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

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I. Introduction

E. Allan Farnsworth devoted a substantial part of his career to developing and studying international commercial law, and played a vital role in the creation of some of its most important instruments. That was why I hesitated, in a *Gedenkschrift* honoring him, to present a paper that focused on obstacles to the fundamental goal of those instruments – bringing uniformity to the legal rules governing international transactions. I was given further pause by the fact that my chosen illustration of these obstacles involved the United Nations Convention on Contracts for the International Sale of Goods ("CISG" or "Convention").[1] This treaty has been called "the most successful attempt to unify an important part of the many and various rules

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[1] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, *available at* http://www.cisg.law.pace.edu/cisg/text/treaty.html [hereinafter CISG].

of the law of international commerce."[2] Moreover, Professor Farnsworth was instrumental in its development, as well as in fostering an understanding of it.[3] Professor Farnsworth, however, was not simply an important advocate for effective international commercial law; he was also a scholar who could look with the clearest gaze upon shortcomings and problems in the fields in which he labored.[4] I believe a clear understanding of the phenomenon I describe in this paper is critical to progress toward the important, but difficult, goal of creating truly uniform international commercial law. For that reason I will try, in my limited way, to emulate Professor Farnsworth's example, and not shrink from charting some of the stumbling blocks on the road to that promised land.

The development on which I wish to focus is an example of what Professor John Honnold, another giant in the field,[5] aptly labeled the "homeward trend."[6] This is the tendency to interpret the CISG, or any uniform international law instrument, in conformity with the background assumptions and conceptions

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[2] Peter Schlechtriem & Ingeborg Schwenzer, *Preface*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) (Peter Schlechtriem & Ingeborg Schwenzer, eds., Geoffrey Thomas trans., Oxford Univ. Press 2005) (1998).

[3] Professor Farnsworth represented the United States at the United Nations Commission on International Trade Law ("UNCITRAL") during the period in which that agency developed the text of what became the CISG, and he was a United States representative at the 1980 diplomatic conference at which the final text of the Convention was approved. He published many articles that analyzed the CISG. See his entries in the bibliography at http://www.cisg.law.pace.edu/cisg/biblio/alpha05.html.

[4] See, for example, E. Allan Farnsworth, *Damages and Specific Relief*, 27 AM. J. COMP. L. 247, 249-51 (1979), for his criticism of an earlier draft of what became Article 28 of the CISG.

[5] Professor Honnold served as secretary of the United Nations Commission on International Trade Law (UNCITRAL) during the time in which the CISG was developed and led the U.S delegation to the 1980 Vienna diplomatic conference at which the final text of the Convention was approved. *See* UNCITRAL, The UNCITRAL Guide: Basic Facts about the United States Commission on International Trade Law 43 (2006), *available at* http://www.uncitral.org/pdf/english/texts/general/V0650941.pdf. His commentary on the CISG, JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (3d ed. 1999), has been called "the most frequently cited text on the CISG." Pace Law School, *CISG Database: New Features*, http://www.cisg.law.pace.edu/cisg/new-features.html (last visited Mar. 5, 2007).

[6] JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INT'L SALES (Kluwer Int'l 1989).

that the interpreter, trained in a particular domestic legal tradition, brings to the task:

> The Convention, *faute de mieux*, will often be applied by tribunals (judges or arbitrators) who will be intimately familiar only with their own domestic law. The tribunals, regardless of their merit, will be subject to a natural tendency to read the international rules in light of the legal ideas that have been imbedded at the core of their intellectual formation. The mind sees what the mind has means of seeing.[7]

As Professor Honnold stated elsewhere,

> One threat to international uniformity in interpretation is a natural tendency to read the international text through the lenses of domestic law. Years of professional training and practice cut deep grooves. How can we avoid the tendency to think that the words we see are merely trying, in their awkward way, to state the domestic rule we know so well?[8]

The danger of the homeward trend influencing interpretation seems particularly acute with respect to Article 79 of the CISG. This provision catalogues the circumstances in which a party that has breached a contract governed by the CISG is not liable in damages for such breach.[9] To qualify for an "exemption," as it is called under Article 79, a breaching party must prove that a failure to perform 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."[10] These requirements, the heart of the exemption rules of the CISG,[11] are marked by vague and malleable

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[7] *Id.*

[8] John Honnold, *The Sales Convention in Action – Uniform International Words: Uniform Application?*, 8 J.L. & COM. 207, 208 (1988). Professor Honnold has also described the homeward trend as "the danger that local tribunals may unconsciously read the patterns of their domestic law into the general language of the Convention" and, most succinctly, "inevitable national bias." HONNOLD, *supra* note 5, § 429.

[9] *See* CISG, *supra* note 1, art. 79.

[10] *Id.* art. 79(1).

[11] Other parts of Article 79 address more specific issues and situations: exemption where the breach is due to a failure of performance by a third person that a party has engaged to perform all or part of a sales contract (*id.* art. 79(2)); temporary impediments (*id.* art. 79(3)); the obligation to give notice of an impediment (*id.* art. 79(4)); and the legal consequences of exemption (*id.* art. 79(5)). In addi-

concepts and standards. What constitutes an "impediment" to performance, and when is failure of performance "due to" an impediment? What is the measure of reasonableness when judging whether a party should have taken an impediment into account, or should have avoided or overcome its consequences? How much effort and sacrifice in overcoming an impediment should be expected of a party before the impediment is deemed "beyond his control"? The interpretative challenges presented by these questions have driven Professor Honnold to admit that he "confesses to despair over the power of words to communicate answers to the questions of degree that are intrinsic to our current problem,"[12] and to declare that "[i]n spite of strenuous efforts of legislators and scholars we face the likelihood that Article 79 may be the Convention's least successful part of the half-century of work towards international uniformity."[13] The result of the necessarily non-specific and plastic norms adopted in Article 79 is similar to a Rorschach test on which the interpreter can project his or her subconscious assumptions and predilections – the perfect environment for the homeward trend.

