

Unreliable Excuses: How Do Differing Persuasive Interpretations of CISG Article 79 Affect Its Goal of Harmony?

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[The states party to the CISG], . . . [being of the opinion] that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade, [have agreed] as follows: . . .¹

I. Introduction

The United Nations Convention on Contracts for the International Sale of Goods (CISG)² “can be regarded as one of the most successful attempts in international commercial law to harmonize divergent legal concepts and principles from various national laws and legal systems.”³

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1. See United Nations Convention on Contracts for the International Sale of Goods, Preamble (U.N. Convention on CISG), April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (highlighting the purpose of the CISG).
 2. See U.N. Convention on CISG, April 11, 1980, 1489 U.N.T.S. 3 (1993); see also U.S. Ratification of 1980 U.N. Convention on Contracts for the Int’l Sale of Goods, 52 Fed. Reg. 40 (Mar. 2, 1987) (outlining the CISG); The CISG became effective January 1, 1988. See also *Valero Mkt. & Supply Co. v. Greeni Oy & Greeni Trading Oy*, 373 F. Supp. 2d 475, 479 (D.N.J. 2005) (citing to 15 U.S.C. app. at 332) (providing general information on the CISG).
 3. See Peter J. Mazzacano, *Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG*, 2 NORDIC J. COM. L. 1, 49 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1982895 (stating that CISG bridges civil and common law).

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The CISG supplies a default uniform international commercial sales law⁴ to seventy-eight ratifying countries, who collectively account for over three-quarters of the world's international trade.⁵ Because a U.S. trader engaging in an international sale or purchase of goods, absent an express and effective choice to be governed by other law,⁶ will very likely be bound by the provisions of the CISG, U.S. traders and their legal advisors should understand the benefits and limitations of the CISG.

As an international treaty, the sources of interpretation for the CISG relied on by courts and tribunals, such as scholarly commentary, the *travaux préparatoires* (legislative history of the treaty), arbitral awards, and the decisions of foreign courts are generally persuasive and not binding.⁷ Despite lacking precedential force, these sources can have strong persuasive authority

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4. Under CISG art. 1.1(a), the CISG applies most directly when each of the parties to the sales contract has its place of business in a different ratifying country. See U.N. Convention on CISG art. 1.1(a), Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M. The CISG may apply in other circumstances, as well: “the CISG may also apply if only one of the parties has its place of business in a ratifying country, but the forum’s choice-of-law rules point to the law of that ratifying country, which law includes the CISG.” See U.N. Convention on CISG art. 1.1(b), Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M.; see also U.N. Convention on CISG art. 10, Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M. (providing a test for determining the applicable “place of business” when a party does business in more than one place). Thus, for example, if a party with its place of business in the ratifying country of France contracts with a party with its place of business in the non-ratifying country of England, the CISG will apply if the forum’s choice-of-law rules select the domestic law of France as the applicable law. The United States, however, declared a reservation to the CISG under Article 95, permitting it to adopt the CISG without Article 1.1(b). See *Valero Mkt. & Supply Co. v. Greeni Oy & Greeni Trading Oy*, 373 F. Supp. 2d 475, 482 (D.N.J. 2005) (explaining that the reservation was inapplicable because Finland and the United States were both signatories to the CISG). Thus, if one of the parties has its place of business in the United States, then the CISG will apply only if the other party has its place of business in a ratifying country, thus satisfying Article 1.1(a). See *id.* at 482. See also Charles R. Calleros, *Toward Harmonization and Certainty in Choice-of-Law Rules for International Contracts: Should the U.S. Adopt the Equivalent of Rome I?*, 28 WIS. INT’L L.J. 639, 644–45 n.17 (2011) (describing how harmonization of interpretations will reduce risks in contract formation). Under Article 6, however, the parties may opt out of the CISG in their contract: “The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.” See U.N. Convention on CISG art. 6, April 11, 1980, 1489 U.N.T.S. 3 (describing the ability for parties to opt out of the CISG).
 5. See Pace University Law School CISG Database: CISG Table of Contracting States, <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> (tabulating CISG members); see also Christopher C. Kokoruda, *The UN Convention on Contracts for the International Sale of Goods—It’s Not Your Father’s Uniform Commercial Code*, 85 FLA. B.J. 103, 103 (providing a count of CISG signatories as of August 2010).
 6. Under Article 6, however, the parties may opt out of the CISG in their contract: “The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.” See U.N. Convention on CISG art. 6, Apr. 11, 1980, 1489 U.N.T.S. 3 (describing the ability of parties to circumvent provisions).
 7. See Calleros, *supra* note 4 at 645 n.20 (citing the U.N. Convention on CISG art. 7(1), Apr. 11, 1980, 1489 U.N.T.S. 3) (“Courts in one signatory country are not bound by the judicial interpretations of the CISG from another country, and any court will have an inevitable tendency to read the CISG through the lens of its own legal system, at least initially. The CISG, however, specifically directs the forum to consider the ‘international character’ of the CISG and ‘the need to promote uniformity in its application.’ Courts thus should consider interpretations of the CISG from other jurisdictions to avoid stratification through conflicting interpretations influenced by local law.”); see also Marlyse McQuillen, *The Development of a Federal CISG Common Law in U.S. Courts: Patterns of Interpretation and Citation*, 61 U. MIAMI L. REV. 509, 510 (2007) (explaining that the CISG is meant to be interpreted by the national courts of CISG signatories).

