Unreliable Excuses: How do Differing Persuasive Interpretations of CISG Article 79 Affect its Goal of Harmony?

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Abstract

The United Nations Convention on Contracts for the International Sale of Goods† ("CSIG") supplies a default uniform international commercial sales law to seventy-eight ratifying countries, including the United States. The legal uniformity provided by the CISG can reduce transaction costs for businesses trading in the international market by reducing the risks associated with operating under varied legal regimes. Toward that goal, CISG Article 79* functions as an internationally standardized *force majeure* clause. Drafted as a compromise between numerous national excuse doctrines, Article 79 promotes uniformity by defining exactly when a contracting party's non-performance—attributable to factors beyond its control—can be excused. But to achieve uniformity, Article 79 (along with the entire CISG) relies on contracting parties, courts, and arbitral tribunals to interpret it in good faith and with regard to its international character.

Unfortunately, despite years of scholarship and court and arbitral decisions purportedly interpreting Article 79 without respect to the domestic legal doctrines it displaced, contradictions exist. To understand these contradictions, I first present an overview of Article 79 academic and judicial interpretations, focusing on several types of questions creating the most confusion. Next, using the recent *Steel Tubes Case*,§ I analyze how the merely persuasive effects of previous academic and judicial interpretations, even when seemingly as well entrenched as "hardship," are subject to the whims of individual national courts or tribunals who may prefer the provisions of a domestic legal doctrine for excuse over Article 79. Last, I offer a few suggestions for how the international judicial and academic communities can fight such discord and instead promote the international legal harmony demanded by international traders who conduct business and contract under the terms of the CISG.

[†] United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (hereinafter "CISG").

^{*} Paragraph one is most relevant here: "(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences." *Id.* at art. 79(1).

[§] Steel Tubes Case (Netherlands v. France), Hof van Cassatie, Belgium (19 June 2009), English translation available at http://cisgw3.law.pace.edu/cases/090619b1.html.

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"[The states party to the CISG], . . . [being of the opinion] that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade, [have agreed] as follows: . . . " **

I. Introduction

The United Nations Convention on Contracts for the International Sale of Goods ("CSIG")¹ "can be regarded as one of the most successful attempts in international commercial law to harmonize divergent legal concepts and principles from various national laws and legal systems."² The CISG supplies a default³ uniform international

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^{**} CISG, infra n. 1, at preamble.

¹ United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (hereinafter "CISG"). U.S. Ratification of 1980 U.N. Convention on Contracts for the Int'l Sale of Goods, 52 Fed. Reg. 40 (Mar. 2, 1987) (codified at 15 U.S.C.A. app. (Supp. 1987)). The CISG became effective January 1, 1988. *Valero Mkt. & Supply Co. v. Greeni Oy & Greeni Trading Oy*, 373 F. Supp. 2d 475, 479 (D.N.J. 2005) (citing to 15 U.S.C. app. at 332).

² Peter J. Mazzacano, Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the historical Origins and Development of an Autonomous Commercial Norm in the CISG, NORDIC J. COM. L., issue 2011#2, at 50, available at http://ssrn.com/abstract=1982895.

³ Under CISG art. 1.1(a), the CISG applies most directly when each of the parties to the sales contract has its place of business in a different ratifying country. CISG, *supra* note 1, at art. 1.1(a). The CISG may apply in other circumstances, as well: "the CISG may also apply if only one of the parties has its place of business in a ratifying country, but the forum's choice-of-law rules point to the law of that ratifying country, which law includes the CISG. *Id.* at art. 1.1(b); *see also id.* at art. 10 (providing a test for determining the applicable 'place of business' when a party does business in more than one place). Thus, for example, if a party with its place of business in the ratifying country of France contracts with a party with its place of business in the non-ratifying country of England, the CISG will apply if the forum's

commercial sales law to seventy-eight ratifying countries, who collectively account for over three-quarters of the world's international trade.⁴ Because a U.S. trader engaging in an international sale or purchase of goods, absent an express and effective choice to be governed by other law,⁵ will very likely be bound by the provisions of the CISG by default, U.S. traders and their legal advisors should understand the benefits and limitations of the CISG.

As an international treaty, the sources of interpretation for the CISG relied on by courts and tribunals, such as scholarly commentary, the *travaeux prepatoire* (legislative history of the treaty), arbitral awards, and the decisions of foreign courts are generally persuasive and not binding.⁶ Despite lacking precedential force, these sources can hold strong persuasive authority for domestic courts grappling with a novel question of the interpretation of the CISG.⁷ The lack of binding precedent creates unique issues for the

choice-of-law rules select the domestic law of France as the applicable law. The United States, however, declared a reservation to the CISG under Article 95, permitting it to adopt the CISG without Article 1.1(b). See Valero Mkt. & Supply Co., 373 F. Supp. 2d at 482 (explaining that the reservation was inapplicable because Finland and the United States were both signatories to the CISG). Thus, if one of the parties has its place of business in the United States, then the CISG will apply only if the other party has its place of business in a ratifying country, thus satisfying Article 1.1(a). Id." Charles R. Calleros, Toward Harmonization and Certainty in Choice-of-Law Rules for International Contracts: Should the U.S. Adopt the Equivalent of Rome I?, 28 WIS. INT'L L.J. 639, 644–45 n. 17 (forthcoming 2012).

⁴ Pace University Law School CISG Database: CISG Table of Contracting States, http://www.cisg.law.pace.edu/cisg/countries/cntries.html.

⁵ Under Article 6, however, the parties may opt-out of the CISG in their contract: "[t]he parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions." CISG, *supra* n. 1, at art. 6.

⁶ "Courts in one signatory country are not bound by the judicial interpretations of the CISG from another country, and any court will have an inevitable tendency to read the CISG through the lens of its own legal system, at least initially. The CISG, however, specifically directs the forum to consider the 'international character' of the CISG and 'the need to promote uniformity in its application.' Courts thus should consider interpretations of the CISG from other jurisdictions to avoid stratification through conflicting interpretations influenced by local law." Calleros, *supra* n. 3, at 645 n. 20 (citing CISG, *supra* note 1, at art. 7(1)).

⁷ For example, the U.S. Supreme Court has stated that within the context of interpreting international treaties, "the opinions of our sister signatories [are] entitled to considerable weight." *Air Fr. v. Saks*, 470 U.S. 392, 404 (1985) (quoting *Benjamins v. British Euro*. *Airways*, 572 F.2d 913, 919 (2d Cir. 1978)).

interpretation of an international treaty because the treaty will have the most success if the varied domestic legal systems that enforce the treaty uniformly interpret its carefully negotiated language with respect to its international character.⁸ Diverging interpretations of the CISG will create disharmony between legal systems, which could lead to unpredictable results that are contrary to its goal of harmonizing international commercial law and reducing barriers to trade.⁹ Moreover, because predictability is the heart of international trade,¹⁰ an unpredictable CISG may be avoided by well-counseled international traders who, under article 6 of the CISG,¹¹ can choose other law to govern their international sales contracts.¹²

As one of the CISG's "most challenging and important . . . provisions," ¹³ article 79 of the CISG ("Article 79") attempts to explain when a party should be exempted from liability for damages resulting from the party's failure to fulfill a contractual obligation. ¹⁴ Hoping "that Article 79 would establish its own autonomous definition of impediments"

⁸ See, e.g. CISG, supra n. 1, at art. 7(1).

⁹ CISG, supra n. 1, at preamble.

¹⁰ Mike Moore, *Promoting openness, fairness and predictability in international trade for the benefit of humanity*, 2 THE WORLD OF PARLIAMENTS 4 (2001), *available at* http://www.ipu.org/news-e/2-4.htm ("Openness, fairness and predictability are at the heart of the multilateral trading system.").

¹¹ CISG, *supra* n. 1, at art. 6.

¹² John H. Jackson, *Perspectives on the Jurisprudence on International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 MICH. L. REV. 1570, 1575 (1985) ("Predictability of decisions, whether based on precedent, statutory formulas, or something else, enables private parties and their counselors (lawyers, economists, and politicians) to calculate generally the potential or lack of potential for a favorable decision under each of a variety of different regulatory schemes.").

 $^{^{13}}$ Harry M. Flechtner, *The Exemption Provisions of the Sales Convention, Including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court*, 3 Belgrade L.R. 84, 85 (2011).

¹⁴ CISG, *supra* n. 1, at art. 79.

beyond a party's control,"¹⁵ the drafters of the CISG avoided the use of various familiar domestic legal terms—such as *force majeure*,¹⁶ *wegfall der geschäftsgrundlage*,¹⁷ *eccessiva onerosità sopravvenuta*,¹⁸ impossibility, and impracticability—in favor of "terminology neutrality."¹⁹ In this way Article 79 bridges the various domestic legal doctrines of the signatory states.²⁰ Yet, the vague language necessitated by its relation to domestic legal doctrines²¹ has caused some scholars to bemoan the lack of uniformity created by Article 79.²²

While it is not possible to evaluate a lack of uniformity found across myriad unpublished court and arbitral decisions, the relatively few published decisions addressing Article 79²³ generally do not support the fear that courts would too readily excuse parties or rely on incompatible domestic law in place of the international

¹⁵ Camilla Baasch Andersen, Uniform Application of the International Sales Law. Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions 94 (2007).