The "Rorschach-test" nature of Article 79 is illustrated by the different views that have been advanced concerning how the exemption provision applies when a seller delivers non-conforming goods. In what circumstances, if any, can such a seller claim exemption for his or her breach? If it can claim exemption, what are the consequences? I am no comparativist, but this issue clearly taps into deep-seated differences between the Civil Law and the Common Law. German law, for example, generally limits the availability of damages to circumstances in which a party was "at fault" for a breach,[14] so that a seller is liable in damages for delivering non-conforming goods only if,

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tion, the subdivision of the CISG entitled "Exemption" includes one other article, Article 80, which provides: "A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission." *Id.* at pt. III ch.V § IV.

[12] HONNOLD, *supra* note 5, § 429.

[13] *Id.* § 432.1.

[14] *See* Reinhard Zimmermann, *Breach of Contract and Remedies under the New German Law of Obligations*, 48 Centro di studi e ricerche di diritto e comparato e straniero, Saggi, Conferenze e seminari 1, 17-18 (2002), *available at* http://w3.uniroma1.it/idc/centro/publications/48zimmermann.pdf. The breaching party, however, has the burden of proving that it was not at fault. *Id.* at 18.

for example, the non-conformity resulted from the seller's negligence in manufacturing the goods. On the other hand, under German law the buyer can require specific performance of a seller (e.g., the buyer can obtain a court order directing the seller to deliver missing goods, or to repair or replace defective goods) without regard to the seller's fault, unless performance has become impossible.[15] In contrast, in the United States, as in other common law jurisdictions, liability for damages is not conditioned on fault, but rather specific performance, including an order requiring a seller to repair or ship replacements for defective goods,[16] is confined to situations where damages would not be an adequate remedy.[17] Thus under United States law, damages for a non-conforming delivery do not depend on the seller's fault, and an award of damages (rather than an order requiring the seller to repair or to deliver substitute goods) is the primary and more commonly issued remedy.

II. BACKGROUND – ARTICLE 79 AND FAULT

Under the Convention, damages, including damages for a seller's delivery of non-conforming goods, are not conditioned on a showing of fault by the breaching party. Professor Honnold has emphasized that the CISG rejects a fault-based approach to damages: "The 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."[18] That the damages regime of the Convention is based on a "strict liability" rather than fault-based approach is not controversial. For example, the discussion of the main CISG damages rules (Article 74) by Dr. Georg Gruber and Professor Hans Stoll in the English translation of the lead-

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[15] *Id.* at 10-11.

[16] *See* Harry M. Flechtner, *Remedies under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.*, 8 J.L. & COM. 53, 58 n.27 (1988).

[17] *See* RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1981). This is the traditional test in U.S. contract law for the availability of specific performance. *See id.* cmt. a. In sales of goods, the requirements for specific performance are satisfied "where the goods are unique or in other proper circumstances." U.C.C. § 2-716(1) (2003).

[18] HONNOLD, *supra* note 5, § 427 at 479. *See also id.* § 26 at 19 and § 276 at 301-02.

ing German commentary on the CISG describes the Convention's approach to damages as follows: "Following the Anglo-American model of strict liability, the promisor is in principle liable for all losses arising from non-performance, irrespective of fault . . . ."[19] As the same passage notes, however, the principle of strict liability for damages applies unless "the promisor who has failed to perform is exempted in accordance with Article 79 . . . CISG."[20] In other words, the no-fault damages regime of the Convention is limited by the Article 79 exemption.[21]

Fearing that a broad interpretation of Article 79 could undermine the no-fault principle adopted in the Convention's damages provisions, Professor Honnold has argued that the language and drafting history of Article 79, specifically the requirement in Article 79(1) that a party's failure to perform must be due to an "impediment," demonstrate that the provision applies only where performance has been *prevented*, and is inapplicable when a party renders "defective performance," such as delivering non-conforming goods.[22] Professor Honnold is at pains to emphasize the implications of the Convention's no-fault approach for claims of exemption by a seller that has delivered non-conforming goods:

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[19] Hans Stoll & Georg Gruber, *Article 74*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), *supra* note 2, at 746 [hereinafter Stoll & Gruber, *Article 74*]. This Commentary is based on the fourth (2004) edition of KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT – although as the Preface to the English version notes, "[i]t is not a mere translation" of the German work, but is "an independent second edition of the first English edition of 1998." Schlechtriem & Schwenzer, *supra* note 2, at v.

[20] Stoll & Gruber, *Article 74*, *supra* note 19, ¶ 2.

[21] *See* Hans Stoll & Georg Gruber, *Article 79*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), *supra* note 2, ¶ 1 at 807 [hereinafter Stoll & Gruber, *Article 79*] ("Article 79 thus constitutes the necessary limitation to the principle of strict liability for non-performance of the contract which otherwise underlies the CISG"); JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN THE USA: A COMPACT GUIDE TO THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS § 6.19 at 126 and § 6.32 at 139 (2d ed. 2004).

[22] HONNOLD, *supra* note 5, § 427 at 479. In its discussion of the application of Article 79 when a seller delivers non-conforming goods, the commentary on Article 79 in the leading German CISG treatise explains that "the reason for the restrictive interpretation of Article 79(1), above all in the American literature, is the fear that an element of the fault principle could be reintroduced into the CISG . . . ." Stoll & Gruber, *Article 79*, *supra* note 21, ¶ 6 at 810 n. 21.

