

## ADAPTING U.C.C. § 2-615 EXCUSE FOR CIVILIAN-MILITARY CONTRACTORS IN WARTIME

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### Abstract

When should a civilian seller of goods who delays delivery or cancels altogether under a wartime contract be able to claim excuse under U.C.C. Article 2? The unprecedented extent of the U.S. military's use of contractors abroad calls for a rethinking of U.C.C. impracticability, as private parties face wartime risks once encountered solely by the government. The traditional approach typically denies the seller the right to excuse the failure of delivery in instances where the wartime risk might be categorized as foreseeable or is expressly or impliedly allocated to the seller. This analysis forces a dilemma upon the seller facing threats of serious injury or death. At the same time, the civilian seller typically does not enjoy the same privileges regarding use of force that government provisioners once exercised. This Article proposes a new paradigm—one that would hold sellers to deliver goods in most circumstances, but would make excuse available to sellers through an analysis of functions that are inherently governmental. This analysis grants excuse where the risks associated with wartime contingencies requiring a military response are inherently governmental and, therefore, remain with the government. The rationale balances the interests of civilians performing wartime contracts and the military's need for goods and control of the wartime theater that would warrant excusing contractors during wartime from performance in cases of extreme hazard to a contractor's employees.

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## I. INTRODUCTION

*“[I]t’s not that we didn’t plan. The problem is that we planned for the wrong contingency.”*

*—Ambassador L. Paul Bremer III<sup>1</sup>*

On September 18, 2001, Congress granted President Bush the “authori[ty] to use all necessary and appropriate force” to combat terrorism in the Middle East.<sup>2</sup> His use of this authority has increased the government’s need to contract for goods and services overseas. Consequently, Congress has approved billions of American dollars for the war and reconstruction efforts in Iraq and Afghanistan, leading to billions of dollars in contracts.<sup>3</sup> The U.S. government and the Iraqi provisional authorities approved wartime and rebuilding contracts in the tens of billions of dollars to companies such as Halliburton, Bechtel Corporation, Fluor Corporation, Washington Group International, Inc., Perini Corporation, Parsons Corporation, and Lucent Technologies, Inc.<sup>4</sup> According to a recent report, more than 182,000 people are employed in Iraq under contracts with the U.S. Government.<sup>5</sup>

Many of these wartime contractors have faced obstacles while providing contracted goods and services in Iraq and Afghanistan due to dangerous conditions created by insurgents. Other contractors have faced obstacles due to dangerous conditions when providing contracted goods in Iraq and Afghanistan.<sup>6</sup> Placing civilian contractors in war zones has led not only to difficulty in contract performance, but also to injury and death of contractors’ employees.<sup>7</sup> In response, some contractors have delayed

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1. L. PAUL BREMER III WITH MALCOLM MCCONNELL, *MY YEAR IN IRAQ: THE STRUGGLE TO BUILD A FUTURE OF HOPE* 26 (2006).

2. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

3. See, e.g., David Jackson & Tom Vanden Brook, *Experts Weigh in on Bush’s Assertions*, USA TODAY, Apr. 4, 2007, at 7A (discussing funding proposals by President Bush); David Rohde & David E. Sanger, *How the ‘Good War’ in Afghanistan Went Bad*, N.Y. TIMES, Aug. 12, 2007, at A1 (comparing amounts spent in Iraq and Afghanistan); Editorial, *The House Speaks; Next Step: Cut Off Funding for the War in Iraq*, PITTSBURGH POST-GAZETTE, Feb. 20, 2007, at B6 (discussing funding controversy in Congress).

4. T. CHRISTIAN MILLER, *BLOOD MONEY: WASTED BILLIONS, LOST LIVES, AND CORPORATE GREED IN IRAQ* xiv–xvi (2006).

5. JENNIFER K. ELSEA & NINA M. SERAFINO, CONGRESSIONAL RESEARCH SERV., *PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES* 3–4 (2007), <http://www.fas.org/sgp/crs/natsec/RL32419.pdf>.

6. See MILLER, *supra* note 4, at 165.

7. See *id.*

performance, or ceased performance altogether.<sup>8</sup> For example, insurgents attacked a Kellogg, Brown & Root (KBR) convoy of nineteen trucks delivering fuel, resulting in the death of six drivers and the loss of two-thirds of the fuel trucks.<sup>9</sup> KBR had been working in Iraq to provide food, fuel, and other items under contracts worth about \$22.3 billion.<sup>10</sup> After the 2004 attack, KBR ceased performance under its contract for about two weeks, leaving the military and government representatives in Iraq without food and water.<sup>11</sup> The military forces faced immediate problems and had to ration food and eat prepackaged MREs.<sup>12</sup> Paul Bremer, head of the Coalition Provisional Authority, even considered food rationing for the CPA staff.<sup>13</sup> KBR is not alone.

Article 2 of the Uniform Commercial Code includes a framework governing breaches by sellers and excuse in contracts for the sale of goods.<sup>14</sup> Despite the general utility of Article 2's default provisions, which may also apply as a backup rule system for government contracts, there is no satisfactory guidance for applying § 2-615 excuse to wartime contracts

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8. *Id.* at 161.

9. MILLER, *supra* note 4, at 132, 148; *see also* J.T. Mlinarcik, Note, *Private Military Contractors & Justice: A Look at the Industry, Blackwater, & the Fallujah Incident*, 4 REGENT J. INT'L L. 129, 138–47 (2006) (discussing the legal and practical difficulties under U.S., Iraqi and international law related to finding and punishing those responsible for killing contractors in Iraq); David Ivanovich & Brett Clanton, *Contractor Deaths in Iraq Nearing 800; Toll Has Surged in Past Months, But Civilians Still Line Up for the Jobs*, HOUS. CHRON., Jan. 28, 2007, at A1 (discussing deaths and injuries of KBR personnel in Iraq, Kuwait, and Afghanistan). For a discussion of the litigation against Halliburton and KBR arising out of the April 2004 attack, *see* Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008) and *infra* note 148 and accompanying text.

10. *See* OFFICE OF THE SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, SIGIR-08-002, LOGISTICS CIVIL AUGMENTATION PROGRAM TASK ORDERS 130 AND 151: PROGRAM MANAGEMENT, REIMBURSEMENT, AND TRANSITION, at i, 1 (2007), *available at* <http://www.sigir.mil/reports/pdf/audits/08-002.pdf> (listing types of services and noting as of March 4, 2007 the total cost of all task orders issued under the contract was approximately \$22.5 billion). The contract is a cost-plus award fee contract, giving the contractor financial incentives based on performance, and does not contain a dollar ceiling amount. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-854, MILITARY OPERATIONS: DOD'S EXTENSIVE USE OF LOGISTICS SUPPORT CONTRACTS REQUIRES STRENGTHENED OVERSIGHT 7–8 (2004), *available at* <http://www.gao.gov/new.items/d04854.pdf>. A copy of the original contract is accessible through various online sources. *See, e.g.*, Kellogg Brown & Root Award Contract (Dec. 14, 2001), <http://projects.publicintegrity.org/docs/wow/LOGCAP.pdf>.

11. MILLER, *supra* note 4, at 162.

12. *Id.*

13. *Id.*; *see also* BREMER, *supra* note 1, at 342.

14. U.C.C. § 2-615 (2003). By its terms, Article 2 only applies to the sale of goods. U.C.C. § 2-102. That said, courts have applied by analogy U.C.C. § 2-615 to cases beyond the scope of Article 2. *See, e.g.*, Asphalt Int'l, Inc. v. Enter. Shipping Corp., 667 F.2d 261, 265–66 (2d Cir. 1981) (applying § 2-615 principles to issues involving repair of a chartered vessel); Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 314–15 (D.C. Cir. 1966) (using § 2-615 principles in case of a chartered vessel during the Suez Canal closure).

where exceptionally harsh conditions arise, such as where the seller is faced with a serious risk of personal injury or death to its employees if it continues to perform. In some circumstances, the Federal Acquisition Regulations will shield government contractors from default under its excusable delay.<sup>15</sup> However, other required contract clauses state that contractors accept at least some of the risk associated with contract performance in dangerous conditions when deployed outside the United States.<sup>16</sup> Civilian contractors' limited ability to fully excuse performance under these provisions for wartime sales is troublesome when the contingency for the claimed excuse arises because of wartime conditions. Yet, practice suggests that government contractors have cancelled or delayed delivery under wartime contracts in some cases, even where the military is faced with shortage of supplies.<sup>17</sup>

"[U]nforeseen supervening circumstances not within the contemplation of the parties at the time of contracting" excuse an Article 2 seller from timely delivery of goods under the doctrine of impracticability and cut off a buyer's right to claim breach.<sup>18</sup> In the case of wartime contracts where extreme personal hazard is a risk, a narrow interpretation of the unforeseen circumstances test may prove unsatisfying for the seller. Yet, if the military goes without needed hardware and supplies, the wartime effort may be compromised. If excuse under § 2-615 is unavailable, what other options are available to the seller? How can the government be truly assured that the military will be properly supplied without having its own personnel ensure all deliveries? Can a government buyer resort to Article

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15. See Federal Acquisition Regulation, Solicitation Provisions and Contract Clauses, 48 C.F.R. § 52.249-14 (2008); see also Defense Acquisition Regulations System, Department of Defense, Solicitation Provisions and Contract Clauses, 48 C.F.R. § 252.217-7009. The regulations allow the government to terminate contracts, but excuse default by the contractor where the causes are: "(1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather." 48 C.F.R. § 52.249-14. Whether a failure is the result of one of the stated causes is determined by the government contracting officer. *Id.*

16. See 48 C.F.R. § 252.225-7040 (2008). This provision observes that performance may be dangerous and that civilian contractors accept the risk of performance under such conditions. *Id.* The provision further recognizes that the contractors are civilians and are limited in their ability to use deadly force. *Id.*; see also Defense Federal Acquisition Regulation Supplement; Contractor Personnel Supporting a Force Deployed Outside the United States, 70 Fed. Reg. 23,790, 23,792 (May 5, 2005) (codified at 48 C.F.R. pts. 207, 212, 225, 252) (discussing comments and subsequent amendments to the proposed language of the rule that adequately reflect the amount of risk the regulation should shift to the contractors). For a discussion of the working of defense provisions and policy, see *infra* Part II.B.

17. See MILLER, *supra* note 4, at 161-62.

18. U.C.C. § 2-615(a) & cmt. 1. Although common law permits excuse in response to impossibility and frustration of purpose, Article 2 allows excuse on an arguably broader ground when "failure of presupposed conditions" creates an impracticability. *Id.*

2 remedies after a seller breaches by failing to deliver goods for the wartime effort? This remains a significant issue. Indeed, a broad definition of excuse would deny the government access to Article 2 remedies and leave the government with little certainty that sellers will deliver under wartime contracts.

This Article analyzes a civilian seller's right to claim excuse from a wartime contract and suggests an approach that balances the seller's risk due to wartime hazards, including extreme personal hazard, against the government's need to have military supplies. Considering the KBR situation as one of the challenges facing contractors and the government, this Article describes the typical approach to the excuse question, which focuses on increased costs associated with performance. Next, this Article explores existing law and scholarly commentary concerning claims of impracticability by non-delivering sellers. I conclude that none of the existing impracticability analyses satisfactorily balance the needs of the civilian seller and the government during wartime where the seller is faced with extreme wartime risks, such as extreme personal hazard.

Instead, I suggest a solution which revisits the demarcation between contractor-assumed risks and government-retained risks of warfare, and involves a novel application of the doctrine of impracticability. The solution uses an analysis of inherently governmental functions to excuse seller performance in extreme wartime conditions where performance would require the seller to perform an inherently governmental function, including tasks contracted out to other companies. Inherently governmental functions are those so intimately related to the public interest as to require performance by federal government employees, according to the Federal Activities Inventory Reform Act of 1998. This theory posits that in certain circumstances the government retains the risk of inherently governmental functions it has expressly or impliedly outsourced. This approach provides sellers a limited right to excuse performance in a manner that is consistent with the underlying principles of Article 2 and general contract law. Though novel, the solution draws from existing doctrines regarding impracticability and inherently governmental functions. This approach honors the ideal of binding parties to their agreements, while accounting for current challenges in wartime procurement. The result is a conceptually sound application of the excuse doctrine that holds sellers to their bargains in most circumstances. I conclude with a proposal of the specific balancing of interests needed in wartime procurements relative to performance and breach under Article 2.

## II. THE PROBLEM OF WARTIME CONTRACTS

### A. *The Contractor Dilemma*

Wartime contractors face the challenge of performance under harsh and changing circumstances that present risk of extreme personal hazard to employees. The KBR scenario after the 2004 attack typifies one contractor performance issue the contractor faced: not only destruction of most of the goods, but also loss of life and injury to employees delivering the goods.<sup>19</sup> After this attack, performance of the contract presented KBR with a case of “extreme” personal hazard on the continuum of contractor performance issues.

The U.S. wartime contract with World Fuel Services Pte., Ltd. (WFS) represents another typical spot on the continuum of the contractor performance issue—one of “partial” personal hazards. In 2002, WFS contracted to supply jet fuel for U.S. aircraft operating from military bases in Afghanistan and Pakistan.<sup>20</sup> The contract authorized WFS to arrange for transportation of fuel to the destination, rather than deliver the fuel itself.<sup>21</sup> At the outset, the parties highlighted the problems along the Pakistani/Afghan border and the need to drive primarily during the day due to security concerns.<sup>22</sup> While the parties recognized the need for WFS to closely coordinate truck movements,<sup>23</sup> they incorrectly anticipated that unforeseen delays would lessen as WFS established a delivery routine.<sup>24</sup>

Instead, WFS faced difficulties and increased costs in the delivery of the fuel under the contract due to threats of violence against the truck drivers.<sup>25</sup> Specifically, WFS’s problems included damage to and theft of trucks, threats to and arrests of truck drivers, and risk of strikes by drivers.<sup>26</sup> Consequently, WFS and the government agreed in April 2003 to a \$100,000 increase in the cost of transportation.<sup>27</sup> Since WFS and the government reached a solution, it remains unclear whether WFS would be entitled to recover the increase in cost under federal regulations or U.C.C.

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19. *See supra* notes 7–13 and accompanying text.

20. *See* World Fuel Services (Singapore) Pte., Ltd. Contract § 2 (Apr. 3, 2002), [http://projects.publicintegrity.org/docs/wow/world\\_fuel\\_services.pdf](http://projects.publicintegrity.org/docs/wow/world_fuel_services.pdf).

21. *Id.* § 13.

22. World Fuel Services (Singapore) Pte., Ltd. Delivery Conditions § 6, [http://projects.publicintegrity.org/docs/wow/world\\_fuel\\_services.pdf](http://projects.publicintegrity.org/docs/wow/world_fuel_services.pdf) (last visited Oct. 14, 2008).

23. *Id.*

24. *Id.*

25. World Fuel Services (Singapore) Pte., Ltd. Amendment of Solicitation/Modification of Contract § 14 (Apr. 15, 2003), [http://projects.publicintegrity.org/docs/wow/world\\_fuel\\_services.pdf](http://projects.publicintegrity.org/docs/wow/world_fuel_services.pdf).

26. *Id.*

27. *Id.*

excuse doctrine. Had WFS needed to excuse or delay its performance under the jet fuel contract, both the foreseeability of the violence and the possibility that the risk of violence was allocated to contractors like WFS who receive a premium for wartime deliveries would present impediments to WFS' argument. The need of the military to receive critical supplies like jet fuel suggests that civilian contractors like WFS should nearly always be held to their deals.

### B. *Unraveling the Web of Defense Regulations and Policy*

Evaluation of whether either contractor on this continuum is able to delay or excuse performance during wartime depends in part on the terms of the agreements made with the government. These agreements rest primarily on contract language and policies set by the federal government and the Department of Defense (DoD). As part of the solicitation and contract practice of the federal government, contract documents provide that the entire body of purchasing practices and mandatory contract clauses contained in the Federal Acquisition Regulations (FARs), the DoD FAR Supplement (DFARS), and the command unique clauses are automatically incorporated into any agreement.<sup>28</sup> As such, a default rule system applies to government contracting—even in wartime—rather than a system with individualized negotiation of substantive clauses. Both the KBR<sup>29</sup> and WFS<sup>30</sup> contracts reflect this practice.

