WHY DO SOME AMERICAN COURTS FAIL TO GET IT RIGHT?

Francesco G. Mazzotta[†]

I. Introduction

Many commentators on the United Nations Convention on Contracts for the Sale of Goods ("CISG" or "Convention")[1] reading the recent decision rendered by the United States District Court for the Northern District of Illinois in *Raw Materials, Inc. v. Manfred Forberich GmbH & Co., KG ("RMI")*[2] probably could not believe their eyes. The court, after holding that the CISG would be the substantive law applicable to the dispute, also ruled that "in applying Article 79 of the CISG, the Court will use as a guide caselaw interpreting a similar provision of § 2-615 of the UCC [Uniform Commercial Code]."[3] In reaching this ruling, the court adopted the plaintiff's (Raw Materials, Inc.) contentions that while no American court has specifically interpreted or applied Article 79 of the CISG, caselaw interpreting the Uniform Commercial Code's ("UCC") provision on excuse provides guidance for interpreting the CISG's excuse provision since it contains similar requirements as those set forth in Article 79.[4] Furthermore, the court stated that "[t]his approach of looking to caselaw interpreting analogous provisions of the UCC has been used by other [American] federal courts,"[5] citing as examples, the *Delchi*[6] and *Chicago Prime Packers*[7] decisions. The court noted that, in any case, the defendant not only failed to dispute this point, but even pointed to case law interpreting the UCC.[8]

The analysis in this article will focus on the court's reasoning in *RMI* and the possible consequences arising therefrom. Based on relevant case law and leading commentaries, one can conclude that the court erred in relying on the UCC to interpret the CISG. In fact, this is a "consummate illustration of a court unwittingly seeing a provision of the Convention through a domestic lens . . . ."[9] This

---

† Dottore in Giurisprudenza, Università degli Studi di Napoli, "Federico II," (Italy), (1993); LL.M. in International & Comparative Law (2000) and J.D. (2005), University of Pittsburgh School of Law (U.S.A.). I would like to thank Professors Harry Flechtner, Albert Kritzer, James Flannery and Thomas Ross for kindly commenting on earlier drafts of this article.

1 United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980. U.S.C.A. app. at 332-94 (West Supp. 1996), 19 I.L.M. 668 (1980) [hereinafter CISG].

2 Raw Materials, Inc. v. Manfred Forberich GmbH & Co., KG, No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 (N.D. Ill. July 6, 2004), *available at* http://cisgw3.law.pace.edu/cases/040706u1.html [hereinafter *RMI*].

3 *Id.*

4 *Id.* at *12.

5 *Id.*

6 Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024 (2d Cir. 1995).

7 Chi. Prime Packers, Inc. v. Northam Food Trading Co., 01 C 4447, 2003 U.S. Dist. LEXIS 9122 (N.D. Ill. May 25, 2003), *available at* http://cisgw3.law.pace.edu/cases/030529u1.html.

8 *RMI*, 2004 U.S. Dist. LEXIS 12510 *13.

9 John E. Murray, Jr., *The Neglect of CISG: A Workable Solution*, 17 J.L. & COM. 365, 370 (1998).

article ultimately addresses whether the *RMI* court, notwithstanding the application of a wrong standard, eventually reached a conclusion in line with the CISG rules. It will argue that even if the court ultimately reached such a conclusion, it sets forth a poor example of how courts should deal with CISG cases.

II. The RMI case[10]

A. Facts

Raw Materials, Inc. ("RMI") is an American corporation in the business of purchasing, processing, and converting used railroad rails into new products that are then resold. Manfred Forberich GmbH & Co., KG ("Forberich") is a German limited partnership in the business of selling used railroad rails. On February 7, 2002, Forberich and RMI entered into an agreement whereby Forberich would supply RMI with 15,000-18,000 metric tons of reroll quality Russian railroad rail. The rail was to be loaded and shipped from St. Petersburg, Russia. The contract provided for a June 30, 2002 delivery date, Free On Board to RMI's plant in Chicago, Illinois. It usually takes three to four weeks for cargo to travel from St. Petersburg to Chicago.

In June, Forberich sought an extension of the delivery date, because its supplier, Imperio Trading, defaulted on its contractual obligation to provide rails to Forberich. It seems that the extension was granted, but it was not clear what the new delivery date was, nor whether the goods were to be actually received or simply shipped by the new date. In its motion for summary judgment, RMI argued that the contract would have been fulfilled if Forberich had delivered the goods to any port in the United States by December 31, 2002. It was not disputed that Forberich never delivered the goods to RMI.

Forberich asserted that its failure to deliver was due to the fact that the port of St. Petersburg unexpectedly froze over at the beginning of December 2002. RMI contended that the port did not freeze until mid-December and that, regardless, Forberich was already in breach of contract at that time because it could not have possibly delivered the goods by December 31, 2002, considering the normal three to four week delivery time. However, as noted above, it was not clear whether Forberich had to deliver by December 31, 2002, or merely ship the goods by that date.[11] If Forberich had to deliver by December 31, 2002, Forberich was in breach. If Forberich simply had to load and ship by December 31, Forberich may have had a viable defense.

The parties did not dispute that the port of St. Petersburg does not normally freeze over until late January and, in any event, ships can make it through even when the water is frozen. It seems, however, that the winter of 2002 was more severe than anyone expected. One of Forberich's ships left St. Petersburg on November 20, 2002, but no evidence was offered of any other ship that left St.

[10] *RMI*, 2004 U.S. Dist. LEXIS 12510 at *1-10.

[11] *See* Def.'s Manfred Forberich GmbH & Co.'s Resp. to Raw Material Inc.'s Rule 56.1(a)(3) Statement of Material Facts in Support of Its Mot. for Summ. J. at 3, ¶ 11, *RMI*, 2004 U.S. Dist. LEXIS 12510 (No. 03 C 1154), 2003 WL 23927331.

Petersburg after that day. RMI, however, contended that an experienced shipping merchant should or could have foreseen that such harsh winter conditions would occur in late 2002. On January 10, 2003, "Forberich notified RMI that it was unable to deliver RMI's goods because the port of St. Petersburg . . . had been frozen over since the middle of December 2002."[12]

B. Procedural History

In 2003, RMI sued Forberich alleging breach of contract for its undisputed failure to meet its contractual obligation to deliver used railroad rails. Forberich responded by raising, *inter alia*, a *force majeure* defense. RMI then moved for summary judgment on the breach of contract claim, arguing that it was entitled to summary judgment because the undisputed facts showed that (i) while Forberich "ignored" its contractual obligations with RMI, it nonetheless entered "into at least 14 contracts and shipped over 145,000 metric tons of Russian rail to U.S. customers other than RMI, all the while reaping the benefits of higher prices it charged those other customers for rail that Forberich should have rightfully delivered to RMI,"[13] and that (ii) Forberich's *force majeure* argument based "on the St. Petersburg port freezing in mid-December 2002 strains credulity"[14] because "it hardly could come as a surprise to any experienced shipping merchant (or any grammar school geography student) that the port in St. Petersburg might become icy and frozen in the Russian winter months."[15] Forberich replied arguing that (i) "RMI's reliance on Forberich's other contracts and shipments made to other customers, during 2002 . . . is without merit. These shipments, the last of which was in November 2002, are irrelevant because RMI had agreed to extend the time period for performance under the contract with Forberich until December 31, 2002,"[16]and that (ii) there was sufficient evidence "on Forberich's *force majeure* affirmative defense so that a jury could reasonably find that *force majeure* is a viable defense."[17]

The court noted that although the contract did not provide for a *force majeure* clause, CISG Article 79 would apply to the matter: "A party is not liable for failure to perform any of his obligations if he proves that 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 its consequences."[18]

Although it was undisputed that Forberich failed to ship 15,000-18,000 metric tons of rail to RMI, as required by the contract, the court deemed that Forberich's

---

[12] *Id.* at 4, ¶ 15.

[13] *See* Pl. Raw Material Inc.'s Mot. for Summ. J. on Count I of Its Am. Compl., 2004 U.S. Dist. LEXIS 12510, (No. 03 C 1154), 2003 WL 23927319.

[14] *Id.*

[15] *Id.*

[16] *See* Def. Manfred Forberich GmbH & Co.'s Resp. to Raw Material Inc.'s Mot. for Summ. J., 2004 U.S. Dist. LEXIS 12510, (No. 03 C 1154), *available at* 2003 WL 23927325.

[17] *Id.*

[18] *RMI*, 2004 U.S. Dist. LEXIS 12510 at *11-2 quoting CISG Article 79.

force majeure argument effectively defied RMI's Motion for Summary Judgment. The court, relying on UCC §2-615, ruled that the defense, in order to be successful, required Forberich to produce evidence showing that;[19] (1) a contingency had occurred; (2) the contingency had made performance impracticable; and (3) the nonoccurrence of that contingency was a basic assumption upon which the contract had been made.[20] As to the first element, the court concluded that Forberich presented evidence that "the frozen port prevented it from meeting this obligation."[21] The court also noted that RMI failed to rebut the evidence by showing that other vessels left the port after November 20, 2002, and to show affirmatively on what terms the parties had agreed to postpone the delivery of the goods.[22] As to the second and third elements of the defense, the court noted that Forberich "presented evidence that the severity of the winter in 2002 and the early onset of the freezing of the port and its consequences were far from ordinary occurrences."[23] Moreover, the court noted that it was undisputed that the St. Petersburg port typically freezes in late January and that Forberich testified that during the winter of 2002 even the icebreakers were unable to break the ice.[24] On the other hand, the court noted that RMI had merely stated (without citation to any supporting records) that "it hardly could come as a surprise to any experienced shipping merchant (or any grammar school geography student) that the port in St. Petersburg might become icy and frozen in the Russian winter months."[25]

Because Forberich was able to show that questions of fact existed as to whether or not the early freezing of the port prevented performance of the contract or whether the freezing of the port was foreseeable, the district court denied RMI's motion for summary judgment.[26]

C. Summary Judgment

Because the *force majeure* defense was raised in the context of a motion for summary judgment, a basic understanding of the summary judgment mechanism is important to fully appreciate the court's decision. Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[27]

---

[19] As to the burden of proof under Article 79, *see infra* note 123.

[20] U.C.C. § 2-615 (1998). Note that U.C.C. § 2-615 also requires the seller to seasonably notify buyer of delay. However, the parties did not really raise any issue as to the notification requirement.

[21] *RMI*, 2004 U.S. Dist. LEXIS 12510, at *16.

[22] *Id.* at *16-17.

[23] *Id.* at *20.

[24] *Id.*

[25] *Id.*

[26] *Id.* at *21

[27] FED. R. CIV. P. 56(c).

Under this rule, a claimant may move for summary judgment at any time after the expiration of 20 days from the commencement of the action or after being served by the other party with a motion for summary judgment. The defending party may move at any time for summary judgment. Such motions for summary judgment are usually made after adequate time for discovery.[28] "Summary judgment should not be entered 'if reasonable minds could differ as to the import of the evidence.' Yet, an issue is 'genuine' only 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'"[29] In other words, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is 'no genuine issue' for trial," and summary judgment is appropriate.[30] The court must draw all reasonable inferences against the moving party in assessing whether a genuine issue of fact exists.[31] However, the nonmoving party may not simply rest on the allegations in its pleadings, but must designate specific facts based upon personal knowledge or evidence that is otherwise admissible to show that there is a genuine issue for trial.[32]

III. Notes on the consummated American way[33] of resorting to domestic case law for purposes of interpreting "similar" CISG provisions

The practice in American courts of resorting to domestic case law for purposes of interpreting "similar" CISG provisions is troubling. It is particularly difficult to pinpoint the reasons for U.S. courts to adopt this approach.[34] Is it because those American courts are not at ease with international treaties?[35] Is it because it is much easier to deal with something familiar rather than going through the trouble of finding out what foreign courts have said about the issue at trial? Is it

---

[28] *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

[29] Claude E. Atkins Enter., Inc. v. United States, No. 96-15074, 1997 U.S. App. LEXIS 6393 at *6 (9th Cir. Apr. 2, 1997) (citation omitted).