> Unknown defects in goods also present problems of allocation of loss. Under the Convention the seller is responsible for these losses . . . . Loss to the buyer is placed on the seller even when the seller is not at fault, as when a seller resells defective goods, obtained from a responsible supplier in sealed containers, which the seller has no reasonable opportunity to inspect . . . . One pragmatic justification for this result is that the aggrieved buyer (unlike the seller) usually has no practicable recourse against the supplier. As we shall see . . . , Article 79 does not reverse these rules.[23]

The key role played by Article 79 in determining the role of "fault" in triggering liability for damages under the CISG, as well as the sensitivity and importance of the question of fault versus no-fault approaches, is also recognized in the Commentary on Article 79 by Professor Stoll and Dr. Gruber in the leading German CISG treatise ["Stoll/Gruber Commentary"]:

> 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 . . . .[24]

The discussion of Article 79 in the Stoll/Gruber Commentary, furthermore, indicates that the drafting history of the provision "appears to confirm" Professor Honnold's view that it was not intended to apply to cases involving the delivery of non-conforming goods.[25] The discussion, nevertheless, concludes that Article 79 *is* applicable in such cases, and accurately asserts that this is the "prevailing view."[26]

The divergence of opinion on the scope of Article 79 appears to be a typical and not very disturbing dispute over the interpretation of a complex treaty. Professor Honnold has evidence

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[23] HONNOLD, *supra* note 5, § 423.3.

[24] Stoll & Gruber, *Article 79*, *supra* note 21, ¶ 1 (citations omitted).

[25] *Id.* ¶ 6.

[26] *Id. See also id.* at 810 n.24. Cases addressing this issue are discussed in the UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Art. 79 ¶ 8, *available at* http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html [hereinafter UNCITRAL Digest of Case Law on the CISG].

from the *travaux préparatoires* of the CISG to back his position that those who drafted and negotiated the text did not intend Article 79 to apply to deliveries of non-conforming goods. That intention, however, was not clearly expressed in the text of Article 79, which states in subpart (1) that the provision applies to "a failure to perform *any* . . . obligation[ ]."[27] In such circumstances, it is not surprising that a dispute concerning the proper interpretation of Article 79 has arisen. The Stoll/Gruber Commentary, furthermore, takes pains to minimize the practical significance of the dispute by arguing that, although in its view Article 79 theoretically is available to a seller that has delivered non-conforming goods, such a seller will seldom be able to satisfy the requirements for exemption under the provision: "Since the promisor basically carries the risk that the goods are in conformity with the contract, an exemption will only be possible in exceptional circumstances. . . ."[28]

Later discussion in the Stoll/Gruber Commentary, however, describes an approach that would give Article 79 a critical role in determining a seller's liability for delivering defective goods.[29] In my view, the approach contradicts the Commentary's asserted goal of avoiding domestic law influences in the interpretation of the provision.

III. Application of Article 79 to Delivery of Non-Conforming Goods

The problematic approach in the Stoll/Gruber Commentary is most clearly illustrated by the discussion of exemption when there is a sale of "generic goods."[30] The Stoll/Gruber Commentary asserts that a seller who does not itself manufacture the generic goods (i.e., the seller acts as "only a dealer or a commission agent" who procures the goods from a supplier for resale to its customer) should be exempt "if he received the goods from a reliable supplier and the defect could not have been discovered using methods which could reasonably be expected of a reasona-

[27] CISG, *supra* note 1, art. 79(1).

[28] Stoll & Gruber, *Article 79*, *supra* note 21, ¶ 6.

[29] *Id.* ¶¶ 39-40.

[30] The term "generic goods" refers to goods that are identified in the contract by a description that more than one specific item might satisfy (for example, the sale of a certain model of computer), as opposed to the sale of specified individual goods (for example, a particular computer identified by serial number).

ble person in the seller's position and was therefore unavoidable."[31] The focus here, clearly, is on whether the seller was "at fault" for delivering non-conforming goods. If the seller can show that it took reasonable precautions against delivering defective goods (that is, if it was non-negligent in procuring the goods), the Stoll/Gruber Commentary asserts that the seller is not responsible in damages for the breach.[32] There is no discussion of the expectations of the buyer and little concern for undermining the no-fault approach of the Convention's remedy and non-conformity provisions, which concerns Professor Honnold.

The rationale for the approach in the Stoll/Gruber Commentary – that "it is practically impossible for the seller to ensure the conformity of the goods with the contract if the goods are directly delivered from the seller's ancillary supplier to the buyer, as is usually the case in international trade"[33] – emphasizes its fault orientation and focus on the seller. In stark contrast, Professor Honnold's view highlights the no-fault nature of a seller's liability for damages if it delivers non-conforming goods, and specifically rejects exemption for a seller just because the non-conforming goods were furnished by a reliable supplier and the seller had no reasonable opportunity to discover the defects before delivery.[34] Interestingly, the Stoll/Gruber Commentary does not adopt a fault-oriented approach where problems with a supplier result in a failure to deliver, as opposed to delivery of non-conforming goods. In cases of non-delivery, the Stoll/Gruber Commentary argues that "the parties will usually intend that the seller bear the risk of procuring goods. He is basically not exempted due to his supplier letting him down. . . ."[35] This, presumably, is true no matter how much care the seller has taken in selecting the supplier. For sales of specific goods already in the seller's possession at the time the contract is formed, however, the Stoll/Gruber Commentary reverts to the view that the seller is entitled to exemption under Article 79 as long as it was not "at fault" for delivering non-

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[31] Stoll & Gruber, *Article 79*, *supra* note 21, ¶ 40.

[32] *Id.*

[33] *Id.*

[34] HONNOLD, *supra* note 5, § 423.3, quoted in the text accompanying note 23, *available at* http://cisgw3.law.pace.edu/cisg/biblio/honnold.html.