for domestic courts grappling with a novel question of interpretation of the CISG.⁸ The lack of binding precedent creates unique issues for the interpretation of an international treaty because the treaty will be successful only if the varied domestic legal systems that enforce the treaty uniformly interpret its language with respect to its international character.⁹ Diverging interpretations of the CISG will create disharmony between legal systems, which could lead to unpredictable results that contradict its goal of harmonizing international commercial law and reducing barriers to trade.¹⁰ Moreover, because predictability is the heart of international trade,¹¹ an unpredictable CISG may be avoided by well-counseled international traders who, under article 6¹² of the CISG, can choose other law to govern their international sales contracts.¹³

As one of the CISG's "most challenging and important . . . provisions,"¹⁴ article 79 (Article 79) attempts to explain when a party should be exempted from liability for damages resulting from the party's failure to fulfill a contractual obligation.¹⁵ Hoping "that Article 79 would establish its own autonomous definition of impediments beyond a party's control,"¹⁶ the draft-

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8. See *Air France v. Saks*, 470 U.S. 392, 404 (1985) (quoting *Benjamins v. British Euro. Airways*, 572 F.2d 913, 919 (2d Cir. 1978) (demonstrating that the U.S. Supreme Court stated that "the opinions of our sister signatories [are] entitled to considerable weight" within the context of interpreting international treaties); see also McQuillen, *supra* note 7 at 537 (reasoning that domestic courts integrate non-binding persuasive domestic precedent, CISG scholarship, and some CISG caselaw when interpreting the CISG).
 9. See, e.g., U.N. Convention on CISG art. 7(1), Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M. (stating that the Convention must be interpreted to promote uniformity); see also Alexander S. Komarov, *Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7(1)*, 25 J.L. & COM. 75, 78 (2005) (emphasizing that domestic law can be taken into account when interpreting CISG cases but not when it conflicts with how the law is interpreted internationally).
 10. See U.N. Convention on CISG, Preamble, Apr. 11, 1980, 1489 U.N.T.S. 3 (stressing that the Convention was created to eliminate barriers to international trade); see also William P. Johnson, *Understanding Exclusion of the CISG: A New Paradigm of Determining Party Intent*, 59 BUFF. L. REV. 213, 268 n.264 (2011) (highlighting the problem that courts in different countries may interpret the CISG in a way that is favorable to their domestic policies).
 11. See Mike Moore, *Promoting Openness, Fairness and Predictability in International Trade for the Benefit of Humanity*, THE WORLD OF PARLIAMENTS, July 2001, <http://www.ipu.org/news-e/2-4.htm> (stating that "[o]penness, fairness and predictability are at the heart of the multilateral trading system.>").
 12. See U.N. Convention on CISG art. 6, Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M. (maintaining that the CISG signatories can exclude the application of the Convention or change the effects of any specific provision).
 13. See John H. Jackson, *Perspectives on the Jurisprudence on International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 MICH. L. REV. 1570, 1575 (1984) (providing that "[p]redictability of decisions, whether based on precedent, statutory formulas, or something else, enables private parties and their counselors (lawyers, economists, and politicians) to calculate generally the potential or lack of potential for a favorable decision under each of a variety of different regulatory schemes.>").
 14. See Harry M. Flechtner, *The Exemption Provisions of the Sales Convention, Including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court*, 3 BELGRADE L. REV. 84, 85 (2011), <http://www.cisg.law.pace.edu/cisg/biblio/flechtner10.html> (describing Article 79 as a vital CISG provision).
 15. See U.N. Convention on CISG art. 79, Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M. (exempting parties from liability for failure to perform any of their obligations, if the failure was due to an impediment beyond their control).
 16. See CAMILLA BAASCH ANDERSEN, UNIFORM APPLICATION OF THE INTERNATIONAL SALES LAW: UNDERSTANDING UNIFORMITY, THE GLOBAL JURISCONSULTORIUM AND EXAMINATION AND NOTIFICATION PROVISIONS OF THE CISG 94 (2007) (quoting the expectations for Article 79).

ers of the CISG avoided the use of various familiar domestic legal terms—such as *force majeure*,¹⁷ *Wegfall der Geschäftsgrundlage*,¹⁸ *ecessiva onerosità sopravvenuta*,¹⁹ impossibility, and impracticability—in favor of “terminology neutrality.”²⁰ In this way Article 79 bridges the various domestic legal doctrines of the signatory states.²¹ Yet, the vague language necessitated by its relation to domestic legal doctrines²² has caused some scholars to bemoan the lack of uniformity created by Article 79.²³

While it is not possible to evaluate the lack of uniformity found across myriad unpublished court and arbitral decisions, the relatively few published decisions addressing Article 79²⁴ gener-