[30] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

[31] *See, e.g.*, United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

[32] *See* FED. R. CIV. P. 56(e).

[33] *See* Murray, *supra* note 9, at 370.

[34] *Compare* Genpharm, Inc. v. Pliva-Lachema, No. 03-CV-2835, 2005 U.S. Dist. LEXIS 4225 (E.D.N.Y. Mar. 19, 2005):

> There are only a handful of American cases interpreting the CISG. . .The Second Circuit [*Delchi Carrier*, 71 F.3d 1024 at 1027-28] has recognized that "caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code ("UCC"), may also inform a court where the language of the relevant CISG provisions tracks that of the UCC. However, UCC caselaw 'is not per se applicable'". Here, the Court finds that caselaw interpreting contract formation under Article 2 of the UCC is helpful. (internal quotations omitted).

[35] *See* James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales*, 32 CORNELL INT'L L.J. 273, 280-81 (1999):

> While other reasons may contribute to this lack of awareness [of the CISG in secondary legal sources], the treaty's character under U.S. law as a self-executing treaty is probably the main reason U.S. parties are unaware of its existence. Hence, as it currently exists under U.S. law, the CISG does not bring uniformity to the law of international sales but instead fosters disharmony based on ignorance (footnote omitted).

still the case, as suggested by Professor Murray, that "[r]eflecting on the experience under the CISG, we now face the reality that it suffers from neglect, as well as ignorance and even fear?"[36] Is it only a matter of passive reliance on questionable rulings? What is it that ultimately prevents many U.S. courts from correctly applying the CISG?

There are authors that seem to suggest that, in general, "it is difficult to imagine a [U.S.] court deferring to the decisions of foreign legal systems to interpret a convention of which that court's country is signatory,"[37] especially if the decision comes from, as they seem to suggest, second tier jurisdictions, such as Uganda[38] or Lithuania.

Why should it be "difficult to imagine" an American court considering decisions from foreign legal systems?[39] Arbitral tribunals,[40] and to a lesser extent courts, around the world, do take into consideration foreign decisions in deciding CISG issues. Consider, for example, what courts do in Germany,[41] France,[42]

---

[36] *See* Murray, *supra* note 9, at 365.

[37] CLAYTON P. GILLETTE & STEVE D. WALT, SALES LAW – DOMESTIC AND INTERNATIONAL 6 (rev. ed. 2002).

[38] There must be quite a distrust toward Ugandan courts, *see* Sunil R. Harjani, *The Convention on Contracts for the International Sale of Goods in United States Courts*, 23 HOUS. J. INT'L L. 49, 66 (2000) ("U.S. courts may find that decisions from Germany and the United Kingdom are particularly persuasive, while decisions from Chilean or Ugandan courts may carry less weight."), *see also* Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 Nw. J. INT'L L. & BUS. 299, 304 (2004).

[39] *See generally* Chi. Prime Packers, Inc. v. Northam Food Trading Co., 320 F. Supp. 2d 702, 709 (N.D. Ill. 2004):

> In light of the Convention's directive to observe the CISG's international character and the need to promote uniformity in its application, [courts should look] to foreign caselaw for guidance in interpreting the relevant provisions of the CISG . . . . Although foreign caselaw is not binding on [courts], it is nonetheless instructive.

Amco Ukrservice & Prompriladamco v. Am. Meter Co., 312 F. Supp. 2d 681, 686-87 (E.D. Pa. 2004); Usinor Industeel v. Leeco Steel Prod., Inc., 209 F. Supp. 2d 880, 886 (N.D. Ill. 2002); St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, No. 00 Civ. 9344, 2002 U.S. Dist. LEXIS 5096 at *8 (S.D.N.Y. Mar. 26, 2002); Asante Technologies, Inc., v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142 (N.D. Cal. 2001); Medical Marketing Int'l, Inc. v. Internazionale Medico Scientifica, No. 99-0380 SECTION "K"(1), 1999 U.S. Dist. LEXIS 7380 at *6 (E.D. La. May 17, 1999). As to American case law dealing with the CISG, *see generally* Elizabeth D. Lauzon, *Construction and Application of United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 200 A.L.R. 541 (2005). The CISG is an international instrument that might look familiar to U.S. courts. It is not, however, intended to be read through a domestic lens. For an excellent (and critical) review of the American courts' methodology, *see* Harry M. Flechtner, *The CISG in American Courts: The Evolution (and Devolution) of the Methodology of Interpretation, in* QUO VADIS CISG? CELEBRATING THE 25TH ANNIVERSARY OF THE UNITED NATIONS CONVENTION FOR THE INTERNATIONAL SALE OF GOODS 91 (Franco Ferrari ed., 2005).

[40] *See* Neth. Arb. Inst., No. 2319, Oct. 15, 2003, *available at* http://cisgw3.law.pace.edu/cases/021015n1.html.

[41] *See* Bundesgerichtshof [BGH] [Fed. Ct. of Justice] Mar. 2, 2005, VIII ZR 67/04, (F.R.G.) available at http://cisgw3.law.pace.edu/cases/050302g1.html where the Court held the following:

> [t]he principles developed there [domestic decisions] cannot simply be applied to the case at hand, although the factual position - suspicion of foodstuffs in transborder trade being hazardous to health - is similar; that is so because, in interpreting the provisions of CISG, we must consider its international character and the necessity to promote its uniform application and the protection of goodwill in international trade (Art. 7(1) CISG). Only insofar as can be assumed that national rules are also recognized internationally - where, however, caution is advised - can they be considered within the framework of the CISG.

Belgium,[43] Switzerland,[44] and Spain.[45] Italian courts have been, particularly in the last few years, the ultimate model for a sound approach in dealing with foreign cases.[46]

While none of the domestic courts of the countries mentioned above are bound by foreign precedent,[47] they recognize foreign precedent and treat it with the respect and consideration it deserves. This is precisely what the United States Supreme Court has stated that American courts should do when interpreting the text of a treaty. Foreign precedents should not simply be considered, but be given "considerable weight."[48] In any event, some commentators argue that even if simply considered, foreign precedents, taken together, constitute the international backdrop against which CISG decisions should be made.[49]

See also Bundesgerichtshof [BGH] [Fed. Ct. of Justice] June 30, 2004, VIII ZR 321/03, (F.R.G.) *available at* http://cisgw3.law.pace.edu/cases/040630g1.html where in its reasoning, the Court acknowledges that:

> [t]he question as to the burden of proof within the framework of Art. 40 CISG has also been the subject of a number of foreign rulings; Arbitral Panel of the Stockholm Chamber of Commerce, decision of 5 June 1998, www.cisg-online.ch 379; Roermond/Netherlands, Arrondissementsrechtbank [Rb.] [ordinary court of first instance and court of appeal to the Kantongerecht] 19 December 1991, CISG-online 29, 900336 (Neth.); ICC International Court of Arbitration, CISG-online 705; Ontario Superior Court of Justice (Canada), IHR 2001, 46.

Bundesgerichtshof [BGH] [Fed. Ct. of Justice], Mar. 24, 1999 VIII ZR 121/98, (F.R.G.).

[42] *See* Cour d'appel [CA] [regional ct. of appeal] Grenoble, Oct. 23, 1996, 94/3859 (Fr.), *available at* http://cisgw3.law.pace.edu/cases/961023f1.html.

[43] *See* Rechtbank van Koophandel [Court of Commerce] Hasselt, Mar. 6, 2002 A.R. 01/2671, (Belg.), *available at* http://www.law.kuleuven.ac.be/ipr/eng/cases/2002-03-06s.html.

[44] *See* Obergericht des Kantons [cantonal ct. of appeal] Luzern, Jan. 8, 1997, 11 95 123/357, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/970108s1.html.

[45] *See* S Audiencia Provincial de Valencia, June 7, 2003, (142/2003) (Spain), *available at* http://cisgw3.law.pace.edu/cases/030607s4.html; *but see* S Juzgado de primera instancia [Court of First Instance] instrucción no. 3 de Tudela, March 29, 2005 (Spain), *available at* http://cisgw3.law.pace.edu/cases/050329s4.html.

[46] *See* Tribunale di Vigevano [District Court Vigevano], 405, 12 July 2000 (Italy), *available at* http://cisgw3.law.pace.edu/cases/000712i3.html; Tribunale di Padova, 40552, 25 Feb. 2004 (Italy), *available at* http://cisgw3.law.pace.edu/cases/040225i3.html. *See* Italdecor SAS v. Yiu's Industries (H.K.) Ltd., Corte di appello di Milano [Ct. of Appeal, Milan], 790, 20 Mar. 1998 (Italy), *available at* http://cisgw3.law.pace.edu/cases/980320i3.html.

[47] *See Chi. Prime Packers,* 320 F. Supp. 2d at 709; Tribunale di Vigevano, 405, (Italy), *available at* http://cisgw3.law.pace.edu/cases/000712i3.html; Tribunale di Pavia, Dec. 29, 1999 (Italy), *available at* http://cisgw3.law.pace.edu/cases/991229i3.html. *See also* Franco Ferrari, *CISG Case Law: A New Challenge for Interpreters*?, 17 J.L. & COM 245-261, 260 (1998); DiMatteo, *supra* note 39, at 303 n.11; Joseph Lookofsky, *Digesting CISG Foreign Case Law: How Much Regard Should we Have?*, 8 VINDOBONA J. OF INT'L COM. L. & ARB. 181 (2004); Camilla Baasch Anderseen, *The Uniform International Sales Law and the Global Jurisconsultorium, available at* http://CISG-online.ch/CISG/The_Unifor_International_Sales_Law_And_The_Global_Jurisconsultorium.pdf.

[48] Olympic Airways v. Husain, 540 U.S. 644, 658, (2004) ("When we interpret a treaty, we accord the judgments of our sister signatories 'considerable weight.'") *Id.* (quoting Air France v. Saks, 470 U.S. 392, 404, (1985)).

[49] *See* Professor Kritzer's Comments on *Raw Materials Inc. v. Manfred Forberich*, Feb. 2005, *available at* http://cisgw3.law.edu/cisg/biblio/kritzer3.html (relevant to [Article 79] case law is the rule cited by the Solicitor General of the United States. He quotes the U.S. Supreme Court as follows in his brief in the case of *Zapata Hermanos v. Hearthside Baking*, 540 U.S. 1068 (2003) page 10, "[J]udicial decisions from other countries interpreting a treaty term are 'entitled to considerable weight.'" El Al Israel Airlines Ltd. v. Tsui Yan Tseng, 525 U.S. 155, 176 (1999)); *See also* United States v. Diebold, Inc., 369 U.S. 654 (1962); *See generally* Peter Schlechtriem, *Uniform Sales Law—the Experience with Uniform*

These same commentators also suggest that it would be unlikely for an American court to adopt "an interpretation of a CISG provision favored by a Lithuanian court or a Ugandan court."[50] What is the problem in doing that, if the decision correctly applies the CISG? A correct statement of the law from a Lithuanian or Ugandan court is preferable to a clear misapplication of the CISG by a more "trusted" domestic court.[51] Foreign decisions should be taken into consideration for "the force of the reasoning in the (foreign) opinion and the apparent soundness of the result."[52] Whether "the decision has support in other jurisdictions"[53] is another factor that clearly indicates if the decision is well-reasoned.