[35] Stoll & Gruber, *Article 79*, *supra* note 21, ¶ 18 (footnote omitted).

conforming goods: "The seller must . . . be permitted the defence that the defect was hidden and could not have been discovered by methods which a reasonable person in the seller's position could reasonably have been expected to adopt."[36]

In fairness, the examples of a fault-oriented approach to exemption described above are more the exception than the rule. As was noted, the Stoll/Gruber Commentary itself refuses to permit exemption based on a lack of fault when it deals with a failure of delivery caused by a supplier, and it also denies exemption for a delivery of non-conforming goods that the seller itself manufactures.[37] Furthermore, the Commentary's fault-oriented position on exemption when a seller's supplier provides non-conforming goods is a minority one, as the Commentary itself, to its credit, recognizes.[38] Various authorities, including several from Germany (many of which the Stoll/Gruber Commentary cites), suggest that a seller bears the risk that goods its supplier ships directly to the buyer are defective, whether or not the seller took reasonable precautions against that eventuality.[39] The German *Bundesgerichtshof*, for example, has found that, although Article 79 theoretically might exempt a seller for delivery of non-conforming goods (it avoided giving a definitive answer on that issue), there was no exemption where the seller's supplier had shipped defective vine wax (used in grafting grape plants) directly to the buyer.[40] The court held that

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[36] *Id.* ¶ 39.

[37] In that situation, it asserts, the seller "is always responsible for defects of the kind which occur from time to time during the manufacturing process; the question of fault is irrelevant." *Id.* This change of focus, frankly, is confusing: if a seller is responsible for damages resulting from manufacturing defects, no matter how much care it took in that process, but can escape liability for damages by non-negligently procuring the goods from a supplier, the method the seller uses to acquire the goods has a significant impact on the buyer's risks concerning the quality of the goods. Must the buyer be aware, at the time of contract conclusion, of the seller's plans for supplying the goods? Suppose the seller's plans change after the sales contract is formed – e.g., the seller decides to close the manufacturing facility in which it originally intended to make the goods, and instead procure them from a third-party supplier?

[38] The "overwhelming" view is that "the seller, due to his risk of procuring the goods, is strictly liable as a matter of course – without any possibility of exemption – that the goods are free of defects." *Id.* ¶ 40.

[39] Stoll & Gruber, *Article 79*, *supra* note 21, ¶ 40, n.141.

[40] Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 24, 1999, VIII ZR 304100 (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990324g1.html.

under the CISG the seller bore the risk of procuring goods that conformed to the contract, and the seller thus was responsible for the defective delivery despite its argument that it should be exempted because it had no chance to inspect the goods and discover the problem before delivery.[41] Specifically, the court found that a non-conforming delivery by a supplier was not "beyond the seller's control" as required for exemption under Article 79, and was a matter that the seller must generally "avoid or overcome" (thus disqualifying the seller from exemption under Article 79).[42] Commenting on this decision, Professor Peter Schlechtriem, a general editor of the compilation in which the Stoll/Gruber Commentary appears, and himself one of the most important contributors to the development and understanding of the CISG,[43] distances himself from the notion that reasonable attempts to assure that goods provided by a supplier will be conforming are enough to qualify a seller for Article 79 exemption when the goods actually delivered prove defective:

> Suppliers, and in turn, their suppliers, are within the seller's sphere of influence. As the *Bundesgerichtshof* correctly pointed out, the seller's liability for them is the same as if he had manufactured the goods himself . . . . [A]s long as the risk is within his economic sphere, the seller is in a better position than the buyer to carry the risk of damages due to a delivery of defective goods . . . . It is a question of an allocation of the risk of damages based on economic reasons and not only on the basis of control over the sphere in which damages could arise. This is not only an expansion of the risk allocation under Art[icle] 79 CISG but also an important idea for German law, which in my opinion should have as consequence the exclusion of a possibility of exemption for the seller in the case of an undiscoverable defect caused by suppliers or their suppliers, despite even the most careful inspection.[44]

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[41] *Id.*

[42] *Id.*

[43] Professor Schlechtriem represented Germany as a delegate at the 1980 Vienna diplomatic conference at which the final text of the CISG was approved. A bibliography of his remarkable scholarly contributions on the Convention can be found at http://www.cisg.law.pace.edu/cisg/biblio/alpha18.html.

[44] Peter Schlechtriem, *Uniform Sales Law in the Decisions of the Bundesgerichtshof, in* 50 YEARS OF THE *Bundesgerichshof* (Federal Supreme Court of Germany): A Celebration Anthology from the Academic Community (2001) (English translation of this text), *available at* http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem3.html. A later decision of the *Bundesgerichtshof* also appears to reserve the question of whether Article 79 applies to a failure to deliver conforming

What is the proper approach? Although Professor Honnold's position that Article 79 was not intended to apply to a seller's delivery of non-conforming goods has substantial support in the drafting history of the provision as well as the principles underlying the CISG, the language of Article 79 does not unambiguously state that its scope is so limited. Case law and commentary, furthermore, suggest that there is no *per se* rule forbidding the application of Article 79 in this scenario.[45] In light of these facts, the approach adopted by the *Bundesgerichtshof* in the vine wax case and praised by Professor Schlechtriem – that Article 79 may in some circumstances exempt a seller that has delivered non-conforming goods, but that the seller bears the risk that its suppliers will provide defective goods irrespective of the precautions the seller has taken – appears to be a sensible position which reflects an international perspective and around which a uniform interpretation could coalesce. The more extreme fault-oriented position of the Stoll/Gruber Commentary, in contrast, is not supported by either the drafting history of Article 79 or the language of the provision. For example, shipment of non-conforming goods by a supplier is not such a rare occurrence that the seller "could not reasonably be expected to have taken [it] into account at the time of the con-

goods, although it strongly hints that Article 79 should apply in this situation. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 9, 2002, VIII ZR 304100 (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020109g1.html. The Oberlandesgericht opinion from which this appeal was taken (and which is summarized in the *Bundesgerichtshof* opinion) seems to have adopted the approach of the vine wax case to a seller's claim for exemption when it delivers non-conforming goods furnished by a supplier: the Oberlandesgericht stated that the seller was liable even if the goods were defective when furnished by its supplier and the defects could not be detected by the seller. *Id.* Dicta at the end of the 2002 *Bundesgerichtshof* opinion, however, may raise some doubt about the continuing validity of the approach in the vine wax case by hinting that Article 79 might be satisfied if the seller's supplier was responsible for the defects and the seller could not reasonably detect the defect before delivery. *Id.* The passage, however, is (at least in the English translation) quite ambiguous on this point. *See id.*