The standard excusable-delay provisions incorporated in the KBR and WFS contracts give the contractor a right to cease performance without governmental recourse for damages if the contractor does not perform due to the acts of a public enemy,<sup>31</sup> a category that would seem to include the

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28. 48 C.F.R. § 52.252-2 (2008); see Robert Nichols & Steve Phillips, *Private Suppliers in a Public Role: Helping the U.S. Military in Iraq and Elsewhere*, 14 BUS. L. TODAY, July–Aug. 2005, at 13, 14 (stating that federal regulatory rules impose more requirements than a typical commercial contract).

29. See Kellogg Brown & Root Award Contract (Dec. 14, 2001), <http://projects.publicintegrity.org/docs/wow/LOGCAP.pdf>.

30. See World Fuel Services (Singapore) Pte., Ltd. Contract § 2 (Apr. 3, 2002), [http://projects.publicintegrity.org/docs/wow/world\\_fuel\\_services.pdf](http://projects.publicintegrity.org/docs/wow/world_fuel_services.pdf).

31. Although different provisions apply depending on whether the contract is one for cost-reimbursement or fixed price supply and service or a commercial items contract, the excusable-delay provisions require the same elements. See 48 C.F.R. § 52.249-8 (addressing fixed price supply and service contracts); 48 C.F.R. § 52.249-14 (addressing various types of contracts such as those for supplies, services, construction, time-and-material contracts and labor-hour contracts); 48 C.F.R. § 52.212-4 (2008) (addressing contracts for commercial items). For a good overview of the use of excusable delay in government contracts generally, see NEIL H. O'DONNELL & PATRICIA A. MEAGHER, *TERMINATIONS OF GOVERNMENT CONTRACTS IV.A* (2007) (arguing that the excusable delay provision is more liberal than the U.C.C.).

insurgents in Iraq and Afghanistan.<sup>32</sup> The regulatory provisions also require that any excuse claimed by KBR or WFS must be both beyond the control and without fault or negligence of the contractor.<sup>33</sup> Additionally, contractors like KBR and WFS are required to request excuse, and the contracting officer must evaluate the extent of the problem.<sup>34</sup> If the contracting officer determines that the failure to deliver or request for delay is justified, then either the delivery schedule is revised or the contract is terminated.<sup>35</sup>

Both the KBR and WFS contracts, though, involved sellers providing goods that support the military efforts in the Middle East—arrangements that increase the potential for action by public enemies. To address these issues relating to contract performance outside the United States during wartime, the government added a new, mandatory contract clause effective June 6, 2005.<sup>36</sup> The regulations in 48 C.F.R. § 252.225-7040 requires inclusion of a contract clause for military contractors recognizing both that contractors are civilians, and that the contract may require performance “in

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32. See 48 C.F.R. §§ 52.249-8(c), (g), 52.249-14(a), 52.212-4(f) (2008). The FARs require as a matter of policy the inclusion of an excusable delay clause. See 48 C.F.R. § 49.505 (2008). In the event that excusable delay is found and the government terminates the contract, such termination is deemed to be “for the convenience of the Government.” 48 C.F.R. § 49.401.

33. See 48 C.F.R. §§ 52.212-4(f), 52.249-8(c), 52.249-14(a); see also *United States v. Brooks-Callaway Co.*, 318 U.S. 120, 122–24 (1943) (finding that contractor could not claim excuse for event it could foresee); *Hardeman-Monier-Hutcherson*, 67-1 B.C.A. (CCH) ¶ 6,158, A.S.B.C.A. No. 10444 (Armed Servs. Bd. of Contract Appeals, Feb. 17, 1967) (appeal) (quoting exculpatory clause in contract); *Marine Transp. Lines, Inc.*, 86-3 B.C.A. (CCH) ¶ 19,164, A.S.B.C.A. No. 28962 (Armed Servs. Bd. of Contract Appeals, July 9, 1986) (appeal) (quoting exculpatory clause in contract but concluding that the contractor was not entitled to delays due to weather conditions). Foreseeability seems not to be a separate requirement under the FARs for sales of goods. See *O'DONNELL & MEAGHER*, *supra* note 31, at IV.A.4.

34. 48 C.F.R. §§ 52.212-4, 52.249-8, 52.249-14. The contractor has the burden of proving the basis for excuse. See *Double B Enters., Inc.*, 01-1 B.C.A. (CCH) ¶ 31,396, A.S.B.C.A. Nos. 52010, 52192 (Armed Servs. Bd. of Contract Appeals, Apr. 24, 2001) (appeals); *FDL Techs., Inc.*, 93-1 B.C.A. (CCH) ¶ 25,518, A.S.B.C.A. No. 41515 (Armed Servs. Bd. of Contract Appeals, Sept. 30, 1992) (appeal).

35. 48 C.F.R. § 52.249-14; see also *De Armas v. United States*, 70 F. Supp. 605, 606–07 (Ct. Cl. 1947) (finding that the contractor was entitled to extension of time for completion of the contract due to unforeseeable weather conditions); *Keith Crawford & Assocs.*, 95-1 B.C.A. (CCH) ¶ 27,388, A.S.B.C.A. No. 46893 (Armed Servs. Bd. of Contract Appeals, Dec. 20, 1994) (appeal) (noting that default termination of the contract by the government should be overturned if the contractor's failure to perform was due to excusable causes).

36. See *Defense Federal Acquisition Regulation Supplement; Contractor Personnel Supporting a Force Deployed Outside the United States*, 70 Fed. Reg. 23,790, 23,792 (May 5, 2005) (codified at 48 C.F.R. pts. 207, 212, 225, 252); see also *JOINT CONTRACTING COMMAND—IRAQ/AFGHANISTAN, CONTRACTING OFFICER'S GUIDE TO SPECIAL CONTRACT REQUIREMENTS FOR IRAQ/AFGHANISTAN THEATER BUSINESS CLEARANCE 17–20, 22* (2007) (implementing new regulation 48 C.F.R. § 252.225-7040).

dangerous or austere conditions.”<sup>37</sup> The provision further states that contractors “accept[] the risk” of performance in such conditions.<sup>38</sup> The intent of this provision is not to change prior law or regulations on excusable delay, but rather to ensure that contractors will assume responsibility for their own employees, and adequately supervise and train them “in as safe a mode as possible.”<sup>39</sup> The government, however, arguably retains all “risk associated with inherently Governmental functions.”<sup>40</sup> Because this general backdrop of regulation clarifies somewhat the government’s right to enforce wartime contracts and the seller’s rights and obligations in the face of extreme personal hazard, impracticability and interpretation doctrines may be useful to guide the government and companies like KBR and WFS.

### C. *Excusing Wartime Sellers under the Traditional Impracticability Doctrine*

In a typical dispute over performance, the government will claim breach for the seller’s failure to deliver the goods. In response, the contractor will usually claim excuse under U.C.C. § 2-615 and that the government is not entitled to damages because unforeseen wartime circumstances caused the problem. Specifically, the contractor would argue that it was ready and otherwise able to perform the contract, but increased insurgent activity created a contingency whereby performance

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37. 48 C.F.R. § 252.225-7040(b) (2008). The provisions place limitations on the ability of contractors to use force. *Id.* Limitations on the use of force are certainly consistent with United States obligations under the United Nations Charter, which prohibits the use of force excepting cases of self-defense, or as authorized by the United Nations Security Council. U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

38. 48 C.F.R. § 252.225-7040(b)(2).

39. Defense Federal Acquisition Regulation Supplement; Contractor Personnel Supporting a Force Deployed Outside the United States, 70 Fed. Reg. at 23,792.

40. *Id.* The implementing regulations for the Federal Activities Inventory Reform (FAIR) Act state that an inherently governmental function “is one that is so intimately related to the exercise of the public interest as to mandate performance by Federal employees.” Implementation of the Federal Activities Inventory Reform Act of 1998 (FAIR Act), Pub. Law No. 105-270, 64 Fed. Reg. 33,927, 33,929 (June 24, 1999). This typically would “include those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government.” *Id.* at 33,931; accord 48 C.F.R. § 7.503 (2008) (providing a non-exclusive list of examples of inherently governmental functions). With respect to the military, these functions would include “activities performed exclusively by military personnel who are subject to deployment in a combat, combat support or combat service support role.” FAIR Act, 60 Fed. Reg. at 33,931; see also Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233, 256–58 (2000) (discussing inherently governmental functions in the context of the armed forces).

raised risk of extreme personal hazard to employees delivering the goods.<sup>41</sup> The contractor would further contend that the changing nature of wartime hazards was not allocated to it by custom or by the agreement—or alternately that the risk is allocated to the government.<sup>42</sup> The contractor would also assert that the increased insurgent activity rendered delivery of the goods commercially impracticable because the cost of overcoming the extreme personal hazard to its employees would include not only increased financial costs of an unknown magnitude, but also loss of life or serious injury to personnel.<sup>43</sup> The contractor would also note that it gave the government notice of the delay or non-delivery within a reasonable time after the ground situation changed and the extent to which delivery may still be possible.<sup>44</sup> Because of this commercial impracticability, the contractor will argue that it did not breach the contract under U.C.C. § 2-615.<sup>45</sup> Therefore, the contractor will assert the government is not entitled to the normal U.C.C. remedies for breach of contract requiring delivery of the goods,<sup>46</sup> and that under U.C.C. § 2-709, it is entitled to payment for any goods that were actually delivered.<sup>47</sup>

If KBR or WFS were faced with an unforeseen severe shortage of goods due to the war in the Middle East, the contractors would have a good chance of succeeding in a claim for excuse.<sup>48</sup> While factual issues would have to be resolved,<sup>49</sup> KBR and WFS have a strong case that performance became impracticable due to excessive and unreasonable financial costs of performance. Because the contingencies involve risk of

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41. *See* *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966) (noting that the three elements of commercial impracticability generally are: (1) that a contingency occurred; (2) that risk of unexpected occurrence had not been allocated; and (3) that occurrence of contingency rendered performance commercially impracticable). The general rules of contract law apply equally to government contracts. *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 607–08 (2000) (“When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.” (quoting *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996))).

42. *Chevron U.S.A., Inc.*, 90-1 B.C.A. (CCH) ¶ 22,602, A.S.B.C.A. No. 32323 (Armed Servs. Bd. of Contract Appeals, Dec. 29, 1989) (appeal).

43. *Id.* (noting that the contractor did not argue commercial impossibility or impracticability based on increased costs but instead that performance became impracticable due to “absolute unsafe conditions” due to threat of hostilities in Persian Gulf).

44. *See* U.C.C. § 2-615(c) (2003) (requiring notification of buyer by seller regarding delay or failure to deliver).

45. *Id.* § 2-615(a).

46. *Id.* (positing that no breach occurs where performance is impracticable).

47. *Id.* § 2-709.

48. *See id.* § 2-615 cmt. 4.

49. For instance, factual issues would include whether the non-occurrence of insurgent activity here was a “basic assumption” under U.C.C. § 2-615(a), whether the contract allocated the risk differently, and whether the contractor gave proper notice to the government under U.C.C. § 2-615(c). *Id.* § 2-615.

partial or extreme personal hazard during wartime, attempts to claim excuse may face obstacles. Citing *Transatlantic*, the federal government can argue that wartime contracts are not subject to excuse for impracticability, because risks of war are always foreseeable for contracts entered into during wartime.<sup>50</sup> The federal government will further respond that the risk of loss must have been allocated to the contractor in these cases. Both these arguments—which together comprise the “traditional” analysis of impracticability under § 2-615—deserve further analysis.

The government, as buyer, will argue that it did not assume the risks relative to delivery of goods in the Middle East, a known war zone, and that by privatizing these particular procurements the government effectively shifted the risk to the seller under U.C.C. § 2-615.<sup>51</sup> In other words, KBR’s and WFS’s act of contracting for delivery of goods in “dangerous or austere” wartime conditions eliminated their ability to later claim excuse under U.C.C. § 2-615. Furthermore, the selling contractors must account to the government for failure to perform.<sup>52</sup> The government will point out that U.C.C. § 2-615 conditions the right to excuse performance on the seller not assuming greater obligations for performance.<sup>53</sup> Because the government made no promises concerning the safety of the war zone, it will argue that the seller contracting during wartime is always obliged to meet its contractual obligations to the military.<sup>54</sup> In short, the government will argue that it never promised contractually that the delivery during wartime could be done safely—and that KBR and WFS at least impliedly did.

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50. See *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 318–19 (D.C. Cir. 1966).

51. See U.C.C. § 2-615 (making § 2-615 not applicable where seller had assumed greater obligations under the contract); see, e.g., *Bethlehem Steel Corp.*, 72-1 B.C.A. (CCH) ¶ 9,186, A.S.B.C.A. No. 13341 (Armed Servs. Bd. of Contract Appeals, Nov. 19, 1971) (appeal) (noting that any shifting of risk of increased cost to the contractor should be clearly stated in the contract); *Aerosonic Instrument Corp.*, 59-1 B.C.A. (CCH) ¶ 2,115, A.S.B.C.A. No. 4129 (Armed Servs. Bd. of Contract Appeals, Mar. 12, 1959) (appeal) (finding that obvious risks are assumed by contractor, such as when contractor undertakes to provide research and development for an item that had never been manufactured before).

52. 48 C.F.R. § 52.212-4(f) (2008) (requiring the contractor to give detailed written notification of all circumstances related to the delay and when they cease to exist).

53. U.C.C. § 2-615.

54. See, e.g., *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 992 (5th Cir. 1976) (“[W]hen the promisor has anticipated a particular event by specifically providing for it in a contract, he should be relieved of liability for the occurrence of such event regardless of whether it was foreseeable.”); *Roy v. Stephen Pontiac-Cadillac, Inc.*, 543 A.2d 775, 778–79 (Conn. App. Ct. 1988) (finding that seller assumed risk of contingency where seller should have known of facts that made performance impracticable); *Swift Textiles, Inc. v. Lawson*, 219 S.E.2d 167, 171–72 (Ga. Ct. App. 1975) (finding that seller assumed risk of price increase); 14 JAMES P. NEHF, CORBIN ON CONTRACTS § 74.8 (rev. ed. 2001). *But see* *Alimenta (U.S.A.), Inc. v. Gibbs Nathaniel (Can.) Ltd.*, 802 F.2d 1362, 1366 (11th Cir. 1986) (finding that seller did not assume risk of drought that prevented peanut deliveries).

Alternatively, the government buyer will contend that U.C.C. § 2-615 excuse is unavailable since regulations mandate inclusion of a contract clause that addresses excusable delay.<sup>55</sup> The contractual out, if any, for KBR and WFS comes from the government, rather than from U.C.C. § 2-615, and the selling contractors must look to the contracting officer for their sole remedy.<sup>56</sup> Although the scope of this regulation is debatable, the government at first seems to have a strong argument against availability of traditional excuse doctrine for wartime sellers. The text of U.C.C. § 2-615 could support this position. Moreover, comment eight provides that KBR's and WFS' assumption of greater obligations can be implied by the circumstances surrounding the contract.<sup>57</sup> Under § 2-615 the parties have the right to make their own agreements that vary from the code defaults. The government will therefore assert that § 2-615 excuse is not envisioned for harsh wartime contingencies.

Perhaps more importantly, the government can point out that the purpose of the excuse doctrine under § 2-615 does not fit the relationship between a wartime seller and the government. Since KBR and WFS agreed to deliver essential supplies to the military in the field, the government can argue that wartime sellers should be required to perform. KBR and WFS almost certainly received a higher price for the goods delivered to the Middle East during wartime. This price increase could cover the extra logistical and security support, higher wages for truck drivers, and even insurance premiums to compensate contractor employees for injury and death. In non-wartime contract situations, KBR and WFS would not likely have needed the additional security support and may have received only a fraction of the purchase price for wartime goods. For paying higher prices, the government should be entitled to obtain the goods. As Judge Skelly Wright observed in the well-known *Transatlantic Financing Corp.* case that arose due to the closure of the Suez Canal:

Parties to a contract are not always able to provide for all the possibilities of which they are aware, sometimes because they cannot agree, often simply because they are too busy. Moreover, that some abnormal risk was contemplated is probative but does not necessarily establish an allocation of the risk of the contingency which actually occurs. In this case, for example, nationalization by Egypt of the Canal Corporation and formation of the Suez Users Group did not necessarily indicate that the Canal would be blocked even if a confrontation resulted. The surrounding circumstances do indicate, however, a willingness by *Transatlantic* to assume

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55. See 48 C.F.R. § 52.249-14.