However, other factors, such as the prominence of the court,[54] should have only limited relevance.[55] Prominence serves no purpose when it is not accompanied by sound application of the law.[56] Finally, given that prior decisions have persuasive value and are not part of a hierarchical, worldwide CISG court system, prior decisions must be considered for their analysis, not for their chronological properties.[57]

Some commentators[58] complain about access to foreign decisions. This was a major problem in the past and, although the situation has improved greatly, access to foreign decisions may still be a problem today. The United Nations Commission on International Trade Law ("UNCITRAL") introduced the Case Law on UNCITRAL Texts System ("CLOUT") for collecting and disseminating international CISG court decisions and arbitral awards in English. However, not all

---

Sales Laws in the Federal Republic of Germany, 2 Juridisk Tidskrift 1-28 (1991/92), *available at* http://cisgw3.law.pace.edu/cisg/biblio/schlech2.html; Supplemental Brief for the Petitioner [Zapata Hermanos Sucesores] on Pet. for a Writ of Cert. to the U.S. Ct. of App. for the Seventh Cir. at 3, Zapata Hermanos Sucesores v. Hearthside Baking Co., *cert. denied* 540 U.S. 1068 (2003) (No-1318) [hereinafter Zapata Supplemental Brief]:

> To 'promote uniformity in [the CISG's] application,' courts *must* be required, at a minimum, to discuss precedents from other nations addressing similar issues. As Justice O'Connor has explained, while foreign decisions 'are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts.

(quoting Sandra Day O'Connor, *Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law – Key Note Address*, 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002)).

[50] *See* GILLETTE & WALT, *supra* note 37, at 5.

[51] *See* Lookofsky, *supra* note 47, at 187.

[52] Lookofsky, *supra* note 47, at 187 (quoting E. ALLAN FARNSWORTH, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES 52-57 (3d ed. 1996)).

[53] *Id.*

[54] *See* Lookofsky, *supra* note 47, at 186.

[55] *See* Zapata Supplemental Brief, *supra* note 49, at 3-4:

> The Solicitor General openly defends the Seventh Circuit's disregard of foreign decisions construing Article 74 because 'those decisions were rendered by courts and arbitration panels in only three countries (Germany, Switzerland, and France)' and because 'none was [sic] rendered by the country's highest court'- as if the views of appellate courts and other tribunals in these important signatory nations simply don't count . . . But that is plainly wrong.

(quoting Solicitor General's Brief (footnote omitted)).

[56] *See* Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024 (2d Cir. 1995).

[57] *See* GILLETTE & WALT, *supra* note 37, at 4-5.

[58] *Id.*

such decisions are reported in CLOUT.[59] Pace University School of Law compiles a CISG database that includes, among other things, hundreds of English translations and abstracts.[60] UNILEX is another useful and convenient source of CISG information.[61] Fortunately, the number of Internet portals offering information about the CISG is growing rapidly. All of these useful sites offer, free of charge, abstracts, translations, and full texts of CISG decisions.[62]

This is not to say that reliance on domestic cases is *per se* wrong, but rather, that it is incorrect to rely on the UCC's case law to interpret the CISG.[63] In other words, the meaning of the CISG should not be determined by reference to similar domestic legal concepts.[64] It would not be a problem to rely on domestic cases

---

[59] UNITED NATIONS, COMM'N ON INT'L TRADE, *User Guide*, U.N. Doc. A/CN.9/SER.C/GUIDE/1/Rev.1 (2000), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/V00/507/65/PDF/V0050765.pdf?OpenElement (last visited on Mar. 7, 2005).

[60] For more information, visit http://cisgw3.law.pace.edu. In 1998, the U.S. Ct. of App. for the Eleventh Circuit defined Pace University's CISG database as a "promising source." *See* MCC-Marble Ceramic Ctr. v. Ceramica Nuova D'Agostino, S.p.A., 144 F.3d 1384, 1390 (11th Cir. 1998), *available at* http://cisgw3.law.pace.edu/cases/980629u1.html.

[61] As stated on their home page, UNILEX is "[a] database of international case law . . . on . . . CISG and . . . UNIDROIT . . . the most important international instruments for the regulation of international commercial transactions." *See* UNILEX, http://www.unilex.info/ (follow "About UNILEX" hyperlink). Consider what the court said in Chi. Prime Packers, Inc. v. Northam Food Trading Co., 320 F. Supp. 2d 702, 712 (N.D. Ill. 2004):

> That decision [Fallini Stefano & Co. s.n.c. v. Foodic BV, No. 900336, Arrondissementsrechtbank Roermond, Netherlands (Dec. 19, 1991), UNILEX 1991] and the other foreign decisions cited in this opinion have not been translated into English and, as a result, cannot be cited directly by this court. Instead, this court relies upon the detailed abstracts of those decisions provided by UNILEX, an "intelligent database" of international case law on the CISG.

[62] THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION (Ronald A. Brand, Franco Ferrari & Harry M. Fletchner, eds. 2004); *See also* Lookofsky, *supra* note 47, at 233 warning:

> I would caution courts (and arbitrators), as well as lawyers and other readers, not to rely on the Digest as their sole source of CISG law, since in many, if not most instances—the selected sources in the Digest cannot provide courts and arbitrators (or anyone else) with a balanced and realistic picture of CISG law.

[63] *See, e.g.*, *MCC-Marble Ceramic Ctr.*, 144 F.3d at 1391 (11th Cir. 1998):

> One of the primary factors motivating the negotiation and adoption of the CISG was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party's legal system might otherwise apply . . . Courts applying the CISG cannot, therefore, upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result. We may only achieve the directives of good faith and uniformity in contracts under the CISG by interpreting and applying the plain language of article 8(3) as written and obeying its directive to consider this type of parol evidence.

See Caterpillar, Inc. v. Usinor Industeel, (U.S.A.), Inc., No. 04 C 2474, (N.D. Ill. Mar. 30, 2005), *available at* http://cisgw3.law.pace.edu/cases/050330u1.html, (completely ignoring foreign case law dealing with promissory estoppel). It is very likely that the court decided that foreign law did not apply because it merely relied on the American Law Reports, which limits its collection of cases interpreting the CISG to only U.S. cases. Again, some U.S. courts believe that only American decisions count for purposes of determining the meaning of the CISG.

[64] *See, e.g.*, Kritzer, *supra* note 49; Harry M. Flechtner, *More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, "Validity" and Reduction on Price Under Article 50*, 14 J.L. & COM. 153, 176 (1995):

> [A]lthough knowledge of the Convention and its significance for international transactions continues to grow, U.S. courts still sometimes fail to appreciate the changes it works. To comprehend those changes, judges must transcend their usual perspective shaped by familiar domestic

that correctly apply the relevant CISG provisions, as long as foreign decisions are also taken into consideration.[65] It is a problem, however, to rely on domestic CISG case law which clearly misapplies the CISG.

Therefore, resorting to domestic law for purposes of interpreting the CISG should be limited to those situations indicated by CISG Article 7(2), keeping in mind CISG Article 7(1).[66] Professor Honnold reminds us that:

> Article 7(2) permits recourse to "the law applicable by virtue of the rules of private international law" only as a last resort - *i.e.*, when questions are "not expressly settled" by the Convention and cannot be "settled in conformity with the general principles on which it is based." The fact that a provision of the Convention presents problems of application does not authorize recourse to some one system of domestic law since this would undermine the Convention's objective "to promote uniformity in its application." (Art. 7(1)).[67]

So, why do some American courts consistently neglect foreign case law? It would be one thing if the American decisions explained their refusal to consider foreign court decisions on grounds that those courts did not correctly interpret and apply the CISG.[68] Unfortunately, this is not the case. There is reason to believe that the answer is normally a matter of mere administrative convenience. After all, why waste the court's time and resources in finding out what the CISG really entails and requires, given that some American courts and commentators plainly state that the CISG is similar to the UCC?[69]

---

sales concepts. Only that will satisfy the mandate of Article 7(1) - the promotion of uniformity in the application of CISG.

But see Delchi Carrier S.p.A. v. Rotorex Corp., 71 F.3d 1024 (2d Cir. 1995), *available at* http://cisgw3.law.pace.edu/cases/951206u1.html.

[65] An ideal approach would be a recent Italian decision: Tribunale di Padova, 31 Mar. 2004, 40466, (Italy) *available at* http://cisgw3.law.pace.edu/cases/040331i3.html. *See also Chi. Prime Packers,* 320 F. Supp. 2d at 702. (holding that in any case, a court's reliance on its own domestic CISG's case law should not be used to elevate domestic practices to international ones). *See* Clayton P. Gillette, *The Empirical and Theoretical Underpinnings of the Law Merchant: The Law Merchant in the Modern Age: Institutional Design and International Usages Under the CISG*, 5 CHI. J. INT'L L. 157, 171 (2004).

[66] CISG, Article 7:

(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.

(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.

[67] *See* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 429 (3d ed. 1999).

[68] *Id.* Similarly, *see* Zapata Supplemental Brief, *supra* note 49, at 3:

While U.S. courts may not be bound by foreign decisions, U.S. courts must at least be required to explain why they are rejecting foreign precedents when they choose to do so. Without such dialogue, it will be impossible to foster the sort of 'uniform interpretation' of the CISG that Article 7 requires.

[69] Although not expressly mentioned by any U.S. court, another explanation of why American courts do not rely on foreign decisions could be that those decisions are not formally published according to U.S. standards. Thus, foreign decisions have no precedential value and, in some circuits, it is a violation

The American CISG decisions where case law from other jurisdictions is neglected, follow the same path first established by the court in *Delchi*. These decisions first, passively recite that American cases applying the CISG are "scant," are only a "handful" in number, or "sparse,"[70] suggesting that only American case law is relevant; then, state that it is appropriate to resort to domestic case law to interpret similar CISG provisions,[71] suggesting that the two sets of rules are similar and, therefore, their case law is freely interchangeable. Both assumptions patently display disregard of the CISG, particularly of Article 7, and of hundreds of commentaries clearly indicating that courts should not read the CISG through a "domestic lens."[72] Moreover, both assumptions clearly show that many American courts are unwilling to critically read the source of all mistakes in approaching the CISG, probably because they mistakenly believe its reasoning is "good law."

However, a few American courts have been able to read the *Delchi* decision critically and free themselves from the convenient approach created by the *Delchi* court. Consider, for example, what the court stated in *Chicago Prime Packers*:

---

of the court rules to even cite them. I believe, however, that this approach is a hold over from when "unpublished" meant that the case was virtually unavailable to the average lawyer. With the advent of the Internet, the situation has changed, but many of the court rules have not. Although, it is quite unlikely that courts are not relying on foreign decisions because of that, it is still a possible explanation. *See* Schmitz-Werke GmbH & Co. v. Rockland Indus., Inc., 37 Fed. Appx. 687 (4th Cir. 2002), *available at* http://cisgw3.law.pace.edu/cases/020621u1.html ("Unpublished opinions are not binding precedent in this circuit. *See* Local Rule 36(c).").

[70] *See, e.g.*, Helen Kaminski v. Marketing Australian Products, No. M-47 (DLC), 1997 U.S. Dist. LEXIS 10630 at *8 (S.D.N.Y. July 21, 1997), *available at* http://cisgw3.law.pace.edu/cases/970721u1.html ("there is little to no case law on the CISG in general, and none determining whether a distributor agreement falls within the ambit of the CISG"); Mitchell Aircraft Spares v. European Aircraft Serv. AB, 23 F. Supp. 2d 915, 919 (N.D. Ill. 1998), *available at* http://cisgw3.law.pace.edu/cases/981027u1.html:

> This court was unable to find any case from the Seventh Circuit or a district court in the Seventh Circuit which has addressed the issue of whether a court can consider parol evidence in a contract dispute governed by the CISG. This is not surprising because 'there is virtually no case law under the Convention.'