[45] *See, e.g.*, the decisions discussed in the UNCITRAL Digest of Case Law on the CISG, *supra* note 26, and the authorities cited in Stoll & Gruber, *Article 79*, *supra* note 21, ¶ 6 at 810 n.24. *See also* FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS; CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS 320-21 (Oceana 1992).

clusion of the contract."[46] In the vine wax case, furthermore, the German *Bundesgerichtshof* found that several other requirements for exemption under Article 79 were not satisfied merely because the seller's supplier had shipped defective goods and the seller had no chance to discover the problem before the goods were delivered to the buyer.[47]

My point, however, has less to do with who is right in the debate concerning the application of Article 79 when the seller has delivered non-conforming goods, and more to do with the fact that the positions in the debate tend to correspond to the domestic law most familiar to their proponents. Both Professor Honnold's position (that Article 79 is simply inapplicable when the seller breaches by delivering non-conforming goods, so that the seller's liability for damages on a no-fault basis cannot be undercut) and the position in the Stoll/Gruber Commentary (that a seller is exempt under Article 79 if its supplier provided defective goods and the seller was not at fault for failing to discover the problem) tend to conform to the rules of the domestic law in which they were trained. Both sides have been able to project approaches corresponding to their familiar domestic conceptions onto the plastic language of Article 79. Of course in Professor Honnold's case there is substantial evidence that his position reflects the intention of those who produced the Convention, and there are perhaps none more familiar than he with the history of the drafting and approval of the text. The approach in the Stoll/Gruber Commentary, however, appears to reflect the temptation to adopt a position that, because of its ingrained familiarity from domestic law, seems to the interpreter the sensible and obvious approach, provided the text can be accommodated to it. Exploration of another issue that has arisen under Article 79, I believe, confirms the impression that the approach of the Stoll/Gruber Commentary to the non-conforming goods question is a product of the homeward trend.

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[46] For discussion of the difficulty of satisfying this requirement, *see* LOOKOFSKY, *supra* note 21, at 127-28. For further discussion along these lines, see *infra* text accompanying notes 59-61.

[47] Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 24, 1999, VIII ZR 304100 (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990324g1.html.

IV. SPECIFIC PERFORMANCE AND EXEMPTION

Article 79(5) addresses the effect of exemption. It provides that "[n]othing in this article prevents either party from exercising any right other than to claim damages under this Convention."[48] There is consensus that, under this provision, an aggrieved party can invoke several remedies other than damages despite the other party's rightful claim of exemption. The remedies that remain available include avoidance of contract, if the other side's exempt non-performance meets the definition of "fundamental breach" under Article 25; recovery of interest under Articles 78 or 84; and, if a buyer has received a non-conforming delivery and has not avoided the contract, reduction of the price pursuant to Article 50.[49] But what about a party's rights under Articles 46 or 62 to demand that the other side perform its obligations? This remedy, obviously, is not "damages," and thus under the terms of Article 79(5) would appear to survive despite a breaching party's exemption. This argument is strengthened by the drafting history of Article 79. The predecessor to the CISG, the Uniform Law for International Sales (ULIS), the text of which formed the starting point for the CISG, cut off a party's right to require performance if the other side successfully claimed exemption.[50] Equivalent language was not, however, carried over to Article 79. Proposals to specify in Article 79 that exemption precluded the right to compel

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[48] CISG, *supra* note 1, art. 79(5).

[49] HONNOLD, *supra* note 5, §§ 311-12, 435.4; Stoll & Gruber, *Article 79*, *supra* note 21, ¶ 45; LOOKOFSKY, *supra* note 21, § 6.19 at 130 and § 6.32 at 140; Joern Rimke, *Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts*, *in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 193, 216-17 (Pace Int'l L. Rev. eds., 1999-2000); ENDERLEIN & MASKOW, *supra* note 45, §§ 13.1, 13.2, 13.4 and 13.6. *But see* Denis Tallon, *Article 79*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW §§ 2.10 (C.M. Bianca & M.J. Bonell eds., 1987) (suggesting that reduction of price under Article 59 "may be regarded as a form of damages" and thus is precluded by exemption) and 2.10.2 (arguing that, where exempt non-performance is "total and definitive," the remedy of avoidance "does not make sense any more" and is not available because the contact is terminated as a matter of law).

[50] *See* ULIS Art. 74(3), *available at* http://www.cisg.law.pace.edu/cisg/text/ulis.html (providing that a party's exemption does not preclude the other party from avoiding the contract or reducing the price of the goods, but failing to preserve the right to require performance). *See* HONNOLD, *supra* note 5, § 435.5 at 494 n.27; Stoll & Gruber, *Article 79*, *supra* note 21, ¶ 46 at 832.

performance, furthermore, were rejected at the 1980 Vienna Diplomatic Conference at which the text of the Convention was finalized.[51]

But how can a party be forced to perform when it has shown, as required for exemption under Article 79, that an impediment has rendered its performance impossible (or, at the very least, so extraordinarily difficult as to satisfy the very strict standard for exemption[52])? The irrationality of this result, combined with a sophisticated reading of the drafting history of the Convention's exemption provision, have led to agreement among most commentators that a party usually will not be able to compel performance where the other side is entitled to exemption under Article 79. Professor Honnold, for example, argues that requiring a party to perform when it has established the requirements for exemption under Article 79 "would be inconsistent with the basic provision that a party 'is not liable' when performance is barred by an impediment."[53] If a tribunal orders a party to perform, he notes, it could result in sanctions "at least as onerous as damages," and "[t]here is no indication that the legislators intended such an absurd result."[54] Professor Schlechtriem, in his 1986 commentary on the CISG, suggests that the absurdity can be avoided by invoking domestic law limitations on the right to compel performance, in particular doctrines making the remedy unavailable if performance is impossible: such limitations can be applied in transac-

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[51] *See* HONNOLD, *supra* note 5, § 435.5 at 494 n.27; Stoll & Gruber, *Article 79*, *supra* note 21, ¶ 46 at 832.