56. See *id.*

57. U.C.C. § 2-615 cmt. 8.

abnormal risks, and this fact should legitimately cause us to judge the impracticability of performance by an alternative route in stricter terms than we would were the contingency unforeseen.<sup>58</sup>

#### D. Remedies under the Traditional Analysis of Impracticability

Under the traditional analysis just described, in which neither KBR nor WFS may be able to use the excuse doctrine, the injured government buyer would be entitled to traditional contract remedies. Upon breach, applying the termination-for-cause provisions of federal regulations, the government is generally entitled to the same remedies as any other buyer in the marketplace.<sup>59</sup> The government is also entitled to withhold payments to contractors absent establishment of excusable delay.<sup>60</sup> Following U.C.C. § 2-712, the government's preferred remedy is the difference between the contract cost and the excess cost to obtain the goods from another contractor, plus incidental and consequential damages.<sup>61</sup>

If the seller establishes excusable delay or impracticability under U.C.C. § 2-615 exists, though, the government will not be able to collect damages.<sup>62</sup> Instead, the government would need to pay the contractor a percentage of the contract price reflecting the goods already provided.<sup>63</sup> Judge Skelly Wright responded to Transatlantic Financing's request for both recovery on the contract and quantum meruit relief this way:

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58. *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 318–19 (D.C. Cir. 1966) (footnote omitted).

59. *See, e.g.*, 48 C.F.R. § 12.403 (addressing termination for cause of contracts for commercial items and containing provision that the government's rights after such termination include all generally available remedies). Additionally, in some cases liquidated damages are available. 48 C.F.R. § 11.501 (providing that a contracting officer should use liquidated damages only when time of performance or delivery is crucial and when the amount of damages would be difficult or impossible to estimate or prove).

60. *See, e.g.*, 48 C.F.R. § 52.249-8(f)–(g) (authorizing the government to withhold part of payment to protect against certain losses but stipulating that excusable defaults are treated as termination for the government's convenience); *cf.* 48 C.F.R. § 352.232-9 (providing, in chapter regulating Health & Human Services, that failure to perform may lead to withholding of payments unless the failure was excusable).

61. 48 C.F.R. § 12.403(c)(2).

62. *See* 48 C.F.R. § 52.212-4(f); U.C.C. § 2-615(a) (stating that in such instances the non-performance is not a breach); *Acme Missiles & Constr. Corp.*, 68-1 B.C.A. (CCH) ¶ 6,734, A.S.B.C.A. No. 11794 (Armed Servs. Bd. of Contract Appeals, Dec. 6, 1967) (appeal) (finding excusable delays for contractor due to operation of the government's priorities system); *Hagstrom Constr. Co.*, 61-1 B.C.A. (CCH) ¶ 3,090, A.S.B.C.A. No. 5698 (Armed Servs. Bd. of Contract Appeals, June 23, 1961) (appeal) (finding contractor not liable for damages where delay in performance occasioned by steel shortages and governmental priorities for steel orders allocation).

63. 48 C.F.R. § 52.212-4(f), (l).

When performance of a contract is deemed impossible it is a nullity. In the case of a charter party involving carriage of goods, the carrier may return to an appropriate port and unload its cargo, subject of course to required steps to minimize damages. If the performance rendered has value, recovery in *quantum meruit* for the entire performance is proper. But here Transatlantic has collected its contract price, and now seeks *quantum meruit* relief for the additional expense of the trip around the Cape. If the contract is a nullity, Transatlantic's theory of relief should have been *quantum meruit* for the entire trip, rather than only for the extra expense. Transatlantic attempts to take its profit on the contract, and then force the Government to absorb the cost of the additional voyage. When impracticability without fault occurs, the law seeks an equitable solution, and *quantum meruit* is one of its potent devices to achieve this end. There is no interest in casting the entire burden of commercial disaster on one party in order to preserve the other's profit. Apparently the contract price in this case was advantageous enough to deter appellant from taking a stance on damages consistent with its theory of liability. In any event, there is no basis for relief.<sup>64</sup>

#### E. *Limits on the Arguments Against Excuse*

Even if one accepts the traditional analysis, there are some circumstances in which a seller would be able to claim excuse under a wartime contract due to war zone conditions, even where the parties include in the contract a procedure for "excusable delay."

True, the newer DFARS provisions recognize that wartime contracts involve performance in "dangerous or austere" conditions.<sup>65</sup> Yet, recognition that performance might be dangerous does not mean that contractors assume the risk of any and all conceivable wartime dangers. We might observe that even those persons who perform dangerous contracts do not necessarily agree to perform under all types of dangers that might present (i.e., even a firefighter is not expected to run into all burning buildings). There are some wartime conditions where even military personnel are held back. One would expect that performance by civilian sellers supporting the military's efforts would have similar limitations. Accordingly, a court could interpret assumption of risk under the DFARS to include only those tasks that are neither reserved to the

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64. *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 320 (D.C. Cir. 1966) (citations and footnote omitted).

65. *See* 48 C.F.R. § 252.225-7040.

government nor assigned to other contractors. If the seller did not presume that the particular wartime risks were not assumed by the seller and that the other requirements of § 2-615 were met, KBR or WFS could delay or excuse performance and not be liable to the government for breach.<sup>66</sup> Given the KBR and WFS facts, it is uncertain whether a court applying the traditional analysis would find that the contractor assumed all risks of wartime contingencies and thereby disallow excuse under U.C.C. § 2-615. However, if contractors assumed the risk of wartime, excuse would not likely be available.

Alternatively, the government might not be able to disclaim applicability of U.C.C. § 2-615 due to the inclusion of the contract provision on excusable delay. This would be the case if the provisions on excusable delay did not completely displace the availability of excuse under U.C.C. § 2-615,<sup>67</sup> if the contracting officer did not properly determine which acts of a public enemy are excusable, or if the government simply did not exercise the excusable-delay provision properly as understood under U.C.C. § 2-103.<sup>68</sup> In that event, at least the traditional analysis of excuse would be available to KBR and WFS if the seller did not assume greater obligations under U.C.C. § 2-615. The FAR language appears to give the government complete authority over whether grounds for excuse exist and what remedy is appropriate.<sup>69</sup> Following the traditional analysis outlined above, KBR or WFS could claim excuse and avoid payment for failure to deliver. However, it remains uncertain whether a court would find that the excusable-delay provisions exclude U.C.C. § 2-615. Moreover, whether the contracting officer exercised the

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66. If the KBR and WFS contracts were not entered into during wartime, the issue of allocation of risk for interference due to insurgent activity would not be as likely to come up in contract performance. The risk would most likely be neither assumed by either party nor one in their contemplation under U.C.C. § 2-615. In such cases, KBR and WFS would seemingly be able to excuse performance in these types of non-wartime cases.

67. See U.C.C. § 2-615 cmt. 8 (2003) (noting that force majeure clauses deviating from U.C.C. § 2-615 should be considered in light of “mercantile sense and reason”); NEHF, *supra* note 54, § 74.8 (noting that the mercantile-sense standard is often treated by courts as subjective rather than objective).

68. See *First Nationwide Bank v. Fla. Software Svcs., Inc.*, 770 F. Supp. 1537, 1542 (M.D. Fla. 1991) (noting that good faith is an implied contractual covenant). See generally 8 CATHERINE M.A. McCAULIFF, CORBIN ON CONTRACTS § 33.4 (rev. ed. 1999) (discussing good faith as restraint on contract performance and enforcement); Robert S. Summers, “Good Faith” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968) (examining the concept of good faith in contract law and the impact of the U.C.C.). The contractor has the right to appeal the determination of the contracting officer as to whether a delay is excusable under the disputes provisions of the FAR. 48 C.F.R. § 49.402-3(g)(5).

69. 48 C.F.R. § 52.249-14 (providing that the contracting officer determines whether failure to perform was excusable).

excuse provisions in good faith would be a fact issue. For these reasons, the extent to which the excusable-delay provision will control arguments of impracticability is uncertain.<sup>70</sup>

Concepts of contract interpretation can also provide a mechanism for sellers to ease performance under a contract. U.C.C. § 2-202,<sup>71</sup> for example, allows parties in many cases to explain or supplement contract terms with course of dealing,<sup>72</sup> usage of trade,<sup>73</sup> course of performance,<sup>74</sup> and evidence of consistent additional terms.<sup>75</sup> Pursuant to § 1-303, course of performance, course of dealing, and usage of trade all anticipate inclusion of the concept of “commercial context” when interpreting contract language, leaving resolution of disputes to the trier of fact and placing the burden of proof on the party asserting the commercial context.<sup>76</sup> Thus, although KBR’s and WFS’s contracts require delivery in war zones, any delay or non-performance may not necessarily entitle the government to damages where the commercial context supports wartime

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70. There is also some precedent, consistent with government practice regarding contracting generally, as to the government’s ability to impose liability for delay or nonperformance on contractors like KBR and WFS, where the performance of the contractor has failed due to the acts of another government contractor. In *Modern Home Mfg. Corp.*, 66-1 B.C.A. (CCH) ¶ 5,367, A.S.B.C.A. No. 6523 (Armed Servs. Bd. of Contract Appeals, Feb. 4, 1966), a housing contractor was entitled to an extension because the site had not been prepared in accordance with the specifications by another contractor that had been hired by the government to perform this function. Although this precedent may be implicated in some delay cases, it probably does not apply to the facts of the representative contracts with KBR and WFS. The facts of the KBR and WFS sales do not justify a conclusion that any failures to perform arose for any reason attributable to other government contractors vested with responsibility over transportation safety matters in Iraq or Afghanistan.

71. U.C.C. § 2-202.

72. U.C.C. § 1-303(b) (2001) (“A ‘course of dealing’ is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.”).

73. *Id.* § 1-303(c) (“A ‘usage of trade’ is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.”).

74. *Id.* § 1-303(a). This subsection provides that:

A “course of performance” is a sequence of conduct between the parties to a particular transaction that exists if: (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

*Id.*

75. U.C.C. § 2-202(1)(b) (2003).

76. U.C.C. § 1-303 cmts. 1, 8.

delays due to third-party interference.<sup>77</sup> Similarly, common law generally provides methods for determining the intentions of contracting parties.<sup>78</sup> Since the government regulations arguably create uncertainty in this situation, the common law notion of interpretation against the draftsman<sup>79</sup> may assist contractors like KBR and WFS in limiting the government's argument for absolute performance in all circumstances.

In sum, under the traditional analysis of the excuse doctrine, a delayed wartime contractor has only very limited ability to successfully claim impracticability. Unfortunately for the government and wartime contractors, many delays and failures to perform will fall outside clear precedent. Given the need of the contracting parties to ensure contractual performance, it is not surprising that some courts and commentators have grappled with alternative approaches to contractual performance. The next Section will explore these alternative approaches to the excuse doctrine.

#### F. *Approaches to the Impracticability Doctrine*

Several authorities present alternative approaches to the impracticability doctrine that, while not addressing wartime contracting, offer guidance that could be used to support its application to wartime sellers. The most common approach applies an objective version of the foreseeability test. A second approach builds on the objective version by using efficiency theory to determine party intent. A third approach suggests that more often than not, courts will apply the objective test in light of fairness norms. Finally, this Article turns to a general critique of any theory that, as applied, would prevent a finding of excuse for wartime contingencies in all cases.

##### 1. Evaluation of Seller Excuse under the Objective Theory

If a court can find that a wartime seller like KBR or WFS has not assumed every risk associated with wartime performance, that insurgent attacks created a contingency, and that the insurgent activity was not "foreseeable," U.C.C. § 2-615 will be satisfied, thus preventing the government buyer from claiming breach and from obtaining damages for delay or nonperformance. Recently, the government has attempted, using new contract language, to allocate risk to contractors deploying with the military.<sup>80</sup> The focus of this clause, though, is aimed at personnel

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77. *Id.* cmt. 1. *But see* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 3.9 (5th ed. 2003) (noting concern with lack of uniform customs in interpretation).

78. *See generally* PERILLO, *supra* note 77 (discussing the role of meaning in interpreting the promises of the parties).

79. *See* RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

80. *See supra* notes 37–39 and accompanying text.

management of contractors, making it questionable support for a broad-based rule of universal contractor assumption of wartime risks, particularly when coupled with government provisions reflecting some policy of excuse.<sup>81</sup> Since the characterization of insurgent activity as a contingency may be difficult to challenge, the element of foreseeability may have primary influence over whether a wartime seller will be successful on a claim of excuse under the traditional analysis.

The problem, of course, is that under traditional analysis, contractors like KBR and WFS neither expressly assumed the risk of third-party interference by insurgents nor did the contracting parties appear to have clearly contemplated the issue at the outset.<sup>82</sup> Moreover, the government buyer drafted the provisions on excusable delay and deployment with the military. Under U.C.C. § 2-615, wartime contractors will be unsuccessful in claiming excuse if the risk is allocated to them or the “unforeseen supervening circumstances” were within the contemplation of the parties at the time of contracting.<sup>83</sup> It is unlikely that the mere entering into a wartime contract is an implied assumption of all risks of wartime, of any type, such as to foreclose impracticability under U.C.C. § 2-615 as a whole. Similarly, the contracts with KBR and WFS do not include sufficiently clear statements concerning obligations during wartime to foreclose impracticability in the proper case, particularly since unclear contractual language is often construed against the draftsman.<sup>84</sup> With this point in mind, cases of excuse may hinge on application of the foreseeability prong of the traditional analysis.

Some judges and commentators have interpreted the general “unforeseen” language of the U.C.C. comments as an objective test of foreseeability to determine availability of excuse. Although the court in *Transatlantic Financing* concluded that the specific vessel and crew were able to sail around the Cape after the closure of the Suez Canal, defeating the seller’s claim of excuse,<sup>85</sup> the court believed that an objective test controlled.<sup>86</sup> The court noted that it was more “reasonable” to conclude that the owner-operators of vessels, rather than the shippers, were in the best position to insure against the closure of the Suez Canal, since they were in the best position to know generally the costs that might arise from

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81. See *supra* notes 34, 40–41 and accompanying text.

82. In the WFS contract, the problems with the delivery conditions were not reflected in the contracting documents until WFS requested a modification due to the conditions. See World Fuel Services (Singapore) Pte., Ltd. Amendment of Solicitation/Modification of Contract § 14 (Apr. 15, 2003), [http://projects.publicintegrity.org/docs/wow/world\\_fuel\\_services.pdf](http://projects.publicintegrity.org/docs/wow/world_fuel_services.pdf).

83. U.C.C. § 2-615 & cmt. 1 (2003).

84. See RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981); 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.27 (rev. ed. 1998).

85. *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 319 (D.C. Cir. 1966).

86. *Id.* at 319 n.13.

closure.<sup>87</sup> The court explained the objective test as one which should not excuse sellers because of less than normal capability unless both parties were aware of the limits.<sup>88</sup> Instead, “[t]he issue of impracticability should no doubt be ‘an objective determination of whether the promise can reasonably be performed rather than a subjective inquiry into the promisor’s capability of performing as agreed.’”<sup>89</sup> The court found that the language of U.C.C. § 2-615 describing the parameters of excuse based on impracticability required a showing of foreseeability judged on a reasonable grounds, rather than the seller’s own particular ability to perform under the contract.<sup>90</sup> Many courts have adopted this theory.<sup>91</sup> Thus, when applied to KBR and WFS, the objective approach would necessarily examine complicated commercial relations during wartime to determine what is “reasonable” under the circumstances. For instance, while the purchase of a computer by the government in the ordinary course may not differ substantially from that of a large business purchasing a computer, the context of the sale of goods delivered to an active war zone changes the context of the parties’ relationship.

Examining the relevant practices in wartime contracting may present additional issues. For example, twentieth-century military practice did not heavily rely on widespread government contracts at such close proximity

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87. *Id.* at 319.