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17. *Force majeure* (and its Latin equivalent, *vis major*) translates literally into “superior force.” However, in many jurisdictions, both common law and civil, this French term is used generically “to characterize a wide range of supervening events.” See BLACK’S LAW DICTIONARY 718 (9th ed. 2009) (defining “force majeure” as “a superior force”); see also Peter J. Mazzacano, *Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG*, 2 NORDIC J. COM. L. 1, 40 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1982895 (stating that CISG bridges civil and common law).
 18. Germany’s domestic hardship principle, *Wegfall der Geschäftsgrundlage*, translates roughly to “elimination of the basis of the business transaction.” See Chengwei Liu, *Force Majeure: Perspectives From the CISG, UNIDROIT Principles, PECL and Case Law*, PACE L. SCH. INST. OF INT’L COM. L. 39 (Apr. 27, 2005), <http://www.cisg.law.pace.edu/cisg/biblio/liu6.html> (noting the Convention avoided referencing domestic theories in the CISG); see also Anja Carlsen, *Can the Hardship Provisions in the UNIDROIT Principles Be Applied When the CISG Is the Governing Law?*, PACE L. SCH. INST. OF INT’L COM. L. (Dec. 14, 1998), <http://www.cisg.law.pace.edu/cisg/biblio/carlsen.html> (stating that the German doctrine of *Wegfall der Geschäftsgrundlage* is inapplicable when the CISG controls).
 19. The Italian adoption of Germany’s *Wegfall* concept, *ecessiva onerosità sopravvenuta* translates roughly to an excessively burdensome supervening event. See Mazzacano, *supra* note 17 at 46 (discussing Italy’s adoption of the *Wegfall der Geschäftsgrundlage* principle); see also Ingeborg Schwenzer, *Wider Perspective: Force Majeure and Hardship in International Sales Contracts*, 39 VUWLR 709, 711 n.10 (2008), <http://www.austlii.edu.au/nz/journals/VUWLawRw/2008/39.pdf> (mentioning Italy’s theory of hardship).
 20. See ANDERSEN, *supra* note 16 (quoting the goal of Article 79).
 21. See 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, 303–04 (2004) (acknowledging that the CISG can help bridge differences between domestic law regimes); see also Mazzacano, *supra* note 17 at 1 (discussing the sale law as advocated by the CISG as being transnationally uniform by design).
 22. See Flechtner, *supra* note 14, at 85 (finding that Article 79’s necessarily vague standards have worked against international uniformity).
 23. See JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 615 (Harry M. Flechtner ed., 4th ed. 2009) (hereinafter HONNOLD 2009) (finding that Professor Honnold’s statements calling Article 79 the least successful effort toward international uniformity are accurate); see also DiMatteo et al., *supra* note 21 at 303–04 (demonstrating that uniformity is an important goal of the CISG).
 24. For example, the UNILEX database lists 29 Article 79 decisions. See UNILEX CISG, <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&cx=1> (last visited Apr. 7, 2013) (listing the 29 decisions pertaining to Article 79). The Pace CISG database lists several more. See *Article 79*, PACE L. SCH. INST. OF INT’L COM. L. (Jan. 7, 2013), <http://www.cisg.law.pace.edu/cisg/text/digest-cases-79.html> (listing additional decisions pertaining to Article 79). The lack of published cases is probably the result of the fact that arbitral decisions are seldom published. Consequently, the CISG Advisory Council warns: “[a]ny survey of reported decisions is to be read with caution, because the number of cases decided at this point do not allow but a few tentative conclusions regarding interpretative trends on CISG Article 79.” See Alejandro M. Garro, *CISG Advisory Council Opinion No. 7: Exemption of Liability for Damages Under Article 79 of the CISG*, PACE L. SCH. INST. OF INT’L COM. L. (Apr. 7, 2008), <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html> (CISG-AC Op.) (claiming that, given the limited cases published on the matter, Article 79 cases should be read with caution [given the limited cases published on the matter]).

ally do not support the fear that courts would too readily excuse parties or rely on incompatible domestic law in place of the international standards in the CISG.²⁵ However, these court and arbitral decisions, along with copious scholarship, have revealed contradictions in the treatment of several Article 79 issues: what exactly constitutes an impediment; how to treat non-conforming goods as contrasted with non-delivery; and when non-performance can be attributed to the actions of a third party.²⁶ Other issues, such as how and whether Article 79 covers “hardship,” may be largely settled, but the non-binding nature of the precedent leaves room for national courts to shoehorn domestic excuse doctrines into their applications of Article 79.²⁷

Both unsettled and inconsistent decisions undermine and frustrate the uniformity of interpretation necessary to create international harmony. Consequently, and in the interests of increasing the value of the CISG, adjudicators should make every effort to consistently apply Article 79 with regard to its international character and regardless of the particular domestic excuse doctrine they would prefer.²⁸ Meanwhile, scholars—and the CISG Advisory Council specifically—should try to ensure that their interpretations of Article 79 consistently promote uniformity and harmony.²⁹

This article will first provide background information illuminating the broad goals and approach of Article 79, and it will introduce several Article 79 issues demonstrating substantial disharmony. Next, the discussion will focus on the particular disharmony created by adjudicators and scholarship that interprets Article 79 provisions too broadly. Last, this article will offer suggestions on how both adjudicators and scholars can create and strengthen harmony in Article 79 applications.

25. See Garro, *supra* note 24 (discussing the issue of whether courts may too readily excuse parties or rely on domestic law in place of international CISG standards); see also Flechtner, *supra* note 22, at 91 (stating that the notion that courts will rely on domestic law instead of international law standards in the CISG is unsupported).

26. See *infra* II.A.3, II.C.1.–3.

27. See *Supermicro Computer Inc. v. Digitechnic, S.A.*, 145 F. Supp. 2d 1147, 1150 (N.D.Cal. 2001) (holding that when no state law issues are present, a court may look to analogous international law situations); see also Hof van Cassatie [Cass.] [Court of Cassation], June 19, 2009, C.07.0289, <http://cisgw3.law.pace.edu/cases/090619b1.html> (Belg.) (announcing that only when changed circumstances were not reasonably foreseeable at the contract's inception, they can amount to an impediment under Article 79).