[52] HONNOLD, *supra* note 5, §§ 432.1 & 432.2; Stoll & Gruber, *Article 79*, *supra* note 21, ¶¶ 23, 30-32; Tallon, *supra* note 49, § 3.1. Some argue that the requirements of Article 79 are met only if an impediment has rendered performance impossible. *See* Dionysios P. Flambouras, *The Doctrines of Impossibility of Performance and clausula rebus sic stantibus in the 1980 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law: A Comparative Analysis*, 13 PACE INT'L L. REV. 261, 271-79 (2001).

[53] HONNOLD, *supra* note 5, § 435.5 at 494.

[54] *Id. Compare* Tallon, *supra* note 49, §§ 2.10 & 2.10.2 (the "unrealistic results" that would follow from allowing performance to be required of a party that is exempt under Article 79 can be forestalled by positing that a "total and definitive" failure of performance for which the non-performing party is exempt under Article 79 results in termination of the contract by operation of law) *with* ENDERLEIN & MASKOW, *supra* note 45, § 13.6 (suggesting that "the optimum solution" is "that a right to performance must not be awarded insofar as the ground of exemption are in effect," but expressing doubt that this approach could be derived from the Convention).

tions governed by the Convention because of Article 28, which provides that "a court is not bound to enter an order for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention."[55]

The Stoll/Gruber Commentary stakes out a complex argument on a party's right to require performance if the other side qualifies for exemption under Article 79. Its starting position is that "[u]pholding the right to claim performance where a promisor has gained exemption under Article 79 is entirely sensible if that is regarded as the basic rule; the different situations in which a promisor may claim an exemption may, however, require a deviation from this rule."[56] Although it rejects recourse to Article 28 and domestic law limitations on requiring impossible performance,[57] the Stoll/Gruber Commentary derives from the CISG itself principles that preclude requiring performance in particular circumstances, for example, where specific ascertained goods covered by a contract have been destroyed.[58] In other situations where an impediment has prevented delivery or payment, the Stoll/Gruber Commentary indicates that the buyer retains the right to require performance, but only in a technical sense for the purpose of preserving the promisee's "claim to accessory securities or the right to interest." In the view of the Stoll/Gruber Commentary, the promisee's claim to performance in these circumstances has not "lapsed," but in order to "avoid absurd results" the claim "is not enforceable for the duration of the impediment."[59] The Stoll/Gruber approach where there has been an exempt failure to deliver or to pay is

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[55] PETER SCHLECHTRIEM, UNIFORM SALES LAW - THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 101-02 (1986), *available at* http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html#a77. *Accord*, Rimke, *supra* note 49; Flambouras, *supra* note 52, at 274-75. *See also* ENDERLEIN & MASKOW, *supra* note 45, § 13.6 at 334 ("We do not think that [using Article 28 to invoke domestic law limitations on specific performance] is the optimum way but believe that, in general, it is well-founded and acceptable"). Professor Honnold cites domestic law limitations on ordering performance when such performance is impossible, applicable in CISG transactions via Article 28, as an alternative basis for denying specific performance remedies against a party who qualifies for exemption under Article 79. HONNOLD, *supra* note 5, § 435.5 at 495.

[56] Stoll & Gruber, *Article 79*, *supra* note 21, ¶ 46 at 832 (footnote omitted).

[57] *Id.* ¶ 47 at 833.

[58] *Id.* ¶ 48 at 833-34.

[59] *Id.*

quite similar to Professor Honnold's; it even echoes Professor Honnold's rationale that requiring performance where such performance has been rendered impossible, or so extremely difficult as to satisfy the standards of Article 79, would be an "absurd result" that must be avoided.[60]

Where, however, a seller that has delivered non-conforming goods qualifies for exemption (which, as we have seen, would not be an extraordinary occurrence under its approach), the Stoll/Gruber Commentary enthusiastically embraces preservation of the buyer's right to require the seller to perform under Article 46: "The seller who is not responsible under Article 79 for the defects in the delivered goods is not exempt from his obligation under Article 46(3) to repair the goods or, if it concerned a sale of generic goods, his obligation under Article 46(2) to make a delivery of substitute goods conforming with the contract."[61] Thus the Stoll/Gruber Commentary posits that a buyer's right to require performance survives the seller's exemption where the seller has delivered non-conforming goods, but not (except perhaps in a technical sense) in cases involving other kinds of breach (e.g., failure to deliver).[62] Given the premises of the Commentary, this makes perfect sense: by permitting a seller to claim exemption if it was "reasonably ignorant" that its supplier was furnishing non-conforming goods, the Stoll/Gruber Commentary permits exemption in the non-conforming goods scenario even though the seller's performance (delivering conforming goods) is not impossible, or even difficult. Given this premise, it is logical to continue to allow a buyer who has received defective goods to compel the seller to

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[60] *Id.* ¶ 48 at 834.

[61] *Id.* ¶ 46 at 833. The cited provisions of Article 46 permit a buyer that has received goods that do not conform to the contract to require the seller either to repair the non-conformity or to replace the non-conforming goods, subject to certain limitations. A buyer can demand substitute goods under Article 46(2) only when the non-conformities in the original goods are serious enough to constitute a "fundamental breach" under Article 25. A buyer cannot demand repair under Article 46(3) when such a demand "is unreasonable having regard to all the circumstances." Requiring the seller to repair might be unreasonable where, e.g., the buyer itself could repair the goods substantially more cheaply than could the seller. *See* Markus Müller-Chen, *Article 46*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), *supra* note 2, ¶ 40 at 549-50; HONNOLD, *supra* note 5, § 284.