(citing Delchi Carrier S.p.A. v. Rotorex Corp., 71 F.3d 1024 (2d Cir. 1995)); Calzaturificio Claudia s.n.c. v. Olivieri Footwear, No. 96 Civ. 8052 (HB)(THK), 1998 U.S. Dist. LEXIS 4586 at *13 (S.D.N.Y Apr. 6, 1998), *available at* http://cisgw3.law.pace.edu/cases/980406u1.html ("The case law interpreting and applying the CISG is sparse") (citing Helen Kaminski, No. M-47 (DLC), 1997 U.S. Dist. LEXIS 10630and Filanto S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992), *available at* http://cisgw3.law.pace.edu/cases/920414u1.html); Supermicro Computer Inc. v. Digitechnic, 145 F. Supp. 2d 1147, 1151 (N.D. Cal. 2001), *available at* http://cisgw3.law.pace.edu/cases/010130u1.htm: "The case law interpreting and applying the CISG is sparse," citing *Delch, 71* F. 3d 1024; *Schmitz-Werke*, 37 Fed. Appx. at 691 ("Case law interpreting the CISG is rather sparse") citing *Calzaturificio Claudia*; Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd., No. 01 C 5938, 2003 U.S. Dist. LEXIS 1306 at *7 (N.D. Ill. Jan. 29, 2003), *available at* http://cisgw3.law.pace.edu/cases/030129u1.html ("As Judge Lindberg pointed out, "federal caselaw interpreting and applying the CISG is scant."") (citing Usinor Industeel v. Leeco Steel Prods., Inc., 209 F. Supp. 2d 880, 884 (N.D. Ill. 2002), *available at* http://cisgw3.law.pace.edu/cases/020328u1.html); Genpharm Inc. v. Pliva-Lachema a.s., 361 F. Supp. 2d 49, 54 (E.D.N.Y. 2005), *available at* http://cisgw3.law.pace.edu/cases/050319u1.html. ("There are only a handful of American cases interpreting the CISG").

[71] *See infra* notes 99, 100.

[72] *See* Lauzon, *supra* note 39 and Flechtner, *supra* note 39.

> In light of the Convention's directive to observe the CISG's international character and the need to promote uniformity in its application, this court has looked to foreign case law for guidance in interpreting the relevant provisions of the CISG in this case. Although foreign caselaw is not binding on this court, it is nonetheless instructive in deciding the issues presented here.[73]

Why then did the *RMI* court resort to domestic case law to interpret the CISG? We can exclude one possible explanation: the *RMI* court was not acting under the assumption that U.S. law is superior to foreign sources.[74] Instead, the court's reliance on the UCC to determine the meaning of the CISG is likely due to the court's desire to decide the case as quickly as possible, carefully avoiding entering any unfamiliar field that would require additional court time or resources. However, by doing that, while the court may not have wasted its time and resources in arriving at the decision under proper standards, it exposed itself to valid criticism.[75]

The same kind of critique, of course, should equally apply to the attorneys who dealt with the case.[76] In *RMI,* the court stated that Forberich did not object to the use of UCC § 2-615 case law to interpret CISG Article 79. Similarly, it seems unlikely that RMI strategically decided not to raise the issue whether Forberich had satisfied the requirements set forth by CISG Article 79.[77]

Apparently, however, some American commentators seem to suggest that after all, the *RMI* decision does not deserve so much criticism. Consider the following:

> The Raw Materials case has been criticized [footnote omitted]. This criticism is somewhat unfair. The court's decision was a summary judgment motion. When important issues, such as the very terms of the contract delivery, remain open, there was no need to engage in exhaustive scholarly analysis. Certainly the court would have been wise to apply the language of Article 79. Nonetheless, a court with a heavy docket must manage its resources. Arguably the result would not likely change regard-

---

[73] Chi. Prime Packers, Inc. v. Northam Food Trading Co., 01 C 4447, 2003 U.S. Dist. LEXIS 9122, 709 n.11 (N.D. Ill. May 25, 2003); *see also* Lauzon, *supra* note 160 and Flechtner, *supra* note 39.

[74] Gillette, *supra* note 65, at 170 stating ("One need not attribute willfulness or jingoism to judges who exhibit this bias.").

[75] Joseph Lookofsky & Harry Flechtner, *Nominating Manfred Forberich: The Worst CISG Decision in 25Years?*, 9 VINDOBONA J. OF INT'L COM. L. & ARB. 199, 202 (2005).

[76] *Id.* at 208.

[77] Albert H. Kritzer, *The Convention on Contracts for the International Sale of Goods: Scope, Interpretation and Resources, in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 147-87 (Cornell Int'l L.J. eds. 1995). Ten years later, Professor Kritzer must still be right:

> Despite this attention [to the CISG], there are many attorneys are not aware of the CISG. A still larger number do not have experience in researching the CISG and are unfamiliar with its interpretation and application in the international setting for which it is designed. As a consequence, many lawyers faced with international commercial law problems are not prepared to properly counsel their clients. In addition, some courts have applied the CISG as though it were domestic law, thereby undermining its value as uniform international law.

less of whether the CISG or the UCC applied: questions of fact precluded summary judgment.[78]

If the CISG governs a dispute, then the CISG applies to the dispute regardless of the domestic procedural instance which gave rise to the CISG issue and regardless of the court's docket. To my knowledge, there is nothing in the CISG that would allow courts to disregard the Convention on such grounds. The *RMI* court was not required to entertain any scholarly analysis. The court was merely required to apply the appropriate standard. It is more than an academic issue; it is about a clear and extensive misapplication of the CISG. It is also about a bad precedent that other American courts may be tempted to follow and that could discredit the good work done by other American courts. The mere fact that the result might be similar under both the CISG and the UCC does not redeem either the decision or the court from its faulty approach to the CISG.

This article is not meant to deal with the general theme of judicial interpretation of international law, but merely with the reprehensible *RMI* decision. But, one could ask, "Why it is so important to consider CISG precedents?" One easy answer could be that the Convention says so and that the United States signed it. However, if the court stumbles to the right decision, why should we be so concerned about the methodology? Because it is the courts' duty to have regard of the Convention's international character and the need for uniformity. The *RMI* decision is questionable because it did not have regard for prior foreign decisions and mostly because it did approach the CISG not through the CISG, but through the UCC.

While researching, accessing and fully understanding a foreign decision may require extra time and resources—which in no event justify foregoing them, comprehending the CISG is a professional obligation for both courts and lawyers.

It is a reality that a domestic judge engaged in the interpretation of an international text may tend, consciously or unconsciously, to rely on his/her experiences and sense of the domestic version of the legal issue, whatever formal methodology he/she might espouse in the text of the opinion. It is a complication that renders Professor Honnold's call for an autonomous, independent interpretation problematic. But problematic as it might look and be, it is our duty to counter the overdeveloped homeward biased attitude of certain domestic courts in relation to CISG interpretation.

Uniformity in law, whether it refers to results or methodology or both, has an inescapable, illusory quality. For example, while we might all agree on the abstract understandings of what "impediment" is supposed to be under Article 79, the real question always becomes whether the particular narrative in the case is a story of an "impediment." The inescapable discretion that resides within that act of interpretation severely limits any imagined meaningful uniformity.

Interpreting and applying the Convention with regard to its international character is an obligation arising from the Convention, but it is also a matter of respect for the other "players" and a way to show our commitment to the success of

[78] VED P. NANDA & DAVID K. PANSIUS, 2 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS 12 34 (2d. 2005).

the CISG. The very possibility of international law depends on the willingness of autonomous courts to cede a degree of authority. It may be that, with regard to the CISG, the reality is that the authority ceded is going to be less than that which the Convention pretends to demand. But the willingness of many courts to actively and correctly apply the Convention may depend in part on the formal signs of respects that other courts give to the Convention.

The mere fact that the *RMI* court may have ultimately reached the correct result does not help it. The decision is a disgraceful display of contempt for the Convention, its interpretative methodology and for the courts of the other CISG states.

IV. Analysis of the *RMI* decision

The *RMI* court's reasoning relies on several grounds, which as we will see, are all questionable. First, the *RMI* court said, "No American court has specifically interpreted or applied Article 79 of the CISG."[79] Second, the court stated "caselaw interpreting the UCC's provisions on excuse provides guidance for interpreting the CISG's excuse provision."[80] Third, the court noted that " [caselaw interpreting the UCC's provisions on excuse] contains similar requirements as those set forth in Article 79."[81] Lastly, the court said "Forberich does not dispute that this is proper and, in fact, also points to caselaw interpreting the UCC."[82]

A. No American Court Has Specifically Interpreted or Applied Article 79 of the CISG[83]

The mere fact that there are no domestic decisions dealing with the CISG on this specific issue should not prevent the court from doing the "right thing:" to

---

[79] Raw Materials Inc. v. Manfred Forberich GmbH & Co., No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 at *12 (N.D. Ill. July 7, 2004), (quoting the Pl.'s pleadings).

[80] *Id.*

[81] *Id.*

[82] *Id.* at *13.

[83] U.S. Courts are very familiar with such an attitude, as pointed out by the *RMI* court. In addition to those cases referred to by the court (Delchi v. Rotorex, 71 F.3d 1024 (2d Cir. 1995) and Chi. Prime Packers, Inc. v. Northam Food Trading Co., 01 C 4447, 2003 U.S. Dist. LEXIS 9122 (N.D. Ill. May 25, 2003), *available at* http://cisgw3.law.pace.edu/cases/030529u1.html), *see generally*, Helen Kaminski v. Marketing Australian Prods., No. M-47 (DLC), 1997 U.S. Dist Lexis 4586 (S.D.N.Y. July 21, 1997), *available at* http://cisgw3.law.pace.edu/cases/970721u1.html; Kahn Lucas Lancaster v. Lark Int'l Ltd., No. 95 Civ. 10506 (DLC), 1997 U.S. Dist. LEXIS 11916, at *16 (S.D.N.Y. Aug. 6, 1997), *available at* http://cisgw3.law.pace.edu/cases/970806u1.html; Schmitz-Werke GmbH & Co. v. Rockland Indus., Inc., 37 Fed. App. 687, 691 (4th Cir. 2002), *available at* http://cisgw3.law.pace.edu/cases/020621u1.html. For other decisions whereby courts similarly neglected CISG's case law resorting instead to the domestic law, see two Canadian examples: Kellogg Brown & Root, Inc. v. Aerotech Herman Nelson Inc. et al., [2004] 238 D.L.R. (4th) 594 (Can.), *available at* http://cisgw3.law.pace.edu/cases/040504c4.html, and Nova Tool & Mold Inc. v. London Indus., Inc., Windsor 97-GD-4131 1, Dec. 16, 1998 (Can.), *available at* http://cisgw3.law.pace.edu/cases/981216c4.html. For a critical assessment of the Canadians courts' treatment of the CISG, *see* Peter J. Mazzacano, *Brown & Root Services v. Aerotech Herman Nelson: The Continuing Plight of the U.N. Sales Convention in Canada*, PACE REV. OF THE CISG (forthcoming 2004-2005), *available at* http://cisgw3.law.pace.edu/cisg/biblio/mazzacano.html#18; and Jacob S. Ziegel, *Canada's First Decision on the International Sales Convention*, 32 CANADIAN BUS. L.J. 313, 325 (1999). For an Australian 'bad' example, *see* Summit Chemicals Pty. Ltd.v. Vetrotex Espana S.A., (2004) 2003

read and correctly apply the CISG provisions dealing with the interpretation of the Convention. This statement by the *RMI* court may lead one to believe that it lacked awareness of the mechanics of the CISG text as well as of the hundreds of commentaries on the CISG (many of them freely accessible). However, this statement by the court in *RMI* is truly only a matter of its administrative convenience.