88. *Id.*

89. *Id.* at 319 n.13 (quoting Symposium, *The Uniform Commercial Code and Contract Law: Some Selected Problems*, 105 U. PA. L. REV. 836, 887 (1957)); see also, e.g., *W. L.A. Inst. for Cancer Research v. Mayer*, 366 F.2d 220, 225 & n.9 (9th Cir. 1966) (noting objective view of excuse doctrine); *Duff v. Trenton Beverage Co.*, 73 A.2d 578, 583 (N.J. 1950) (noting that standard is whether parties reasonably could be assumed to have contemplated the contingency); *Alamance County Bd. of Educ. v. Bobby Murray Chevrolet, Inc.*, 465 S.E.2d 306, 311 (N.C. Ct. App. 1996) (“Foreseeability under § 2-615 is an objective standard; it matters not whether the seller thought a certain event would or would not occur, but what contingencies were reasonably foreseeable at the time the contract was made.”).

90. *Transatlantic*, 363 F.2d at 319 & n.13.

91. NEHF, *supra* note 54, § 74.8 (describing grounds for adoption of theory by courts but also noting criticism by some commentators); see also Sheldon W. Halpern, *Application of the Doctrine of Commercial Impracticability: Searching for the ‘Wisdom of Solomon’*, 135 U. PA. L. REV. 1123, 1140–41 (1987) (concluding that subjective intentions of the parties is often impossible to ascertain and describing the objective approach to impracticability); Paul L. Joskow, *Commercial Impossibility, the Uranium Market and the Westinghouse Case*, 6 J. LEGAL STUD. 119, 157–58 (1977) (appearing to suggest a test bounded by subjective and objective considerations and looking at “[w]hat occurrences were or should have been included in the negotiations underlying the contract and what contingencies were not”); Donald J. Smythe, *Bounded Rationality, the Doctrine of Impracticability, and the Governance of Relational Contracts*, 13 S. CAL. INTERDISC. L.J. 227, 237 (2004) (describing the objective version of the foreseeability test as consistent with the official interpretation of the U.C.C.); Symposium, *The Uniform Commercial Code and Contract Law: Some Selected Problems*, *supra* note 89, at 887 (“No doubt the draftsmen contemplated an objective determination.”).

to the active war zone where a contractor would potentially need to exercise force. Military practice, rather, focused on government control of the use of force through military strength.<sup>92</sup> Although the United States has historically relied on contractors,<sup>93</sup> its practice has traditionally been more for support and weapons procurement at greater distances from active war zones.<sup>94</sup> Due to the changing nature of wartime contracting,<sup>95</sup> coupled with the presence of insurgents who interfere with contract performance, it may be difficult under the objective approach to determine which particular risks were foreseeable to the parties and arguably allocated between them. Because success of a claim of excuse under U.C.C. § 2-615 hinges on the characterization of the contingency, the government buyer cannot comfortably expect that the U.C.C. will hold wartime sellers to performance. The parties will certainly dispute the risks associated with extreme personal hazards compared with more ordinary hazards.

Some authorities have criticized the objective approach, which would examine whether the parties should have contemplated wartime contingencies.<sup>96</sup> Affirming a denial of excuse based upon impracticability in *American Trading & Production Corp. v. Shell International Marine Ltd.*,<sup>97</sup> Judge Mulligan of the Second Circuit commented that “[m]atters involving impossibility or impracticability of performance of contract are concededly vexing and difficult. One is even urged on the allocation of such risks to pray for the ‘wisdom of Solomon.’”<sup>98</sup> Using an objective test to allocate all risks for wartime contingencies to the contractor may prove unsuccessful, especially since the government recognizes in its regulations, the civilian status of contractors and limits their use of force. Nevertheless, the difficulty of the impracticability doctrine reflects an approach that “the promisor should not be released from his obligation.”<sup>99</sup> This view would

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92. MILLER, *supra* note 4, at 163.

93. *Id.* at 74–75.

94. *Id.* at 75.

95. *Id.* at 75–76; *see also* Deborah Avant, *What Are Those Contractors Doing in Iraq?*, WASH. POST, May 9, 2004, at B1 (discussing number and role of contractors and private security forces in Iraq).

96. *See, e.g.*, *Am. Trading & Prod. Corp. v. Shell Int’l Marine Ltd.*, 453 F.2d 939, 944 (2d Cir. 1972) (stressing difficulty of applying the impracticability doctrine); NEHF, *supra* note 54, § 74.8; Halpern, *supra* note 91, at 1142–44 (highlighting the difficulty of applying the doctrine in a complex commercial world).

97. 453 F.2d 939 (2d Cir. 1972).

98. *Id.* at 944 (quoting 6 A. CORBIN, CONTRACTS § 1333 (1962)).

99. *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 517 F. Supp. 440, 454 (E.D. Va. 1981). The court, criticizing a more subjective approach, observed:

Because the future is by definition unknowable, a rule holding the obligor to performance only where he foresees, but fails to guard against, the precise event that renders performance more difficult, would be meaningless. . . . [I]t may be

encourage parties to provide for more contingencies in their contract, but might also eliminate the seller's right to claim excuse for wartime contingencies—a right clearly granted in U.C.C. § 2-615.

## 2. Using the Efficiency Theory to Determine Party Intent

Judge Richard Posner and Andrew Rosenfield argue that the excuse doctrine is best considered in light of basic economic theory.<sup>100</sup> They suggest that courts “reduce the costs of contract negotiation by supplying contract terms that the parties would probably have adopted explicitly had they negotiated over” the allocation of the risk of a certain contingency.<sup>101</sup> The primary criterion rests with a determination of which terms would maximize the value of the exchange to the parties.<sup>102</sup> Posner and Rosenfield explain:

An easy case for discharge would be one where (1) the promisor asking to be discharged could not reasonably have prevented the event rendering his performance uneconomical, and (2) the promisee could have insured against the occurrence of the event at lower cost than the promisor because the promisee (a) was in a better position to estimate both (i) the probability of the event's occurrence and (ii) the magnitude of the loss if it did occur, and (b) could have self-insured, whereas the promisor would have had to buy more costly market insurance.<sup>103</sup>

Thus, a wartime seller would appear able to excuse performance if the government was the “cheaper insurer” against the contingency.<sup>104</sup>

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enough that he is (or should be) aware of a certain trend, or that a given state of affairs is in flux, or that an assumption is more than usually uncertain.

*Id.*; see also *McGinnis v. Cayton*, 312 S.E.2d 765, 775 (W. Va. 1984) (Harshbarger, J., concurring) (noting that impracticability is rarely successful as a defense). *But see* Smythe, *supra* note 91, at 249–61 (arguing that impracticability doctrine improves the efficiency and productivity of long-term contracts and suggesting guidelines).

100. Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 89, 92 (1977); see also Daniel T. Ostas & Frank P. Darr, *Understanding Commercial Impracticability: Tempering Efficiency with Community Fairness Norms*, 27 RUTGERS L.J. 343, 357–67 (1996) (arguing for a blend of efficiency and fairness theory).

101. Posner & Rosenfield, *supra* note 100, at 88. *But see* James M. Buchanan, *Good Economics-Bad Law*, 60 VA. L. REV. 483, 489–90 (1974) (criticizing the law and economics approach for imposing contract terms to which the parties have not consented).

102. Posner & Rosenfield, *supra* note 100, at 108.

103. *Id.* at 92. Posner and Rosenfield recognize explicitly that not all cases are easy ones. *Id.*

104. *Id.* at 91 (discussing factors that determine which party is the cheaper insurer).

Posner and Rosenfield apply basic economic principles to the excuse doctrine, in an example involving a sale of custom printing machinery from A to B.<sup>105</sup> A fire destroys B's premises without the fault of B and puts it out of business.<sup>106</sup> A, left with a printing machine that does not have any salvage value, sues B for the price of the custom printing machinery.<sup>107</sup> Under Posner and Rosenfield's analysis, B will successfully argue that it be excused from contract performance and A is not entitled to damages.<sup>108</sup> B thus escapes liability for the price of the printing machinery because A is the superior risk bearer.<sup>109</sup> In addition, A was in the best position to determine the magnitude of the loss from the machine if a fire occurred.<sup>110</sup>

In *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, Judge Posner used the economic analysis to deny excuse to a buyer who wanted relief from its obligations to purchase coal.<sup>111</sup> The plaintiff Northern, who was obliged to purchase coal from the defendant Carbon County on a fixed quantity and price basis for twenty years, later found that it could buy electricity for less than the cost of electricity it generated from the coal.<sup>112</sup> When Northern stopped taking coal deliveries from Carbon County, Northern sought a declaration that it was excused from its purchase requirements.<sup>113</sup> Judge Posner described the excuse doctrine as "shifting risk to the party better able to bear it, either because he is in a better position to prevent the risk from materializing or because he can better reduce the disutility of the risk (as by insuring) if the risk does occur."<sup>114</sup> Ultimately, Judge Posner avoided the decision about which party was the better insurer by concluding that excuse doctrine does not apply where parties have assigned the particular risk—and that fixed-price contracts do just that.<sup>115</sup> Judge Posner explained that fixed-price contracts are explicit assignments of market risks, especially where escalation clauses are used.<sup>116</sup> Where the buyer forecasts the market incorrectly and therefore finds himself locked into a disadvantageous contract, he has only himself to blame and cannot shift the risk back to the seller.<sup>117</sup>

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105. *Id.* at 92–94.

106. *Id.* at 92.

107. *Id.*

108. *Id.* at 93.

109. *Id.* at 93–94 (noting that A is the superior risk bearer particularly in situations when B is a closely held corporation and A is a publicly held corporation).

110. *Id.* at 93.

111. 799 F.2d 265 (7th Cir. 1986).

112. *Id.* at 267.

113. *Id.* at 267–68.

114. *Id.* at 278.

115. *Id.*

116. *Id.*

117. *Id.*

Although the court instructs how risk allocation may arise in differing ways to preclude claims of excuse, in the end the court allows losses to fall as they may without recognizing that the parties might not have considered the contingency of *falling* prices when they entered the contract. In this case, Judge Posner never tells us which party really was the better insurer.

KBR faced extreme hazard when it delayed delivery of goods after intense insurgent attacks on delivery trucks.<sup>118</sup> This development might well give KBR grounds to invoke excuse under the efficiency theory. The question is: Was the government or KBR the more efficient insurer? Economic analysis of excuse cases will often falter at this step, as most cases do not indicate which party can insure more efficiently.<sup>119</sup> Private parties may be completely unable to insure for many of the particular wartime risks. For instance, the federal Defense Base Act<sup>120</sup> mandates that companies purchase insurance coverage for overseas workers who may be subject to risk of injury or death.<sup>121</sup> Because of the uncertainty of insurability, the federal government, through the War Hazards Compensation Act,<sup>122</sup> guarantees that the U.S. government will reimburse insurers for deaths or injuries resulting from combat.<sup>123</sup> If government contractors are unable to obtain insurance against insurgent activity, then either the parties anticipated the contractors would self-insure (and potentially pass the cost onto the government in terms of price) or that the government was the most efficient insurer. The problem is not determining that both parties assumed some risks, but, rather, drawing the line between them for wartime contingencies. Any finding that the contractors are the best insurers would presumably bar application of the excuse doctrine and entitle the government buyer to damages. The difficulty in applying efficiency theory through insurability suggests the limitations of this analysis for resolving excuse claimed under wartime contracts.

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118. See *supra* notes 9–13 and accompanying text.

119. See, e.g., Halpern, *supra* note 91, at 1160–61 (noting that the judgments about the more efficient insurer are made after a dispute has arisen and in practice “amount to little more than conjecture”); Robert A. Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 CORNELL L. REV. 617, 626 (1983) (“[E]mploying hindsight to ascertain the efficient allocation will be problematic in many instances.”); Ostas & Darr, *supra* note 100, at 352 (noting that it is difficult to determine which party is the most efficient insurer).

120. 42 U.S.C. §§ 1651–1654 (2006).

121. *Id.* § 1651. For a discussion of workers’ compensation protections for contractors, see Jeffrey L. Robb, *Workers’ Compensation for Defense Contractor Employees Accompanying the Armed Forces*, 33 PUB. CONT. L.J. 423 (2004).

122. War Hazards Compensation Act, 42 U.S.C. §§ 1701–1717 (2006) (originally enacted as Act of Dec. 2, 1942, ch. 668, § 101, 56 Stat. 1028).

123. *Id.* § 1704; see also Claims for Compensation under the War Hazards Compensation Act, as Amended, 20 C.F.R. §§ 61.1 to 61.404 (outlining procedures and benefits that accrue to claimants under Defense Base Act and War Hazards Compensation Act).

### 3. Considerations of Fairness

Some authorities have argued that fairness principles should apply to excuse determination.<sup>124</sup> Unless the parties expressly or impliedly allocated the risk,<sup>125</sup> these authorities would advocate fairness as a contractual gap-filler.<sup>126</sup> Professor Robert Hillman suggests that “[w]hen the evidence concerning the parties’ intentions on cessation is inadequate or the parties had no intentions, or when the enforceability of an express cessation clause is uncertain, courts rely heavily on fairness in framing their decision on the propriety of cessation.”<sup>127</sup> Comment six to § 2-615 provides support for the use of fairness norms referencing “the general policy of this Act to use equitable principles in furtherance of commercial standards and good faith.”<sup>128</sup>

Professor Hillman recommends that courts use four norms of fairness.<sup>129</sup> First, courts should evaluate the comparative equities of the case, requiring a balancing of the gains and losses if the parties are held to their agreement.<sup>130</sup> The second norm is harm avoidance whereby one party’s costs from the claimed excuse “greatly outweigh the prospective losses of the other party.”<sup>131</sup> The third norm evaluates whether the party claiming excuse has acted reasonably and concludes that “[i]f the harm suffered by a party was the result of that party’s own unreasonable conduct, courts discount the harm in the balancing process.”<sup>132</sup> Finally, courts look to reciprocity as a measure of the benefits to the parties from performance under the contract.<sup>133</sup> Even if a party is successful in claiming excuse, however, courts, when tailoring the remedy of expectancy or reliance costs, may also take fairness into consideration.<sup>134</sup>

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124. See IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT* 62 (1980) (arguing that remedies for trouble in a contractual transaction should not be open-ended); Hillman, *supra* note 119, at 618–19 (outlining the application of four fairness norms in the context of cessation of contract relationships); Leon E. Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 471, 518–19 (1985) (suggesting different approaches to loss allocation based on fairness principles).

125. Hillman, *supra* note 119, at 623; Trakman, *supra* note 124, at 485; see also, e.g., *Sons of Thunder, Inc. v. Borden, Inc.*, 666 A.2d 549, 560 (N.J. Super. Ct. App. Div. 1995) (finding that seller’s argument’s that buyer wrongfully terminated contract failed where express contract language allowed such a termination).

126. Hillman, *supra* note 119, at 629.

127. *Id.*

128. U.C.C. § 2-615 cmt. 6 (2003).

129. Hillman, *supra* note 119, at 618–19 (outlining four fairness norms).

130. *Id.* at 629–30.

131. *Id.* at 634.

132. *Id.* at 637.

133. *Id.* at 638.

134. *Id.* at 639–40.

An example of an impracticability case employing fairness norms is *Alimenta (U.S.A.), Inc. v. Gibbs Nathaniel (Canada) Ltd.*<sup>135</sup> Alimenta, the buyer of a peanut crop, brought suit for breach of contract when the seller, Gibbs, failed to deliver the 1980 peanut crop because of unprecedented drought.<sup>136</sup> Both Gibbs and Alimenta were international dealers in agricultural commodities.<sup>137</sup> Using U.C.C. § 2-615, Gibbs allocated the peanuts available from its shellers among its customers and claimed impracticability for the rest.<sup>138</sup> It would have cost Gibbs about \$3.8 million to purchase other peanuts to complete its contract, whereas its profit on the contract was \$18,000 and its net worth was \$2.4 million.<sup>139</sup>

Finding that the parties had not allocated the risk of crop failure, the Court of Appeals for the Eleventh Circuit stated that Gibbs was entitled to allocate the peanuts if the drought was “not reasonably foreseeable when the contracts were entered into and [the] performance as agreed was made impracticable thereby.”<sup>140</sup> The court upheld the jury finding that Gibbs was justified in allocating the available peanuts under § 2-615 and that its allocation was reasonable.<sup>141</sup> The court’s application of the objective approach to impracticability focused on the facts surrounding the execution of the peanut contract, the circumstances of the drought, the reasonableness of Gibbs’ response to the drought, and the effect that enforcement of the deal would have on Gibbs.<sup>142</sup> These factors strongly correlate to Professor Hillman’s fairness-focused analysis of impracticability.

