⁹

Lord Wright rejected the view that the doctrine of frustration was founded on the autonomy of the parties' will, and took the view that the doctrine was made by the courts to reconcile the principle of sanctity of contracts with those special exceptions which justice demanded.¹⁰ In other words, Lord Wright's theory denied the basic position that courts do not make contracts for the parties but simply enforce them as made.¹¹ However, this view was dismissed by the House of Lords in *British Movietonews Ltd. v. London and District Cinemas Ltd.*¹² In this case, the House of Lords unanimously reversed the decision of the Court of Appeals which had decided the case using the Lord Wright's theory.

Some years later, Lord Radcliffe used a "radically different" test in *Davis Contractors Ltd. v. Fareham Urban District Council* holding that:

frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do.¹³

In order to say the contract is frustrated under the test of the changed significance of the obligation,¹⁴ there must be a radical change of circumstances which had the parties anticipated would

8. Schmitthoff, *supra* note 3, at 33.

9. *Denny, Mott & Dickinson v. Fraser & Co.* [1944] A.C. 256, 215.

10. Schmitthoff, *supra* note 3, at 134.

11. Schlegel, *Of Nuts, and Sealing Wax, Suez, and Frustrating Things—The Doctrine of Impossibility of Performance*, 23 RUTGERS L. REV. 419, 426 (1969) [hereinafter Schlegel].

12. [1952] A.C. 166.

13. [1956] A.C. 695.

14. Named by Lord Radcliffe himself in *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696, 729.

have led them to make a new and different contract. The English theory of frustration regards the contract as altogether terminated in terms of exemption.¹⁵ This system looks for a failure to perform the entire contract not on one or more of the party's obligations (partial non-performance) as in the theory of *force majeure* in French law.¹⁶

There are two laws concerning frustration of contract in England. One is the English Sales of Goods Act of 1893 which covered only a small part of the substantive law of frustration. The other is the Law Reform (Frustrated Contracts) Act of 1943.¹⁷ The Sales of Goods Act treated only cases involving frustration of contract to sell generic goods. This Act provides that an agreement to sell specific goods is avoided if the goods perish without any fault of the parties before the risk has passed to the buyer. The Law Reform Act extended its scope to all instances of frustration except those covered by the Sales of Goods Act. The Law Reform Act provided that parties could recover any down payments or other benefits exchanged before the time of frustration and that the judge could divide between the parties reliance expenses incurred in contemplation of the performance of the contract.¹⁸ But this Act dealt only with the forms of judicial relief after the recognition of frustration, leaving the substantive rules of frustration untouched.

III. United States Law

In the United States, as in Britain, there are many theories concerning the problem of frustration, although the law is still vague and uncertain. The absolute liability theory derived from the English case, *Paradine v. Jane*, became more flexible by the end of the nineteenth century. First, American courts have developed the rule that impossibility due to unforeseeable circumstances excuses non-performance. Impossibility is sometimes defined broadly to include the concept of unreasonable difficulty, expense, injury or loss involved.¹⁹ The assumption that a certain event will or will not occur is the basis of this doctrine. If this basic assumption proves false, the parties are exempted from obligations.²⁰

Courts and scholars also recognize a theory of frustration of purpose, a theory that exempts a defaulting party when the circum-

15. In civil law systems, on the other hand, only French law takes such an approach. Exemption from liability in damages is provided.

16. Nicholas, *Force Majeure & Frustration*, 27 AM. J. COMP. L. 231, 234 (1979) [hereinafter Nicholas, *Force Majeure & Frustration*].

17. Law Reform (Frustrated Contracts) Act, 1943, 6 & 7 Geo. 6, c. 40, §§ 1-3.

18. See Law Reform (Frustration Contracts) Act, 1943, 6 & 7 Geo. 6, c. 40, §§ 1(2), (3).

19. RESTATEMENT OF CONTRACTS § 454 (1932).

20. Berman, *supra* note 4, at 1421 n.17.

stances are so "radically changed" that performance would be vitally different. Notably, a distinction has been made between frustration of performance and frustration of purpose. The former includes cases in which performance has become impossible, extremely difficult, or too expensive; the latter also embraces cases where the known purpose which was the basis of the contract has been destroyed even though performance may not be impossible or even too difficult or expensive.²¹

The doctrine of frustration has been incorporated into both the First and Second Restatement of Contracts.²² In the Second Restatement, the party who wants to be exempted on the ground of frustration of purpose must meet four requirements: (1) the principal purpose of the party must have been substantially frustrated; (2) the parties must have a basic assumption, on which the contract was made, that the event would not occur; (3) the frustration must have resulted without the defaulting party's fault; and (4) the party must not have assumed a greater obligation than the law imposes.²³

Section 2-615 of the Uniform Commercial Code (UCC) deals, to some extent, with frustration of contract. Under the title of "Excuse by Failure of Presupposed Conditions," section 2-615 provides that delay in delivery or non-delivery by the seller is excused under three conditions: (1) if there should be an occurrence of a contingency; (2) if the non-occurrence of a contingency was a basic assumption of the contract; and (3) if the performance agreed to in the contract should have been made impracticable by the occurrence of the contingency.²⁴ UCC 2-615 provides an excuse only for the seller, and only with respect to two aspects of performance: "delay in delivery" and "non-delivery." However, there has been support for a broader approach based on the general principles of frustration.²⁵

The "Black and White" rule²⁶ of termination of contract has prevailed in American courts even though it was changed by legislation in England.²⁷ For the possible unjust situation resulting from this absolute common law rule, "excuse" or "non-excuse," Comment

21. Smit, *supra* note 1, at 287 n.4. In most civil law systems, strict impossibility is distinguished from frustration. Generally, specific remedy is provided in statutory provisions for strict impossibility but not for frustration.