28. See *infra* III.

29. See *id.*

II. Background

A. Overview of Article 79

In contracts governed by the CISG, any party that fails to perform its contractual obligations may be liable to the other party for damages.³⁰ Under certain extraordinary circumstances, the CISG grants a party exemption from liability for non-performance.³¹ To avoid liability for breach under Article 79, the non-performing party must prove: (1) an impediment to performance; (2) that prevented performance; (3) was beyond the party's control; (4) could not reasonably have been taken into account at the time of the conclusion of the contract; (5) and, along with its consequences, could not have been avoided or overcome.³² Professor Honnold, one of the drafters of the CISG, summarized the principal elements as "externality of the cause, reasonable unforeseeability of the event, and reasonable unavoidability and inability

30. See U.N. Convention on CISG art. 45(1)(b), 61(1)(b), Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M. (indicating damages that can be collected for non-performance). Note that under these articles, "a party has a right to claim damages for any non-performance of the other party without the necessity of providing fault or a lack of good faith or the breach of an express promise on his part, as is required by some legal systems." See *Guide to CISG Article 79*, PACE L. SCH. INST. OF INT'L COM. L. (Aug. 30, 2006), <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-79.html> (asserting that breaches under the CISG may result in damages); see also Marlyse McQuillen, *The Development of a Federal CISG Common Law in U.S. Courts: Patterns of Interpretation and Citation*, 61 U. MIAMI L. REV. 533 (2007) (noting the CISG allows relief for breaches through awards of consequential and expectation damages).

31. See U.N. Convention on CISG art. 79, Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M., stating 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 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.

See also Jennifer M. Bund, Note, *Force Majeure Clauses: Drafting Advice for the CISG Practitioner*, 17 J.L. & COM. 381, 386 (1998) (explaining that for a party to be excused under the CISG, the non-performing party must establish that performance was obstructed by an unforeseeable impediment).

32. See U.N. Convention on CISG art. 79(1), Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M. (noting that to be free from liability, the non-performing party must fulfill certain criteria); see also Dionysios P. Flambouras, *The Doctrines of Impossibility of Performance and Clausula Rebus Sic Stantibus in the 1980 Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law—A Comparative Analysis*, 13 PACE INT'L L. REV. 261, 264 (2001) (acknowledging that the non-performing party must prove why its performance was obstructed).

to overcome the event or its consequences.”³³ Additionally, Article 79 includes four subsections to address several specific issues and procedural details that may arise.³⁴

Article 79(2) excuses the obligation to perform in some circumstances if the party’s failure stemmed from “the failure by a third person whom he . . . engaged to perform the whole or a part of the contract.”³⁵ The scope of “third person” is not entirely clear, but the drafters may have intended it to be read narrowly.³⁶ Additionally, Article 79(2)(a) and (b) require the non-performing party to demonstrate that both it and the third person fulfill the Article 79(1) requirements.³⁷

Article 79(3) clarifies that only non-performance during the period within which the impediment exists will be excused.³⁸ Therefore, if an impediment is temporary—perhaps a transit strike preventing delivery of the goods—Article 79 does not provide a permanent excuse.³⁹ Accordingly, when the impediment vanishes, the non-performing party’s obligation to perform is reinstated.⁴⁰

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33. See HONNOLD 2009, *supra* note 23, at 626 (stating non-performance of a party must be based on unforeseeability and unavoidability); see also Flambouras, *supra* note 32 at 264 (noting an acceptable excuse for non-performance relies upon the non-performing party meeting certain criteria).
 34. See U.N. Convention on CISG art. 79(2)–(5), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668 (providing guidance for additional circumstances and procedural issues with regard to exemptions); see also Flechtner, *Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods*, 19 PACE INT’L L. REV. 29, 42 (2007) (discussing one specific subsection of Article 79 which addresses specific performance and exemption).
 35. See U.N. Convention on CISG art. 79(2), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668 (stating that performance may be excused when a third party is at fault); see 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. 424 (2004) (explaining that Article 79 contains a provision which addresses failure to perform when a third party is to blame).
 36. Honnold states that “[the] legislative history indicates that narrow scope should be given to the phrase . . . there must be an ‘organic link’ between the main contract and the subcontract.” JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 615 (3d ed. 1999) (hereinafter HONNOLD 1999) (commenting that a narrow reading of “third party” was intended); see also Carla Spivack, *Of Shrinking Sweatsuits and Poison Vine Wax: A Comparison of Basis for Excuse Under U.C.C. § 2-615 and CISG Article 79*, 27 U. PA. J. INT’L ECON. L. 757, 777 (2006) (analyzing the ambiguity of whether a supplier is considered a third party).
 37. See U.N. Convention on CISG art. 79(2)(a)–(b), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668 (indicating two conditions for excusing performance under the third party exemption); see also Spivack, *supra* note 36 at 776 (2006) (reiterating the conditions that are required for excusal of performance due to third-party obstruction).
 38. See U.N. Convention on CISG art. 79(3), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668 (clarifying that non-performance will be excused only when it occurs during the obstruction by the third party); see also Tom Southerington, *Impossibility of Performance and Other Excuses in International Trade*, Publication of the Faculty of Law of the University of Turku, Private law publication series B:55, <http://www.cisg.law.pace.edu/cisg/biblio/southerington.html> (noting that the exemption applies only from the time the impediment begins to when it ends).
 39. See U.N. Convention on CISG art. 79(3), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668 (defining the time limitation on excusal of non-performance due to impediment); see also Southerington, *supra* note 38 (remarking that there is provision addressing only partial impediment to performance).
 40. See U.N. Convention on CISG, art. 79(3), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (indicating that the exemption provided only has effect when an impediment exists); see also Bund, *supra* note 31 at 387 (commenting that Article 79 does not provide a permanent excuse for a temporary impediment).