The fairness approach expressed in the *Alimenta* analysis has adherents.<sup>143</sup> Professor Sheldon Halpern, commenting on the risks and benefits of applying fairness norms, pointed out that the approach also has its opponents:

Adjustment based on the broad exercise of equitable powers is an intuitively appealing mechanism for dealing with the “contractual accident.” Using this device, a court

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135. 802 F.2d 1362 (11th Cir. 1986).

136. *Id.* at 1362–63, 1365.

137. *Id.* at 1362.

138. *Id.* at 1364–65. Based on estimates from shellers, Gibbs was going to receive 52% of the crop it had contracted to purchase. *Id.* at 1365. Ultimately, Alimenta was allocated 87% of the amount it had contracted for. *Id.*

139. *Id.* at 1365 n.6.

140. *Id.* at 1364.

141. *Id.* at 1364 n.5, 1366.

142. *Id.* at 1362, 1365.

143. See, e.g., *Alimenta (U.S.A.), Inc. v. Cargill, Inc.*, 861 F.2d 650, 652–55 (11th Cir. 1988) (addressing another peanut contract loss involving Alimenta where the court followed to a large degree the first *Alimenta* case); *Unihealth v. U.S. Healthcare, Inc.*, 14 F. Supp. 2d 623, 637–39, 638 n.22 (D.N.J. 1998) (citing the balancing proposed by Professor Hillman with approval).

may “police the transaction in the interest of fairness,” and avoid the “harsh and unjust results” that occur when courts are forced to place the loss on one party or the other. By substituting a “winner take some” for the “winner take all” result inherent in the concept of “excuse,” the severe consequences of an absolute decision for either party are ameliorated. Loss sharing, as was done in *ALCOA*, rather than allocating the entire burden to one party, facilitates a more expansive application of the doctrines of impracticability and frustration . . . .

To the detriment of clarity and doctrinal advancement, the debate is conducted with loaded words: stability and predictability pitted against fairness and flexibility. It should be evident that we need ultimately to maximize all of these values. The excuse complex requires balancing. To the extent that we view the concept of contract as grounded on the terms of the agreement, application of excuse must be limited and judicial intervention tightly circumscribed or “the coherence and rationality of our law of contract” is indeed threatened. The real issues, however, are what is “our law of contract” and to what is it referable.<sup>144</sup>

The primary criticism of the fairness approach is the lack of predictability inherent in judicial discretion involved in its application.

The *Alimenta* application of fairness norms relies on the jury’s factual finding that the party claiming excuse was simply “justified” in doing so, which the appellate court affirmed as supported by the evidence without discussion of the requirements of U.C.C. § 2-615.<sup>145</sup> This analysis renders the code provisions virtually meaningless since they can be finessed by evidence supporting the contention that a party was justified in claiming impracticability. Surely, the drafters did not write U.C.C. § 2-615 with the intent that it be collapsed into a simple justification test. Rather, the drafters clearly intended U.C.C. § 2-615 to be the basis for rules governing excuse when “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.”<sup>146</sup> The risk, seen in *Alimenta*, is that courts may simply discount the code to achieve the desired result.

If courts follow the *Alimenta* analysis without faithfulness to the code, the predictability intended for sales transactions might be undermined,

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144. Halpern, *supra* note 91, at 1169–70 (citations and footnotes omitted).

145. Without discussing the requirements of U.C.C. § 2-615, the Eleventh Circuit affirmed that the evidence supported excuse. *Alimenta*, 802 F.2d at 1364 & n.5, 1365.

146. U.C.C. § 2-615 (2003).

leading parties to attempt to allocate risks of contingencies in advance, even in the absence of reliable information. For example, the parties in *Alimenta* could have expressly allocated all risks to the seller by requiring delivery of peanuts in all circumstances, thereby foreclosing the availability of excuse under U.C.C. § 2-615.<sup>147</sup> Since agriculture production and marketing involves many risks, any clause obliging the seller to deliver in all circumstances, foreseen or unforeseen, will certainly require imposition of a substantially higher cost on sellers. The *Alimenta* case is a perfect example since the drought experienced had been unprecedented.

Applying fairness to the KBR and WFS representative cases, even if the contractors did not assume all risks, and even if excuse should be precluded in at least some of the partial personal hazard cases, it is not certain whether weighing of the relevant equities will prevent the sellers' successful claim of excuse and allow the government to recover damages. While *Alimenta* suggests that excuse is allowed after a factual weighing to determine whether the contingency was reasonably foreseeable, any factual showing related to the equities of the case will involve military strategy that affected safety on the ground.<sup>148</sup> Moreover, evaluating the prospective losses of the parties is troublesome because it requires a court to balance the needs of troops in the field against the safety of civilian contractors. Similarly, inquiring into the reasonableness of the actions of the party claiming excuse is also complicated as it may require balancing the government's needs for wartime supplies against the contractor's desire to keep delivery personnel safe. Even the reciprocity factor is vexing where the wartime contractors are receiving a premium for performance during wartime, but that premium may not contemplate the full extent of wartime risks. Even if excuse is barred universally in all wartime cases, the cost of the increased risk would surely be passed back to the government when negotiating the cost of goods delivered to war zones. If wartime contractors assume all risks of non-delivery, will

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147. See *Alimenta*, 802 F.2d at 1363–64.

148. See *Lane v. Halliburton*, 529 F.3d 548, 561, 563, 567 (5th Cir. 2008) (acknowledging that judicial inquiry into what constitutes adequate protection of convoys in Iraq and into the policy of “employing civilian contractors in combat-support roles” may be barred by the political question doctrine but remanding the case for determination whether plaintiffs could recover on tort-based theories without the courts second-guessing the Army's actions). The case was brought after the April 2004 attack on civilian truck convoys in Iraq. *Id.* at 554–55; see also Kateryna L. Rakowsky, Note, *Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan*, 2 STAN. J. C.R. & C.L. 365, 366 (2006) (discussing limitations of tort theory in wartime actions); Brett Clanton & David Ivanovich, *Ruling Revives KBR Case/Court Sees Way Lawsuits over Workers' Deaths Could Be Resolved*, HOUS. CHRON., May 30, 2008, at Bus. 1 (noting that the families of killed and injured truck drivers are seeking \$300 million in damages).

contractors faced with harsh ground conditions be able to arrange for delivery at any cost?<sup>149</sup>

In short, neither efficiency principles nor fairness approaches to an objective determination of impracticability, without further refinements, provide satisfactory guidance for evaluating claims of impracticability for contracts during wartime, particularly for those contracts where the seller, like KBR, faces extreme hazard.

#### 4. General Critique of Analysis that Would Find that Wartime Hazards Never Constitute Excuse

Regardless of the approach for determining impracticability, contract theory by its nature intends to hold parties to their bargains. A leading treatise observes that when determining allocations of risk of post-contracting events, certainty and fairness are sometimes at odds.<sup>150</sup> Most authorities seek to avoid any injustice arising from choosing one party over the other by finding that the risk of loss was at least impliedly assumed by one of the parties.<sup>151</sup> U.C.C. § 2-615 recognizes that parties may expressly allocate risk or do so based upon the circumstances of contracting, through trade usage and the like.<sup>152</sup> Although risks may be “foreshadowed” at the time of contracting resulting in allocation of risks to one party, any allocation must be made “in the light of mercantile sense and reason, for this section itself sets up the commercial standard for normal and reasonable interpretation and provides a minimum beyond which agreement may not go.”<sup>153</sup> This principle should both embrace the drafting of force majeure clauses and the policing of such clauses by courts using a mercantile sense-and-reason standard.<sup>154</sup> This position avoids, however, the more commonplace issues of interpretation regarding risk allocations that exist generally, and which do exist with wartime contracts under the FAR and DFARS.

To maintain a sense of justice for unforeseen events, commentators who discuss that U.C.C. § 2-615 allows excuse in some cases tend to downplay its rarity.<sup>155</sup> As authorities recognize that the seller has recourse

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149. *See, e.g.*, World Fuel Services (Singapore) Pte., Ltd. Amendment of Solicitation/Modification of Contract § 14 (Apr. 15, 2003), [http://projects.publicintegrity.org/docs/wow/world\\_fuel\\_services.pdf](http://projects.publicintegrity.org/docs/wow/world_fuel_services.pdf) (containing contract modifications indicating that truck drivers may strike altogether).

150. NEHF, *supra* note 54, § 74.15.

151. *Id.*

152. U.C.C. § 2-615 cmt. 8 (2003) (citations omitted).

153. *Id.*

154. NEHF, *supra* note 54, § 74.8.

155. *See, e.g.*, Ostas & Darr, *supra* note 100, at 346–50 (discussing attempts to create workable impracticability theories); Smythe, *supra* note 91, at 228 (noting the trend is toward

under U.C.C. § 2-615, the bulk of the discussion addresses why the doctrine is difficult to apply. The problem lies with the foreseeability element of the objective test whereby “a contingency is more likely to be unforeseen by the parties yet still [be] a foreseeable risk.”<sup>156</sup> One should keep in mind the harsh effect of denying excuse and the ultimate result of sellers imposing higher costs to self-insure. Application of the rule in a way that tends to deny excuse broadly may undermine the acknowledgment by parties that not all risks are allocated through price adjustments, but rather that the parties expect that as a result of some contingencies the seller should be excused.

Applying impracticability so that wartime sellers never have a right to claim excuse even in extreme hazard cases is tantamount to carving an exclusion to U.C.C. § 2-615 altogether. The availability of excuse is well grounded in both U.C.C. Article 2 and general contract law, and its availability for wartime contracts is easily justified as a matter of policy.<sup>157</sup> The role of the U.C.C. as a gap-filler applies especially to wartime contracts where the contracts themselves are drafted in a general sense using the default terms of the FARS and DFARS without tackling specific wartime contingencies. Although the risks of wartime are generally foreseeable to the contractors and the government, not all of the specific risks associated with Iraq, for instance, were foreseen. Otherwise, we might expect that KBR drivers would not have been on the road in Fallujah at all in April 2004. The government buyer is certainly capable of understanding, and seems to understand upon reading the FARS and DFARS provisions,<sup>158</sup> that contractors assume some, but not all, risks. By privatizing wartime deliveries of goods, the government buyer takes the possibility of harsh wartime conditions into account when using civilians to provide needed military supplies. It makes little sense to construe the

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expansion of the grounds on which excuse granted); Stephen G. York, *Re: The Impracticability Doctrine of the U.C.C.*, 29 DUQ. L. REV. 221, 229–38, 254–55 (1991) (providing critical analysis of judicial inquiry into impracticability and stressing the importance of relational contracting). *But see* McGinnis v. Cayton, 312 S.E.2d 765, 775 (W. Va. 1984) (Harshbarger, J., concurring) (“[T]he commercial impracticability doctrine is recognized, but rarely allowed as an excuse for nonperformance.”); E. Allan Farnsworth, *Developments in Contract Law During the 1980s: The Top Ten*, 41 CASE W. RES. L. REV. 203, 213–16 (1990) (arguing that in the 1980s courts retreated from accepting the excuse doctrine); Robert A. Hillman, *The “New Conservatism” in Contract Law and the Process of Legal Change*, 40 B.C. L. REV. 879, 879–80 (1999) (noting development of rule oriented, inflexible approach to contracts).

156. NEHF, *supra* note 54 (pointing to a case that found against impracticability because trail derailments are objectively foreseeable events even though in that case the parties completely failed to foresee its occurrence).

157. *See generally id.* (discussing impracticability under the U.C.C.); *see also* L.N. Jackson & Co. v. Royal Norwegian Gov’t, 177 F.2d 694, 699 (2d Cir. 1949) (observing that an approach that requires an absolute showing of unforeseeability would eliminate the doctrine altogether).

158. *See supra* notes 28–40 and accompanying text.

U.C.C. in a way that makes excuse for impracticability unavailable in all wartime sales when civilian sellers are limited in their ability to use force to ensure wartime delivery of goods. Imposing damages in the extreme hazard cases, at least, will not likely encourage sellers to make deliveries in those situations.

There is an alternative to broad-based exclusion of excuse for wartime contracts that is both more efficient and more consistent with basic fairness norms. If the application of the excuse doctrine under U.C.C. § 2-615 needs refinement in its application—and I agree that it does, even though there is a strong policy toward ensuring that the government receives wartime supplies—then the sensible solution is to rethink the approaches to the impracticability doctrine that draw the line between risks assumed by wartime contractors and those retained by the government.

### III. USING PAST EXPERIENCE AS A GUIDE

Some commentators have argued in certain categories of cases that excuse either is or should be available to sellers.<sup>159</sup> Although the commentaries help by analogy to establish some recourse for sellers through excuse, unfortunately, none of them establishes a proper basis in the area of wartime contracting. What is needed is a theory that draws the line for risk allocation between wartime contractors and the government while remaining consistent with basic U.C.C. and contract principles. After surveying these authorities, this Article will fashion such a theory and explain its application to wartime contracts.

#### A. Domestic Terrorism

The attacks of September 11, 2001, resulted in commercial losses estimated between \$60 and \$90 billion.<sup>160</sup> Although terrorist threats have

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159. See, e.g., Mark B. Baker, “A Hard Rain’s A-Gonna Fall”—*Terrorism and Excused Contractual Performance in a Post September 11th World*, 17 *TRANSNAT’L LAW.* 1, 20–21 (2004) (arguing that a strict requirement of foreseeability should not be imposed in a context where terrorist attacks occur more often yet unpredictably); Patrick J. O’Connor, *Allocating Risks of Terrorism and Pandemic Pestilence: Force Majeure for an Unfriendly World*, *CONSTR. LAW.*, Fall 2003, at 5, 10 (suggesting that the inevitability and unpredictability of terrorism make it a classic force majeure risk); Jennifer Sniffen, *In the Wake of the Storm: Nonperformance of Contract Obligations Resulting from a Natural Disaster*, 31 *NOVA L. REV.* 551, 575 (2007) (noting that force majeure clauses have become more important in light of the 2005 hurricane season).

160. RICHARD E. SPEIDEL, *CONTRACTS IN CRISES: EXCUSE DOCTRINE AND RETROSPECTIVE GOVERNMENT ACTS* 3 (2007). For a discussion of terrorism generally, see INGRID DETTER DELUPIS, *THE LAW OF WAR* 25 (2d ed. 2000) (defining international terrorism as “the intermittent use or threat of force against person(s) to obtain certain political objectives of international relevance from a third party”). *But see* Gabor Rona, *International Law Under Fire: Interesting Times for International Humanitarian Law: Challenges from the “War on Terror”*, 27 *FLETCHER F. OF WORLD AFF.* 55, 61 (2003) (arguing that terrorist groups such as Al Qaeda cannot engage in armed

become more commonplace such that they could possibly be foreseen by parties, the “frequency and predictability” are not such that parties can respond properly in order to preclude claims of impracticability on these grounds.<sup>161</sup> Thus, commentators adopt the position that terrorism is a classic force majeure event that would constitute a contingency impracticability.<sup>162</sup> One commentary concerning the construction industry made the following observation:

It is this difference between the inevitability of terrorism striking somewhere and the unpredictability—indeed, the unlikelihood—that it will occur in a particular location at a particular time that makes terrorism a classic force majeure risk. A terrorist act occurring in California is not likely to affect a construction project in North Carolina. This may not be true, however, for all industries. The airline industry is notoriously prone to disruption due to generalized terrorism threats. The travel business decreases as anxiety over terrorism increases. As a consequence, the foreseeability of harm from terrorism to a particular airline’s business is a much different matter than whether it is foreseeable that a particular construction project might be affected by terrorism. An airline might not have a force majeure defense due to a specific terrorist event, whereas a building contractor might.<sup>163</sup>

Moreover, even if the parties discussed the risk of terrorism generally, they might not have thought through the consequences of a particular terrorist attack.<sup>164</sup> Parties are advised to use a well-drafted force majeure clause because it is never certain how much hardship courts will require before allowing excuse based on impracticability.<sup>165</sup>

In *Travel Wizard v. Clipper Cruise Lines*, domestic terrorism did not support a claim for excuse.<sup>166</sup> On June 12, 2001, the parties entered into a charter contract whereby Travel Wizard agreed to lease clipper cabins for a ten-day cruise to see the solar eclipse from waters near Australia.<sup>167</sup> After the attacks of September 11, 2001, the travel industry collapsed, and

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conflict for purposes of international law because they do not control territory).