¹⁶ Force majeure (and its Latin equivalent, *vis major*) literally translates into "superior force." However, in many jurisdictions, both common law and civil, this French term is used generically "to characterize a wide range of supervening events." Mazzacano, *supra* n. 2, at 40.

¹⁷ Germany's domestic hardship principle. "Wegfall der geschäftsgrundlage" roughly translates to "elimination of the basis of the business transaction."

¹⁸ The Italian adoption of Germany's *wegfall* concept, *eccessiva onerosità sopravvenuta* roughly translates to an excessively burdensome supervening event. Mazzacano, *supra* n. 2, at 46. *See also*, Schwenzer, *infra* n. 141, at 711, n. 10.

¹⁹ Baasch, supra n. 15, at 94.

²⁰ Mazzacano, supra n. 2, at 49.

²¹ Flechtner, supra n. 13 at 85.

²² Professor John Honnold, one of the drafters of the CISG, opines: "Article 79 may be the least successful part of the half-century of work towards international uniformity." UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, 425 (ed. H. M. Flechtner 2009).

²³ For example, the UNILEX database lists 29 Article 79 decisions. *UNILEX CISG Database*, http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1. The Pace CISG database lists several more. Pace University CISG Database, http://www.cisg.law.pace.edu/cisg/text/digest-cases-79.html. The lack of published cases is likely the result of the fact that arbitral decisions are seldom published. Consequently, the CISG Advisory Council warns: "[a]ny survey of reported decisions is to be read with caution, because the number of cases decided at this point do not allow but a few tentative conclusions regarding interpretative trends on CISG Article 79." CISG-AC Op., *infra* n. 74, at ¶ 3.

standards in the CISG.²⁴ Nonetheless, these court and arbitral decisions, along with copious scholarship, have revealed contradictions in the treatment of several Article 79 issues: what, exactly, constitutes an impediment; how to treat non-conforming goods as contrasted with non-delivery; and when non-performance can be attributed to the actions of a third party.²⁵ Other issues, such as whether and how Article 79 covers "hardship," may be largely settled, but the non-binding nature of the precedent leaves room for national courts to shoe-horn domestic excuse doctrines into their applications of Article 79.²⁶

Both unsettled and inconsistent decisions undermine and frustrate the uniformity of interpretation necessary to create international harmony through widespread contracting under the CISG. Consequently, and in the interests of increasing the value of the CISG, adjudicators should make every effort to consistently apply Article 79 with regard to its international character and regardless of the particular domestic excuse doctrine they would prefer it resemble.²⁷ Meanwhile, scholars—and the CISG Advisory Council, specifically—should endeavor to ensure that their influential interpretations of Article 79 consistently promote uniformity and harmony, rather than fragmentation and discord.²⁸

This comment will first provide background information illuminating the broad goals and approach of Article 79, and it will introduce several Article 79 issues

 $^{^{24}}$ CISG-AC Op., infra n. 74, at \P 3; Fletchtner, supra n. 13 at 85.

²⁵ See this comment, infra sections II.A.iii, II.C.i.-iii.

²⁶ Steel Tubes Case, infra n. 136; Supermicro Computer, infra n. 156.

²⁷ See this comment, infra section III.

²⁸ *Id*.

demonstrating substantial disharmony. Next, the discussion will focus on the particular disharmony created by adjudicators and scholarship that too expansively interprets

Article 79 provisions. Lastly, this comment will offer suggestions on how both adjudicators and scholars can create and strengthen harmony in Article 79 applications.

II. Background

A. Overview of Article 79

In contracts governed by the CISG, any party that fails to perform its contractual obligations may be liable to the other party for damages.²⁹ Under certain extraordinary circumstances, the CISG grants a party exemption from liability for non-performance.³⁰ To avoid liability for breach under Article 79, the non-performing party must prove: (1) an impediment to performance; (2) that prevented performance; (3) was beyond the

²⁹ CISG, *supra* n. 1, at art 45(1)(b), 61(1)(b). Note that under these articles, "a party has a right to claim damages for any non-performance of the other party without the necessity of providing fault or a lack of good faith or the breach of an express promise on his part, as is required by some legal systems." Secretariat Commentary, Guide to CISG Article 79, *available at* http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-79.html.

³⁰ CISG, *supra* n. 1, at art. 79 [hereinafter Art. 79]: "(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

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

⁽a) he is exempt under the preceding paragraph; and

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

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

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

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

party's control; (4) could not reasonably have been taken into account at the time of the conclusion of the contract; (5) and, along with its consequences, could not have been avoided or overcome.³¹ Professor Honnold, one of the drafters of the CISG, summarized the principal elements as "externality of the cause, reasonable unforeseeability of the event, and reasonable unavoidability and inability to overcome the event or its consequences."³² Additionally, Article 79 includes four more subsections to address several specific issues and procedural details that may arise.³³

Article 79(2) excuses the obligation to perform in some circumstances if the party's failure stemmed from "the failure by a third person whom he . . . engaged to perform the whole or a part of the contract." The scope of "third person" is not entirely clear, but the drafters may have intended it to be read narrowly. Additionally, Article 79(2)(a) and (b) require the non-performing party to demonstrate that both it and the third person fulfill the Article 79(1) requirements.

Article 79(3) clarifies that only non-performance during the period within which the impediment exists will be excused.³⁷ Therefore, if an impediment is temporary—perhaps a transit strike preventing delivery of the goods—Article 79 does not provide a

³¹ Art. 79(1).

 $^{^{32}}$ J. Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention 427 (1987).

³³ Art. 79(2)-(5).

³⁴ Art. 79(2).

³⁵ Honnold states that "[The] legislative history indicates that narrow scope should be given to the phrase... there must be an 'organic link' between the main contract and the subcontract." UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 546-547 (2d ed. 1991).

³⁶ Art. 79(2)(a)-(b).

³⁷ Art. 79(3).

permanent excuse.³⁸ Accordingly, when the impediment vanishes, the non-performing party's obligation to perform is reinstated.³⁹

Article 79(4) adds the additional requirement that the non-performing party must give reasonably timely notice to the other party of "the impediment and its effect on his ability to perform."⁴⁰

Article 79(5) limits the excuse to damages only.⁴¹ Parties retain all other rights to relief including the right to "avoid" the contract, demand performance, seek restitution or interest, or reduce the purchase price.⁴²

i. Article 79 in General: Contrasting "Impediment" with National Legal
 Doctrines

Carefully chosen by the CISG drafters to be less restrictive than the term "impossibility," "failure to perform . . . due to an impediment beyond his control" 43 denotes an objective, outside force or obstacle that interferes with performance. 44 Professor John Honnold contends that the impediment must be severe enough to actually prevent performance—essentially a causation element. 45 Honnold also argues that the drafters did not adopt the term "frustration," which allows excuse on the

³⁸ *Id*.

³⁹ *Id*.

⁴⁰ Art. 79(4).

⁴¹ Art. 79(5).

⁴² CISG, *supra* n. 1, at art. 46, 49, 50, 62, 78, 81(2). Avoidance requires a "fundamental breach" which may or may not have occurred in a situation where an impediment prevented performance. *Id.* at art. 25, 49, 79.

⁴³ Art. 79(1).

 $^{^{44}}$ J. Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention \$427 (1987).

⁴⁵ See id. at §432.1.

grounds of economic hardship, because they assumed that "an extreme and unforeseeable change in economic circumstances" could, if it actually prevented performance, itself qualify as an "impediment" under Article 79(1).46 The International Chamber of Commerce, when creating a guide for its arbitrators, concluded that an "impediment" should be "some kind of obstacle which has prevented performance as normally foreseen"—a definition appearing to leave room for hardship.47 Article 79's "impediment" may also include the U.S. concept of "frustration of purpose,"48 but only to the extent that it relates to an obstacle obstructing contractual performance as originally envisaged.49 Also missing from the text of Article 79 is the United States' Uniform Commercial Code (U.C.C.) doctrine of "commercial impracticability."50

Whatever "impediment" was originally intended to mean, since the CISG entered into force, its ultimate meaning is the product of its application and interpretation by courts and arbitration tribunals. When defining "impediment," most jurisdictions started by determining if and how their national doctrines for exemption fit within the CISG's concept of "impediment." For example, Germany's *Schiedsgericht der*

⁴⁶ Id. at 442-43.

⁴⁷ International Chamber of Commerce, Force Majeure and Hardship comment 9, at 11 (1985).

⁴⁸ "Frustration of purpose or the object of the contract" is based upon the "fundamental premise that relief should be given where the parties could not reasonably have protected themselves by the contract's terms against contingencies that later arose." Am. Jur. 2d Contracts § 651.

⁴⁹ See Henry D. Gabriel, A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code, 7 Ind. Int'l & Comp. L. Rev. 279, 280 (1997) ("Article 79 embodies the CISG's provisions for frustration of purpose and impossibility.").