The *RMI* court had the opportunity to avoid the same mistake previously made by the *Delchi* court. Unfortunately, not only did the court fail to rectify this error, it reiterated the mistakes in the *Delchi* opinion by misapplying the CISG. Several CISG commentators concluded that the *Delchi* court's approach is erroneous.[84] The *RMI* court passively accepted and relied on the approach taken by the *Delchi* without bothering to get into a more critical reading of the decision.

The *Delchi* court first stated that in the interpretation of the CISG provisions, due regard should be given to the international character of the Convention, to the need to promote uniformity in its application, and to the observance of good faith in international trade.[85] However, it did not follow through on its own statements when it later stated, among other questionable rulings,[86] that "caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code may. . . inform a court where the language of the relevant CISG provisions tracks that of the UCC."[87] The *RMI* court applied a very similar approach to the *Delchi* court. The *RMI* court first stated that: (i) there is no American case law on Article 79 and that (ii) it is appropriate to rely on UCC case law to interpret the CISG,

WASC 182 (Supreme Court of Western Australia), *available at* http://cisgw3.law.pace.edu/cases/040527a2.html; *see also* Bruno Zeller, *The UN Convention on Contracts for the International Sale of Goods (CISG)—A Leap Forward Towards Uunified International Sales Laws*, 12 PACE INT'L L. REV. 79 (2000) (commenting on the Australian courts' approach).

[84] *See, e.g.*, V. Susanne Cook, *The UN Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity*, 16 J.L. & COM. 257, 260-63 (1997); Jeffrey R. Hartwig, *Schmitz-Werke GmbH & Co. v. Rockland Industries Inc. and the United Nations Convention on Contracts for the International Sale of Goods (CISG): Diffidence and Developing International Legal Norms*, 22 J.L. & COM. 77, 78 (2003) ("As a result, Delchi Carrier has become questionable precedent on which to rely. [footnote omitted] Schmitz-Werke's use of this precedent appears only to perpetuate a flawed interpretive principle"). *See generally* John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation, in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, 115-265 (Pace Int'l L. Rev. eds. 2000-2001), *available at* http://www.cisg.law.pace.edu/cisg/biblio/felemegas.html. *See also, e.g.*, Murray, *supra* note 9, at 370; Eric C. Schneider, *Consequential Damages in the International Sale of Goods: Analysis of Two Decisions*, 16 U. PA. J. INT'L BUS. L. 618,668 (1995); Zeller, *supra* note 83, at 88; Clemens Pauly, *The Concept of Fundamental Breach as an International Principle to Create Uniformity of Commercial Law*, 19 J.L. & COM. 221, 235-36 (2000); Bailey, *supra* note 35, at 288 ("The Second Circuit's decision in Delchi Carrier SPA v. Rotorex Corp. is an excellent example of the errors that result from the failure to interpret and apply the Convention as an international, rather than a domestic, body of law" (footnote omitted)).

[85] Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1028 (2d Cir. 1995).

[86] *See* Felemegas, *supra* note 84, at n. 86:

> The Delchi decision has received extensive and strong, but valid criticism regarding the court's failure to grasp the Convention's spirit of internationalism. This is evident in the methodology it followed in resolving most of the issues at hand, from the applicability of CISG and its discussion of concepts of 'fundamental breach' and 'foreseeability,' to its damages and pre-judgment interest award [footnotes omitted].

See also Bailey, *supra* note 35, at 289.

[87] *See Delchi*, 71 F.3d at 1028.

because the excuse requirements under the CISG are similar to the UCC.[88] How useful can it be to adopt the reasoning of *Delchi*, which unleashed hundreds of pages of contemptuous comments? Would it not be better to do what the decision in *Delchi* preached (UCC case law is not *per se* applicable) rather than what the court actually did (relied on UCC case law since the language of the CISG tracks that of the UCC)? Such an approach would finally redeem the American courts from much of the criticism raised by many commentators.[89]

The *RMI* court, although it cited the *Chicago Prime Packers* for the purposes of reinforcing its approach with regard to UCC case law, it neglected to take into consideration how the *Chicago Prime Packers* court confronted the absence of American case law concerning the CISG. In *Chicago Prime Packers,* the court did not follow the practice set forth by the *Delchi* court, but instead it followed what the *Delchi* court preached.[90] A more careful reading of the *Chicago Prime Packers* decision shows that it sets forth a commendable example of how American courts should deal with foreign decisions. Seven foreign decisions are considered by the *Chicago Prime Packers* court in dealing with the issues at trial.[91] For this reason it has been noted that:

> In *Chicago Prime Packers, Inc.* the Court promotes uniformity in the application of the CISG by looking to more foreign cases than any other available secondary authority. In fact, this case cites more foreign cases than any other previous American decision on the CISG. The decision represents great progress in the development of the Convention.[92]

Finally, the *Chicago Prime Packers* court cites *Usinor Industeel v. Leeco Steel Products, Inc.*,[93] which stated that "federal caselaw interpreting and applying the CISG is scant,"[94] but also noted that "[w]hile this case [an Australian case] is far in distance from the present jurisdiction, commentators on the CISG have noted that courts should consider the decisions issued by foreign courts on the CISG."[95] Thus, the cases cited by the *RMI* court in support of the ruling concerning the use of domestic law for purposes of interpreting the CISG quite clearly are not in accord with the actual outcome.

---

[88] Raw Materials, Inc. v. Manfred Forberich GmbH & Co., KG, No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 (N.D. Ill. July 6, 2004), at *13.

[89] *See, e.g.*, Flechtner, *supra* note 64.

[90] *Delchi*, 71 F.3d at 1028. The Court stated that "[t]he Convention directs that its interpretation be informed by its international character and . . . the need to promote uniformity in its application and the observance of good faith in international trade." (internal quotations omitted).

[91] *See* Chi. Prime Packers, Inc. v. Northam Food Trading Co., 01 C 4447, 2003 U.S. Dist. LEXIS 9122 (N.D. Ill. May 25, 2003), *available at* http://cisgw3.law.pace.edu/cases/030529u1.html

[92] *See* Annabel Teiling, *CISG: U.S. Court Relies on Foreign Case Law and the Internet*, Uniform Law Review/Revue de droit uniforme 431-435 (2004), *available at* http://cisgw3.law.pace.edu/cisg/biblio/teiling.html.

[93] Usinor Industeel v. Leeco Steel Prods., Inc., 209 F.Supp.2d 880 (N.D.Ill. 2002).

[94] *Id.* at 884.

[95] *Id.* at 886.

B. Caselaw Interpreting the UCC's Provisions on Excuse Provides Guidance for Interpreting the CISG's Excuse Provision[96]

Once again, this approach directly contradicts the plain language of CISG Article 7(1).[97] The approach is erroneous for two reasons: First, the CISG in general should be interpreted "autonomously";[98] second, the excuse provision under the UCC is quite different from CISG Article 79, both in terms of its requirements and its consequences. This section discusses the first of the mistakes made by the *RMI* court. The following sections will discuss the second.

The following material contains extensive quotations from several authors. The quoted material is self-explanatory and does not require elaboration on what the cited authors say. The goal is to provide some evidence that it is not accurate to imply that U.S. courts resort to UCC case law because it is difficult to access CISG material and that U.S. courts should not rely on the UCC at all in interpreting CISG provisions. The following material is readily available, whether through databases such as Westlaw or Lexis or, free of charge, from the Pace University database, to judges and practitioners who really want to know more about the CISG. The approach taken by the *RMI* court is so disrespectful to the CISG and the other courts that directly quote well-known legal authorities, best highlight the court's missteps. In essence, what the sources herein cited all say is the very same thing, in different ways: the CISG should not be construed and interpreted through domestic concepts. With this in mind, we can now read what these authors have to say about the CISG-UCC relationship.

Professor Ferrari is very clear about the dangers that may result from reading the CISG through the UCC:

Although the UCC has greatly influenced the CISG, it is impossible and even perilous to assert that the aforementioned sets of rules are similar in content, or, even worse, that they "are sufficiently compatible to support claims of overall consistency." An awareness of the UCC's influence might aid in understanding the CISG, especially with respect to issues that the Convention's legislative history demonstrates as influential. It is, however, impermissible and dangerous to assert that the concepts of the CISG and UCC are analogous. The comparison is

---

[96] Raw Materials, Inc. v. Manfred Forberich GmbH & Co., KG, No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 (N.D. Ill. July 6, 2004), at *12.

[97] Listing commentaries that reach the very same conclusion would be too extensive to report. *See, e.g.*, HONNOLD, *supra* note 67, at § 87("[T]he reading of a legal text in the light of the concepts of our domestic legal system [is] an approach that would violate the requirement that the Convention be interpreted with regard to its international character"); *see also* John Felemegas, *An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals*, 15 PACE INT'L L. REV. 91, 114-121 (2003).

[98] Consider, for example, Richteramt Laufen des Kantons Berne [RA] [District Court], May 7, 1993 (Switz.), *available at* http://cisgw3.law.pace.edu/cases/930507s1.html ("[T]he CISG requires uniform interpretation on grounds of its multilaterality, whereby special regard is to be had to its international character (Art. 7(1) CISG). Therefore, it is supposed to be interpreted autonomously and not out of the perspective of the respective national law of the forum"); Bundesgerichtshof [BGH] [Fed. Ct. of Justice] Apr. 3, 1996 VIII ZR 51/95, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/960403g1.html ("The CISG is different from German domestic law, whose provisions and special principles are, as a matter of principle, inapplicable for the interpretation of the CISG (Art. 7 CISG)"); Handelsgericht des Kantons Aargau, [Commercial Court] Dec. 19, 1997, OR.97.00056 (Switz.), *available at* http://cisgw3.law.pace.edu/cases/971219s1.html.

dangerous because it makes one believe – erroneously – that the concepts of the CISG correspond to those of the UCC and can therefore be interpreted in light of the UCC. But this is impermissible since a similar approach conflicts with the principle, expressly laid down in Article 7(1) of the CISG, that the CISG and its concepts must be interpreted in light of its international character and the need to promote uniformity on its application [footnotes omitted].[99]

Similar concerns were recently reiterated by the American Law Institute and National Conference of Commissioners on Uniform State Laws in a note on Amended UCC Article 2:

> When parties enter into an agreement for the international sale of goods, because the United States is a party to the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Convention may be the applicable law. Since many of the provisions of the CISG appear similar to provisions of Article 2, the committee drafting the amendments considered making references in the Official Comments to provisions in the CISG. However, upon reflection, it was decided that *this would not be done because the inclusion of such references might suggest a greater similarity between Article 2 and the CISG than in fact exists* (emphasis added).[100]

The note also explains:

> The principle concern was the possibility of an inappropriate use of cases decided under one law to interpret provisions of the other law. This type of interpretation is contrary to the mandate of both the Uniform Commercial Code and the *CISG* (emphasis added). Specifically, Section 1-103(b) of the Code directs courts to interpret it in light of its common-law history. This was an underlying principle in original Article 2, and these amendments do not change this in any way. On the other hand, the *CISG* specifically directs courts to interpret its provisions in light of international practice with the goal of achieving international uniformity. See

---

[99] Franco Ferrari, *The Relationship Between the UCC and the CISG and the Construction of Uniform Law*, 29 LOY. L.A. L. REV. 1021 (1996). *See also* Jacob S. Ziegel, *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives, in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS § 9.02 (Nina M. Galston & Hans Smit eds., Juris Pub. 1984), *available at* http://www.cisg.law.pace.edu/cisg/biblio/ziegel6.html:

> The general drafting style of the Vienna provisions follows the familiar civilian models in its succinctness and brevity, and in its emphasis on broad statements of principle and general lack of situational settings. To those familiar with the baroque style of Article 2 of the Uniform Commercial Code the contrast will be striking.