22. RESTATEMENT OF CONTRACTS § 288; RESTATEMENT (SECOND) OF CONTRACTS § 265. (1981).

23. E. FARNSWORTH, CONTRACTS 691 (1982).

24. UCC § 2-615(a).

25. UCC § 1-103; *see* Nora Springs Coop. Co. v. Brandau, 247 N.W.2d 744 (Iowa 1976). In this case, the court said in dicta that UCC § 2-615 should be "equally applicable to buyers [since] the code expressly recognizes the doctrine of 'commercial frustration.'" *Id.*

26. Schmitthoff, *supra* note 3, at 142. Professor Schmitthoff characterized the judicial practice that the declaration of frustration meant termination of the contract with no downpayments or reliance expenses being recoverable. *Id.*

27. Rapsomanikis, *Frustration of Contract in International Trade Law and Comparative Law*, 18 DUQ. L. REV. 551, 559 (1980) [hereinafter Rapsomanikis].

6 to the section 2-615 states:

. . . adjustment under the various provisions of this Article is necessary, especially the sections on good faith, on insecurity and assurance and under reading of all provisions in the light of their purposes, and the general policy of this Act to use equitable principles in furtherance of commercial standards and good faith.

The UCC imposes some obligations on the discharged seller: to tender a commercially reasonable substitute;²⁸ to notify the buyer about the delay or the non-delivery reasonably;²⁹ and to allocate the part of the production unaffected by the contingency among his customers, with his option to include regular customers not then under contract in any manner which is fair and reasonable.³⁰

A rise or a collapse of price in the market does not excuse a party. Increased cost alone does not excuse performance unless it occurs by some unforeseen contingency which alters the essential nature of the performance.³¹

UCC § 2-613 rules on casualty to goods identified when the contract was made (specific goods). UCC § 2-614 provides for the effect of failure of agreed means of transportation or payment when a "commercially reasonable" or "substantial equivalent" substitute is available; this provision saves the contract by providing that the equivalent substitute must be tendered.

IV. Suez Canal Cases³²

On July 26, 1956, President Nasser of Egypt announced the nationalization of the Suez Canal, then owned by the French-managed Suez Canal Company. The Canal had been one of the most important commercial passages for shipments from the Middle East to Europe. From October 28, 1956, heavy fighting between Egyptian and Israeli forces took place in the Sinai Peninsula. Great Britain and France bombed by air various targets in Egypt just after the ultima-

28. UCC § 2-614.

29. UCC § 2-615(c).

30. UCC § 2-615(b).

31. UCC § 2-615 comment 4.

32. There are seven cases after the first closure of the Suez Canal in 1956 and two cases after the second closure in 1967. See *Carapanayoti & Co. v. E.T. Green Ltd.*, [1959] 1 Q.B. 131 (1958); *Tsakiroglou & Co. v. Noble Throl G.m.b.H.*, [1962] A.C. 93 (H.L. 1961); *Albert D. Gaon & Co. v. Société Interprofessionnelle des Oléagineux Fluides Alimentaires*, [1960] 2 Q.B. 348 (C.A.); *Glidden Co. v. Hellenic Lines, Ltd.*, 275 F.2d 253 (2d Cir. 1960); *Société Franco Tunisienne d'Armement v. Sidermar S.P.A.*, [1961] 2 Q.B. 278 (1960); *Ocean Tramp Tankers Corporation v. V/O Sovfracht*, [1963] 2 Lloyd's List L.R. 155, aff'd, [1964] 2 Q.B. 226 (C.A. 1963); *Transatlantic Interfinancing Corporation v. United States*, 363 F.2d 312 (D.C. Cir. 1966); *Palmco Shipping, Inc. v. Continental Ore Corp.*, [1970] 2 Lloyd's List L.R. 21 (1969); *American Trading Production Corp. v. Shell International Marine Ltd.*, 453 F.2d 939 (2d Cir. 1972).

tum was delivered on October 30, 1956. A general cease-fire took effect on November 7, 1956; by that time, the Canal was blocked by over forty sunken ships, and it was likely that the Canal would be closed for a period of time.³³ In fact, the Canal was closed for some five months until April 1957, when it was reopened through the aid of the United Nations. To provide some background for analyzing Article 79 of the 1980 U.N. Sales Convention, four cases will be discussed in some detail.