⁵⁰ See U.C.C. §2-615 (1997) ("Except so far as a seller may have assumed a greater obligation . . . (a) Delay in delivery or non-delivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid."). See also, Am. Jur. 2d Contracts § 656 ("A contract is said to be commercially impracticable when, because of unforeseen events, it can be performed only at an excessive and unreasonable cost or when all means of performance are commercially senseless.").

Handelskammer, an arbitral tribunal, interpreted Article 79's "impediment" to be consistent with force majeure, economic impossibility, and excessive onerousness.⁵¹

Italy's Tribunale Civile di Monza, a civil district court, however, expressly found "impediment" to be distinct from and not including eccessiva onerosità sopravvenuta—the Italian hardship doctrine.⁵² In this way, the Italian court implied that an impediment requires actual impossibility.⁵³

Further, a distinction between Article 79 and domestic excuse doctrines can be inferred from rulings by courts and tribunals that Article 79 preempts and displaces the similar domestic doctrine when the CISG governs a transaction.⁵⁴ More often, Article 79 decisions have found "impediment" to be most similar to their domestic exemptions standards for "impossibility."⁵⁵ Still, others have found that while impossibility may be

⁵¹ See, e.g., Chinese Goods Case (Germany v. China), Schiedsgericht der Handelskammer Hamburg, Germany (1996), English language abstract available at http://www.unilex.info/case.cfm?pid=1&do=case&id=195&step=Abstract; German full-text available at http://www.unilex.info/case.cfm?pid=1&do=case&id=195&step=EullTout) (Applexizing Article 70 to

http://www.unilex.info/case.cfm?pid=1&do=case&id=195&step=FullText) (Analogizing Article 79 to various national legal doctrines).

⁵² Ferrochrome Case (Italy v. Sweden), Tribunale Civile di Monza, Italy (1993), English abstract *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=21&step=Abstract; Italian full-text *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=21&step=FullText) (Concluding that the CISG does not allow avoidance under Article 79 on the grounds of hardship).

⁵³ *Id*.

⁵⁴ See, e.g., Electronic Hearing Aid Case (Germany v. Italy), Landgericht Aachen, Germany (1993), English translation available at http://cisgw3.law.pace.edu/cases/930514g1.html) ("Rules of frustration or economic hardship (Wegfall der Geschäftsgrundlage) under domestic law or domestic law challenges having to do with mistake as to the quality of the goods are irrelevant because the CISG fills the field in these areas").

⁵⁵ See, e.g., Ferrochome case, supra n. 52; Frozen Raspberries Case (Chile v. Belgium), Rechtbank van Koophandel, Hasselt, Belgium (1995), English abstract available at http://www.unilex.info/case.cfm?pid=1&do=case&id=263&step=Abstract, Dutch full-text available at http://www.unilex.info/case.cfm?pid=1&do=case&id=263&step=FullText) (Where the Court held that drops in the market price of a good cannot exempt the buyer for non-performance because "fluctuations of prices are foreseeable events in international trade and far from rendering the performance impossible they result in an economic loss well included in the normal risk of commercial activities."); Iron Molybdenum Case (U.K. v. Germany), Oberlandesgericht Hamburg, Germany (1997), English translation available at http://cisgw3.law.pace.edu/cases/970228g1.html) (This German Court held that Article 79

the most similar concept, "hardship" standards apply to render Article 79 exemption standards less restrictive than the harsher "impossibility." ⁵⁶ Although undoubtedly frustrating to the CISG's goal of uniformity, such diverging opinions on the scope of "impediment" can hardly be considered surprising given that "[t]he convention, *faute de mieux*, will often be applied by tribunals (judges or arbitrators) who will be intimately familiar with their own domestic law." ⁵⁷

ii. Concepts of "Fault" Weighed Against "Risk" in Article 79

Specific interpretations of the exact standards of "impediment" notwithstanding, Article 79 decisions provide a limited reprieve from the CISG's "no-fault," or "strict liability," approach to damages.⁵⁸ Contrasting the CISG's intent to approach the concept of damages from the perspective of a party's guarantee (strict liability) with that of a fault-based assessment, Professor Honnold explained: "[t]he Convention thus is based on a unitary, contractual obligation to perform the contract and be responsible for damages—as contrasted with some legal systems that make liberal use of the idea of fault in dealing with liability for damages for breach of contract."⁵⁹ Other leading

does not exempt a seller from liability for non-delivery to buyer because of a supplier's failure to deliver unless it is impossible for the seller to procure replacement goods of a similar quality on the market).

⁵⁶ Shoes Case (Italy v. Germany), Amtsgericht Charlottenburg, Germany (1994), English Translation *available at* http://cisgw3.law.pace.edu/cases/940915g1.html (Where the German court held that Article 79 exempted a buyer from interest on delayed payment of the purchase price because the Court determined timely payment, although possible, could not be reasonably expected in the circumstances and thereby implied Article 79 less restrictive than the impossibility exemption standards).

⁵⁷ John Honnold, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES (Kluwer International 1989).

⁵⁸ Harry Flechtner, Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods, 19 Pace Int'l. L.R. 29, 32-33 (2007).

⁵⁹ J. Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention §427 at 479 (3rd ed. 1987).

commentators, such as Dr. Georg Gruber and Professor Hans Stoll, have expressed accord: "[f]ollowing the Anglo-American model of strict liability, the promisor is in principle liable for all losses arising from non-performance, irrespective of fault." Article 79, however, provides an exception from such strict liability by allowing exemption from liability for damages where the non-performing party can sufficiently meet the standards for "impediment" presented in Article 79.61 Thus, Article 79's exemption establishes a limit to the no-fault regime inherent in the CISG.62

Although Article 79's departure from the CISG's no-fault approach may balance the strict liability of guarantee, its check is not unlimited. Instead, Article 79's exemption maintains a careful balance with the general no-fault approach:

Article 79 is the result of a difficult compromise between the advocates of an absolute guarantee that the contract will be performed, in accordance with the Anglo-American model, and the proponents of the principle of fault, characteristic for most of the continental European legal systems. The compromise must not be weakened by recourse to principles of liability under national law when interpreting Article 79....⁶³

Recognizing this balance, tribunals contemplating Article 79 exemptions have often applied concepts of risk—more specifically, which party was best positioned to manage the risk of the *force majeure* event that ultimately occurred.⁶⁴ A 1996 German

⁶⁰ Hans Stoll & Georg Gruber, *Article 74, in* Commentary on the UN Convention on the International Sale of Goods (CISG) 746 (Peter Schlechtriem & Ingeborg Schwenzer, eds., Geoffrey Thomas trans., Oxford Univ. Press 2005).

⁶¹ Article 79 CISG.

⁶² Hans Stoll & Georg Gruber, *Article 74*, *in* Commentary on the UN Convention on the International Sale of Goods (CISG) 807 (Peter Schlechtriem & Ingeborg Schwenzer, eds., Geoffrey Thomas trans., Oxford Univ. Press 2005) (1998) ("Article 79 thus constitutes the necessary limitation to the principle of strict liability for non-performance of the contract which otherwise underlies the CISG").

⁶³ *Id*.

⁶⁴ See, e.g., Vine Wax Case II (Austria v. Germany), Bundesgerichtshof, Germany (1999), English language translation *available at* http://cisgw3.law.pace.edu/cases/990324g1.html ("The possibility of exemption under CISG Art. 79 does not change the allocation of the contractual risk.").

arbitration known as the *Chinese Goods Case* provides a strong example of the risk of loss analysis that tribunals may use to determine the applicability of the Article 79 exemption. In the *Chinese Goods Case*, the tribunal analyzed which party bore the risk of loss and ultimately determined that because the buyer paid in advance for a missed delivery, the contract for sale clearly allocated the risk of procurement of the goods to the seller when its supplier was unable to provide the goods. Asserting that "[o]nly the apportionment of risk in the contract is relevant" to application of Article 79, the tribunal denied the seller's claim for Article 79 exemption. These decisions therefore imply that, regardless of "fault," the non-performing party must not have assumed the risk of the event that caused the non-performance.

In certain rare circumstances, Article 79's emphasis on which party assumed the risk of the supervening event can require interpretation of domestic risk of loss rules.⁶⁸ For example, in a 1996 Hungarian arbitration known as the *Caviar Case*, the seller and buyer each claimed that the other bore the risk of loss where an intervening trade embargo (taking effect after the seller's delivery of caviar to the buyer and before the payment due date) caused the caviar to be destroyed by preventing the buyer from making payment to the seller and taking possession of the caviar.⁶⁹ Finding the CISG and the contract unclear on which party bore the risk of loss at that time, the Court of

⁶⁵ Chinese Goods Case, supra n. 51.

⁶⁶ *Id*.

⁶⁷ *Id*.

⁶⁸ CISG Art. 7(2) requires gaps in the CISG that cannot be filled by its general principles to be filled "in conformity with the law applicable by virtue of the rules of private international law."