Louis F. Del Duca & Patrick Del Duca, *Practice Under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders*, 29 UCC L.J. 99, 157 (1996), *available at* http://www.cisg.law.pace.edu/cisg/biblio/delduca.html ("Many similarities between the CISG and the UCC are readily observable . . . Nonetheless, serious pitfalls await those who assume that the differences between the CISG and otherwise applicable law, such as the United States' UCC, are of no moment.").

[100] AMERICAN L. INST. & NAT'L CONFERENCE OF COMM'R ON UNIFORM STATE LAWS, UCC § ART. 2, NOTE, AMENDMENTS TO UNIFORM COMMERCIAL CODE ARTICLE 2. (2004).

> *CISG* art. 7. This approach specifically eschews the use of domestic law, such as Article 2, as a basis for interpretation.[101]

It seems clear, therefore, that many secondary legal authorities expressly warn against the dangers of relying on UCC case law and, in general, on UCC concepts, for purposes of construing and applying the CISG.

C. Caselaw Interpreting the UCC's Provisions on Excuse Contains Similar Requirements as Those Set Forth in Article 79[102]

A better, more informed approach to Article 79 suggests quite the opposite conclusion from that reached by the *RMI* court. With reference to Article 79, several authors have noted that "interpretation of the concept 'impediments' in Article 79 ought not be guided exclusively by (sometimes too narrow) notions of Anglo-American law."[103]

To better illustrate that the two provisions are simply not similar, it is useful to first read the actual language of Article 79 and then compare it with UCC § 2-615. Article 79 provides that:

> (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

---

[101] *Id. See also* Flechtner, *supra* note 64. *See* Calzaturificio Claudia s.n.c. v. Olivieri Footwear, Ltd., 96 Civ. 8052 (HB)(THK), 1998 U.S. Dist. LEXIS 4586 at *14 (S.D.N.Y Apr. 6, 1998): ("Where controlling provisions are inconsistent, it would be inappropriate to apply UCC caselaw in construing contracts under the CISG.").

[102] Raw Materials, Inc. v. Manfred Forberich GmbH & Co., KG, No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 *12 (N.D. Ill. July 6, 2004).

[103] *See* HERBERT BERNSTEIN & JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN EUROPE 32 (2d ed. 2003); *see also* FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 319 (1992), *available at* http://cisgw3.law.pace.edu/cisg/biblio/enderlein.html#art79:

> It is in our view important to stress that the Convention has developed a *concept of its own in regard to impediments*, which cannot be directly traced back to any national law. This saves from borrowing from a domestic law in interpretation, which could be very misleading, especially when it comes to one's own domestic law.

Id.

> 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.[104]

UCC § 2-615, on the other hand, provides as follows:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
>
> (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.[105]

Even a very quick reading of the provisions reveals that the two provisions are not similar at all. In this regard, in comparing them, consider Professor Honnold's comments on Article 79. He expressly warns against the temptation of reading Article 79 through domestic concepts. Article 79's requirements, although resembling domestic concepts, are to be read in the context of the CISG, not through domestic law. It is not only that Article 79 has its own requirements, but also that the CISG expressly provides for the interpreter to read and apply the CISG in light of the CISG's principles.

> Domestic rules in this area often bear a family resemblance to each other and to Article 79 of the Convention but a penetrating study by Professor Nicholas exposes the hazards of relying on "superficial harmony which merely mutes a deeper discord" [footnote omitted]. The Convention (Art. 7) enjoins us to interpret its provisions "with regard for its international character and . . . the need to promote uniformity in its application." This goal would be served if we could (as by a draft from Lethe) purge our

---

[104] CISG Article 79, 52 Fed. Reg. 6262-80, 7737 (1987), *available at* http://www.cisg.law.pace.edu/cisg/text/e-text-79.html.

[105] U.C.C. § 2-615 (1998).

> minds of presuppositions derived from domestic traditions and, with innocent eyes, read the language of Article 79 in the light of the practices and needs of international trade. In the absence of such innocence, the preconceptions based on domestic law may be minimized by close attention to the differences between domestic law and the Convention.[106]

Interestingly, even the UNCITRAL recently addressed the problem of reading the CISG relying on domestic concepts, with an express reference to Article 79. The wording of Article 79 deliberately avoided referencing concepts that might induce interpreters to apply their own set of legal concepts. Thus, in approaching Article 79, judges and practitioners should bear in mind that:

> Article 79 of CISG offers an example of this drafting style [aimed at avoiding the use of legal concepts typical of a legal tradition], as it does not refer to terms typical of the various domestic systems such as "hardship", "force majeure" or "Acts of God", but provides instead a factual description of the circumstances that may excuse failure to perform. The choice of breaking down sophisticated legal concepts, often bearing elaborate domestic interpretative records, into their factual components is evident in the replacement of the term "delivery of goods" with a set of provisions relating to performance and passing of risk. Similarly, the use of the notion of "avoidance of the contract" in the Convention introduces a legal concept that may overlap on a number of well-known domestic concepts and calls for autonomous and independent interpretation.[107]

Fortunately, the scope and the content of Article 79 is described in several authoritative writings, and is easily accessible by everyone, even those with little familiarity of the American legal system. In general, the main differences between Article 79 and UCC § 2-615 can be summarized as follows:

> [Article 79] differs in several ways from the approach of the Uniform Commercial Code. UCC § 2-615 provides excuse only for the seller, and only as to two aspects of performance: "delay in delivery" and "non-delivery" [footnote omitted]. Under CISG Article 79(1), on the other hand, *either* party may be excused from liability for damages, 'for failure to perform any of his obligations.' Thus, while the threshold test for excuse under the CISG may be stricter than that found in the UCC, its benefits are available in a wider set of circumstances. At the same time, however, paragraph (5) of Article 79 limits these benefits to escaping the obligation to pay damages and does not prevent the other party 'from exercising any [other] right' available under the CISG.[108]

---

[106] HONNOLD, *supra* note 67, at § 425; *see also* Peter Schlechtriem, *Interpretation, Gap-filling and Further Development of the U.N. Sales Convention*, 16 PACE INT'L L. REV. 279, 289 (2004).

[107] U.N. Comm'n on Int'l Trade Law, *Introduction to the Digest of Case Law on the United Nations Sales Convention, Note by the Secretariat*, ¶ 5, U.N. Doc. A/CN.9/562 (Jun. 9, 2004), *available at* http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html.

[108] Ronald A. Brand, *Article 79 and a Transaction Test Analysis of the CISG*, *in* THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION

In particular, compare the consequences of the occurrence of the contingency under the two sets of rules. "UCC § 2-615 operates to make the relevant non-performance 'not a breach.' Thus, it provides full excuse. On the contrary, CISG Article 79 provides relief only from the obligation to pay damages. Other obligations remain intact [footnote omitted]."[109]

D. Forberich Does Not Dispute that this is Proper and, in Fact Points to Caselaw Interpreting the UCC[110]

It is very interesting that the *RMI* court specifically includes in its reasoning for justifying its reliance on UCC case law the fact that Forberich did not complain about the court's approach. The *RMI* court noted that (1) Forberich had not disputed the mistake made by the court in relying on UCC's case law, and (2) that Forberich itself had referred to UCC case law.[111] This final piece of justification is debatable as well. The mere fact that the party, mistakenly or strategically, did not raise the issue, does not shield the court from criticism for its faulty approach.

One final comment: in line with the erroneous approach taken, the *RMI* court even cites a case from the Louisiana Court of Appeals dealing with the freezing of the Mississippi River.[112] In order to appreciate the seriousness of the questionable reference made by the court, one should consider: (1) the Louisiana Court of Appeals is a state court that applied domestic state law, not the CISG; (2) Louisiana has not even adopted UCC Article 2, which means that Louisiana case law on impracticability may be different from UCC Article 2 case law; and (3) the Louisiana Appellate Court was called to interpret a contractual *force majeure* clause.

V. What the Court Should Have Done

The *RMI* court should have read Article 79. Although Article 79 may not be the best example of clarity,[113] a court may not simply ignore it and apply domestic concepts to CISG provisions, unless the requirements set forth in Article 7 are met.[114]

CISG Article 7(1) provides: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in

392-407, 393 (Ronald A. Brand, Franco Ferrari, & Harry Flechtner eds., 2004); *see also* HONNOLD, *supra* note 67, at § 423.4 et seq.

[109] *See* Brand, *supra* note 108, at 398; *see also* BERNSTEIN & LOOKOFSKY, *supra* note 103, at 138 nn. 149-50.

[110] Raw Materials, Inc. v. Manfred Forberich GmbH & Co., KG, No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 *13 (N.D. Ill. July 6, 2004).

[111] *Id.*

[112] *Id.* at *21 (citing Louis Dreyfus Corp. v. Cont'l Grain Co., 395 So.2d 442 (La. Ct. App. 1981)).

[113] *See* HONNOLD, *supra* note 67, at § 432.1; *see also* Brand, *supra* note 108, at 394 (citing JACOB S. ZIEGEL & CLAUDE SAMSON, REPORT TO THE UNIFORM LAW CONFERENCE OF CANADA ON CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 150-151 (1981)).

[114] HONNOLD, *supra* note 67, at § 429.

its application and the observance of good faith in international trade."[115] The provision "amounts to a (public international law) command to all Contracting States and their courts: you shall have regard to the character of the treaty, and you shall undertake an independent (autonomous) interpretation."[116] In order to comply with the requirements of CISG Article 7(1), a court should interpret the CISG autonomously, which means that a court should consider the text of the law, legislative history,[117] scholarly writings,[118] and case law[119] together in making its ruling. Professor Honnold explains this duty as follows:

> Consistent with this basic obligation of fidelity, the Convention's general rules for a diverse, complex and developing field should not be applied narrowly but should be given full effect to achieve their underlying purpose as shown by the structure of the Convention and its legislative history. [footnote omitted] At this point several of Article 7's rules of interpretation converge: (1) Regard for the Convention's 'international character' requires a sensitive response to the purposes of the Convention in the light of its legislative history rather than the preconceptions of domestic law; (2) Response to the 'need to promote *uniformity* in . . . *application*'", which calls for consideration of interpretations developed in other countries through adjudication *(jurisprudence)* and scholarly writing *(doctrine)*; (3) Regard for "the observance of *good faith* in interna-

---

[115] *See* CISG Article 7.

[116] *See* St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, No. 00 Civ. 9344 (SHS), 2002 U.S. Dist. LEXIS 5096 *8 (S.D.N.Y. Mar. 26, 2002):

> The CISG aims to bring uniformity to international business transactions, using simple, non-nation specific language . . . To that end, it is comprised of rules applicable to the conclusion of contracts of sale of international goods . . .. In its application regard is to be paid to comity and interpretations grounded in its underlying principles rather than in specific national conventions [internal citations omitted].

See generally BERNSTEIN & LOOKOFSKY, *supra* note 103; Gyula Eörsi, *General Provisions*, *in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS §§ 2.1 to 2.04 (Nina M. Galston & Hans Smit eds., 1984); Michael Joachim Bonell, *Comments on Article 7*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW 65-94, 73 (Cesare Massimo Bianca & Michael Joachim Bonell eds. 1987). Bruno Zeller, *The Development of Uniform Laws – An Historical Perspective*, 14 PACE INT'L L. REV. 163, 167 (2002).