*A. Carapanayoti & Co. Ltd. v. E.T. Green Ltd.*³⁴

Carapanayoti and E.T. Green entered into a contract for the sale of Sudanese cottonseed cake on September 6, 1956. The sellers agreed to sell to the buyers cottonseed cake and to ship from Port Sudan during October or November at the sellers' option, c.i.f. Belfast. Clause 17 of the contract provided: "In case of prohibition of export, blockade or hostilities . . . preventing fulfillment, this contract or any unfulfilled portion thereof so prevented shall be cancelled."³⁵ When the Canal was closed, the sellers refused to perform their contract obligations. The buyers sued for breach of contract. An arbitrator held for the buyer. The Court of Queen's Bench reversed the arbitrator's decision, and held the contract frustrated. The court ruled that the contract had been frustrated because of fundamental differences in the sellers' obligation (voyage around the Cape of Good Hope, not by way of the Canal) and that the contract could also be excused by means of the clause 17 of the contract.³⁶ Moreover, the parties regarded the availability of the Canal as a "fundamental assumption" and could not foresee the contingency.

The "fundamental difference" test makes the court's decision reasonable³⁷ because it can be said that the distance is changed fundamentally enough from the fact that the original distance of 4068 miles changed to 10,793 miles after the closing of the Canal.³⁸ Furthermore, there is no foreseeability present in this case since there had not been any closure of the Canal before the time the contract was entered into, and there was no hostile action when the contract was made. The problem in this case is that the contract included c.i.f. terms. One may argue that "a c.i.f. contract casts the risk of non-shipment upon the seller even when shipment is rendered physically impossible . . . unless by an event covered by the excuse clause

33. *Société Franco Tunisienne d'Armement v. Sidermar S.P.A.*, [1961] 2 Q.B. 278, 286 (1960).

34. [1959] 1 Q.B. 131 (1958).

35. [1959] 1 Q.B. 131, 132 (1958).

36. *Id.* at 149.

37. Rapsomanikis, *supra* note 27, at 583.

38. [1959] 1 Q.B. 131 (1958) at 142.

or by some other clauses in the contract;³⁹ yet, to impose such a risk on the seller may be too burdensome. A c.i.f. contract should be interpreted so that a seller incurs the risk of normal freight increase. The seller in this case could, therefore, be exempted even though he had executed a c.i.f. contract.⁴⁰ Furthermore, the seller can be excused by clause 17 of the contract.

*B. Glidden Co. v. Hellenic Lines, Ltd.*⁴¹

Glidden, a manufacturing company, and Hellenic Lines had entered into four charter parties for transportation of ilmenite from Koilthottam, India to a United States Atlantic port north of Cape Hatteras. The first charter party was to be delivered on September 7, 1956, the remainder delivered on November 1, 1956. The contract had a *force majeure* clause which would exonerate Hellenic in case of closing of the Canal. Also incorporated was section 4 of the Carriage of Goods by Sea Act,⁴² which absolved the carrier of responsibility for loss resulting from an "act of war" or "any other cause arising without actual fault . . . of the carrier."

The trial court, relying upon the *Carapanayoti* case, decided that the agreements were frustrated by the closing of the Suez Canal. But the United States Court of Appeals for the Second Circuit reversed the judgment of the trial court, reasoning that alternative routes specifically referred to in the agreements were available to Hellenic's ship,⁴³ and, therefore, the provision of the contract relating to *force majeure* and section 4 of the Carriage of Goods by Sea Act had no applicability. In other words, there is no room for the theory of frustration; thus, the only thing left is to interpret the contract provisions. To interpret ambiguous clauses in the contract, the court examined the surrounding circumstances (evidence of the negotiations) which revealed that the carrier had unsuccessfully pressed for the inclusion of a specific clause. The court held that the carrier should perform using an alternative route in case of the closing of the Canal.⁴⁴

However, this problem must be solved by the contract itself, not by the circumstantial evidence. If there are no express terms and no inference can be made from the contract itself, then one should use prevailing commercial custom relating to the allocation of the risk of non-performance resulted from the same contingency.⁴⁵ In any event,

39. Berman, *supra* note 4, at 1422 n.21.

40. See UCC § 2-320 comment 7.

41. 275 F.2d 253 (2d Cir. 1960).

42. 46 U.S.C. § 1304.

43. 275 F.2d 253, 255 (2d Cir. 1960).

44. *Id.* at 257.