⁶⁹ Caviar Case (Yugoslavia v. Hungary), Arbitration Court attached to the Hungarian Chamber of and Industry, Hungary (1996), English language translation *available at* http://cisgw3.law.pace.edu/cases/961210h1.html.

Arbitration determined that the seller's national law (Yugoslav) governed the transaction and held that the title to ownership passed to the buyer at the moment the goods are taken over by the buyer.⁷⁰ Because the risk of freight was borne by the buyer and because "the damage caused by force majeure has to be borne by the party where the risk is at the moment the force majeure occurs," the Arbitration Court concluded that Article 79 did not exempt the buyer and awarded damages to the seller.⁷¹ Note, however, that even where national risk of loss laws were not implicated, Article 79 has been interpreted to avoid upsetting the contractual allocation of risk, which could impart the risk of freight on the buyer.⁷²

iii. Special Case of Breach Via Delivery of "Non-conforming Goods"

The term "impediment" denotes an event external to the seller of the goods, thus applying to events causing non-delivery or delay in delivery, but arguably excluding problems leading to non-conformance (defectiveness) in delivered goods.⁷³ This conservative approach reflects the fear of drafters from common-law jurisdictions—who favored a "warranty-based" approach—that "contractual liability . . . based on proof of fault, might unduly influence civil-law judges or arbitrators too ready to allow sellers to

⁷⁰ *Id*. at ¶ 9.

⁷¹ *Id*.

⁷² Art Books Case (Italy v. Switzerland), Handelsgericht des Kantons Zürich, Switzerland (1999), English language translation *available at* http://cisgw3.law.pace.edu/cases/990210s1.html (Where "[t]he [seller] fulfilled its delivery obligation by handing over the goods to the first carrier. [Seller] therefore did not engage the forwarding agent 'for the performance' of its delivery obligation The [seller] is therefore not responsible for the carrier's miscellaneous mistakes.").

⁷³ See Barry Nicholas, *Impracticability and Impossibility in the U.S. Convention on Contracts for the International Sale of Goods in* Nina M. Galston & Hans Smit eds., International Sales: The United Nations Convention on Contracts for the International Sale of Goods, Matthew Bender § 5.02 at 5-10 (stating that the choice of the word "impediment" resulted from the widely shared view that a seller could not be exonerated of liability for non-conforming goods).

escape liability for defective performance, pleading events beyond their control that could not have been taken into account."⁷⁴

Yet, Article 79(1) refers to non-performance with the phrase "failure to perform any of his obligations."⁷⁵ Because Article 35 imparts on the seller an obligation to deliver conforming goods,⁷⁶ a breach of that obligation appears to be potentially excusable under the plain-language of Article 79(1). Therefore, when read with an emphasis on fault, "a defect present in the goods at the time of the conclusion of the contract may conceivably constitute an impediment to the seller's obligation to deliver conforming goods," and may potentially merit Article 79 exemption as an impediment.⁷⁷ In practice, however, successful claims by sellers for exemption from liability for delivering non-conforming goods have been extremely rare.⁷⁸

In the *Vine Wax Case*, Germany's *Bundesgerichtshof* (Federal Supreme Court) appears to have allayed the "fear that extending the exemption to delivery of nonconforming goods might reintroduce the principle of liability for fault through the 'backdoor."⁷⁹ In the *Vine Wax Case*, a seller forwarded defective vine wax he had received from his supplier-manufacturer directly to the buyer without first inspecting

⁷⁴ CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, para 6, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007, available at http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html [hereinafter CISG-AC Op.].

⁷⁵ Art. 79(1).

⁷⁶ CISG, *supra* n. 1, at art. 35.

⁷⁷ CISG-AC Op., *supra* n. 74 at ¶ 7.

⁷⁸ *Id.* at ¶ 8. *See*, UNCITRAL Digest and cases cited in notes 13 and 14, *available at* http://cisgw3.law.pace.edu/cisg/text/anno-art-79.html (citing to nine cases where tribunals denied exemption for delivery of non-conforming goods and only one where exemption was granted).

⁷⁹ CISG-AC Op., *supra* n. 74 at ¶ 8.

it.⁸⁰ The intermediate appellate court found that, in theory, Article 79 could exempt a seller from delivering non-conforming goods.⁸¹ Nonetheless, it held the seller liable for delivering non-conforming goods because the seller had failed to inspect the wax prior to delivering it to the buyer.⁸² Disagreeing with the lower court's reasoning but still denying exemption to the seller, the *Bundesgerichtshof* held that:

The [seller's] liability under the [CISG] is, contrary to the Lower Court 's opinion, not based on the supplier's obligation to inspect the goods before delivery to its purchaser That is so because the seller's culpability is not important due to the statutory allocation of risk and the lack of a different agreement between the parties concerning the allocation of risk, resulting in a guarantee [warranty] liability of the seller.⁸³

By refusing to pronounce generally on whether or not a seller could ever be exempt when delivering non-conforming goods, and by explaining why this particular seller could not be exempted from delivering non-conforming goods, the decision suggests that the *Bundesgerichtshof* believes Article 79 might theoretically apply to excuse a seller's delivery of non-conforming goods.⁸⁴ In a subsequent case, the *Bundesgerichtshof* similarly left open the possibility of Article 79 excusing delivery of non-conforming goods by refusing to pronounce a general principle and instead emphasizing the heavy burden of proof beholden on such petitions for exemption.⁸⁵

⁸⁰ Vine Wax Case II, supra n. 64.

⁸¹ Vine Wax Case I (Austria v. Germany), Oberlandesgericht Zweibrücken, Germany (1998), English translation *available at* http://cisgw3.law.pace.edu/cases/980331g1.html.

⁸² Id.

⁸³ Vine Wax Case II, *supra* n. 64 at ¶ II.2.b.

⁸⁴ CISG-AC Op., *supra* n. 74, at ¶ 10.

⁸⁵ Powdered Milk Case (Netherlands v. Germany), Bundesgerichtshof, Germany (2002), ¶ III, English Translation *available at* http://cisgw3.law.pace.edu/cases/020109g1.html.

Consistent with a "plain language" interpretation of Article 79, these decisions strengthen the notion that a seller's delivery of non-conforming goods is a violation of "any of his obligations" within the scope of Article 79(1).86 Even if exemption from liability is possible for such a breach, however, the scope of the Article 79 exemption does not expand greatly because "it is generally and correctly considered that sellers implicitly assume the risks involved in the procurement of the goods they sell."87 Thus while exemption for delivery of non-conforming goods remains theoretically possible, it is likely to be rare in light of the demanding requirements.88

B. CISG Advisory Opinion No. 7

Recognizing the "considerable room for judicial appraisal and divergent interpretation of several words used in, and issues raised by, Article 79,"⁸⁹ on October 12, 2007, the CISG Advisory Council ("CISG-AC")⁹⁰ released an advisory opinion attempting to address three areas of current and potential divergence and disharmony:

⁸⁶ CISG-AC Op., *supra* n. 74, at ¶ 10.

⁸⁷ *Id.*, at ¶ 13.

⁸⁸ For a theoretical example, see CISG-AC Op., supra n. 74, at ¶ 12 ("Assume, for example, the case of a seller bound to deliver frozen goods which, due to a blackout or power failure occurring before the transfer of risk to the buyer but after the seller parted with the goods, arrive in a decomposed state at the place of delivery. Article 79 may apply in this case only if the seller succeeds in establishing that he did not know of the blackout and that the power failure was totally beyond his control. The seller would not be exempted of liability for damages if he reasonably could have been expected to take the possibility of a power failure into account at the time of the conclusion of the contract.").

⁸⁹ Id. at ¶ 4.

⁹⁰ Composed of scholars specializing in international trade law and from diverse legal cultures, the CISG Advisory Council "is a private initiative which aims at promoting a uniform interpretation of the CISG. ... Accordingly the group is afforded the luxury of being critical of judicial or arbitral decision and of addressing issues not dealt with previously by adjudicating bodies. The Council is guided by the mandate of Article 7 of the Convention as far its interpretation and application are concerned: the paramount regard to international character of the Convention and the need to promote uniformity. ... In practical terms, the primary purpose of the CISG-AC is to issue opinions relating to the interpretation and application of the Convention on request or on its own initiative." These opinions, while not binding on any particular adjudicative body, are nonetheless viewed as highly influential. CISG Advisory Council, http://www.cisgac.com.

the delivery of non-conforming goods, a party's liability for impediments arising from the actions of third-persons, and economic hardship as a ground for exemption. 91 The CISG-AC noted that the limited success parties have had invoking Article 79, the dearth of published cases decided thus far, and the limited utility of those cases 92 prevented strong conclusions regarding interpretative trends. Therefore, the CISG-AC relied heavily on the *traveaux preparatoires* and scholarly opinions. 93 The CISG-AC's opinion first discusses the general treatment of each of the three issues by variegated national court and arbitral decisions, and then concludes with a theoretical extension of Article 79 to resolve hypothetical situations not yet addressed in published decisions. 94 By preemptively addressing points of possible divergence, the CISG-AC, laudably, attempts to provide the basis for uniform decisions in the future. Unfortunately, the CISG-AC may have thwarted its goal because its speculation on how to apply Article 79 to potential "hardship" situations 95 appears to invite an overly liberal basis for exemption and remedy that inadvertently provides grounds for further divergence and disharmony, 96

⁹¹ CISG-AC Op., *supra* n. 74. For summaries of the CISG-AC's positions and a further discussion of these three topics, *see* this comment, *supra* section II.A.iii. for non-conforming goods; *infra* section II.C.ii. for suppliers as third parties; and *infra* section II.C.iii. for economic hardship.