161. Baker, *supra* note 159, at 21.

162. Baker, *supra* note 159, at 21; O’Connor, *supra* note 159, at 10.

163. O’Connor, *supra* note 159, at 10.

164. Baker, *supra* note 159, at 20; O’Connor, *supra* note 159, at 10.

165. Baker, *supra* note 159, at 33 (explaining that contracting parties should address risks explicitly to avoid leaving “their positions to the whim of the courts”); O’Connor, *supra* note 159, at 11.

166. No. 06 Civ. 2074 (GEL), 2007 WL 29232 (S.D.N.Y. Jan. 3, 2007).

167. *Id.* at \*1.

Travel Wizard claimed excuse due to impracticability.<sup>168</sup> Affirming the arbitral award in favor of Clipper, the court observed that the parties' force majeure clause only allowed excuse by Clipper, and that even if the clause applied, it "would not excuse payment where performance has merely become economically inadvisable, even if the economic conditions were the result of a force majeure event."<sup>169</sup>

The most complete analysis toward permitting excuse in response to a terrorist attack is found in an article by Professor Mark Baker.<sup>170</sup> By using a hypothetical sale of goods by a fictitious seller whose cooking software business in the World Trade Center is completely destroyed on September 11, 2001, he argues that a terrorist act that destroys a party's place of business is just the sort of contingency that U.C.C. § 2-615 envisions.<sup>171</sup> Such events should be considered unforeseen because a strict reading of foreseeability undermines the doctrine.<sup>172</sup> In support of his argument, Professor Baker points out that terrorist attacks have "not risen to a level at which they could be reasonably and accurately foreseen [so] [i]t is arguably unreasonable to impose hardship on contracting parties who have not expressly or impliedly negotiated on the subject of terrorist attacks."<sup>173</sup> Therefore, he argues, it is inconsistent with U.C.C. § 2-615 to automatically conclude that terrorist attacks are foreseen contingencies.<sup>174</sup>

While this argument has force, Professor Baker himself admits that it does not resolve his case because some courts might impose a strict foreseeability requirement.<sup>175</sup> Additional points, furthermore, are worthy of consideration. First, even where courts do not impose strict foreseeability standards on contracting parties, circumstances in some cases may indicate that one party or the other did assume the risk. Moreover, presuming Professor Baker is correct regarding foreseeability, he recognizes that even where a seller's entire inventory is destroyed, the case may be one of delay rather than full excuse.<sup>176</sup> Third, if other sources are available, the case may be more properly one of allocation under U.C.C. § 2-615(b), whereby the seller would not have a full claim to excuse.<sup>177</sup> Finally, Professor

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168. *Id.* at \*1, \*5.

169. *Id.* at \*5 n.3; *see also* 7200 Scottsdale Rd. Gen. Partners v. Kuhn Farm Mach., Inc., 909 P.2d 408, 410 (Ariz. Ct. App. 1995) (denying impracticability in case arising after the first Gulf War).

170. Baker, *supra* note 159, at 33–35.

171. *Id.* at 12–14, 20–21.

172. *Id.* at 20.

173. *Id.* at 21.

174. *Id.* at 20–21.

175. *Id.* at 21.

176. *Id.* at 30.

177. U.C.C. § 2-615(b) (2003) ("If the causes mentioned in paragraph (a) affect only a part

Baker's hypothetical presumes a company whose entire business was located in a building completely destroyed by a terrorist attack. The analysis does not consider collateral damages to businesses and industries that are not at the center of the attack, as in *Travel Wizard*. As a result, this analysis does not address the more difficult questions about where to draw the line on allowing excuse under U.C.C. § 2-615 after a terrorist attack where the business suffers less than a full loss.

Small variations on Professor Baker's example will illustrate this point. Suppose that the software company involved in the terrorist attack in Professor Baker's hypothetical had either a key software engineer who survived the attack and who can replicate the technology, a software backup for the lost programs that can be customized and put into production that is located at a facility in another state, or inventory of the software located at a warehouse in another location. On these facts, the seller may not be able to fully claim excuse under U.C.C. § 2-615 if, for instance, the company is merely delayed in performance. The effect of the variation is that the seller is able to either perform on a delayed basis or allocate existing inventory to the buyer. The cases of total loss in Professor Baker's hypothetical are really only the beginning of the analysis. A terrorist attack may not always result in seller excuse. Of course, the further away the business is geographically from the terrorist attack, the more likely the *Travel Wizard* result will actually hold the parties to performance. The policy underlying the availability of excuse in cases where a contingency "alters the essential nature of the performance" may not prevail where the seller has not been devastated.<sup>178</sup>

Professor Baker fails to tackle some primary arguments against permitting a seller to excuse performance under U.C.C. § 2-615 that might be more helpful with the cases of wartime contractors. Once it is recognized that the availability of excuse depends on the principles of foreseeability and risk allocation (express or implied), the weakness of current impracticability doctrine and the need for standards for particular types of contingencies, like terrorism and wartime contracts, becomes apparent. While parties generally should be held to their contracts, Professor Baker's terrorism hypothetical does provide a convincing framework that would seem to warrant excuse in some cases. The problems with extending his analysis to further terrorism events or to wartime contracts are the unresolved issues of foreseeability and risk allocation that are at the heart of much of the impracticability scholarship.

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of the seller's capacity to perform, the seller must allocate production and deliveries among its customers but may at its option include regular customers not then under contract as well as its own requirements for further manufacture. The seller may so allocate in any manner that is fair and reasonable.").

178. U.C.C. § 2-615 cmt. 4.

As will be shown below, it is possible to address some of these issues with respect to wartime contracting with a clear and coherent theoretical basis that seems to be consistent with some of the concerns raised by commentators on domestic terrorism. Before turning to that task, however, it is important to take a look at another area that might add to the resolution of wartime contracting issues.

### B. *Government Acts*

Most commentators who consider excuse in the context of the effect of government acts on performance do so in the context of particular cases.<sup>179</sup> The most comprehensive analysis of the effect of government acts is found in Professor Richard Speidel's writing.<sup>180</sup> He refers to the problem as "retrospective" government acts to describe the legal consequences of acts that: "(1) impair certainty and stability by unsettling reasonable expectations and investments; (2) undermine the legitimacy of a justice system through seemingly arbitrary results; and (3) unexpectedly shift a public burden to a specific group who did not cause the underlying problem."<sup>181</sup> Because it is not foreseeable that the law will change, Professor Speidel argues that it is easier to obtain excuse in a private contract relationship for retrospective government acts where the act makes the contract either unenforceable or would result in direct governmental sanctions on the performing party.<sup>182</sup>

To make his point, Professor Speidel uses the example of homeowners who have five-year fixed-price contracts for gas supply at \$3 per BTU.<sup>183</sup> After hurricanes disrupt the gas supply, the market price of gas that the provider, who sells at \$3 per BTU, must pay to the suppliers becomes \$6 per BTU.<sup>184</sup> The government, in an effort to bail out the suppliers, deletes the fixed-price term from the consumer contracts in the area.<sup>185</sup> Professor

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179. See, e.g., Rodger G. Citron, *Lessons from the Damages Decisions Following United States v. Winstar Corp.*, 32 PUB. CONT. L.J. 1, 38 (2002) (discussing *Winstar* in the context of damages); Daniel R. Fischel & Alan O. Sykes, *Governmental Liability for Breach of Contract*, 1 AM. L. & ECON. REV. 313 (1999) (exploring the implications of *Winstar* on government contracts); John Kidwell, Commentary, *Reactions to Professor Speidel's "Contract Excuse Doctrine and Retrospective Legislation: The Winstar Case"*, 2001 WIS. L. REV. 825, 825-29 (2001) (discussing *United States v. Winstar Corp.* and commentaries); Jonathan R. Macey, *Winstar, Bureaucracy and Public Choice*, 6 SUP. CT. ECON. REV. 173, 190-93 (1998) (discussing specific implications of *Winstar*); Richard E. Speidel, *Contract Excuse Doctrine and Retrospective Legislation: The Winstar Case*, 2001 WIS. L. REV. 795, 796 (2001) (arguing the *Winstar* case was wrongly decided).

180. SPEIDEL, *supra* note 160; Speidel, *supra* note 179.

181. SPEIDEL, *supra* note 160, at 9.

182. *Id.*

183. *Id.* at 10.

184. *Id.*

185. *Id.*

Speidel argues that the hurricane in all likelihood did not make performance excusable due to the fixed-price nature of the contracts.<sup>186</sup> The supplier is excused nevertheless due to the government act.<sup>187</sup> Thus, the consumer must pay the higher market price for gas.<sup>188</sup>

Explaining this outcome, Professor Speidel notes that the foreseeability factor is satisfied in the government act cases under the direct language of U.C.C. § 2-615, leaving only the impracticability component of the test, unless issues of risk allocation are present.<sup>189</sup> Comment ten, though, explains that “governmental interference cannot excuse unless it truly ‘supervenes’ in such a manner as to be beyond the seller’s assumption of risk.”<sup>190</sup> The comments to the Second Restatement of Contracts further explain that parties are often aware of the risks of government regulation and assume the risk.<sup>191</sup> Thus, private law principles should excuse performance in these cases.<sup>192</sup>

The leading case, which found the government was not excused by a change in the law, is *United States v. Winstar Corp.*<sup>193</sup> The case involved a claim by Winstar that the Federal Home Loan Bank Board breached a promise to provide a favorable regulatory environment regarding amortization of goodwill under a regulatory contract under which Winstar was to operate failed savings and loans.<sup>194</sup> The contract did not expressly address which party bore the risk in the event that Congress changed the law,<sup>195</sup> which ultimately happened when congressional actions led to termination of the favorable accounting treatment given to companies like Winstar.<sup>196</sup> Winstar brought suit for damages since it would now be required to meet the new accounting standards or be liquidated.<sup>197</sup>

Justice Souter observed that if the risk of the change in law was foreseeable to the parties, then the absence of a contract provision

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186. *Id.* at 11.

187. *Id.*

188. *Id.*

189. *Id.* at 158–59; *see also* U.C.C. § 2-615(a) (2003) (“[I]f performance as agreed has been made impracticable by . . . compliance in good faith with any applicable foreign or domestic governmental regulation or order . . .”).

190. U.C.C. § 2-615 cmt. 10.

191. RESTATEMENT (SECOND) OF CONTRACTS § 264 cmt. a (1981).

192. SPEIDEL, *supra* note 160, at 260–61.

193. 518 U.S. 839 (1996) (plurality opinion).

194. *Id.* at 848–53, 858.

195. The contract, however, contained an express agreement to provide favorable accounting treatment of supervisory goodwill. *Id.* at 864–66.

196. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, 103 Stat. 183 (codified in part at 12 U.S.C. § 1464 (2006)); *see also Winstar*, 518 U.S. at 856–58 (describing immediate and severe impact of the statute on entities that had acquired failed thrifts).

197. SPEIDEL, *supra* note 160, at 265.

indicates that the parties assumed the risk.<sup>198</sup> The Court found that the risk of regulatory change was allocated to the United States because the contract gave particular regulatory treatment to Winstar.<sup>199</sup> Since the agreement was made at a time when the regulatory environment was in flux, the United States could foresee the legal changes.<sup>200</sup> Since the changes were foreseeable, given the contract language, the Court concluded that the United States must have assumed the risk of regulatory change.<sup>201</sup> This was especially true in *Winstar*, where the regulatory change would eliminate the value of the consideration received under the contract to Winstar.<sup>202</sup> Finally, the Court concluded that the risk allocation prevented the United States from claiming excuse due to the regulatory change.<sup>203</sup> Justice Souter noted that government contracts often include provisions whereby risk is shifted to the government.<sup>204</sup>

Justice Souter also explained that the unmistakability doctrine, which provides that a government's sovereign power remains unless surrendered in "unmistakable" terms,<sup>205</sup> depends on the type of contract at issue and the consequences of enforcement. Justice Souter describes a spectrum of claims that could impair sovereign authority, such as a claim for a rebate under an agreement contemplating a tax exemption whereby the unmistakability doctrine would apply.<sup>206</sup> "Humdrum supply contracts though, would not be subject to the doctrine because a contract to purchase food in the army, for instance, would not limit sovereign power."<sup>207</sup> Justice Souter targets the middle where the unmistakability doctrine will not apply if the "contract is reasonably construed to include a risk-shifting component that may be enforced without effectively barring the exercise of that power."<sup>208</sup>

The commentary evaluating *Winstar* expresses concern that Justice Souter's opinion is not fully consistent with contract doctrine.<sup>209</sup> Professor Speidel comments that the opinion suffers from five problems.<sup>210</sup> First, the

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198. *Winstar*, 518 U.S. at 905 (quoting *Lloyd v. Murphy*, 153 P.2d 47, 50 (Cal. 1944)).

199. *Id.* at 906.

200. *Id.* at 906–07.

201. *Id.* at 907.

202. *Id.*

203. *Id.*

204. *Id.* at 908–09 (quoting *Hughes Commc'ns Galaxy, Inc. v. United States*, 998 F.2d 953, 958–59 (Fed. Cir. 1993)).

205. *Id.* at 871.

206. *Id.* at 880.

207. *Id.*

208. *Id.* at 880 (citations and footnotes omitted).

209. See, e.g., Kidwell, *supra* note 179, at 825 ("In addition to the apparent misreading of contract doctrine that Professor Speidel highlights in his paper, the Supreme Court's decision in the case comes up short in terms of satisfying the law-clarification function of appellate opinions.").

210. Speidel, *supra* note 179, at 817–18.

Court did not discuss important issues of procedural due process or takings.<sup>211</sup> Second, the Court failed to distinguish between those types of contracts that might be subject to the unmistakability doctrine and those beyond its scope.<sup>212</sup> Third, the Court left open issues concerning availability of public law defenses in regulatory contracts.<sup>213</sup> Fourth, in applying contract doctrine, the Court, in finding that it was foreseeable to the United States that the laws regarding the savings and loans might change, did not faithfully follow the well-established contract rule that parties presume that the law will not change.<sup>214</sup> Finally, the Court remanded the case without instruction on damages.<sup>215</sup>

Raising an important issue for wartime contracts, Professor Speidel expressed concern with the use of ordinary contract principles to allocate the risk of retrospective legislation where the government premises preferential regulatory treatment.<sup>216</sup> Professor Speidel explained that certain policies should guide risk allocations in government contracting where the government retains superior bargaining power due to limited competition among private contractors.<sup>217</sup> Risk allocation rules must be responsive to the type of contract and should be stated either in the contract itself or administrative regulations.<sup>218</sup> Professor Speidel warned that risk allocation concerning retrospective laws should not be given over to ordinary understandings regarding bargaining or multi-part tests based on party assumptions.<sup>219</sup>

Professor Speidel's argument can be extended beyond the scope of regulatory contracts to wartime contracting. Although Justice Souter notes the humdrum nature of basic procurement contracts,<sup>220</sup> wartime sales contracts in Iraq have turned out to be less than routine due to hazards created by insurgents. The strict application of traditional doctrine must also proceed with caution as wartime contracts arguably exhibit the same differential in bargaining power noted by Professor Speidel. As such, the traditional rules are as applicable to wartime contracts as they are to regulatory ones, but one must exercise care in the allocation of risks. The problem for wartime contracts is that the solution proposed by Professor Speidel—a sharing of the risks by allowing excuse in response to a change in the law, but awarding the other party reliance or restitution

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211. *Id.* at 817.

212. *Id.*

213. *Id.* at 818.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 818–19.

218. *Id.*

219. *Id.*

220. *United States v. Winstar Corp.*, 518 U.S. 839, 889 (1996) (plurality opinion).

damages—may not be readily applicable to wartime contracting.<sup>221</sup> As will be shown below, though, it is possible to allocate risk on a basis that recognizes some of the concerns expressed in Professor Speidel’s writings.

This Article now turns to the search for such a basis for balancing the needs of the government to obtain needed wartime supplies with the contractor’s role as a civilian seller faced with various levels of wartime hazards. It proceeds, first, by clarifying the contractual relationship between the governmental buyer and the wartime seller and then by proposing a method for determining whether the seller can claim excuse due to wartime hazards.