45. Berman, *supra* note 4, at 1424 n.26.

the decision in this particular case was fair and reasonable since the seller had decided not to perform at all instead of performing via an alternate route and asking for compensation for added cost. In short, the court concluded that the carrier bore the risk of the closing of the Canal because the carrier did not expect to be excused without an express provision.⁴⁶

C. *Société Franco Tunisienne D'Armement v. Sidermar S.P.A.*⁴⁷

Shipowners and charterers made a charter party on October 18, 1956 for the carriage of iron ore from India to Genoa. The material clauses of the charter party are:

2. That the ship . . . shall . . . proceed with all convenient speed to Genoa . . . 3. Freight to be paid at and after the rate of 134 s. per ton . . . 37 . . . captain also to telegraph to "Marutsider Genoa" on passing Suez Canal.⁴⁸

The vessel sailed for Genoa on November 19, 1956, and the next day the shipowners informed the charterers that the charter party was frustrated by the blocking of the Canal and demanded higher freight in order to proceed via the Cape of Good Hope. The shipowners contended that an agreement was to be inferred, after the original contract had been frustrated, and that the charterers would pay a reasonable remuneration for the carriage of the cargo. But when the voyage was completed, the charterers refused to pay more than the contract rate and contended that the charter party was not frustrated. The arbitrator held that the contract was not frustrated. The reasoning was that the performance of the voyage via the Cape of Good Hope was not commercially or fundamentally different from the performance via the Suez Canal, and that the continued availability of the Suez Canal was not a basic assumption of the charter party.

The Court of Appeal reversed this decision and held that the charter party was frustrated. The court awarded the shipowner a reasonable remuneration in *quantum meruit*. The court said that the parties' appreciation of the frustrating event at the time of the making of their contract did not affect the contract being frustrated by the event when it did occur because "the possibilities appreciated by both parties at the time of making their contract, that a certain event may occur, is one of the surrounding circumstances to be taken into account in construing the contract, and will, of course, have greater or less weight according to the degree of probability or im-

46. *Id.*

47. [1961] 2 Q.B. 278 (1960).

48. [1961] 2 Q.B. at 281.

probability and all the facts of the case."⁴⁹ In interpreting clause 37 of the contract, the court saw an obligation to pass through the Suez Canal. The court also said that the voyage via the Cape of Good Hope was a fundamentally different voyage from the one via the Suez Canal. The court held that the route by way of the Cape is highly circuitous, unnatural, and different in a number of other respects.⁵⁰ The court distinguished the charter party from a c.i.f. contract, in cases like *Carapanayoti*, saying that in charter cases, in addition to the freight and duration of the voyage, which should also be considered in a c.i.f. contract,⁵¹ additional hazards to the crew, to the ship, or to the goods are the factors to be considered.

The effort of the court to differentiate the charter party from the c.i.f. contract is not so persuasive because the court eventually focused on a "fair and reasonable" result, as in the c.i.f. contract cases. Unlike the *Glidden* case, the shipowner had not refused to perform, but rather had agreed to go around the Cape demanding a reasonable remuneration, the court decided so as to provide the shipowner with a "fair and reasonable" result. One can argue that there was no specific route of the voyage in the contract; the phrase "on passing" in the clause, "captain to telegraph . . . on passing Suez Canal," could mean "if" the Suez Canal is passed instead of "when."⁵² Therefore, there would be no obligation to go through the Suez Canal, but only to go by the route which was customary at the time of performance. However, the court interpreted differently. The court could only give answers and results about this kind of frustration problem without giving any meaningful reasons. This may have resulted from the lack of standards for frustration.

*D. Ocean Tramp Tankers Corporation v. V/O Sovfracht (The Eugenia)*⁵³

Shipowners and charterers entered into a time charter party on September 9, 1959 for a "trip out to India via Black Sea." There was a war clause in the charter party (clause 21(a)) which read:

The vessel, unless the consent of the owners be first obtained, not to be ordered nor continue to any place or on any voyage nor be used on any service which will bring her within a zone which is dangerous as the result of any actual or threatened act of war, war, hostilities, warlike operations⁵⁴

49. *Id.* at 303.

50. *Id.* at 304, 307.

51. *Id.* at 308.

52. Berman, *supra* note 4, at 1427.

53. [1963] 2 Lloyd's List L.R. 155, *aff'd*, [1964] 2 Q.B. 226 (C.A. 1963).

54. [1964] 2 Q.B. 226, 234 (C.A. 1963).

Both parties appreciated that the Suez Canal might be closed at the time of negotiating the charter party, but failed to insert any express term for that contingency.⁵⁵ After delivering the vessel, *The Eugenia*, they tried to sail her from Odessa to India through the Suez Canal which was still the customary route. *The Eugenia* arrived at Port Said which, at that time, was considered as a "dangerous zone" within the clause 21. *The Eugenia* entered the Canal on October 31, 1956, and was trapped when Egyptian Government blocked the Canal by sinking ships and blowing up bridges. Early in January 1957, the passage was cleared northwards. On January 4, 1957, the charterers claimed that the charter party had been frustrated by the closing of the Canal. The owners, however, denied this and treated the charterers' conduct as a repudiation.

The court faced two questions; first, whether the charterers breached the war clause by allowing *The Eugenia* to go into the Canal and second, whether the charter party was frustrated. The trial court held that the charterer breached the war clause reasoning that since it was a "self induced" blockade of the vessel; the charterer could not rely on it as relevant to frustration.⁵⁶ For the second question, the court made a hypothetical situation that the vessel had never entered the Canal but stayed at Port Said. The court held the contract frustrated in this hypothetical case applying the "fundamental difference" test used in the *Sidermar* case. On appeal, the court of appeals affirmed that the charterer had breached the war clause.