⁹² "However, not every decision identifies facts that may become relevant to draw some tentative conclusions (e.g., the nationality of the parties, the type of goods involved or other details of the transaction), while others are incomplete in the sense that they merely state that the conditions of Article 79 have not been met." CISG-AC Op., *supra* n. 74, at ¶ 4.

⁹³ Id. at ¶ 2-3.

⁹⁴ CISG-AC Op., supra n. 74.

⁹⁵ *Id.* at ¶¶ 33, 39-40.

⁹⁶ For discussion on the divergence and disharmony fostered by CISG-AC Opinion No. 7, as exemplified by the *Steel Tubes Case* (*infra* n. 136), *see* this comment, *infra* sections III.A.–B.

The Pace University CISG library reveals only sixteen published cases with an Art. 79 issue decided since Oct. 12, 2007 (the release date of CISG-AC Opinion No. 7). Pace University Article 79 Database,

C. Article 79(1) Requirements

Article 79(1) requires the non-performing party to prove: (1) an impediment to performance existed; (2) it prevented performance (causation); (3) it was beyond the party's control; (4) it could not reasonably have been taken into account at the time of the conclusion of the contract; and (5) it or its consequences could not have been avoided or overcome.⁹⁷ The following subsections discuss actual examples of impediments, causation, and the three other elements within Article 79(1) in order to better understand how courts and arbitral tribunals apply Article 79(1) in practice.

i. "Impediment" Requirement, Generally, Under Article 79(1)

Non-performing parties governed by the CISG have argued, with varying degrees of success, that a wide variety of events constituted "impediments" within the meaning of Article 79 and therefore that the party should be exempted from liability for its non-performance. 98 Often, court decisions and arbitral tribunal awards do not specifically discuss the question of impediment. In such cases, inferences that the impediment requirement was met can be gleaned from either a grant of exemption (permitting an inference that the stated facts of the case satisfied all the elements for exemption, including an impediment) or from a denial of exemption on grounds that the impediment did not satisfy one or more of the additional Article 79(1) requirements. In many other decisions, however, courts and tribunals denied exemption on the basis of a

http://www.cisg.law.pace.edu/cisg/text/digest-cases-79.html. Of these sixteen cases, the *Steel Tubes Case* (*infra* n. 136) is the only case directly addressing issues discussed in the CISG-AC Op. hypotheticals.

97 Art. 79(1).

⁹⁸ See, generally, UNCITRAL Digest and cases cited within, available at http://cisgw3.law.pace.edu/cisg/text/anno-art-79.html.

separate Article 79(1) element and did not address the (potentially difficult) question of whether or not an impediment existed.⁹⁹ While this class of cases may not illuminate the nature of the impediment requirement, they nonetheless demonstrate the wide variety of impediments claimed by parties, many of which presumably were viewed by the tribunals to be valid impediments, though without explicit rulings to that effect.

In general, courts and arbitral tribunals have used language requiring "that an impediment be an unmanageable risk or a totally exceptional event, such as *force majeure*, economic impossibility, or excessive onerousness." ¹⁰⁰ Exceptional conditions precipitating a delivery of non-conforming goods—such as the non-existence of a method to detect or prevent non-conformity prior to delivery ¹⁰¹—may also fall within the scope of impediment. ¹⁰² More specifically, successful impediments have included, *inter alia*: various typical *force majeure* events (such as fire, flood, or extreme weather); ¹⁰³ a prohibition on exports by the seller's country; ¹⁰⁴ a refusal by state officials to allow buyer to import the goods into its country; ¹⁰⁵ military hostilities (the Second Iraq War) preventing inspection and acceptance of the goods pursuant to the terms of the

⁹⁹ Id. at ¶ 13, and cases cited in n. 42–53.

¹⁰⁰ *Id.* at ¶ 10 (citing to the Chinese Goods Case, *supra* n. 51).

¹⁰¹ Powdered Milk Case, *supra* n. 85.

¹⁰² See prior commentary in this comment.

¹⁰³ See, generally, UNCITRAL Digest and cases cited within, available at http://cisgw3.law.pace.edu/cisg/text/anno-art-79.html.

¹⁰⁴ Coal Case (Ukraine v. Bulgaria), Arbitration Award 56/1995 of the Bulgarska turgosko-promishlena palata, Bulgaria (1996), English translation *available at* http://cisgw3.law.pace.edu/cases/960424bu.html.

¹⁰⁵ Butter Case (Russia v. Germany), Award 155/1996, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russia (1997), English language translation *available at* http://cisgw3.law.pace.edu/cases/970122r1.html (Note that in this case the buyer was exempted from damages stemming from failing to take delivery of the goods).

contract;¹⁰⁶ the delivery of defective goods manufactured by the seller's supplier where the supplier's manufacturing process was found to be beyond the seller's control;¹⁰⁷ the failure of a carrier to timely deliver the goods to the buyer where the seller duly arranged and timely transferred the goods to the carrier;¹⁰⁸ and a strike by the employees of the seller's supplier.¹⁰⁹

In contrast, some tribunals refusing to grant an exemption have employed "language suggesting that there was not an impediment within the meaning of Article 79(1)."¹¹⁰ While not always clearly stating whether the rationale was due to failure of the impediment requirement or another element of 79(1), the decisions nonetheless give some indication of events that may not be considered impediments: a seller's failure to deliver due to an emergency shut-down at its supplier's plant;¹¹¹ a seller's failure to deliver after its supplier ceased production due to extreme financial difficulties;¹¹² a buyer's refusal to pay for delivered goods because of negative market developments,

¹⁰⁶ Hilaturas Miel, S.L. v. Republic of Iraq, 573 F.Supp.2d 781 (S.D.N.Y. 2008).

¹⁰⁷ Sports Clothes / Judo Suits Case (Switzerland v. France), Tribunal de commerce de Besançon, France (1998), English translation *available at* http://cisgw3.law.pace.edu/cases/980119f1.html (Additionally, this French commercial court emphasized seller's lack of bad faith as additional justification for its Article 79 exemption).

¹⁰⁸ Art Books Case, *supra* n. 72 (The seller was found exempt for damages from late delivery).

¹⁰⁹ Coal Case, *supra* n. 104 (The arbitral tribunal recognized the coal miner's strike as an impediment causing the seller's failure to deliver the goods, but denied exemption from liability because the seller had already breached its obligation to timely deliver when the strike occurred).

¹¹⁰ UNCITRAL Digest at ¶ 12.

¹¹¹ Metallic Sodium Case (Germany v. Russia), Award 155/1994 of Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia (1995), English translation *available at* http://cisgw3.law.pace.edu/cases/950316r1.html.

¹¹² Chinese Goods Case, supra n. 51.

currency revaluation, and other adverse economic events;¹¹³ a buyer's failure to pay the purchase price because of inadequate currency reserves that could be freely converted into the payment currency;¹¹⁴ and a buyer's failure to open a letter of credit where buyer's government ordered a general suspension on the payment of foreign debts.¹¹⁵

Within this variety of claimed impediments, the decisions reveal three classes of impediments claimed with frequency. First, Governmental actions—such as custom restrictions, trade sanctions, or an embargo—appear to be favored as impediments. ¹¹⁶ Similarly, civil actions unrelated to the contract—such as a sufficiently disruptive strike—can also be impediments. ¹¹⁷ Second, a seller's breach caused by its supplier's default creates a special class of impediment. ¹¹⁸ Third, forces creating particularly onerous economic hardship may also be grounds for excuse. ¹¹⁹ Governmental actions and civil counteractions appear to be particularly fact dependent, and further discussion is outside the scope of this comment. Breaches by suppliers and economic hardship considerations, however, warrant deeper analysis.

ii. Breach by Suppliers as a Particular Impediment

¹¹³ Steel Ropes Case (Russia v. Bulgaria), Arbitration before the Bulgarian Chamber of Commerce and Industry, Bulgaria (1998), English translation *available at* http://cisgw3.law.pace.edu/cases/980212bu.html.

¹¹⁴ Equipment / Automatic Diffractameter Case (Germany v. Russia), Award 123/1992 of Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia (1995), English translation *available at* http://cisgw3.law.pace.edu/cases/951017r1.html.

¹¹⁵ Failure to Open Letter of Credit and Penalty Clause Case (Austria v. Bulgaria), ICC International Court of Arbitration, Award 7197 of 1992, *available at* http://cisgw3.law.pace.edu/cases/927197i1.html.