#### IV. SOLVING THE PROBLEM OF EXCUSE DURING WARTIME

In order to adapt U.C.C. § 2-615 excuse doctrine to non-routine procurement contracts, it is necessary to determine how parties have expressly or impliedly allocated the risks associated with wartime performance by civilian contractors deploying with the military. As Professor Speidel observed regarding retrospective government acts, and equally persuasive here, “private law principles may be helpful by analogy, [but] should not be the primary basis for risk allocation.”<sup>222</sup> Moreover, the difficulty that the foreseeability principle adds to impracticability analysis is heightened in contracts where parties arguably knew that they contemplated some level of heightened risk.

In framing a solution, we must consider the relationship of the government, which is out-sourcing wartime functions, to civilian-military contractors, who are typically paid a premium for wartime service, but who are not enlisted soldiers. As such, sharing risks for purposes of U.C.C. § 2-615 excuse should not allocate to the contractor risks that would in essence alter that relationship. This Article proposes that we can allocate the risk related to inherently governmental functions to the government because it is both what the government intends and is equitable since the government limits the ability of the civilian contractors to defend themselves.

##### A. *The Relationship Between the Government and Private Sellers:     Civilians Versus Government Personnel*

Government contracting in wartime presents obvious differences that distinguish it from routine government purchases. Cases that refuse to allow a party to claim excuse often base their analysis in part on the

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221. Speidel, *supra* note 179, at 821. Professor Speidel’s proposition is consistent with the comments to the U.C.C. referring to equitable principles where finding of excuse or no excuse does not lead to a satisfactory result. U.C.C. § 2-615 cmt. 6 (2003).

222. Speidel, *supra* note 179, at 818–19.

parties' relationship to determine which party was in the best position to insure against the particular hazard.<sup>223</sup> Similarly, the comments to U.C.C. § 2-615 note that determinations of risk allocation are to be made with reference to the "circumstances surrounding the contracting."<sup>224</sup> Extending this analysis to wartime contracts, the nature of the relationship between the government and the contractors and the particular circumstances of wartime contracting should factor into any recommendations regarding a framework for resolving claims of excuse.

The circumstances surrounding contracts are especially important for determining excuse for wartime contracts. The status of the selling contractors as civilians<sup>225</sup> is important to the allocation of the risk of insurgent interference with contract performance. Because of wartime conditions, the contract between parties differs from a typical government procurement contract. The government places restrictions on the means by which the contractors can achieve delivery. For instance, contractors generally may not use deadly force to secure delivery of goods.<sup>226</sup>

Contractors that actually engage in hostilities become "combatants" and may lose their "law of war protection" as civilians.<sup>227</sup> The law of war generally prohibits civilians from engaging in hostilities in order to protect them from becoming legitimate targets for an enemy attack.<sup>228</sup> Civilians who break the law of war and become unlawful combatants may face criminal liability, endanger the general civilian population, and leave the United States in violation of the law of war under several international conventions.<sup>229</sup> For these reasons, contractors' civilian status is important to any consideration of excuse due to wartime hazards. Any rule that

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223. See, e.g., *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 319 (D.C. Cir. 1966).

224. U.C.C. § 2-615 cmt. 8.

225. 48 C.F.R. § 252.225-7040(b)(3) (2008) (providing that contractor personnel are civilians); see also JOINT CONTRACTING COMMAND—IRAQ/AFGHANISTAN, CONTRACTING OFFICER'S GUIDE TO SPECIAL CONTRACT REQUIREMENTS FOR IRAQ/AFGHANISTAN THEATER BUSINESS CLEARANCE, DFARS DEVIATION 2007-00010; CONTRACTOR PERSONNEL IN U.S. CENTRAL COMMAND AREA OF RESPONSIBILITY 24 (2007) (providing that contractor personnel are civilians).

226. 48 C.F.R. § 252.225-7040(b)(3). Contractors may only use deadly force in self-defense. *Id.*

227. 48 C.F.R. § 252.225-7040(b)(3)(iii); see also J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. REV. 155, 158 (2005) ("The law of war concerning civilians accompanying the armed forces needs to be changed to better protect these civilians and to maintain the general distinction between combatants and civilians unaffiliated with the military, while also acknowledging and legitimizing the fact that civilians are so integrated into many armed forces that they have become an indispensable and inseparable part of them.").

228. Heaton, *supra* note 227, at 157.

229. *Id.* at 158. See also The 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

would expect wartime contractors to perform in all circumstances would necessarily fail to take into consideration the limitations on the contractor's ability to perform.

Thus, we should reject any argument favoring an absolute rule barring excuse for military contractors. The argument that a contractor's high compensation makes wartime harm foreseeable fails to account for the circumstances surrounding wartime contracting. Rather, the analysis should consider the limitations placed on contractors by the military itself due to the nature of warfare and the civilian status of contractors. Both extremes in an excuse debate—an argument that the general foreseeability of harsh wartime conditions should prevent a seller from excusing delivery and a counterargument that general foreseeability should not be a barrier to excuse—would present an incomplete analysis of the circumstances of wartime contracting.

Consider the contracts described at the beginning of this Article, in which the government purchased from KBR food, fuel, and other items needed for the military in Iraq,<sup>230</sup> and purchased fuel from WFS.<sup>231</sup> Both KBR and WFS are civilian parties, as are their employees. Both KBR and WFS might receive a premium for providing goods during wartime. Both KBR and WFS contracts are subject to uniform governmental contracting procedures. Government contracting regulations, though, not only recognize the civilian status of sellers, but also limit the ability of KBR and WFS to: (1) use force in the delivery of goods; (2) protect either personnel or goods; or (3) engage in hostilities of any sort.<sup>232</sup>

Two separate analyses emerge. First, the 2004 attack on KBR trucks delivering fuel presented KBR with extreme personal hazard. While KBR personnel were able to use deadly force in response to the 2004 attack, KBR employees were civilians and not authorized to engage in hostilities. The ground conditions indicated that continuation of KBR deliveries after the 2004 attack would likely trigger use-of-force issues and result in the death or injury of KBR personnel.<sup>233</sup> Second, the security concerns, the damage and theft to trucks, and the threats of violence against WFS drivers presented WFS with a case of partial personal hazard.<sup>234</sup> As such, performance of the WFS contract does not appear to have implicated civilian status because there was no escalation to force issues.

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230. *See supra* text accompanying note 10.

231. *See supra* text accompanying note 20.

232. *See* JOINT CONTRACTING COMMAND—IRAQ/AFGHANISTAN, CONTRACTING OFFICER'S GUIDE TO SPECIAL CONTRACT REQUIREMENTS FOR IRAQ/AFGHANISTAN THEATER BUSINESS CLEARANCE, DFARS DEVIATION 2007-O0010: CONTRACTOR PERSONNEL IN U.S. CENTRAL COMMAND AREA OF RESPONSIBILITY 24 (2007).

233. *See supra* note 9 and accompanying text.

234. *See supra* text accompanying note 22.

If the military itself decided not to send its own convoys to deliver supplies to the troops or, alternatively, to use force to deliver supplies, no one would question its authority to do so. Therefore, the fact that civilians undertook the sale and delivery of goods during wartime may make a difference in the excuse analysis. Thus, absent alternative facts or contractual allocation of wartime risks by civilian contractors, there are valid reasons for allowing the civilian status of contractor to factor into excuse determinations.

It does not follow, however, that civilian status allows contractors to excuse performance whenever wartime hazards are present. First, impracticability under U.C.C. § 2-615 is subject to the assumption of greater liability by agreement of the parties.<sup>235</sup> The surrounding circumstances and foreseeability of the contingency tend to go to this first element.<sup>236</sup> Second, the civilian status of the contractors represents just part of the circumstances of contracting that determine which party has taken the risk of certain wartime hazards.<sup>237</sup> Unless the risk is allocated either expressly or impliedly, excuse under U.C.C. § 2-615 typically also requires a showing of impracticability.<sup>238</sup> Admittedly, the civilian status of the contractors is related to questions of risk allocation and, perhaps, to impracticability. It should not be said, though, that civilian status answers each element.

The most important aspect of the civilian status of contractors involves the allocation of risk for wartime contingencies. Limitations on the contractor's ability to ensure delivery goes to the issue of whether the government assumed certain types of wartime risks. The civilian status of the contractors may indicate that the contract allocated to the government some of the risks. Yet, the status does not delineate which particular risks were in fact allocated to the government, such that the seller might successfully claim excuse, and which risks were allocated to the contractors. Thus, while civilian status will help elucidate the availability of excuse in some circumstances, the status does not clearly indicate where the line is drawn between types of risks. The problem then becomes creating a framework for this allocation. I believe such a solution—one that can be squared with U.C.C. § 2-615 and good contract theory—can be obtained by looking further into the language of the FARS and DFARS and the circumstances of wartime contracting.

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235. U.C.C. § 2-615 & cmt. 8 (2003).

236. *See Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 318–19, 319 n.13 (D.C. Cir. 1966).

237. U.C.C. § 2-615 cmt. 8.

238. *See Transatlantic*, 363 F.2d at 315–16, 315 n.3.

### B. *A Solution Based on the Inherent Government Function*

The excuse analysis under the traditional approach, which generally requires showing that a contingency was unforeseen and that the parties did not allocate the risk, contains wildcards implicating military policy and political decision-making.<sup>239</sup> For example, any claim that insurgent activities created an extreme personal hazard might involve arguments that the government failed to exercise its war powers to make the area safe. Fact issues raising the political question doctrine<sup>240</sup> may leave some contracting parties unable to prove excuse. Both the government and contractors alike might use military strategy as a shield against liability. In the end, traditional excuse frameworks may be less effective when the government's war powers are used.

One method of proving excuse for wartime contractors under U.C.C. § 2-615 is to show the parties either expressly or impliedly allocated the risk of wartime contingencies to the government.<sup>241</sup> Where the risk is allocated to one party, then responsibility for the contingency rests with that party.<sup>242</sup> However, answering the question of excuse by reference to risk allocation dispenses with some of the more troublesome factual issues traditional for a U.C.C. § 2-615 analysis. Further, avoiding the difficulties inherent with the showing of "commercial senselessness of requiring performance" is a prime reason for focusing on risk allocation under U.C.C. § 2-615, where the contingency presented in wartime involves extreme personal hazard to contractor personnel, rather than the traditional

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239. *See supra* note 158 and accompanying text.

240. *See Lane v. Halliburton*, 529 F.3d 548, 564–68 (5th Cir. 2008) (addressing the interplay between the political question doctrine and tort claims by employees against KBR for fraud and intentional infliction of emotional distress).

241. *See, e.g., R. M. Hollingshead Corp. v. United States*, 111 F. Supp. 285 (Ct. Cl. 1953); *Beaver Contracting & Grading Co.*, 88-3 B.C.A. (CCH) ¶ 21,180, A.G.B.C.A. Nos. 85-114-1, 84-305-1, 84-236-1, 84-237-1 (Dep't of Agric. Bd. of Contract Appeals, Sept. 27, 1988) (finding Government's responsibility for subsidence of embankment caused by weight of equipment when contract specifications did not require lighter equipment and were thus defective); *J.J. Bonavire Co.*, 83-2 B.C.A. (CCH) ¶ 16,732, A.S.B.C.A. No. 28121 (Armed Servs. Bd. of Contract Appeals, July 27, 1983) (appeal) (finding that it was the government's responsibility to find an alternative means for paint removal when contractor was required to use one of two methods and stop work if damage occurred to the underlying surface); *see also O'DONNELL & MEAGHER, supra* note 33, IV.C.2.c.(2) to (3) (discussing allocation of risk). *But see Whittaker Corp.* 79-1 B.C.A. (CCH) ¶ 13,855, A.S.B.C.A. Nos. 15005, 14722, 15628, 14191, 14740 (Armed Servs. Bd. of Contract Appeals, Mar. 30, 1979) (appeal) (stating that the Government was not responsible for defect in specifications where contractor was aware of the specifications at the time of contracting and could not have been misled); *Aerosonic Instrument Corp.*, 59-1 B.C.A. (CCH) ¶ 2,115, A.S.B.C.A. No. 4129 (Armed Servs. Bd. of Contract Appeals, Mar. 12, 1959) (appeal) (finding contractor responsible for risk where contractor undertook to perform research beyond the state of the art).

242. U.C.C. § 2-615 & cmt. 8 (2003).

increased cost of performance in a pure monetary sense.<sup>243</sup> Yet, focusing on risk allocation remains true to the underlying principles of excuse generally. This approach is in keeping with the policy of U.C.C. § 2-615 that excuse is not available when allocated either expressly or impliedly or when the contingency is “sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as part of the dickered terms, either consciously or as a matter of reasonable, commercial interpretation from the circumstances.”<sup>244</sup>

Moreover, focusing on the test of risk allocation may not always be appropriate to determine excuse under U.C.C. § 2-615, such as when the arising wartime contingency creates an impracticability for financial reasons only. The policy of the Code indicates that “increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance.”<sup>245</sup> If a wartime seller wants to claim excuse due to increased costs of performance, the traditional analysis of impracticability would seem to apply in the same way as for ordinary sale-of-goods contracts. This last consideration is important for honoring the basic policy underlying the Code and existing precedent. Only the issue of wartime hazards raised by interference of third parties such as insurgents requires special consideration.

Because there is not an exhaustive list of events supporting a claim of excuse, a wartime seller who cannot show allocation of risk will be faced with a fact-intensive inquiry in which the seller would have the burden of proof.<sup>246</sup> The type of evidence required will depend on the nature of the particular wartime contingency alleged and may still have the potential for raising issues of military strategy and, thereby, raise a political question, not resolvable by courts.

Unfortunately, where allocation of wartime risks is not apparent, the traditional approach to excuse may be fraught with limitations, difficulties, and uncertainties for wartime sellers. The wartime seller will bear the burden of proof regarding each element of the impracticability test.<sup>247</sup> This presumably will include a showing that the contingency was not foreseeable to the parties at the time of contracting.<sup>248</sup> Like situations involving domestic terrorism that could possibly be foreseen by parties due

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243. See *Transatlantic*, 363 F.2d at 315–16, 315 n.3.

244. U.C.C. § 2-615 cmt. 8.

245. *Id.* § 2-615 cmt. 4.

246. U.C.C. § 2-615 cmt. 2; NEHF, *supra* note 54, § 74.8.

247. NEHF, *supra* note 54, § 74.8.

248. U.C.C. § 2-615 cmt. 1 (referring to “unforeseen supervening circumstances”); NEHF, *supra* note 54, § 74.8 (noting that courts seem to require unforeseeability even though this is not expressly required by § 2-615 itself).

to the greater occurrences of terrorism,<sup>249</sup> wartime contingencies are similarly foreseeable to parties generally, yet present challenges for contracting parties to draft contractual language that is responsive to possible risks. Thus, despite the possibility of wartime contingencies being foreseeable, the parties may not have considered the consequences of particular wartime contingencies, leaving availability of U.C.C. § 2-615 impracticability in question.

Given the problems with assessing wartime contingencies, particularly with issues of foreseeability, it makes sense to resolve claims of wartime excuse through allocation-of-risk analysis. Although the FAR and DFARS do not clearly answer the question of whether the government or the sellers assume the risks for various wartime contingencies, the regulations suggest that both parties bear some risk. Thus, any framework governing risk must take on two issues: first, which types of risk are assumed by the seller, thereby preventing claims of excuse, and second, which risks remain with the government and would support a contractor's claim of excuse for a covered contingency.

Determinations of risk allocation for wartime contingencies should take into account not only the circumstance of the civilian status of contractors, but also the difference between wartime sales and humdrum, ordinary procurements. The circumstances of contracting indicating allocation of risk would include consideration of the effect of the FAR and DFARS excusable-delay provisions.<sup>250</sup> The excusable-delay provisions from the FAR would appear to allow contractor excuse resulting from the acts of a public enemy.<sup>251</sup> This provision, though, must be read along with other government regulations because wartime contracts anticipate acts of a public enemy. Thus, the excusable-delay provision should not necessarily insulate a wartime seller from liability in all instances for non-delivery due to the acts of a public enemy.

The allocation of risk for wartime contingencies would require evaluation as to what extent the nature of wartime contracting limits the normal excuse for acts of a public enemy under FAR. The defense regulations on contractors deploying with the military sketch the first part of the line between government and seller risk for wartime contingencies. It is appropriate to allocate some risk—but not total risk—to contractors for wartime contingencies because the DFARS recognize that: (1) contractors deploying with the military may be performing under “dangerous or austere conditions”; and (2) the contractor “accepts the risks

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249. *See supra* Part III.A.