However, in determining the second question, the court reversed the decision of the trial court overruling the *Sidermar* decision. The court discarded the "unforeseeability" requirement saying that the only thing important is the existence of the contractual provision. The court could apply the "fundamental difference" test since there was no provision relating to frustration in the contract, and held that the changed obligations (extended voyage) was not sufficient to hold the contract frustrated. This case is another example in which the court tried to get to the just result before giving a meaningful reasoning.⁵⁷

V. United Nations Sales Convention

As in American and British legal systems, the concept of exemption for the non-performing party is found in the United Nations Convention. Article 79 of the Convention deals with the exemption of a party's liability when the party failed to perform his obligations

55. *Id.* at 233.

56. *Id.* at 237.

57. Rapsomanikis, *supra* note 27, at 590.

if the failure is due to an impediment beyond his control.

Article 79 is the result of the compromise by delegations from various countries and does not follow a single domestic theory on frustration. This makes it very difficult to interpret Article 79 since one cannot resort to a domestic law as a guide.⁵⁸ Furthermore, Article 7 of the Convention provides that one should interpret the provisions in the Convention "with regard for its international character and . . . the need to promote uniformity in its application." Professor Honnold said "this goal would be served if we could . . . purge our minds of presuppositions derived from domestic tradition, and, with innocent eyes, read the language of Article 79 in the light of the practices and needs of international trade."⁵⁹

A. *Scope of Article 79*

Article 79, unlike the UCC,⁶⁰ provides that either party (seller or buyer) can be exempted of his obligations. All the obligations of the buyer and the seller, whether under the Convention or under the contract, can be exempted.⁶¹ In other words, Article 79 provides a general cause of exemption for non-performance of any obligations, and applies to any kind of obligations generated by a contract of sale of goods. Like civil law systems, the Convention also provides extended rules on excuse to all aspects of a party's performance.⁶²

If the impediment existed at the time of the conclusion of the contract and was known to the defaulting party, Article 79(1) would not apply to this defaulting party. The defaulting party might "have taken the impediment into account at the time of the conclusion."

One problem is how to handle contracts for sales of specific goods which were already destroyed at the time of contracting without the knowledge of either party. Cases which deal with specific goods which are destroyed subsequent to the time of contracts but before the risk of loss is passed to the buyer clearly come within Article 79; in these cases, the sellers can treat the contracts frustrated because they are impossible to perform. But for the former cases, various opinions come from various jurisdictions. In France, for example, this problem will be solved under the theory of condition of validity. The existence of the subject-matter is regarded as a condition of validity. In this situation, the contract will be declared

58. Tallon, *Exemptions*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 574 (C. Bianca & M. Bonnell, eds., 1987) [hereinafter Tallon].

59. J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 429 (1982).

60. UCC § 2-615.

61. Seller's obligations are stated in Article 30 and buyer's are listed in Article 53.

62. J. HONNOLD, *supra* note 59, at 430.

void. Therefore, there is no place for Article 79 of the Convention because the problem of validity is not governed by the Convention according to Article 4(a).

It is also possible to treat this problem under the theory of mistake in some other systems.⁶³ Under this theory, the contract will also be declared as void. On the other hand, the UCC of the United States treats this problem under § 2-613. This governs the frustration of contract for the sales of goods which is identified at the time of contracting.⁶⁴ UCC § 2-613 reads: "If the loss is total, the contract is avoided." Thus, if we follow the view of the UCC, Article 79 will apply to this problem. However, if we follow the French view, Article 79 will not apply because of Article 4(a), which says that the Convention will not apply to the problem of validity of contract. The Secretariat's Commentary stated that Article 79 applies to this problem without any explanation.⁶⁵

It is desirable to interpret Article 79 extensively for the uniformity. However, there is a conflicting problem between the Convention and some of the domestic laws which require the existence of the subject-matter as a rigorous rule. Because of this conflict, it seems better to decide that Article 79 will not apply to this problem by virtue of Article 4(a) of the Convention.⁶⁶

B. *Elements of Article 79*

Article 79 states:

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

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, the party is exempt from liability only if;

(a) he is exempt under the preceding paragraph;

and

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

63. Tallon, *supra* note 58, at 578.

64. See § 2-613 Comment 2.

65. OFFICIAL RECORDS I, 55; see also P. SCHLECHTRIEM, UNIFORM SALES LAW: THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 101 (Vienna: Manzsche Verlags and Universitätsbuchhandlung, 1986) [hereinafter P. SCHLECHTRIEM].

66. Tallon, *supra* note 58, at 577-78. Article 34 of ULIS excluded reliance on national remedies for mistake in case of non-conforming goods.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect of his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform new or ought have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Three elements must be proved by a non-performing party who contends that he is not liable for failure to perform under paragraph (1) of Article 79: (1) the failure was "due to an impediment beyond his control;" (2) "he could not reasonably be expected to have taken the impediment into account at the time of conclusion of the contract;" and (3) he could not reasonably be expected "to have avoided or overcome [the impediment] or its consequences."