¹¹⁶ See, e.g., Id.; Coal Case, supra n. 104; Butter Case, supra n. 105; Hilaturas, supra n. 106.

¹¹⁷ See, e.g., Coal Case, supra n. 104.

¹¹⁸ See, e.g., Metallic Sodium Case, supra n. 111; Chinese Goods Case, supra n. 51.

¹¹⁹ See, e.g., Steel Ropes Case, supra n. 113; Equipment / Automatic Diffractameter case, supra n. 114.

At first glance, a seller's supplier (or subcontractor) appears to be a "third party" implicating Article 79(2) and, indeed, in some circumstances a tribunal may find that to be the case. 120 In general, however, a seller (or the buyer) retains responsibility for the performance of those within its sphere of risk; "for example, the seller's own staff or personnel and those engaged to provide the seller with raw materials or semimanufactured goods." 121 Third parties within the seller's sphere of risk include those third parties "who, while not entrusted with the performance of the contract vis-à-vis the buyer, nevertheless enable, assist, or create the preconditions for the seller's delivery of conforming goods." 122 A consistent line of decisions concludes that the seller bears the risk that these third-party suppliers or subcontractors on which the seller depends may breach their own contract with the seller, so that the seller will not be excused when failure to perform was caused by its supplier's default. 123 Because these are not the types of third persons "engaged to fulfill a whole or a part of the contract" 124 contemplated in Article 79(2), 125 "Article 79(1) remains the controlling provision to ascertain the liability

¹²⁰ The author is unaware of a published case where a seller's supplier or subcontractor was found to be a "third party" implicating Article 79(2). The CISG-AC Advisory Opinion No. 7 did not cite a case supporting this proposition, but nonetheless suggests that a supplier's monopoly may be such a situation. CISG-AC Op., *supra* n. 74, at ¶ 20.

¹²¹ CISG-AC Op., *supra* n. 74, at ¶ 2.2(a).

¹²² *Id*. at ¶ 18.

¹²³ See, e.g., Vine Wax Case II, supra n. 64; Sports Clothes / Judo Suits Case, supra n. 107.

¹²⁴ Art. 79(2).

¹²⁵ Article 79(2) contemplates "third persons" to be those "independently' engaged by the seller to perform all or part of the contract directly to the buyer" and who, unlike third-party suppliers or subcontractors "for whose performance the seller is fully responsible, are not merely separate and distinct persons or legal entities, but also economically and functionally independent from the seller, outside the seller's organizational structure, sphere of control or responsibility." CISG-AC Op., *supra* n. 74, at ¶ 19 (citing to Denis Tallon, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION, at 545 (M. Bianca and M.J. Bonell, eds.) (1987).

of the seller for the acts or omissions of that type of 'third persons' whose default cannot be invoked by the seller to excuse his own failure to deliver conforming goods."¹²⁶

Although not yet addressed in a decision, some commentators argue that a seller's sphere of risk does not extend to situations where the seller cannot control the choice of supplier or its performance—perhaps in situations where the supplier holds a monopoly.¹²⁷ In this way, the "sphere of risk" analysis appears to be a proxy for the "control" element of Article 79(1) to the extent that a seller controls its choice of supplier (as contrasted with a supplier chosen by the buyer). Therefore, potentially subject to the narrowest of exceptions, a supplier's default does not constitute a genuine impediment with regard to the seller's performance.

iii. Economic Hardship as a Particular Impediment

Non-performing parties have frequently claimed that significant changes in the financial aspects of a contract that cause performance to become extraordinarily burdensome should qualify as an "impediment" exempting the party from liability. Such "hardship" arguments appear to be grounded in both national legal doctrines (such as *imprévision*, frustration of contract, commercial impracticability, *wegfall der geschäftsgrundlage*, *eccesiva onerosita sopravvenuta*) and conflicting scholarly opinions about the extent of "impediment." Although some early commentators argue

¹²⁶ CISG-AC Op., *supra* n. 74, at ¶ 18.

¹²⁷ *Id.* at ¶¶ 18–20 (citing to Hans Stoll & Georg Gruber, in Peter Schlechtriem and Ingeborg Schwenzer eds., Commentary on the UN Convention on the International Sale of Goods (CISG) Article 79, at 819-22 (2d ed., Oxford University Press, 2005)).

¹²⁸ See UNCITRAL Digest and cases cited within, available at http://cisgw3.law.pace.edu/cisg/text/anno-art-79.html.

¹²⁹ CISG-AC Op., *supra* n. 74, at ¶ 26.

that the drafting history of Article 79 indicates that "hardship" cannot fit within the "insurmountable obstacle" concept of "impediment," in actuality "such history evidences that the discussions were not conclusive on this question." Because Article 79 does not define "impediment" as an event that renders performance absolutely impossible, an impediment may be represented by "a totally unexpected event that makes performance excessively difficult." ¹³¹

In practice, courts and tribunals have routinely denied petitions for Article 79 exemption grounded in hardship stemming from changes in market prices: sellers' failure to deliver the goods caused by an increase in cost, 132 sellers' failure to deliver the goods where the market price of the goods increased dramatically, 133 and buyers' refusal to accept delivery and pay the seller because of a dramatic decrease in the value of the goods being sold. 134 When denying such petitions, courts have generally commented that "a party is deemed to assume the risk of market fluctuations and other cost factors affecting the financial consequences of the contract." 135 Indeed, it was not until June 2009, almost twenty years after the CISG's entry into force, that a court granted an

 $^{^{130}}$ *Id.*, at ¶ 27–28, 30. For an extremely thorough discussion of the drafting history of Article 79 as it relates to the concept of "hardship," *see id.* at ¶ 24–40, n. 27–47.

¹³¹ *Id.*, at ¶ 28.

¹³² See, e.g., Tomato Concentrate Case (France v. Germany), Oberlandesgericht Hamburg, Germany (1997), English translation available at http://cisgw3.law.pace.edu/cases/970704g1.html; Steel Bars Case (Egypt v Yugoslavia), Award 6281, ICC International Court of Arbitration (1989), available at http://www.unilex.info/case.cfm?pid=1&do=case&id=11&step=FullText; Iron Molybdenum Case, supra n. 55; Chinese Goods Case, supra n. 51.

¹³³ Ferrochrome Case, supra n. 52.

¹³⁴ Frozen Raspberries Case, *supra* n. 55; Steel Ropes Case, *supra* n. 113.

¹³⁵ UNCITRAL Digest at para. 15, n. 63.

Article 79 petition expressly on grounds of "hardship" stemming from a rise in the cost of raw materials. 136

Specifically addressing the concept of hardship, the Belgian *Hof van Cassatie* (Supreme Court) contemplated whether or not a 70% rise in the market price of steel tubes constituted sufficient hardship to excuse the seller from liability for declining to perform its obligation to deliver steel tubes to the buyer. First, the *Hof van Cassatie* opined that Article 79 can govern situations of hardship: "[c]hanged circumstances that were not reasonably foreseeable at the time of the conclusion of the contract and that are unequivocally of a nature to increase the burden of performance of the contract in a disproportionate manner, can, under circumstances, form an impediment in the sense of [Article 79]." Such an opinion accords with the leading scholarship and cases addressing the issue."

Next, the *Hof van Cassatie* applied this general theory to the facts before it and determined that the market fluctuation of 70% was, indeed, sufficient hardship to warrant exemption under Article 79 and ordered that parties renegotiate the contract!¹⁴⁰ Such a holding, however, not only was the first instance of hardship successfully justifying excuse in a published decision, but also directly contradicts established

¹³⁶ Steel Tubes Case (Netherlands v. France), Hof van Cassatie, Belgium (19 June 2009), English translation *available at* http://cisgw3.law.pace.edu/cases/090619b1.html (A seller of steel tubes refused to deliver the tubes to the buyer after the price for steel unexpectedly rose by about 70% and the buyer refused to renegotiate the contract).

¹³⁷ *Id*.

¹³⁸ *Id.* But note that renegotiation of a contract is a remedy neither within the scope of the Art. 79 specifically (which only grants an exemption from damages), nor the CISG generally.

¹³⁹ See authorities cited within this comment, infra section II.C.iii.

¹⁴⁰ Steel Tubes Case, *supra* n. 136. Also remarkable is the remedy prescribed by the court—the text of Article 79 purports only to excuse liability from damages. Art. 79. For a more detailed discussion, *see* this comment, *infra* III.B.

decisions stating that economic fluctuations cannot be an "impediment" to the extent that they reflect the risk inherent in international trade. 141 Indeed, according to the decisions addressing hardship under Article 79 prior to the *Steel Tubes Case*, a price increase or decrease of more than 100% does not suffice. 142 Moreover, even a scholar that accepts the *Steel Tubes* principle in extreme cases argues that the 100% threshold may be based on domestic markets and should actually be greater for international markets, perhaps as high as 150-200%. 143 Thus, when determining how substantial an economic change must be to fall within the scope of "impediment," courts and tribunals now must determine whether the Belgian court's new, lenient threshold is an aberration or the emergence of a trend.