[117] For the legislative history of CISG Article 79, *see* Text of Secretariat Commentary on Article 65 of the 1978 Draft [draft counterpart of CISG Article 79] *available at* http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-79.html; *See also* Joern Rimke, *Force Majeure and Hardship: Application in International Trade Practice with Specific Regard to the CISG and UNIDROIT Principles of International Commercial Contracts*, *in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 221 (Pace Int'l L. Rev. eds. 1999-2000) (Although the legislative may be useful, many times "recourse to such materials must not be overestimated"); Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales*, 24 GA. J. INT'L & COMP. L. 183, 206.

[118] For selected bibliography concerning CISG Article 79, visit Unilex web site at http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13359 or Pace University CISG database at http://cisgw3.law.pace.edu/cisg/text/e-text-79.html#schol. *See* Lookofsky, *supra* note 47, at 221 (Professor Lookofsky indicates that "CISG scholarly writing (*doctrine*) . . . May sometime provide the *only* reliable available information as to why courts and arbitrators have ruled as they do" (alterations in the original)).

[119] *See* Mot. for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of the Int'l Assoc. of Contract and Comm. Managers and the Inst. of Int'l Comm. Law of the Pace Univ. School of Law on Pet. for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, at 4-5, Zapata Hermanos Sucesores v. Hearthside Baking Co., cert. denied 540 U.S. 1068 (2003) (No. 02-1318).

> tional trade", a principle that . . .can resist stultification and circumvention of the Convention's rules; and (4) Questions not expressly settled by the Convention should be answered, when possible, "in conformity with the *general principles* on which it is based," an approach that reinforces regard for both the Convention's '*international* character' . . .and "the need to promote *uniformity*."[120] (emphasis in the original)

Having in mind these guidelines, pursuant to CISG Article 79, the *RMI* court was required to establish: (i) whether the contingency that occurred met the "impediment" requirements under Article 79; (ii) whether Forberich's failure to perform was due to an "impediment" that was "beyond [its] control;" (iii) whether Forberich could not have been reasonably expected to take the impediment into account at the time of the conclusion of the contract; (iv) whether Forberich could not reasonably be expected to avoid or overcome the impediment or its consequences; (v) whether Forberichs's failure to perform is due to the impediment; and (vi) whether the notice requirements have been met.

A. Whether the Contingency that Occurred Met the "Impediment" Requirements Under Article 79

The first issue that the *RMI* court should have been concerned with should have been whether the event that occurred met the "impediment" requirements under Article 79. The *RMI* court, instead, by applying case law related to UCC § 2-615, applied the "impracticability" test. Relevant CISG case law, however, seems to suggest that "exemption under Article 79 requires satisfaction of something in the nature of an 'impossibility' standard."[121] Now, even under U.S. law, the two concepts are different.[122] A contingency that causes a performance to become an impediment under Article 79 does require something more than the contingency making the performance impracticable.[123] The kind of event re-

---

[120] *See* HONNOLD, *supra* note 67, at § 103.2.

[121] Harry M. Flechtner, *Article 79, in* THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 818, 819 (Ronald A. Brand, Franco Ferrari, & Harry Flechtner eds., 2004), citing Oberlandesgericht Hamburg [OLG] [Court of Appeals] July 4, 1997, 1 U 143/95 and 410 O 21/95, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/970704g1.html; Rechtbank van Koophandel [district court] Hasselt, AR 1849/94, May 2, 1995 (Belg.), *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=263&step=Abstract; Oberlandesgericht Hamburg [OLG] [Court of Appeals] Feb. 28, 1997, 1 U 167/95, (F.R.G.) *available at* http://cisgw3.law.pace.edu/cases/970228g1.html; *See, also, e.g.*, Cour de Cassation, June 30, 2004 Y 01-15.964, (Fr.), *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=981&step=Abstract *aff'g* Cour d'Appel de Colmar, June 12, 2001 (Fr.), *available at* http://cisgw3.law.pace.edu/cases/010612f1.html; Bundesgerichtshof [BGH] [Fed. Ct. of Justice] Mar. 24, 1999, VIII ZR 121/98, (F.R.G.); *See also.*, DiMatteo, *supra* note 38, at 425; Dionysios Flambouras, *Remarks on the Manner in Which the PECL may be Used to Interpret or Supplement Article 79 CISG, available at* http://cisgw3.law.pace.edu/cisg/text/anno-art-79.html.

[122] Mineral Park Land Co. v. Howard, 172 Cal. 289, 293 (Cal. 1916). The California Supreme Court states, "[a] thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost." *Id.*

[123] Bundesgericht [BGer] [Fed. Ct.], Sept. 15, 2000, 4P.75/2000 (Switz.), *available at* http://cisgw3.law.pace.edu/cases/000915s1.html:

> In effect, in order for a supplier to be exempt from liability for a failure to perform any of his obligations in the terms of [CISG Article 79], he must prove that the failure was due to an unpredictable and inevitable impediment, which lies outside his sphere of control, or due to an

quired for purposes of meeting the requirements of Article 79 is an event that "must render proper performance impossible from an objective point of view. It is not the obligor's subjective view that counts."[124]

B. Whether Forberich's Failure to Perform was Due to an "Impediment" that was "Beyond [its] Control"

The impediment must be an event whose occurrence was beyond Forberich's control. This means that "[i]t is necessary to differentiate between external obstacles and those occurring within the obligor's sphere of responsibility. Only external impediments over which he has no influence can exonerate the obligor."[125]

Case law concerning this CISG requirement focuses mainly on two kinds of situations: cases where failure to perform resulted from some kind of governmental action[126] and cases where a third party failed to supply the seller.[127] The facts of the case do not give rise to any issue of whether the contingency was beyond Forberich's control.[128]

The requirement, although not expressly set forth by UCC § 2-615, is implied as a normal requirement applied by American courts.[129] The Restatement (Second) of Contracts, in explaining what could be an event that can give rise to impracticability and/or frustration of purpose defense, states as follows:

> Events that come within the rule stated in this Section [Impracticability of Performance and Frustration of Purpose] are generally due either to 'acts of God' or to acts of third parties. If the event that prevents the obligor's performance is caused by the obligee, it will ordinarily amount to a

overwhelming obstacle, which is not the case in situations within his sphere of control and facts could be attributed to him personally, especially events that affect the supply of the goods.

See also Bundesgericht [BGer] [Fed. Ct.], 4C.105/2000, Sept. 15, 2000 (Switz.), *available at* http://cisgw3.law.pace.edu/cases/000915s2.html. "The determinative facts do not reveal the existence of circumstances that may constitute an unforeseeable or unavoidable impediment, or an obstacle that the [seller] could not reasonably have overcome (*cf.* Neumayer/Ming, op. cit., n. 2 et 4 ad art. 79 CISG)." *Id.*

124 *See* Ulrich Magnus, *Force Majeure and the CISG, in* THE INTERNATIONAL SALE OF GOODS REVISITED 1-33, 14 (Petar Sarcevic and Paul Volken eds. 2001).

125 *Id.*

126 Bulgarska turgosko-promishlena palata [Bulgarian Chamber of Commerce and Industry] Apr. 24, 1996, 56/1995 (Bulg.), *available at* http://cisgw3.law.pace.edu/cases/960424bu.html; Trib. of Int'l Comm. Arb. at the Russian Fed. Chamber of Commerce and Industry, 155/1996, Jan. 22, 1997 (Russ.), *available at* http://cisgw3.law.pace.edu/cases/970122r1.html.

127 Bundesgerichtshof [BGH] [Fed Ct. of Justice] Mar. 24, 1999, VIII ZR 121/98 (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/990324g1.html.

128 Lookofsky & Flechtner, *supra* note 75, at 206. "We might expect the buyer (RMI) in Manfred Forberich to acknowledge that the impediment to performance alleged in this case - the extreme weather leading to the freezing of the harbor in St. Petersburg - lay beyond [Manfred Forberich 's] control [internal quotation omitted]." *Id.*

129 *See* Sink v. Meadow Wood Country Estates, 559 A.2d 725, 728 (Conn. App. 1989), *cert. denied* 564 A.2d 1072 (Conn. 1989); Bloor v. Falstaff Brewing Corp., 454 F. Supp. 258, 267-68 (S.D.N.Y. 1978), *aff'd*, 601 F.2d 609 (2d Cir. 1979); Liner v. Armstrong Homes, 579 P.2d 367 (Wash. Ct. App. 1978); Nodland v. Chirpich, 240 N.W.2d 513 (Minn. 1976); Lowenschuss v. Kane, 520 F.2d 255 (2d Cir. 1975), *on remand*, 72 F.R.D. 498 (S.D.N.Y. 1976); Chemetron Corp. v. McLouth Steel Corp., 381 F. Supp. 245 (N.D. Ill. 1974), *aff'd*, 522 F.2d 469 (7th Cir. 1975).

> breach by the latter and the situation will be governed by the rules stated in Chapter 10, without regard to this Section . . . If the event is due to the fault of the obligor himself, this Section does not apply. As used here 'fault' may include not only 'willful' wrongs, but such other types of conduct as that amounting to breach of contract or to negligence.[130]

The issue of whether or not the breach on the part of the supplier could be construed as an impediment was not considered by the *RMI* court because, regardless of the reason behind the postponement of the delivery date, Forberich and RMI agreed that the term was in fact extended.

C. Whether Forberich Could Not Have Been Reasonably Expected to Take the Impediment into Account at the Time of the Conclusion of the Contract

The standard set forth by Article 79 requires that the party claiming the exemption was *reasonable* in failing to take into consideration (foresee) the occurrence of the impediment at the time of the conclusion of the contract.[131] On the other hand, UCC § 2-615 seems to focus the analysis on whether the nonoccurrence of the supervening event was a basic assumption of the parties to the contract and whether the event was *unforeseen* so as to give rise to impracticability.[132] Some U.S. courts seem not to "cling to that characterization"[133] but rather believe that "[f]oreseeability or even recognition of a risk does not necessarily prove its allocation."[134] Pursuant to this view, an event, even if foreseeable, makes an agreement commercially impracticable if the contingency was not expected by the parties. This test focuses on the particular party's ability to perform, and on whether the performance itself is practicable.

The *RMI* court discussed this issue briefly, concluding that the contingency may not have been *foreseeable* to Forberich. The court did not expressly say that it was unforeseeable, but it came very close when it stated that "the freezing over [of] the upper Mississippi River has been the basis of a successful force majeure defense."[135] The showing made by Forberich that the event was "unexpected" was good enough for the *RMI* court. For the purposes of ruling, the court held that there was a question of material fact to be decided by the jury and dismissed the motion.

Under the CISG, given the status of United States case law, the conclusion likely would be the same. Again, the extent of the contingency apparently could

---

130 RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d. (1979)

131 *See* Magnus, *supra* note 124, at 17.

132 *See* U.C.C. § 2-615, cmt. 1 ("Unforeseen supervening circumstances not within the contemplation of the parties") and U.C.C. Section § 2-615, cmt. 4 ("Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance"). *See also* Waldinger v. C.B.S. Group Eng'rs., Inc., 775 F.2d 781, 786 (7th Cir. 1985).

133 JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 640 (3d ed. 1990).

134 Opera Co. of Boston v. Wolf Trap Found. For Performing Arts, 817 F.2d 1094 (4th Cir. 1987).

135 Raw Materials, Inc. v. Manfred Forberich GmbH & Co., KG, No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 *13 (N.D. Ill. July 6, 2004).

not have been foreseeable to anyone.[136]Similarly, even if the relevant time was the time when the delivery date was changed, and not the time the original agreement was concluded, the contingency/impediment was not foreseeable.