1. *Due to an Impediment Beyond His Control. (a) Impediment.*—Non-performance should be "due to an impediment" to get an exemption. The Vienna Conference seems to have adopted the word "impediment" to emphasize the objective nature of the hindrance rather than its personal aspect. Regarding the definition of "impediment," there is a serious problem which was discussed at the 1964 Hague Conference and UNCITRAL⁶⁷ proceedings: "may a non-negligent seller be excused from liability when he delivers defective goods?"⁶⁸ To answer this question, a look to the legislative history of Article 79 would be helpful. The 1956 Draft provided that the non-performance must result from an "obstacle." At the Hague Conference in 1964, a civil law group, led by the Federal Republic of Germany, proposed to eliminate the word "obstacle" because they wished to permit the exemption not only by "supervening and external events" but also by "extreme and onerous change in economic circumstances."⁶⁹ The outcome of the discussion was the ULIS Article 74 which states:

1. Where one of the parties has not performed one of his obligations, he shall not be liable for such non-performance if he can prove that it was due to circumstances which according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or to overcome; in the absence of any expression of the intention of

67. United Nations Commission on International Trade Law.

68. J. HONNOLD, *supra* note 59, at 430.

69. *Id.* at 431.

the parties, regard shall be had to what reasonable persons in the same situation would have intended.

It was possible to interpret Article 74 of ULIS as exempting the seller for unknown defects. This problem was revived in the discussion of the UNCITRAL Working Group⁷⁰ and in the Vienna Conference. The word "impediment" was adopted⁷¹ instead of the word "circumstances" which implies, like "obstacle," an external barrier to performance rather than personal aspects of the seller's performance. Thus, the exemption does not apply to defective performances such as supply of non-conforming goods.⁷² This problem should be solved under Article 35 which governs conformity of the goods.

In defining the concepts of "impediment," we must decide whether the concept of "impracticability," which means radically changed conditions without any barrier to performance, is governed by Article 79. This is the area of "*imprévision*" or "frustration." In common law, the notion of "frustration of the venture" comprises both "impossibility" (Act of God) and "*imprévision*." Sections 261 and 265 of Restatement Second on Contracts show this trend by referring to the notion of "impracticability" which covers "impossibility" and "frustration."⁷³

However, this extensive approach does not seem to be the viewpoint of the Convention. Article 79 provides the general question of exemption from just "impossibility," even though the concept of "impossibility" is interpreted somewhat broadly, not from frustration of purpose. Thus, Article 79 does not deal with the question of whether a defaulting party can claim an exemption from liability because of the theory of frustration of purpose or *imprévision*. When courts envisage this problem, they may be tempted to refer to a similar concept in their own law. Yet, this approach will not be consistent with the Convention's basic idea of international unification.⁷⁴ In other words, courts should not use domestic laws first, even though Article 79 of the Convention does not deal with the problem. Article 7(2) permits using a domestic law only as a last resort after using the general principle on which the Convention is based. There-

70. 5 UNCITRAL Yearbook 39-40 (1974); 6 UNCITRAL Yearbook 60-61 (1975).

71. The word "impediment" is also adopted in the final text of the Convention.

72. J. HONNOLD, *supra* note 59, at 432; Nicholas, *Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sales of Goods*, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 5-14 (N. Gaston & H. Smit eds. 1984) [hereinafter Nicholas, *Impracticability and Impossibility*]. Nicholas does not agree with this view. See Nicholas, *Force Majeure and Frustration*, *supra* note 16, at 240. Professor Huber also interprets "impediment" differently. He said the changes from "circumstances" to "impediment" was not significant. *Id.* at 5-11. Nicholas cites Huber, *Die UNICTRAL-Entwurf eines Übereinkommens über international Warenkaufverträge*, 43 *RabelsZ* 413, 165 (1979); Tallon, *supra* note 58, at 509.

73. See E. FARNSWORTH, *supra* note 23, at 690; Tallon, *supra* note 58, at 593.

74. See Article 7(1).

fore, when this last stage is approached, it is necessary to use domestic law as guidance in comparative law approach, i.e., prevailing patterns and trends of domestic law.⁷⁵ This comparative law approach will contribute to the goal of the Convention: "to promote uniformity in its application."⁷⁶ Moreover, this approach will practically prevent parties from "forum shopping."

The next problem is whether economic difficulties—unaffordability—can be an impediment under Article 79 of the Convention.⁷⁷ This problem was treated in the UNCITRAL discussions.⁷⁸ The general view of the UNCITRAL was that a party could be exempted under both physical and economic impossibilities. Professor Schlechtriem⁷⁹ suggests that one should "treat radically changed circumstances as 'impediment' under Article 79 in exceptional cases in order to avoid the danger that courts will find a gap in the Convention and invoke domestic laws and their widely divergent solutions." The "impediment" in Article 79 of the Convention cannot be interpreted only as an occurrence that absolutely bars the obligor's performance. It should be interpreted to include economic difficulties, such as unaffordability.