250. 48 C.F.R. §§ 52.249-8, 52.249-14, 252.217-7009 (2008).

251. *See supra* notes 31–32 and accompanying text.

associated with required contract performance in such operations.”<sup>252</sup> Taken together, these provisions begin to create a framework designed to ensure that the government will receive needed military supplies despite the hazards of war, and to limit the ability of wartime sellers to claim excuse under the general FAR provisions. Therefore, based on these provisions, the seller would have to demonstrate that the particular wartime contingency was not one for which it accepted risk.

The determination of risk allocation for wartime contingencies ultimately depends on the particular risks the sellers accepted under the contract clause required by DFARS.<sup>253</sup> A strict reading of this provision would suggest that the sellers assumed any and all risks associated with wartime deliveries. Such a conclusion would bar availability of excuse under U.C.C. § 2-615 unless such an allocation stretched the minimum requirements of “mercantile sense and reason.”<sup>254</sup> If the provision is read as being less than a full acceptance by contractors of the risks of wartime hazards, then excuse doctrine would still be available. The arguments favor the latter interpretation of the DFARS risk language.

A limited reading of the DFARS risk allocation provision is supported by regulatory history and by the other DFARS provisions. First, the DFARS provisions not only stress the ramifications of the civilian status of the contractors performing during wartime, but also anticipate the development of generalized security plans for the safety of contractors and provide that the contractors will obtain “security services.”<sup>255</sup> These provisions indicate that the risks allocated to contractors would include those that security services could protect against, as opposed to threats requiring a military-style response.<sup>256</sup> Second, the regulatory history supports a limited reading of the risks allocated to wartime contractors under the risk provision, including statements that the government retains

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252. 48 C.F.R. § 252.225-7040(b)(2); *see also* JOINT CONTRACTING COMMAND—IRAQ/AFGHANISTAN, CONTRACTING OFFICER’S GUIDE TO SPECIAL CONTRACT REQUIREMENTS FOR IRAQ/AFGHANISTAN THEATER BUSINESS CLEARANCE, DFARS DEVIATION 2007-O0010: CONTRACTOR PERSONNEL IN U.S. CENTRAL COMMAND AREA OF RESPONSIBILITY 24 (2007).

253. 48 C.F.R. § 252.225-7040(b)(2) (“Except as otherwise provided in the contract, the Contractor accepts the risks associated with required contract performance in such operations.”).

254. U.C.C. § 2-615 cmt. 8 (2003).

255. 48 C.F.R. § 252.225-7040(c); *see also* JOINT CONTRACTING COMMAND—IRAQ/AFGHANISTAN, CONTRACTING OFFICER’S GUIDE TO SPECIAL CONTRACT REQUIREMENTS FOR IRAQ/AFGHANISTAN THEATER BUSINESS CLEARANCE, DFARS DEVIATION 2007-O0010: CONTRACTOR PERSONNEL IN U.S. CENTRAL COMMAND AREA OF RESPONSIBILITY 24 (2007) (“Unless specified elsewhere in the contract, the Contractor is responsible for all logistical and security support required for contractor personnel engaged in this contract.”).

256. Additionally, the same would arguably be true with respect to tasks that require the acts of another contractor in the performance of a separate contract with the Government.

the risks associated with “inherently Governmental functions.”<sup>257</sup> While the contractor is obliged to obtain security services for its personnel and to supervise and train its employees regarding safety matters, the restrictions on civilian engagement in hostilities<sup>258</sup> argue that the risks related to the performance of inherently governmental functions remain with the government. Therefore, a claim of excuse by a contractor that arises due to need for the military to exercise an inherently governmental function should be allowable since this particular risk is allocated to the government.

Tying the proposed risk allocation of wartime contingencies to an evaluation of inherent governmental functions would allow a wartime seller to claim excuse for non-delivery of goods arising from contingencies that require response from the military. Giving the seller a narrow ground for excuse when the seller was unable to deliver goods because contractual performance involved duties performed by the military would represent a balancing of the concerns of wartime contractors with the needs of the military for supplies. The wartime seller would therefore have shown that it is entitled to excuse, under the risk allocation provisions of U.C.C. § 2-615, demonstrated by the circumstances surrounding the performance of wartime contracts.<sup>259</sup> Such an allocation would also reflect flexibility since the types of functions that are inherently governmental may change over time as the government privatizes commercial tasks.<sup>260</sup> At this time, at a minimum, the command of military personnel and the engagement in hostilities would be functions inherently governmental and allocated to the military.<sup>261</sup>

The proposed procedure for evaluating excuse claims for wartime contractors is consistent with DFARS and U.C.C. § 2-615, which expressly contemplate looking at contract circumstances to determine assumption of liability by contracting parties.<sup>262</sup> Of course, the facts supporting the inherent governmental function analysis itself may also be subject to dispute. Yet, there is an attractive quality to a framework that streamlines the impracticability analysis in wartime cases where contingencies are, by nature, expected.

Returning to our representative cases for an illustration of the proposed framework, the two cases present different types of contingencies. First,

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257. Defense Federal Acquisition Regulation Supplement; Contractor Personnel Supporting a Force Deployed Outside the United States, 70 Fed. Reg. 23790, 23792 (May 5, 2005) (codified at 48 C.F.R. pts. 207, 212, 225, 252).

258. 48 C.F.R. § 252.225-7040(b)(3).

259. U.C.C. § 2-615 cmt. 8.

260. See FAIR Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382.

261. See Davidson, *supra* note 40, at 257–58.

262. U.C.C. § 2-615 cmt. 8; 48 C.F.R. § 252.217-7009(e).

the case of KBR after the 2004 attack appears to present a case of extreme personal hazard to KBR personnel vested with delivery of goods under the contract.<sup>263</sup> The case appears to be one where KBR's two-week delay of performance may be excused under this framework because safe delivery of the fuel would probably have required engagement in hostilities. Since engagement in hostilities is an inherently governmental function,<sup>264</sup> KBR would most likely have a valid ground to claim excuse. Second, the case of WFS does not appear to present a case of extreme personal hazard of the type in the KBR representative case.<sup>265</sup> Instead, WFS appears to have been presented with a case where WFS could respond by ordinary security measures, such as careful timing of fuel deliveries during the day or perhaps increased compensation to truck drivers facing threats and harassment. None of these measures would seem to require a military response. Since no inherently governmental function appears to be implicated with the WFS case, WFS would not seem to have a valid ground to claim excuse. Of course, even a contractor that does not initially have a ground for excuse may face deteriorating wartime conditions that require the exercise of an inherently governmental function at a later time.

In sum, the ability of the contractor in each of the representative cases to claim excuse depends on whether the contingency that presents requires a response by the military, rather than the contractor. In the former scenario, excuse would seem to be available under U.C.C. § 2-615. In the latter scenario where the contractor can respond to the contingency, the contractor is expected to do so and would not be able to excuse performance due to the perceived dangers. In other words, some wartime risk is assumed by contractors as part of the nature of delivering goods during war. There are, however, some risks that are beyond the response of the selling contractors and that require military action. These cases would justify a claim of excuse even for a contract entered into during wartime whereby the parties must have foreseen wartime contingencies of some sort.

Under the proposed approach, a wartime seller facing a contingency that involves an inherently governmental function establishes a case for excuse under U.C.C. § 2-615 by showing that the risk of the particular contingency was retained by the government in its military capacity. To decide otherwise would suggest that civilian contractors should deliver goods under all contingencies and thus require the contractors to engage in hostilities and hence lose their law-of-war protection.<sup>266</sup> At the same

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263. See *supra* notes 8–12 and accompanying text.

264. See Davidson, *supra* note 40, at 257–58.

265. See *supra* notes 20–27 and accompanying text.

266. 48 C.F.R. § 252.225-7040(b)(3) (2008); see also JOINT CONTRACTING COMMAND—IRAQ/AFGHANISTAN, CONTRACTING OFFICER'S GUIDE TO SPECIAL CONTRACT

time, the government is assured that contractors cannot rely on excuse doctrine where the wartime hazard is such that a military response is unnecessary. Since the contingencies involve inherently governmental functions, there should not be a case of excuse where the military was unaware of the contingency. The basis for excuse created under this framework is thus narrowly tailored to fit the contractual relationship between the government and the civilian seller. The proposed framework that allocates risk based on whether a contingency requires exercise of an inherently governmental function considers the need of the government to receive military supplies, while remaining consistent with contractual theory and U.C.C. § 2-615.

Allocating risk under the inherently governmental function approach will yield different results depending on the contingency that the wartime contractor faces. The KBR and WFS cases present two points on this continuum that suggest different outcomes. Courts applying the traditional approach, most often through the objective theory of whether a contractor could reasonably perform the delivery, may not take into account the nature of the allocation of responsibility for certain tasks during wartime, a point that in turn might lead to significant differences in results. Application of efficiency principles or fairness norms would, similarly, not necessarily lead to a unified standard in this area. Under my proposal, however, the seller establishing that its failure to deliver goods was the result of a contingency that required a military response would, in most cases, be a sufficient showing on a claim of excuse for nonperformance. The government buyer could rebut this evidence by showing, for example, that the contingency only required employment of routine wartime security services or solely required a contractor's increased cost. Even if a contingency raising the exercise of an inherently governmental function is argued, the government could respond that delay, rather than complete response is justified. In any event, the government would be obliged to pay for goods that are actually delivered, even if the goods represent less than the full amount needed.

Of course, if the government wishes to reduce the seller's recourse to excuse doctrine, the issues involving the seller's civilian status and the law-of-war protection would be triggered. The advantage of the proposed approach is that, in most cases, the wartime seller will be able to articulate a case for excuse only where it involves the need for a military response to a contingency. This rule solves the fundamental problems associated with traditional applications of excuse doctrine, including foreseeability, without creating a means whereby sellers can easily avoid their contractual

obligations to deliver during wartime simply because the contract requires performance under “dangerous or austere conditions.”<sup>267</sup> The proposed solution also leaves the burden of establishing the allocation of risk on the wartime seller and should not implicate an evaluation of military strategy that raises the political question doctrine.

The proposed procedure for establishing excuse based on the need for the exercise of an inherently governmental function or action of another governmental contractor should apply only to wartime contracts. Where a party to a governmental contract otherwise claims excuse, the provisions on excusable delay and U.C.C. § 2-615 would apply without special considerations.<sup>268</sup> The proposed procedure for establishing excuse is based on the FAR, DFAR, and U.C.C. § 2-615 as written. The proposed procedure implements the excuse doctrine under the federal regulations and the code.<sup>269</sup> The suggested limitations on that procedure are based on sound policy under which a court could conclude that certain contingencies did not involve inherently governmental functions.

*C. A Solution Based on Interpretation: Dispensing with Excuse  
Doctrine Altogether for Wartime Contracts in Favor of Contract  
Limitations on Delivery Obligations*

Courts could arrive at the proposed procedure for establishing excuse based on the inherently governmental function framework by using interpretation of excusable-delay provisions from government contracts. While an analysis based primarily on interpretation is not as straightforward as one based on excuse doctrine, adopting the proposed procedure on the basis of interpretation is consistent with sound policy and code provisions.<sup>270</sup> U.C.C. § 2-202 allows parties to explain their agreements with course of dealing, course of performance, and usage of trade.<sup>271</sup> An aggrieved contractor could argue that the delineation between inherently governmental functions and those typically performed by contractors is such a usage of trade. Applying interpretation principles would result in excuse of the contractor’s performance when performance would implicate an inherently governmental function. Thus, the result would be the same. Although the key policy arguments would match those set forth above, a brief sketch of this alternative analysis is helpful.

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267. 48 C.F.R. § 252.225-7040(b)(2).

268. See U.C.C. § 2-615 (2003); *supra* notes 31–35 and accompanying text.

269. See *supra* text accompanying notes 239–50.

270. For a discussion of the interpretation issues presented by standard government contract clauses, see William E. Slade, *A Question of Intent*, 7 FED. CIR. B.J. 251, 278–79 (1997) (discussing the differing rules governing interpretation of contracts and legislation and arguing that normal contract principles should apply to procurement matters).

271. U.C.C. § 2-202 (2003).

The analysis would begin with the provision on excusable delay already part of the contracts for wartime sales, which allow excuse for acts of a public enemy.<sup>272</sup> Because wartime contracts by their nature involve acts of a public enemy, it is doubtful that courts would read this provision as allowing excuse in the event of *any* act of a public enemy. A court could decide to limit this provision by interpreting it with reference to the provisions governing the deployment of contractors with the military.<sup>273</sup> The administrative history of the risk provisions<sup>274</sup> and the status of selling contractors as civilians suggests that the risk of performance relating to deliveries of goods that require the military to perform inherently governmental functions are not allocated to contractors. If a contingency that arises requires the military to act, then the seller would be excused by interpretation of the excusable-delay provisions, rather than through excuse doctrine itself. Although this alternative analysis depends on tying various provisions together in order to obtain the limited interpretation of excusable delay, such an interpretation rests soundly on the same arguments as those for the excuse doctrine. The proposed solution under this analysis would be subject to the same limitations, as well.

## V. CONCLUSION

A wartime seller who has experienced an unexpected contingency during wartime should not, in most cases, be able to excuse performance. The simple reason is that the government needs military supplies. That said, a wartime seller who has experienced a wartime contingency involving extreme personal hazard to contractor personnel should be able to show that delay or excuse is justified. Theories that either bar excuse doctrine or favor excuse for all acts of a public enemy are not consistent with the U.C.C. § 2-615. There is no basis in law or policy for such harsh treatment of military contractors.

Furthermore, the government buyer should not be able to claim breach of contract when a contractor faces extreme personal hazard. Some cases and commentaries regarding the impracticability doctrine might unduly limit the application of excuse in wartime cases by failing to take fully into account the circumstances surrounding wartime contracting. This analysis would run counter to the principles of both U.C.C. Article 2 and traditional contract remedies. Cases involving domestic terrorism, in particular, run the risk of the same failures. As Professor Speidel showed with

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272. *See supra* notes 31–35 and accompanying text.

273. *See supra* notes 36–40 and accompanying text.

274. Defense Federal Acquisition Regulation Supplement; Contractor Personnel Supporting a Force Deployed Outside the United States, 70 Fed. Reg. 23790, 23792 (May 5, 2005) (codified at 48 C.F.R. pts. 207, 212, 225, 252).

retrospective governmental actions, sometimes the classic application of contract doctrine needs revision when applied to certain types of government contracts. As a result, the solution in the area of wartime contracting should include methodology to adjust contractual relations to the nature of wartime contracting.

This Article proposes such a solution. The proposed solution recognizes that there are some cases where a government buyer should not be able to obtain damages for breach of contract after a contractor fails to deliver or is delayed in doing so. U.C.C. § 2-615 already makes excuse available to parties who meet its requirements. Thus, the proposed solution is firmly grounded in the U.C.C. and contract theory generally. The focus of the solution is identifying how the parties have allocated the risk of the occurrence of different wartime contingencies so that courts and the parties will know when excuse is appropriate. As U.C.C. § 2-615 already recognizes that parties may allocate the risk of contingencies, either expressly or impliedly, the proposed solution does not require any change in the law.

Unlike the application of the classic three-pronged approach to impracticability, however, the proposed procedure for excuse focuses on a determination of whether the parties have allocated the risk of loss of a certain wartime contingency to the contractor because the contingency does not involve a response requiring exercise of an inherently governmental function. For example, after the 2004 attack, KBR would appear to be justified in delaying performance because the wartime contingency required a military response. Alternatively, WFS would not seem to present a case of excuse because the wartime contingency appeared to be one that WFS could respond to by hiring security services, altering delivery schedules, and the like. Each of the representative cases leads to a different outcome due to the application of the risk allocation that places risk of certain wartime contingencies on the contractors in cases where a military response is not needed. These cases highlight the merits of the risk-allocation methodology proposed in this Article.

In short, while traditional impracticability analysis offers less clarity when applied to wartime contracts for the sale of goods, current law supports the application of a risk-allocation method of excuse determination. Judges and parties can determine whether the contingency underlying the claimed excuse implicated an inherently governmental function—that is, a military response, rather than a civilian one. This procedure for allocating the risk of a wartime contingency is merely a method for making out a case for excuse by recourse to established statutes and regulations on inherently governmental functions. This methodology is also available by the alternative grounds of interpretation of required contract language for wartime contracts.