[62] Stoll & Gruber, *Article 79*, *supra* note 21, at 833.

perform (i.e., repair the non-conformities or deliver conforming substitutes) despite the seller's exemption. Indeed, it would be a miscarriage of justice to foreclose the availability of such remedies to the buyer.

Of course the fact that the Stoll/Gruber Commentary would permit the seller to claim exemption even though delivery of conforming goods was neither impossible nor extremely difficult raises questions about the premise that a seller should be exempt under Article 79 if it can show that a supplier furnished non-conforming goods and the seller was reasonably ignorant of the situation. More questions are raised by the fact that the Stoll/Gruber Commentary fails to consider how its proposed approach would work in a jurisdiction like the United States, which restricts the availability of specific performance remedies such as an order requiring the seller to repair or replace defective goods. Under CISG Article 28, a United States court would not be required to issue such orders unless the requirements of United States domestic law were met.[63] The failure of the Stoll/Gruber Commentary to consider the operation of its proposed approach in jurisdictions with different domestic approaches to requiring performance suggests a lack of an international perspective that is contrary to the interpretational norms enshrined in CISG Article 7(1).[64]

At any rate, it is now possible to see the full picture of the approach in the Stoll/Gruber Commentary to applying Article 79 when a seller has delivered non-conforming goods that were furnished by a third-party supplier: such a seller can claim exemption provided it was not at fault for the non-conformity, i.e., it took reasonable precautions against delivering non-conforming goods by choosing a "reliable" supplier and was reasonable in its failure to discover the non-conformity prior to delivery to the buyer. The exemption, however, will only relieve the seller of its liability for damages: unless the buyer exercises a right to avoid the contract, the seller will remain obligated to repair or replace the goods or at least be subject to a reduction in price under Article 50. Compare this to Professor Honnold's approach, which would *always* deny the seller an exemption,

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[63] *See* Flechtner, *supra* note 16, at 59-60.

[64] CISG, *supra* note 1, art.7(1)("In the interpretation of this Convention, regard is to be to its international characters . . . .").

thereby subjecting it to liability in damages regardless of the precautions the seller has taken.

V. ARTICLE 79 AND THE HOMEWARD TREND

The Stoll/Gruber Commentary's vision of how Article 79 applies to a seller who has delivered non-conforming goods that were provided by the seller's supplier corresponds neatly, at least in broad outline, to the approach of German domestic law in this situation: no damages unless the seller is at fault for delivering the defective goods; regardless of fault, however, the seller may be required to replace or repair the non-conforming goods or to undergo Article 50 price reduction, a remedy that reflects civil law doctrines.[65] Of course an equivalent observation might be made about Professor Honnold's application of Article 79 to the non-conforming goods situation: it corresponds to the American legal approach in that the seller is liable for damages, and any other remedies applicable under the Convention, without regard to fault. In my view, Professor Honnold's vision more faithfully reflects the history and intended purpose of Article 79, as well as the principles behind the CISG provisions governing conformity of goods and remedies; however, since I too am a United States-trained lawyer, that opinion may not be terribly surprising. That two quite incompatible views of the application of Article 79 can be projected onto the text of the provision illustrates vividly the Rorschach-test nature of that text. That such contradictory positions appear in two of the most influential commentaries on the CISG, whose principals include distinguished academics such as Professors Honnold and Schlechtriem – scholars who were intimately involved in the creation of the CISG and who are committed to promoting (and among the best qualified in the world to achieve) an international perspective on the Convention – illustrates the insidiousness of the homeward trend.

It is worthwhile to trace how the Stoll/Gruber Commentary projects the fault principle onto Article 79 when dealing with a seller's delivery of non-conforming goods furnished by a supplier. I have already noted statements that reveal the ethical perspective behind this approach: "it is practically impossible

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[65] *See* HONNOLD, *supra* note 5, § 313 at 338-39.

for the seller to ensure the conformity of the goods with the contract if the goods are directly delivered from the seller's ancillary supplier to the buyer."[66] The implication of this statement is that it would be unfair to hold the seller liable in damages. There is no mention of the complementary ethical issue of whether it is fair that a buyer – who generally has even less control over or knowledge of the actions of the seller's supplier, and who is generally also not "at fault" for the non-conformity – should suffer uncompensated damage in the situation. The two issues together, of course, frame the real issue: where neither the buyer nor the seller is "at fault" for a delivery of non-conforming goods furnished by a third-party supplier, who should bear the financial risk with regard to losses that the buyer suffers as a result?

In the German domestic system, which forms the background to the Stoll/Gruber Commentary, the presumption, or the default rule, is that the seller only assumes the risk with respect to liability for damages of avoiding "fault" in performing the contract; in other words, the seller will be liable in damages only if it fails to perform properly with respect to matters within its control. Within the vague and pliable terms of Article 79, it is not terribly surprising that this perspective takes over when dealing with the application of Article 79 to the case of non-conforming goods furnished by a supplier: the usual, normal, "reasonable" presumption, from the German perspective, is that the seller intends to assume the risk of liability for a non-conforming delivery only if it could have prevented the breach by taking reasonable action. For this reason, the conclusion that seems eminently sensible is that "the seller should be exempted under Article 79 if he received the goods from a reliable supplier and the defect could not have been discovered using methods which could reasonably be expected of a reasonable person in the seller's position and was therefore unavoidable."[67]

In my view the emphasis of the foregoing passage on exempting the seller when its breach was "unavoidable" does not reflect the provisions of Article 79. It is true that one requirement for exemption is that a party claiming exemption "could not reasonably be expected to have . . . avoided or overcome [the

[66] Stoll & Gruber, *Article 79*, *supra* note 21, ¶ 40 at 829.
[67] *Id.* at 829-30.

impediment that caused a failure to perform] or its consequences."[68] Article 79(1), however, also requires that the party claiming exemption "could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract."[69] As noted previously, in my view the failure of a supplier (even a normally reliable supplier) to furnish conforming goods is not the kind of highly unusual event that cannot be "taken into account" when concluding a contract:[70] if a seller is unwilling to take the quite foreseeable risk that its supplier may fail to perform properly, it can insert appropriate language into the contract.[71] If the seller accepts the risk, i.e., if it fails to include exculpatory contract language addressing the risk, it will be liable for the buyer's foreseeable[72] damages if a supplier furnishes non-conforming goods even if the seller *reasonably* fails to detect the lack of conformity. In that case, however, the seller has recourse against the supplier who provided the defective items. Under the Stoll/Gruber approach, according to which the seller can claim exemption in this situation, the innocent buyer rather than the supplier who caused the problem may have to bear, for example, consequential losses caused by the defective goods.[73] Of course the seller's recourse against the supplier may prove unavailing (e.g., if the supplier has gone out of business), but as between the seller and the buyer (who had no direct dealings with the supplier), who should bear *that* risk?