(b) *Beyond his control.*—According to Article 79(1), an exemption is permitted only when the impediment to performance is beyond the obligor's control. Regarding the concept of "beyond his control," the problem is how to treat, under Article 79, the damages that defects in the goods would cause to the buyer. The seller may contend that the defect, especially from a remote supplier, was beyond his control. But to the extent that the impediment relates to the defaulting party's activity, it is not "beyond his control." Because of this "external approach," the "non-external" impediment cannot be a cause of exemption even though it meets other conditions.⁸⁰

(1) *Causal element.*—The non-performance of the contract must be "due to" the impediment. The exempting event must necessarily be the exclusive cause of the failure to perform. It is sometimes difficult to find out what was the precise cause of the failure when there were several causes. Since both the Convention and the general principle on which the Convention is based do not point out on this effect, the solution will depend on the judge's decision. The judge will use a domestic law by virtue of the rules of private inter-

75. J. HONNOLD, *supra* note 59, at 434.

76. Article 7(1).

77. See P. SCHLECHTRIEM, *supra* note 65, at 102.

78. 5 UNCITRAL Yearbook 39, 66-67 (1974); 6 UNCITRAL Yearbook 84-85 (1975); 8 UNCITRAL Yearbook 57 (1978) § 459; *id.* at 135 § 24; *id.* at 160 § 14.

79. P. SCHLECHTRIEM, *supra* note 65, at 102 note 422a.

80. Tallon, *supra* note 58, at 580; see also J. HONNOLD, *supra* note 59, at 430-32.

national law.⁸¹

(2.) *Foreseeability*.—To be an impediment which can give the defaulting party an exemption, the event should not be foreseeable at the time of the conclusion of the contract. If the event were foreseeable, the defaulting party might have considered the risk of its realization. Foreseeability should be perceived at the time of contracting, and if the impediment were reasonably foreseeable, the defaulting party cannot be exempted. The Convention anticipates a reasonable man, who would decide the foreseeability, not an extreme pessimist nor a resolute optimist. This impersonal tone of the text of the Vienna Convention is different from the ULIS which referred to the intention of the parties. The detail measurement of the foreseeability is left to a judge or an arbitrator depending on the circumstances of the case. This is because it seems difficult to provide more details in the Convention.⁸² Furthermore, foreseeability must relate not only to the impediment per se but also to the time of its occurrence. The Suez Canal cases are the examples which the closure of the Canal was foreseeable in a more or less distant future.

(3.) *Unavoidability*.—The impediment must also be unavoidable. A defaulting party must have been reasonably unable "to have avoided or overcome [the impediment] or its consequences." Thus, in order to claim an exemption under Article 79 of the Convention, there should be an unforeseeable impediment which is out of the obligor's control and his reasonable effort to take all the necessary steps to avoid the impediment, or to overcome the consequences of the impediment. Thus, unavoidability will frequently coincide with the concept of "beyond his control." The "reasonable person" test is also the basis of reference as for unforeseeability.

This criterion, however, has difficulties in distinguishing between what is possible and what is impossible to overcome. Again, economic impossibility should be considered in solving this problem. To pick up something lost at sea, for example, is economically impossible even though it is not absolutely impossible.

(c) *Notice*.—Article 79(4) provides that the defaulting party must give notice to the other party within a reasonable time after the defaulting party knew or ought to have known of the impediment. Although there was no provision like this in the ULIS, this rule seemed to be an international practice.⁸³ The notice is effective upon receipt. This means the risk of transmission is on the defaulting

81. Article 7(2).

82. Tallon, *supra* note 58, at 580-81; Secretariat's Commentary, OFFICIAL RECORDS 1, 55.

83. Tallon, *supra* note 58, at 586.

party. This is an exception to the general rule of the Convention in Article 27.⁸⁴

If the defaulting party fails to notify according to Article 79(4), he is liable for the damages. The damages in paragraph (4) do not mean those resulting from the non-performance of the contract, but those from the failure to give notice to the other party who could have otherwise taken the necessary steps to reduce the damages of the non-receipt.

(d) *Effects of the exemption.*—Paragraph (5) of Article 79 restrains the effects of the exemption only to damages. When we read paragraph (1), it seems that in a case of one party's exemption, the other party cannot claim any remedy. But paragraph (5) provides that "nothing . . . prevents either party from exercising any right other than to claim damages." Thus, "a party is not liable . . ." in paragraph (1) means that he is not liable for damages. All the other party's remedies are unaffected. Avoidance and specific performance are the most important remedies available for the other party.