Article 79(4) adds the additional requirement that the non-performing party must give reasonably timely notice to the other party of “the impediment and its effect on his ability to perform.”⁴¹

Article 79(5) limits the excuse to damages only.⁴² Parties retain all other rights to relief including the rights to “avoid” the contract, demand performance, seek restitution or interest, or reduce the purchase price.⁴³

1. Article 79 in General: Contrasting “Impediment” With National Legal Doctrines

Carefully chosen by the CISG drafters to be less restrictive than the term “impossibility,” “failure to perform . . . due to an impediment beyond his control”⁴⁴ denotes an objective, outside force or obstacle that interferes with performance.⁴⁵ Professor John Honnold contends that the impediment must be severe enough to actually prevent performance—essentially a causation element.⁴⁶ Honnold also argues that the drafters did not adopt the term “frustration,” which allows excuse on the grounds of economic hardship, because they assumed that “an extreme and unforeseeable change in economic circumstances” could, if it actually prevented performance, itself qualify as an “impediment” under Article 79(1).⁴⁷ The International Chamber of Commerce, when creating a guide for its arbitrators, concluded that an “impedi-

41. See U.N. Convention on CISG art. 79(4), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (stating that the failure to give such notice will result in liability to the non-performing party); see also Flambouras, *supra* note 32, at 261, 272–73 (2001) (addressing the reliance damages incurred if notice has not been given).

42. See U.N. Convention on CISG art. 79(5), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (stating that a party is not prevented from exercising rights other than a claim to damages); see also JOSEPH M. LOOKOFKY, UNDERSTANDING THE CISG: A COMPACT GUIDE TO THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 130 (2004) (explaining that the Article 79(5) damages exemption does not preclude a claim for interest).

43. See U.N. Convention on CISG art. 46, 49, 50, 62, 78, 81(2), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (outlining the wide range of reliefs a party may retain when a contract has been breached). Avoidance requires a “fundamental breach” which may or may not have occurred in a situation where an impediment prevented performance; see also U.N. Convention on CISG, art. 25, 49, 79, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (discussing different instances where a fundamental breach may lead to remedies for the buyer); see also Eric C. Schneider, *Measuring Damages Under the CISG Article 74 of the United Nations Convention on Contracts for the International Sale of Goods*, 9 PACE INT’L L. REV. 223, 224 (1997) (referring to the numerous general provisions of the Convention that have a bearing on a party’s claims for damages).

44. See U.N. Convention on CISG art. 79(1), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (stating that an excuse is available for a non-performing party only if they were unable to expect or avoid the consequences of an impediment); see also CHRISTOPH BRUNNER, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES 76 (2009) (remarking that the non-performing party must not explicitly or implicitly assume the risk of an impediment’s occurrence).

45. See HONNOLD 1999 *supra* note 36 at 480 (defining Article 79’s “impediment” standard); see also PETER HUBER & ALASTAIR MULLIS, THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS, 257–58 (2007) (discussing the impediment standard in the CISG).

46. See HONNOLD 1999, *supra* note 36 at 483 (explaining the standard required for a showing of “impediment”); see also STEVEN L. HARRIS ET AL., UNIFORM COMMERCIAL CODE SERIES (2012) (interpreting CISG Article 79 as a provision that excuses non-performance and stating its requirements).

47. See HONNOLD 1999, *supra* note 36 at 477 (examining “change” under the performance exemptions); see also Lillian V. Blageff, *Recent Cases Interpreting the Convention on Contracts for the International Sale of Goods*, CORP. COUNS. Q., Jan. 2011, at 1 (labeling Article 79 of the CISG as a force majeure clause).

ment” should be “some kind of obstacle which has prevented performance as normally foreseen”—a definition appearing to leave room for hardship.⁴⁸ Article 79’s “impediment” may also include the U.S. concept of “frustration of purpose,”⁴⁹ but only to the extent that it relates to an obstacle obstructing contractual performance as originally envisaged.⁵⁰ The text of Article 79 also fails to address the United States’ Uniform Commercial Code (U.C.C.) doctrine of “commercial impracticability.”⁵¹

Whatever “impediment” was originally intended to mean, since the CISG entered into force, its ultimate meaning is the product of its application and interpretation by courts and arbitration tribunals. When defining “impediment,” most jurisdictions started by determining if and how their national doctrines for exemption fit within the CISG’s concept of “impediment.” For example, Germany’s *Schiedsgericht der Handelskammer*, an arbitral tribunal, interpreted Article 79’s “impediment” to be consistent with *force majeure*, economic impossibility, and excessive onerousness.⁵² Italy’s *Tribunale Civile di Monza*, a civil district court, however, expressly found “impediment” to be distinct from and not including *eccessiva onerosità sopravve-*

48. See International Chamber of Commerce, Force Majeure and Hardship comment 9, at 11 (1985); see also ICC Force Majeure Clause, ICC Hardship Clause 2003, Publication No. 650, <http://www.trans-lex.org/700700> (last visited Mar. 25, 2013) (detailing the structure of the ICC force majeure clause).

49. See 17 AM. JUR. 2D *Contracts* § 651 (1964) (holding that “Frustration of purpose or the object of the contract” is based upon the “fundamental premise that relief should be given where the parties could not reasonably have protected themselves by the contract’s terms against contingencies that later arose”); see also Andrew A. Schwartz, *A “Standard Clause Analysis” of the Frustration Doctrine and the Material Adverse Change Clause*, 57 UCLA L. REV. 789, 800 (2010) (articulating the history and purpose of the frustration clause).

50. See Henry D. Gabriel, *A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code*, 7 IND. INT’L & COMP. L. REV. 279, 307 (1997) (asserting that “Article 79 embodies the CISG’s provisions for frustration of purpose and impossibility”); see also Francesco G. Mazzotta, *Why Do Some American Courts Fail to Get It Right?*, 3 LOY. U. CHI. INT’L L. REV. 85, 87 (2005) (noting that Article 79 is essentially a force majeure, or impossibility, clause).