D. Whether Forberich Could Not Reasonably be Expected to Avoid or Overcome the Impediment or its Consequences

The standard set forth by Article 79 requires that the party claiming the extension could not be reasonably expected to avoid or overcome the impediment or its consequences.[137] The requirements set forth by Article 79 once again focus on the party's objective inability to avoid or overcome the event or its consequences. "Even if an unforeseen impediment hinders performance, the obligor is not allowed to simply give up. He must take reasonable steps to effect performance or find an agreeable substitute if possible."[138]

Under UCC § 2-615, with reference to the performance, "[t]he issue of impracticability should no doubt be an objective determination of whether the promise can reasonably be performed rather than a subjective inquiry into the promisor's capability of performing as agreed."[139] Thus, the focus of the impracticability analysis is on the nature of the agreement and the expectations of the parties.[140]

In any event, under the circumstances of *RMI,* even if Forberich was only required to load the goods by December 31, 2002, at the beginning of December the port was completely frozen, no vessel could either enter or leave the port, and because this had not occurred in the previous sixty years, it did not leave much room to believe that Forberich could have avoided non-performance or tried alternative ways of performing.[141]

E. Whether Forberichs's Failure to Perform is Due to the Impediment

Although the issue of whether domestic law or a "uniform notion of causality . . . under the CISG"[142] should determine the causation requirement, generally, Article 79 and UCC § 2-615 require a causal connection between the event and

---

[136] Lookofsky & Flechtner, *supra* note 75, at 207. "The fact that the (early winter) weather conditions in St. Petersburg were (as described by [*Manfred Forberich*]) the 'worst in 50 years', the district court might - consistently with foreign CISG precedents on the foreseeability issue - classify the impediment in question as 'unforeseeable' at the time of contracting." *Id.*

[137] *See* Magnus, *supra* note 124, at 18.

[138] *Id.*

[139] Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir.1966).

[140] Alimenta (U.S.A.), Inc. v. Cargill, Inc. (Canada), 861 F.2d 650 (11th Cir. 1986).

[141] *See* Arrondissementsrechtbank [Rb] [district court] Rotterdam, July 12, 2001, HA ZA 99-529 (Neth.) *available at* http://cisgw3.law.pace.edu/cases/010712n1.html:

> The Court orders the [Seller] to evidence these factors. More specifically, it will have to show that, as a result of the enduring frost, during the relevant period, no other Ellendales [mandarins] were available which met the agreed standard, and also, that the [Seller] could not reasonably be expected to have taken the enduring frost and the possibility that it may not be able to fulfill its obligation to deliver these mandarins into account at the time of the conclusion of the contract.

[142] *See* Magnus, *supra* note 124, at 18.

the obligor's failure to perform; therefore, similar results are likely to result under both. Issues related to the alleged default by Forberich's supplier (Imperio Trading) were not really put forward by Forberich. Thus, there is no reason to get into this line of "defenses," which are quite common under Article 79.[143] So, the only impediment we are left with is that the St. Petersburg port was frozen some time at the beginning of December 2002. Assuming that Forberich was merely required to load the goods on the ship by December 31, 2002, the facts lead us to reasonably believe that Forberich's failure to perform was due to the impediment. However, if Forberich was required under the amended terms of the contract to *deliver* the goods by December 31, 2002, then the port's conditions would not excuse Forberich from its failure to perform because Foreberich would have had to load the goods at least 3-4 weeks prior to delivery to account for the shipping time.

F. Article 79 Notice Requirement

Article 79 requires the obligor to promptly notify the obligee about the impediment and its effects.[144]

Notice requires no special form; however, the obligor must specify the type of impediment and its impact on performance, especially whether it is final or temporary, partial or complete. Furthermore, notice must be given to the obligee within a reasonable time after the obligor knew or ought to have known about the impediment.[145] Failure to give the notice within a reasonable time may result in liability for those damages incurred by the other party, which a timely notice could have avoided.[146] Similarly, UCC § 2-615, provides that "[t]he seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required . . . of the estimate quota thus made available for the buyer."[147]

In *RMI*, the requirement was met when Forberich, on January 10, 2003, informed RMI that it could not ship the rails because the port had been frozen for the previous three weeks, preventing it from fulfilling its obligations.[148]

VI. Assuming the Court Applied the Wrong Standard, as in fact it did, is the Ultimate Outcome Nonetheless in Line with the CISG Provisions?

The difference between the approaches of UCC § 2-615 and CISG Article 79, under the facts of *RMI,* does not impact the outcome resulting from the application of requirements of the two sets of rules. It must be said, in fact, that the

---

143 *See id.* at 17.

144 *See id.* at 22.

145 *Id.* at 22.

146 *Id.*

147 U.C.C. § 2-615(c) (1998).

148 Raw Materials, Inc. v. Manfred Forberich GmbH & Co., KG, No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 *13 (N.D. Ill. July 6, 2004).

outcomes resulting from the application of the CISG or the UCC in this case would be similar.[149] It must be clearly understood, however, that it is only because the event that occurred in the present case was so severe as to meet the more stringent requirements of Article 79 that the two results are the same.[150] In the present case, performance[151] was not only impracticable, but also objectively impossible. So, at least at this stage, the court ended up getting the correct result even though it applied the wrong standard.

This conclusion, however, must be qualified for another reason. Given the particular phase in which the dispute is presented to the court, a major point that was not fully developed concerns the terms of the extension of the delivery date (the actual date set for the delivery and whether Forberich was required to deliver the goods to the United States by that date or whether Forberich was merely required to load the goods by that date). If Forberich was required to deliver the goods by December 31, 2002, it is clear that Forberich would not be excused under the CISG nor the UCC because the good would have had to leave St. Petersburg before it froze at the beginning of December 2002. Moreover, it must be noted that the facts were not fully reviewed by the court as the impediment/ impracticability issue was raised within a summary judgment motion.

Finally, another difference may arise when the courts have to determine the consequences of the occurrence of the contingency. This problem did not come up before the *RMI* court given the particular procedural posture in which the issue was raised, but it would certainly come up at a later procedural stage. As stated earlier, the CISG provides exemption for the failure to perform *any* obligation even though it does not prevent either party to the contract from exercising any right other than to claim damages under the Convention.[152] On the other hand, UCC § 2-615 operates to cure the breach of the relevant non-performance.[153] Thus, if the impracticability occurred due to a supervening event, the existing duty is discharged under the UCC.[154] On the contrary, CISG Article 79

---

[149] *See* Lookofsky & Flechtner, *supra* note 75, at 205 ("We make this (very negative) assessment of [the *RMI* decision] notwithstanding the fact [the] 'apparent soundness of result.'").

[150] *See id.* at 206. ("In any event, it seems undeniable that the extreme winter conditions in St. Petersburg qualify as an 'impediment' in the Article 79 sense.")

[151] Assuming that the Seller was only required to load the goods by Dec. 31, 2002.

[152] These rights include those provided for in Articles 46, 49, 50 and 78. *See* Brand, *supra* note 108, at 394, n.4; Magnus, *supra* note 124, at 22.

[153] Magnus, *supra* note 124, at 22.

[154] *See* MURRAY, *supra* note 133, at 659; Jan Hellner, *The Vienna Convention and Standard Form Contracts*, *in* INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 353 (Petar Šarcevic and & Paul Volken eds. 1986).

> According to the express provisions of Art. 79(5), nothing in the article prevents either party from exercising any right other than to claim damages under the Convention. This means that even if the seller is exempted, the buyer retains his right to declare the contract avoided if the breach is fundamental or if there is no delivery within the *Nachfrist*. The buyer may even claim performance of the contract. [footnote omitted].

Id. Whether performance can be sought and obtained is, of course, a quite different matter when the performance is impossible. PETER SCHLECHTRIEM, UNIFORM SALES LAW—THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 102 (1986).

provides relief only from the obligation to pay damages.[155] Other obligations remain intact.[156] In fact,

> Subsection (5) makes it clear that article 79 has only a limited effect on the remedies available to the party that has suffered a failure of performance for which the non-performing party enjoys an exemption. Specifically, article 79(5) declares that an exemption precludes only the aggrieved party's right to claim damages, and not any other rights of either party under the Convention.[157]

The next issue, however, is how the RMI court would deal with the legal consequences of the occurrence of an impediment? If the *RMI* court persists in the same approach of looking at the UCC to interpret the CISG, there would be little doubt that the outcomes under the rules of the UCC and the CISG differ greatly. If the *RMI* court instead returns to CISG Article 79 for purposes of determining the consequences, how is the court going to explain its approach given its previous reliance on the UCC?

At this point, a few commentators have already expressed concerns over the *RMI* court's methodology. One commentator in particular acknowledges that it might be difficult for judges not to resort to familiar concepts, but clearly condemns this practice and, particularly, with reference to the *RMI* court, it clearly disapproves of the quickness in bypassing the CISG in favor of a more familiar UCC. Consider the following clear and concise comment on the court's approach in *RMI*:

> Steeped in the traditions of their domestic law, courts naturally gravitate to a comparison of their vested domestic law principles in the interpretation of a uniform international law. This proclivity, however, threatens to undermine the essential uniformity principle that is the essential basis for CISG. It is one thing to consider an analogous application of domestic law as a guide. It is quite another to conclude without a careful analysis that the domestic law is symmetrical. While the result in this case may be clearly in accord with the governing principle of Article 79, the haste with which the court simply adopted UCC § 2-615 as identical to Article 79 suggests a judicial methodology that is not in accordance with the underlying philosophy of CISG.[158]

---

[155] *See* Magnus, *supra* note 124.

[156] *See* Brand, *supra* note 108, at 394 n.4.

[157] *See* Flechtner, *supra* note 121, at 819.

[158] *See* ARTHUR L. CORBIN 14-74 CORBIN ON CONTRACTS, Supp. to § 74.8 (2005). Of course, I read the reference to resorting to "an analogous application of domestic law as a guide" as meaning that it is appropriate to resort to domestic CISG case law as a guide. If it is not what the author has meant, this is an example of how difficult it can be to truly entertain an autonomous interpretation of the CISG freed from domestic models. *See also* Franco Ferrari, *The CISG's Uniform Interpretation by Courts—An Update*, 9 VINDOBONA J. OF INT'L COM. L. & ARB. 233, 237 (2005) (stating that the RMI's approach violates CISG Article 7 as well as the very rationale behind the CISG).

VII. Conclusion

In conclusion, the *RMI* court's approach to the CISG is an example of how things should not be done. As stated by Professors Lookofsky & Flechtner:

> [T]he patently improper approach to interpreting and applying the CISG taken by the U.S. District Court in [*RMI*] is a depressing development that tends to bring international disrepute on the CISG jurisprudence of U.S. courts. We sincerely hope the case is soon buried and forgotten, except perhaps as an example of an interpretational methodology to be avoided at all costs.[159]

The mere fact that the ultimate outcome might have been correct, even though the *RMI* court applied the wrong methodology, should not somehow redeem the decision from its mistakes and implications.[160] The *RMI* decision undermines the commendable work done by other United States courts and gives the opportunity to unleash waves of valid criticism against a hard to die homeward trend that too many courts in the United States have passively displayed.

---

[159] *See* Lookofsky & Flechtner, *supra* note 75, at 208.

[160] *Id.* at 205. "We make this (very negative) assessment of [RMI] notwithstanding the fact that 'apparent soundness of result' is entitled to at least some weight on our own precedential scale, *i.e.*, even though the court might have reached the 'right' result in denying plaintiff's motion for summary judgment." *Id.* As Professor Murray stated in commenting on the *Delchi* decision where the court applied the "familiar" foreseeability test of *Hadley v. Baxendale* instead of CISG Article 74, "[a]s applied to the facts of this particular case, the result would not change regardless of which test had been applied. The harm, however is to precedent." *See* Murray, *supra* note 9, at 370.