Let us suppose a fact situation where a seller contracted to make and deliver goods to a buyer. Because of a certain impediment, (for example, fire at the seller's factory) the seller cannot deliver the goods on the date stipulated in the contract. The seller needs more time to make and deliver the goods (rebuild the factory and manufacture the goods). If the impediment was beyond the seller's control and passed the "reasonable expectation test," the seller is exempted from the liability of damages for the delay for the period the impediment actually exists.⁸⁵ Yet, the seller should perform his obligations when the impediment is removed and the buyer has the right to avoid the contract⁸⁶ if the delay constitutes a fundamental breach under Article 25. If the delay substantially deprives the buyer of what he is entitled to expect, it is a fundamental breach. Notably, the seller has no right to avoid even though the late performance would be radically different from the original performance because of the changed circumstances (for example, the price of the raw material rises considerably). With the increased cost itself, the seller cannot receive an exemption because the increased cost alone does not constitute an impediment under Article 79 of the Convention.⁸⁷

Paragraph (3) of the 1978 Draft provided that the exemption "has effect [only] for the period during which the impediment exists." Thus, the seller, in our hypothetical case, may be asked to per-

84. There are other exceptions in Article 15 and Article 18(2).

85. Paragraph (3), (5) of Article 79.

86. Article 49.

87. Nicholas, *Impracticability and Impossibility*, *supra* note 72, at 5-17; Comment 4 on UCC § 2-615; J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* 131-32 (2d Ed. 1980).

form, when the impediment is over, no matter how the circumstances have changed. A proposal was made at Vienna Conference⁸⁸ to add to paragraph (3) a provision that the defaulting party is permanently exempted if during the temporary exemption period the circumstances have "so radically changed that it would be manifestly unrealistic to impose performance at that late stage." This proposal was most likely rejected on the basis that the delegates did not want to treat the problems of frustration in the Convention.⁸⁹

Yet, the word "only" was deleted from paragraph (3). The intention was to avoid any impression that paragraph (3) laid down a rigid rule requiring contract relations to rescue on the original basis no matter how long the impediment existed or how much the circumstances have changed. With the omission of the word "only," Article 79 can be interpreted more elastically when deciding whether it excludes the theory of frustration as a ground of exemption or not.

Another problem is that even though the defaulting party is exempted from liability in damages, it is possible for that party to be compelled to perform if the temporary impediment did not make the performance physically impossible—physically possible but impractical within the meaning of paragraph (1) of Article 79. Because paragraph (5) provides that any other remedies except the damages are available, the defaulting party can envisage the judgment of specific performance. It means that the impossible performance (under paragraph (1)) is still actionable as long as the other party does not declare an avoidance on the basis of a fundamental breach under Article 49(1).⁹⁰ Thus, it is possible for the defaulting party to be in the absurd position in which he is exempted from paying the damages, but has to pay the fine or penalty which the national courts may impose for non-compliance—an order for performance. These penalties may exceed the amount of the damages from which the defaulting party is exempted.⁹¹ There was a proposal at Vienna to exclude the right to compel performance from paragraph (5).⁹² This proposal was rejected because of the fear that an exemption from the obligation of performance could also release collateral rights and interest claims.⁹³

As Professor Schlechtriem stated, one can get a reasonable limitation of Article 79(5) from the general beliefs expressed in Vienna that a judgment for a physically impossible performance would be

88. OFFICIAL RECORDS 381-82.

89. Nicholas, *Impracticability and Impossibility*, *supra* note 72, at 5-17.

90. P. SCHLECHTRIEM, *supra* note 65, at 103; Nicholas, *Impracticability and Impossibility*, *supra* note 72, at 5-19.

91. P. SCHLECHTRIEM, *supra* note 65, at 103.

92. OFFICIAL RECORDS 383-85.

93. OFFICIAL RECORDS 373.

neither sought nor obtained. Furthermore, a court is not bound to enter the judgment of specific performance under Article 29 if this kind of judgment would be contrary to the public policy of that jurisdiction.⁹⁴ If a party demands the performance of a contract that has become impracticable, he would be deemed in bad faith. Paragraph (1) of Article 7 provides that in interpreting the Convention "regard is to be had to . . . the observance of good faith in international trade." If one interprets paragraph (5) with the limitation mentioned above, there is no grave difficulty with the specific performance. However, it will be better for the main objective of uniformity to give a lasting exemption when the impediment is permanent or when the performance is impracticable after the impediment ceases to exist.

VI. Conclusion

The United Nations Convention has been a vital step towards the unification of international trade law. Yet, since it came from a compromise of various law systems, it has only a limited scope of application. Article 79 deals with the problem of exemption, but as we have seen so far, it governs only the exemption from just impossibility not from frustration. Thus, the problem of frustration should be solved outside of Article 79.

General principles on which the Convention are based will apply in this situation. In the case of a lack of general principles, domestic laws in the comparative law approach, which seeks guidance from prevailing patterns and trends of modern domestic law, will apply. This comparative law approach may prevent the courts from applying their own legal systems and promote uniformity in interpretation and application. This approach also has a difficulty in that some courts are unable to recognize the legal developments in other countries. However, as Professor Honnold has asserted, "the realization that such material is relevant should, at the very least, tend to broaden and liberate the tribunal's outlook."⁹⁵

Of course, the best way to solve these problems is to make and add a provision which governs frustration to Article 79. It should be carefully drafted so as to be accepted by most countries. Only then will the uniform customs and practices of the international trade pierce national barriers. At this time, because of the imperfect unification of international sales law, a party who desires to be exempted when a certain contingency occurs must utilize clear exemption clauses in the contract to be sure.

94. P. SCHLECHTRIEM, *supra* note 65, at 103.

95. J. HONNOLD, *supra* note 59, at 434.