III. Discussion

Within the overall goal of harmonizing international commercial trade law,

Article 79 aspires to "bridge the differences between the civilian principles of hardship
and *force majeure* with the common law's limited recognition of impracticability,
frustration, and impossibility."¹⁴⁴ Such a bridge requires uniform interpretation to
succeed; accordingly, Article 79 "must be read and interpreted without reference to

¹⁴¹ Ingeborg Schwenzer, Force Majeure and Hardship in International Sales Contracts (39 VUWLR 709, 716, n. 44 (2008)) (citing "FeMo" Alloy Case (United States v. China), CIETAC, China (1996), English translation available at http://cisgw3.law.pace.edu/cases/960502c1.html; Steel Ropes Case, supra n.
113; Frozen Raspberries Case, supra n. 55; Polyurethane Foam Covers Case I (Switzerland v. France), Colmar Cour d'Appel, France (2001), English translation available at http://cisgw3.law.pace.edu/cases/010612f1.html; Polyurethane Foam Covers Case II (Switzerland v. France), Cour de Cassation, France (2004), English translation available at http://cisgw3.law.pace.edu/cases/040630f1.html). Note also that in the Ferrochrome Case, the Italian Court did not believe Art. 79 provided for excuse on the grounds of hardship at all, and specifically not for a 30% increase in the price. Ferrochrome Case, supra n. 52.

¹⁴² See cases previously cited, supra n. 119.

¹⁴³ Schwenzer, *supra* n. 141 at 717.

¹⁴⁴ Mazzacano, supra n. 2 at 49.

domestic legal principles."¹⁴⁵ Perhaps the most self-evident method of promoting harmony and ensuring uniform interpretation is for a court or tribunal to rely on the body of previous interpretations, both academic and judicial. Years of decisions influenced by domestic legal doctrines, however, have resulted in contradictory treatment of several issues: what, exactly, constitutes an impediment; whether or not delivering non-conforming goods may ever be excused; and when non-performance can be attributed to the actions of a third party. These contradictions necessarily reduce the predictability of Article 79 application and therefore reduce the utility of the CISG to the businesses who transact under its governance.¹⁴⁶

In other areas, such as "hardship," the body of previous Article 79 judicial and arbitral interpretations overwhelmingly support a uniform interpretation despite differing domestic legal doctrines. Because such sources are typically only persuasive on the court or tribunal tasked with applying Article 79, the courts and tribunals may instead reinterpret Article 79 through the lens of domestic legal doctrines, reintroducing disharmony in the application of Article 79, as happened in the *Steel Tubes Case*.

The CISG Advisory Council, in its Advisory Opinion No. 7, attempted to increase harmony by identifying three areas of potential fracture—non-conforming goods, third party liability, and hardship—and reconciling or recommending, as appropriate, a uniform solution. 147 Yet, rather than promoting harmony by establishing a uniform interpretation, the Advisory Opinion may have actually increased disharmony.

¹⁴⁵ *Id*.

¹⁴⁶ "By enhancing predictability regarding the content of governing law, the CISG can help parties to assess the costs and risks of entering into an international commercial sales contract, thus facilitating commercial exchanges." Calleros, *supra* n. 3 at 645.

¹⁴⁷ CISG-AC Op., supra n. 74.

Specifically, this comment first discusses the danger of disharmony through overly liberal interpretations of the requirements for exemption. Then, this comment discusses the danger of regional disharmony from adapting domestic interpretations into Article 79 applications. Last, this comment discusses several methods for preserving, creating, and strengthening harmony.

A. Disharmony: Fracture Through Liberalization of the Requirements for Excuse The recent *Steel Tubes Case*¹⁴⁸ presents perhaps the best example of the potential disharmony fostered by liberal (in the "too lenient" sense) interpretations of Article 79 elements. When asked to determine if a 70% rise in the cost of steel constituted sufficient hardship to become an "impediment" and excuse a Belgian seller, ¹⁴⁹ the *Hof van Cassatie* was faced with a substantial, consistent body of prior decisions and scholarship indicating that excuse was not warranted. ¹⁵⁰ Undaunted, it decided sufficient hardship existed, applied Article 79, and excused the Belgian seller from liability for damages. ¹⁵¹

Rather than being persuaded by the prior decisions, the *Hof van Cassatie* may be justifying its interpretation on CISG Advisory Opinion No. 7. Despite concluding that market fluctuations "are a normal risk of commercial transactions," the CISG-AC refrained from excluding them all together under the theory that "the theoretical possibility of such radical and unexpected changes admits the application of Article 79

¹⁴⁸ Steel Tubes Case, supra n. 136.

¹⁴⁹ *Id*.

¹⁵⁰ See this comment, supra section II.C.iii.

¹⁵¹ Steel Tubes Case, supra n. 136.

in those rare instances."¹⁵² By declaring the theoretical possibility without setting a threshold despite the clear decisions to the contrary, the CISG-AC may have emboldened the *Hof van Cassatie* to break from the otherwise international uniformity against such instances of claimed hardship.¹⁵³

Admittedly, if market fluctuations can theoretically precipitate sufficient economic hardship, then in practice that threshold will necessarily vary based on the specific facts of the transaction, the effect the transaction would have on the parties, and the industry within which the transaction occurs. 154 Such variances, however, undermine the uniformity and predictability of application sought after by the member states of the CISG. This becomes especially problematic where, as it currently stands, a Bulgarian steel manufacturer cannot find relief from even a 200% increase in market prices 155 in a Bulgarian court while its Belgian buyer could be relieved of at least a 70% (and perhaps smaller) change in prices if pursued in a Belgian court. Such trade imbalances, if allowed to spread, would severely undermine the commercial utility of the CISG. Thus, even if some variance must be expected between industries, some baseline standard must emerge to prevent spreading fractured interpretations of the CISG.

¹⁵² CISG-AC Op., *supra* n. 74 ¶ 39.

¹⁵³ CISG-AC Opinion No. 7 is not cited in the court's decision, but it had been available for approximately eighteen months.

¹⁵⁴ See, e.g., Schwenzer, supra n. 141; Fletchtner, supra n. 13 at 85.

¹⁵⁵ Steel Ropes Case, *supra* n. 113. The Bulgarian tribunal found any amount of market fluctuations for these steel products foreseeable, and thus not sufficient hardship under the CISG.

B. Disharmony: Regional Fracture Through Adaptations of Domestic Interpretations

Although not the first instance of a national court adapting domestic excuse doctrines into its interpretation of the CISG,¹⁵⁶ the Belgian *Steel Tubes Case* was the first judicial application of Article 79 to justify an additional remedy other than exemption from liability for damages. Consequently, it again provides a terrific example of what "not to do" if desiring uniformity in the interpretation of Article 79 specifically, and the CISG generally.¹⁵⁷ After determining hardship applicable under Article 79, the *Hof van Cassatie* determined that the CISG's failure to provide for the remedy of an obligation to renegotiate constituted a "gap" in the CISG that the court must fill.¹⁵⁸ Citing Article 7(2),¹⁵⁹ the *Hof van Cassatie* "determined that the convention itself, rather than applicable international law, required a court to adapt the terms of the parties' contracts in light of the seller's hardship" and affirmed the intermediate appellate court's order increasing the price the buyer was obliged to pay.¹⁶⁰

¹⁵⁶ See, e.g., Supermicro Computer Inc. v. Digitechnic, S.A., 145 F. Supp. 2d 1147 (N.D.Ca. 2001) (Where a U.S. court asserted that the CISG does not address disclaimers of the implied quality obligations imposed by CISG Art. 35(2) and applied domestic law, U.C.C. §2-316).

¹⁵⁷ See Fletchtner, supra n. 13.

¹⁵⁸ Steel Tubes Case, supra n. 136.

¹⁵⁹ Recognizing their inability to foresee (and perhaps to agree) on all potential situations that could arise, the drafters of the CISG included Article 7(2) to prescribe the methodology for answering questions governed by the CISG that are not expressly addressed therein: "(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law." CISG Art. 7(2).

¹⁶⁰ See Fletchtner, supra n. 13 at 93-94.

Potentially inconsistent methodology for gap-filling aside, ¹⁶¹ the Belgian *Hof van Cassatie* effectively determined that the CISG contained a gap to be filled because Article 79's only remedy is exemption from liability from damages stemming from non-performance. Renegotiation of contractual terms or adaptation by the court—modification without the parties' agreement—is a national remedy for hardship (albeit one common to civil law jurisdictions), ¹⁶² and not a remedy within the CISG. Moreover, this exact remedy was *rejected* by the drafters of the CISG. ¹⁶³ If predictability and uniform interpretation are goals of the CISG, then a court's ability to incorporate its own domestic legal doctrines into the range of potential remedies must surely be anathema to parties contracting under the CISG.