51. See U.C.C. § 2-615 (2011) (stating that “[e]xcept so far as a seller may have assumed a greater obligation . . . (a) Delay in delivery or non-delivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid”); see also 17 AM. JUR. 2D *Contracts* § 656 (2013) (proclaiming that “[a] contract is said to be commercially impracticable when, because of unforeseen events, it can be performed only at an excessive and unreasonable cost or when all means of performance are commercially senseless”); see also Carla Spivack, *Of Shrinking Suitsuits and Poison Vine Wax: A Comparison of Basis for Excuse Under U.C.C. § 2-615 and CISG Article 79*, 27 U. PA. J. INT’L ECON. L. 762 (2006) (explaining that excuse under Article 79 is narrower than excuse under the U.C.C. since a literal “impediment” is required as opposed to a mere showing of impracticability).

52. See, e.g., Chinese Goods Case (Ger. v. China), *Schiedsgericht der Handelskammer* (Hamburg, Ger. 1996), English-language abstract, <http://www.unilex.info/case.cfm?pid=1&do=case&id=195&step=Abstract>; German full text, <http://www.unilex.info/case.cfm?pid=1&do=-case&id=195&step=FullText> (analogizing Article 79 to various national legal doctrines); see also Ingeborg Schwenzer, *Wider Perspective: Force Majeure and Hardship in International Sales Contracts*, 39 VUWLR 709 (2008), <http://www.austlii.edu.au/nz/journals/VUWLawRw/2008/39.pdf>.

nuta—the Italian hardship doctrine.⁵³ In this way, the Italian court implied that an impediment requires actual impossibility.⁵⁴

Further, a distinction between Article 79 and domestic excuse doctrines can be inferred from rulings by courts and tribunals, emphasizing that Article 79 preempts and displaces the similar domestic doctrine when the CISG governs a transaction.⁵⁵ More often, Article 79 decisions have found “impediment” to be most similar to their domestic exemptions standards for “impossibility.”⁵⁶ Still, others have found that while impossibility may be the most similar concept, “hardship” standards apply to render Article 79 exemption standards less restrictive than the harsher “impossibility.”⁵⁷ Although undoubtedly frustrating to the CISG’s goal of uniformity, such diverging opinions on the scope of “impediment” can hardly be considered surprising given that “[t]he convention, *faute de mieux*, will often be applied by tribunals (judges or arbitrators) who will be intimately familiar with their own domestic law.”⁵⁸

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53. See *Nuova Fucinati v. Fondmetal Int'l* (It. v. Swed.), Tribunale Civile di Monza (It. 1993), English abstract, <http://www.unilex.info/case.cfm?pid=1&do=case&id=21-&step=Abstract>; Italian full text, <http://www.unilex.info/case.cfm?pid=1&do=-case&id=21&step=FullText> (concluding that the CISG does not allow avoidance under Article 79 based on hardship).
54. See *id.* (holding that hardship is not a ground for avoidance).
55. See, e.g., *Electronic Hearing Aid Case* (Ger. v. It.), Landgericht Aachen (Ger. 1993), English translation, <http://cisgw3.law.pace.edu/cases/930514g1.html> (maintaining that the “[r]ules of frustration or economic hardship (*Wegfall der Geschäftsgrundlage*) under domestic law or domestic law challenges having to do with mistake as to the quality of the goods are irrelevant because the CISG fills the field in these areas”); see also Chengwei Liu, *Force Majeure: Perspectives From the CISG, UNIDROIT Principles, PECL and Case Law*, PACE L. SCH. INST. OF INT’L COM. L. 39 (Apr. 27, 2005), <http://www.cisg.law.pace.edu/cisg/biblio/liu6.html> (reasoning that Art. 79 preempts comparable national doctrines).
56. See, e.g., *Nuova Fucinati v. Fondmetal Int'l* (It. v. Swed.), Tribunale Civile di Monza (It. 1993), English abstract, <http://www.unilex.info/case.cfm?pid=1&do=case-&id=21&step=Abstract>; Italian full text, <http://www.unilex.info/case.cfm?pid=1&do=-case&id=21&step=FullText> (determining that contract avoidance because of hardship is not a remedy under Art. 79); see also *Vital Berry Mktg. v. Dira-Frost* (Chile v. Belg.), *Rechtbank van Koophandel, Hasselt* (Belg. 1995), English abstract, <http://www.unilex.info/case.cfm?pid=1&do=case&id=263&step=Abstract>; Dutch full text, <http://www.unilex.info/case.cfm?pid=1&do=case&id=263&step=FullText> (informing the Court held that drops in the market price of a good cannot exempt the buyer for non-performance because “fluctuations of prices are foreseeable events in international trade and far from rendering the performance impossible they result in an economic loss well included in the normal risk of commercial activities”); see also *Iron Molybdenum Case* (U.K. v. Ger.), *Oberlandesgericht Hamburg* (Ger. 1997), <http://cisgw3.law.pace.edu/cases/-970228g1.html> (holding that Article 79 does not exempt a seller from liability for non-delivery to buyer because of a supplier’s failure to deliver unless it is impossible for the seller to procure replacement goods of a similar quality on the market).
57. See U.N. Convention on CISG art. 79, Apr. 11, 1980, 15 U.S.C.A. 1987, 1489 U.N.T.S. 3, I.L.M. (agreeing that a party is not liable for the failure to perform their obligations if the party can prove the failure was due to factors beyond that party’s control); see also *Shoes Case* (It. v. Ger.), *Amtsgericht Charlottenburg*, Germany (1994), English Translation, <http://cisgw3.law.pace.edu/cases/940915g1.html> (holding that Article 79 exempted a buyer from interest on delayed payment of the purchase price because the Court determined timely payment, although possible, could not be reasonably expected in the circumstances and thereby implied Article 79 less restrictive than the impossibility exemption standards).
58. JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 1 (1989) (hereinafter HONNOLD, DOCUMENTARY HISTORY) (acquiescing that the tribunals will tend to read international rules skewed toward the legal ideas ingrained in them).