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[68] CISG, *supra* note 1, art. 79(1).

[69] *Id.*

[70] *See supra* text accompanying note 46.

[71] The Stoll/Gruber approach reverses the burden of inserting favorable contract language onto a buyer that wants to hold the seller responsible should a supplier furnish goods with a non-conformity that the seller reasonably fails to detect:

> *If nothing else has been agreed upon*, the [seller's] liability [to deliver conforming goods], like all other obligations of the parties, is subject to the reservation under Article 79. Accordingly, the seller should be exempted under Article 79 if he received the goods from a reliable supplier and the defect could not have been discovered using methods which could reasonably be expected of a reasonable person in the seller's position and was therefore unavoidable.

Stoll & Gruber, *Article 79*, *supra* note 21, ¶ 40 at 829-30 (emphasis added).

[72] CISG, *supra* note 1, art. 74 (requiring that damages be foreseeable at the time of the conclusion of the contract in order to be recoverable).

[73] Stoll & Gruber, *Article 79*, *supra* note 21, at 829.

VI. CONCLUSION

This Comment suggests a pessimistic view about whether the CISG actually constitutes, as described in its Preamble, "uniform rules," and whether the admonition in Article 7(1) to interpret its provisions with a view to "its international character and the need to promote uniformity in its application" can truly be observed.[74] The example of United States courts offers no more reason for optimism, as one United States decision on Article 79 stands as the most obvious, conscious and direct example of the homeward trend that has yet arisen.[75] I have already commented on the forces tending to push the Convention toward different regionalized interpretations.[76] Professor Michael Bridge has very eloquently and very aptly observed: "The challenge facing the CISG is no less than the manufacture of a legal culture to envelope it before the centrifugal forces of nationalist tendency take over."[77] Analysis of the views on Article 79 in the Stoll/Gruber Commentary and comparison to the approach in Honnold suggest that the "centrifugal forces of nationalist tendency" have already asserted themselves in even the most enlightened quarters.[78] Professor Honnold's bleak assessment of Article 79 as "the Convention's least successful part of the half-century of work towards international uniformity"[79] appears disturbingly accurate.

But there are also hopeful signs, hopeful enough that even a pessimist must admit they still predominate. One of the premises of this study is that Article 79 is particularly susceptible to the homeward trend. Thus, diverging analyses of its meaning may not be a fair indicator of the success of the CISG in establishing uniform international sales law. The evolution of new tools that promote a uniform international interpreta-

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[74] CISG, *supra* note 1, pmbl.

[75] *See* Joseph Lookofsky & Harry Flechtner, *Nominating* Manfred Forberich*: The Worst CISG Decision in 25 Years?*, 9 VINDOBONA J. INT'L COMM. L. & ARBITR. 199, 203 (2005).

[76] Harry M. Flechtner, *Another CISG Case in the U.S. Courts: Pitfalls for the Practitioner and the Potential for Regionalized Interpretations*, 15 J.L. & COM. 127 (1995).

[77] Michael G. Bridge, *The Bifocal World of International Sales: Vienna and Non-Vienna*, *in* MAKING COMMERCIAL LAW: ESSAYS IN HONOUR OF ROY GOODE 288 (Ross Cranston ed., 1997).

[78] HONNOLD, *supra* note 5, § 432.1 at 484.

[79] *Id.*

tion of the Convention, such as UNCITRAL's ambitious CLOUT initiative ("Case Law on UNCITRAL Texts")[80] and the marvelous CISG website maintained by the Pace University Institute for International Commercial Law,[81] bespeak the evolution of a new template for transnational research and practice.[82] Indeed, as this paper itself noted, there are good reasons to think that a truly international perspective on Article 79 itself may prove stronger than the pull of the homeward trend.[83] Yet the task of creating a global commercial legal order that maintains its uniformity remains a challenging one. Pointing out this undeniable fact in a *Gedenkschrift* honoring E. Allan Farnsworth seems fitting because difficulties and errors in the quest for truly international commercial law could not escape his keen observation and penetrating mind. Neither, however, could they daunt his energetic and intelligent pursuit of the goal. We would all do well to follow both aspects of his example.

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[80] *See* UNCITRAL, Case Law on UNCITRAL Texts (CLOUT), http://www.uncitral.org/uncitral/en/case_law.html (last visited Nov. 24, 2007). UNCITRAL's Digest of case law on the CISG is a particularly helpful tool for those seeking an international perspective through familiarity with the application of the CISG by courts and arbitral tribunals around the world. *See* UNCITRAL Digest of Case Law on the CISG, *supra* note 26.

[81] *See* Pace Law School Institute of International Commercial Law, http://cisgw3.law.pace.edu (last visited Nov. 24, 2007).

[82] *See* Harry M. Flechtner, *Recovering Attorneys' Fees as Damages Under the U.N. Sales Convention (CISG): The Role of Case Law in the New International Commercial Practice, with Comments on* Zapata Hermanos v. Hearthside Baking, 22 NW. J. INT'L L. & BUS. 121, 121-25 (2002).

[83] *See supra* text accompanying notes 37-38.