Like its landmark finding of sufficient economic hardship, the Belgian court's application of a domestic remedy for hardship may be related to the CISG Advisory Opinion. Specifically, the final paragraph of the Advisory Opinion tackles the issue of hardship remedies and concludes: "[i]n a situation of hardship under Article 79, the court or arbitral tribunal may provide *further relief* consistent with the CISG and the general principles on which it is based" (emphasis added). The Belgian *Hof van Cassatie* makes no indication that it has considered the CISG Advisory Opinion, but it

 $^{^{161}}$ Such methodology is not within the scope of this comment. For a detailed analysis of the topic, *see* Fletchtner, *supra* n. 13.

¹⁶² See Schwenzer, supra n. 141 at 721–25.

¹⁶³ See John Honnold, Documentary History of the Uniform Law for International Sales 350 (1989) (where Honnold recalls that a proposal aimed at incorporating an article allowing a party to "claim an adequate amendment of the contract or its termination" on account of "excessive difficulties" was expressly rejected by UNCITRAL's Working Group).

¹⁶⁴ Emphasis added. CISG-AC Op., supra n. 74, at ¶ 3.2, 40.

does track the Advisory Opinion closely in contradiction to any previous decisions.¹⁶⁵ Despite explicitly noting the absence of "guidelines under the Convention for a court or arbitrator to 'adjust,' or 'revise' the terms of the contract so as to restore the balances of the performances," the Advisory Opinion allows for the theoretical possibility of stretching either the good-faith requirement of Article 7(1)¹⁶⁶ or Article 79(5)'s¹⁶⁷ preservation of rights to allow a court or tribunal to determine the obligations of the parties and "adapt" the terms of the contract to fit the changed circumstances.¹⁶⁸ Mirroring the process described in the Advisory Opinion, the Belgian *Hof van Cassatie* cites Article 7(1)'s good faith requirement as the basis for allowing a remedy of judicial adaptation.¹⁶⁹ Thus, the Advisory Opinion may again be implicated in inadvertently harming the very uniformity it seeks to preserve.

C. Harmony: Suggestions for Creating and Strengthening Uniformity

The CISG's strength and purpose comes from its harmonizing effects on international trade law. Promoting uniformity and predictability not only benefits contracting parties, but manifests the intent of the member states. One way in which the CISG creates this harmony is by relying on principles of guarantee between contracting parties irrespective of fault for breaches that arise. However, the "principle of *rebus sic stantibus* and concept of changed circumstances [had been] widely recognized by

¹⁶⁵ Steel Tubes Case, *supra* n. 136.

¹⁶⁶ "(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." CISG, *supra* n. 1, at art. 7(1).

¹⁶⁷ "(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention." Art. 79(5).

 $^{^{168}}$ CISG-AC Op., supran. 74, at \P 40.

¹⁶⁹ Steel Tubes Case, supra n. 136.

arbitral tribunals and the courts of most jurisdictions."¹⁷⁰ Logically, then, the CISG's inclusion of Article 79's provisions for excuse from liability for damages stemming from non-performance serves to appease such concepts of fairness and equity when unforeseeable and uncontrolled events prevent contractual performance. But, because domestic legal doctrines governing excuse vary so greatly—from *force majeure* to impossibility, *eccessiva onerosità sopravvenuta* to impracticability, *wegfall der geschäftsgrundlage* to economic hardship—harmony requires member states to set aside their specific doctrines in favor of autonomous and internationally uniform standards.¹⁷¹

This uniformity and harmony, however, fragments when courts and tribunals allow their domestic legal doctrines to influence their decisions such that concepts of fault creep in beyond what was envisaged by Article 79. Such liberalization of the requirements for Article 79 undermines the interests of contracting parties by reducing the predictability of the interpretations and applications of the treaty's provisions. Similarly, as domestic courts reinterpret the CISG to add their own national or civil or common-law doctrines, regionalization occurs and the fundamental uniformity of the CISG fragments.

Fortunately for the forces of harmony, because most sources of Article 79 interpretations are persuasive rather than authoritative, courts and tribunals preferring to promote uniformity have the ability to ignore decisions from other jurisdictions anathema to international harmony. Indeed, in the interests of uniformity, courts and

¹⁷⁰ Mazzacano, supra n. 2 at 11-12.

¹⁷¹ See, e.g., Id. at 49-52.

tribunals not required to follow the Belgian *Steel Tubes Case* should ignore the decision or other divergent interpretations of the CISG.

Additionally, courts and other tribunals interpreting Article 79 can promote further harmonization by staying true to the international principles inherent in the CISG and explicitly promoted by Article 7.172 While protecting immediate national interests (such as a company seated in the state and requesting excuse under Article 79) will always hold great appeal, courts should take a longer view and realize that protecting the international character at the expense of their national legal doctrines helps create uniformity, predictability, and harmony benefitting their businesses in future transactions.

Further, harmony can be created and preserved by refraining from stretching the definition of "impediment" to fit circumstances divergent from the established strict doctrine. Indeed, the CISG-AC Advisory Opinion, itself, may be guilty of stretching "impediment." By expounding a theoretical teaser based on academic hypotheticals, the CISG-AC may inadvertently be providing the theoretical framework necessary for courts and tribunals to liberalize the concept of "impediment" and the scope of Article 79. The *Steel Tubes Case* acts as a prime example of how such academic gymnastics can lead to fragmentation and discord, especially when contrasted with the relatively uniform applications of impediment established in case law and the current scholarly literature. Consequently, the CISG-AC would better serve its mission of promoting uniform interpretation of the CISG if it more carefully articulated its academic speculation on the

¹⁷² "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." CISG, *supra* n. 1, at art. 7(1).

potential extent of interpretations—especially for Article 79 where it has admitted that the relative paucity of case law renders predicting trends in interpretation treacherous. Perhaps the CISG-AC could amend Advisory Opinion No. 7 to better reflect the strictness of the decisions published thus far instead of speculating on how courts and tribunals might someday stretch the provisions of Article 79 to expand its current narrow applications, as happened in the subsequent *Steel Tubes Case*. Such an amendment would likely help curtail future disharmony by eliminating language that currently provides an overly liberal basis for exemption that allows "gaps" to be filled by a variety of applications based on domestic legal standards.

To address the potential for courts and tribunals to fragment interpretation of Article 79 by interpreting new remedies into suspect "gaps," the CISG-AC should specifically amend the final paragraph of Advisory Opinion No. 7.¹⁷³ Alternatively, and perhaps to greater effect, a new advisory opinion concerning the extent of "gaps," especially regarding remedies, may help prevent future nationalistic interpretations and restore some harmony to applications of Article 79. In the meantime, courts and tribunals must have the intellectual integrity to preserve the international character in their interpretations of excuse under the CISG by following the mandate of Article 7(1): "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."¹⁷⁴

¹⁷³ Where the advisory opinion suggests that courts and arbitral tribunals can use Article 79(5) to justify "adapting" the contract terms. CISG-AC Op., supra n. 74, at ¶ 40.

¹⁷⁴ CISG, *supra* n. 1, at art. 7(1).

IV. Conclusion

Where certainty is the currency of business, then the uncertainty of exactly how governing laws will be applied must be an inefficiency needlessly increasing the costs of international trade. By harmonizing international trade law, the CISG has been largely successful at creating uniformity and reducing the cost of doing business. Article 79, as the compromise between numerous domestic excuse doctrines, promotes uniformity by delimitating exactly when a contracting party's non-performance can be excused. But to achieve uniformity, Article 79 relies on contracting parties, courts, and arbitral tribunals to interpret it in good faith and with regard to its international character.

Despite years of scholarship and court and arbitral decisions purportedly interpreting Article 79 without respect to the domestic legal doctrines it displaced, contradictions exist. Business transactions governed by the CISG must manage the uncertainties created by non-uniform treatment of several issues: what, exactly, constitutes an impediment; whether or not delivering non-conforming goods may be ever be excused; and when non-performance can be attributed to the actions of a third party. The merely persuasive effects of previous academic and judicial interpretations, even when as well entrenched as "hardship," are subject to the whims of individual national courts or tribunals who may prefer the provisions of a domestic legal doctrine for excuse over Article 79. Consequently, both unsettled questions and inconsistent decisions risk the harmony the CISG attempts to create.

If nothing is done, courts and tribunals, sensing the beginnings of a trend towards nationalistic or liberal interpretations, may very well engage in a race to the bottom as they protect perceived national interests. Such an evisceration of the

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uniformity, predictability, and harmony of the doctrine of excuse would undoubtedly be against the intent of the member states and would seriously weaken the CISG.¹⁷⁵ After all, what state would force its businesses to bow to the whims of foreign courts and tribunals, adding extra layers of expense and unpredictability at no benefit? If the CISG is to accomplish the goals of its member states—blessing business transactions with the benefit of universal and uniform rules no matter the counterparty—then harmony, including within the doctrines for excuse, must be preserved, even at the expense of entrenched domestic legal doctrines and short-term nationalistic gains.

¹⁷⁵ See, e.g., Georg Gruber and Hans Stoll, "Article 79" in Peter Schlechtriem and Ingeborg Schwenzer, eds., Commentary on the UN Convention on the International Sale of Goods (CISG), 2d ed. (2005) at 807; JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, 4th ed., Harry Flechtner, ed., (2009) at 615.