2. Concepts of “Fault” Weighed Against “Risk” in Article 79

Specific interpretations of the exact standards of “impediment” notwithstanding, Article 79 decisions provide a limited reprieve from the CISG’s “no-fault,” or “strict liability” approach to damages.⁵⁹ Contrasting the CISG’s intent to approach the concept of damages from the perspective of a party’s guarantee (strict liability) with that of a fault-based assessment, Professor Honnold explained: “The Convention thus is based on a unitary, contractual obligation to perform the contract and be responsible for damages—as contrasted with some legal systems that make liberal use of the idea of fault in dealing with liability for damages for breach of contract.”⁶⁰ Other leading commentators, such as Dr. Georg Gruber and Professor Hans Stoll, have expressed accord: “Following the Anglo-American model of strict liability, the promisor is in principle liable for all losses arising from non-performance, irrespective of fault.”⁶¹ Article 79, however, provides an exception from such strict liability by allowing exemption from liability for damages where the non-performing party can sufficiently meet the standards for “impediment” presented in Article 79.⁶² Thus, Article 79’s exemption establishes a limit to the no-fault regime inherent in the CISG.⁶³

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

Article 79 is the result of a difficult compromise between the advocates of an absolute guarantee that the contract will be performed, in accordance with the Anglo-American model, and the proponents of the principle of fault, characteristic for most of the continental European legal systems. The compromise must not be weakened by recourse to principles of liability under national law when interpreting Article 79. . . .⁶⁴

59. See Harry M. Flechtner, *Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods*, 19 PACE INT’L L. REV. 32–33 (stating that in Germany, it has been found that Article 79 decisions provide a strict liability approach); see also Spivack, *supra* note 51 at 796 (asserting that under Article 79, with respect to third-party excuses, something close to strict liability seems to operate).

60. See HONNOLD 1999, *supra* note 36 at 479 (1999) (explaining the ideas that the Convention is based upon).

61. See Hans Stoll & Georg Gruber, *Article 74*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 746 (Peter Schlechtriem & Ingeborg Schwenzer eds., Geoffrey Thomas trans., Oxford Univ. Press 2005).

62. See U.N. Convention on CISG art. 79, Apr. 11, 1980, 15 U.S.C.A. 1987, 1489 U.N.T.S. 3, I.L.M. (providing exemptions for a non-performing party when an impediment exists that they reasonably could not have prepared for at the time of creation).

63. See Stoll & Gruber, *supra* note 61 at 746 (“Article 79 thus constitutes the necessary limitation to the principle of strict liability for non-performance of the contract which otherwise underlies the CISG”); see also JOSEPH M. LOOKOFKY, UNDERSTANDING THE CISG IN THE USA 154 (3d ed. 2008) (reiterating that the exemption is available only in certain exceptional circumstances, and that the general rule remains strict liability).

64. Stoll & Gruber, *supra* note 61 at 746.

Recognizing this balance, tribunals contemplating Article 79 exemptions have often applied concepts of risk—more specifically, which party was best positioned to manage the risk of the force majeure event that they addressed.⁶⁵ A 1996 German arbitration known as the *Chinese Goods Case* provides a strong example of the risk of loss analysis that tribunals may use to determine the applicability of the Article 79 exemption.⁶⁶ In the *Chinese Goods Case*, the tribunal analyzed which party bore the risk of loss and ultimately determined that because the buyer paid in advance for a missed delivery, the contract for sale clearly allocated the risk of procurement of the goods to the seller when its supplier was unable to provide the goods.⁶⁷ Asserting that “[o]nly the apportionment of risk in the contract is relevant” to application of Article 79, the tribunal denied the seller’s claim for Article 79 exemption.⁶⁸ Therefore, these decisions imply that regardless of “fault,” the non-performing party must not have assumed the risk of the event that caused the non-performance.

In certain rare circumstances, Article 79’s emphasis on which party assumed the risk of the supervening event can require interpretation of domestic risk of loss rules.⁶⁹ For example, in a 1996 Hungarian arbitration known as the *Caviar Case*, the seller and buyer each claimed that the other bore the risk of loss where an intervening trade embargo (taking effect after the seller’s delivery of caviar to the buyer and before the payment due date) caused the caviar to be destroyed by preventing the buyer from making payment to the seller and taking possession of the caviar.⁷⁰ Finding the CISG and the contract unclear on which party bore the risk of loss at that time, the Court of Arbitration determined that the seller’s national law (Yugoslav) governed the transaction and held that the title to ownership passed to the buyer at the moment the goods are taken over by the buyer.⁷¹ Because the risk of freight was borne by the buyer and because “the damage caused by force majeure has to be borne by the party where the risk is at the moment the force majeure occurs,” the Arbitration Court concluded that Article 79 did not exempt the buyer and awarded damages to the seller.⁷² Note, however, that even where

65. See, e.g., *Vine Wax Case II* (Austria v. Ger.), Bundesgerichtshof, Germany (1999), English language translation, <http://cisgw3.law.pace.edu/cases/990324g1.html> (reiterating that “the possibility of exemption under CISG Art. 79 does not change the allocation of the contractual risk”); see also Peter Schlechtriem, *Uniform Sales Law in the Decisions of the Bundesgerichtshof* (Todd J. Fox trans., Pace Law Institute of International Commercial Law) (2000) (attributing responsibility to the party who retained the risk in their economic sphere).

66. *Chinese Goods Case* (Ger. v. China), Schiedsgericht der Handelskammer (Hamburg, Ger. 1996), English language abstract, <http://www.unilex.info/case.cfm?pid=1&do=-case&cid=195&step=Abstract>; German full text, <http://www.unilex.info/case.cfm?pid=1&do=-case&cid=195&step=FullText> (expressing that China and Germany’s agreement on a German arbitral court for dispute resolution meant that parties had implicitly chosen laws of Germany to govern contract and therefore CISG applied).

67. *Id.* (holding that seller liable for damages resulting from non-receipt).

68. See *id.* (discussing contracting parties’ ability to manage risk under Article 79 of the U.N. Convention on CISG).

69. CISG Art. 7(2) requires gaps in the CISG that cannot be filled by its general principles to be filled “in conformity with the law applicable by virtue of the rules of private international law.” See U.N. Convention on CISG art. 7(2), Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M. (addressing matters that are governed by, but not expressly addressed within, the United Nations Convention on Contracts for the International Sale of Goods).

70. See *Caviar Case* (Yugoslavia v. Hung.), para. 1, (Arb. Ct. attached to the Hung. Chamber of Comm. and Indus. of Budapest 1996), English language translation, <http://cisgw3.law.pace.edu/cases/961210h1.html> (paraphrasing the factual background to an arbitration concerning a caviar shipment contract).

71. See *Caviar Case*, *supra* note 70 para. 10 (highlighting the arbitrator’s decision to adhere to Hungarian conflict of law rules).

72. See *id.* (describing the passing of risk from the Seller to the Buyer).

national risk of loss laws were not implicated, Article 79 has been interpreted to avoid upsetting the contractual allocation of risk, which could impart the risk of freight on the buyer.⁷³

3. Special Case of Breach via Delivery of “Non-conforming Goods”

The term “impediment” denotes an event external to the seller of the goods, thus applying to events causing non-delivery or delay in delivery, but arguably excluding problems leading to non-conformance (defectiveness) in delivered goods.⁷⁴ This conservative approach reflects the fear of drafters from common-law jurisdictions—who favored a “warranty-based” approach—that “contractual liability . . . based on proof of fault, might unduly influence civil-law judges or arbitrators willing to allow sellers to escape liability for defective performance, pleading events beyond their control that could not have been considered.”⁷⁵

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

In the *Vine Wax Case*, Germany’s *Bundesgerichtshof* (Federal Supreme Court) appears to have allayed the “fear that extending the exemption to delivery of non-conforming goods might

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73. See *Art Books Case* (It. v. Switz.) (Handelsgericht des Kantons Zürich 1999), English-language translation, <http://cisgw3.law.pace.edu/cases/990210s1.html> (noting that where “[t]he [seller] fulfilled its delivery obligation by handing over the goods to the first carrier. [Seller] therefore did not engage the forwarding agent ‘for the performance’ of its delivery obligation The [seller] is therefore not responsible for the carrier’s miscellaneous mistakes”).
 74. See Barry Nicholas, *Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods* in *INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* § 5.02 at 5-10 (Nina M. Galston & Hans Smit eds., Matthew Bender) (stating that the choice of the word “impediment” resulted from the widely shared view that a seller could not be exonerated of liability for non-conforming goods).
 75. See CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, para 6, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People’s Republic of China, on 12 October 2007, <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html> (commenting on the first discussion of whether a seller may claim exemption of liability under CISG Art. 79).
 76. See U.N. Convention on CISG art. 79(1), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (stating that a party is not liable for failure of performance if it was due to an impediment beyond his control).
 77. See U.N. Convention on CISG art. 35, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (outlining conformity of goods and third-party claims more in depth).
 78. See CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, *supra* note 75.
 79. See *id.* (providing a rare example of a case in which a seller may be exempted of liability for delivery of non-conforming goods); see also UNCITRAL Digest (nn. 13–14), <http://cisgw3.law.pace.edu/cisg/text/anno-art-79.html> (citing to nine cases where tribunals denied exemption for delivery of non-conforming goods and only one where exemption was granted).

reintroduce the principle of liability for fault through the ‘back door.’”⁸⁰ In the *Vine Wax Case*, a seller forwarded defective vine wax he had received from his supplier-manufacturer directly to the buyer without first inspecting it.⁸¹ The intermediate appellate court found that, in theory, Article 79 could exempt a seller from delivering non-conforming goods.⁸² Nonetheless, it held the seller liable for delivering non-conforming goods because the seller had failed to inspect the wax prior to delivering it to the buyer.⁸³ Disagreeing with the lower court’s reasoning but still denying exemption to the seller, the *Bundesgerichtshof* held that:

The [seller’s] liability under the [CISG] is, contrary to the Lower Court’s opinion, not based on the supplier’s obligation to inspect the goods before delivery to its purchaser. . . . That is so because the seller’s culpability is not important due to the statutory allocation of risk and the lack of a different agreement between the parties concerning the allocation of risk, resulting in a guarantee [warranty] liability of the seller.⁸⁴

By refusing to generalize on whether or not a seller could ever be exempt when delivering non-conforming goods, and by explaining why this particular seller could not be exempted from delivering non-conforming goods, the decision suggests that the *Bundesgerichtshof* believes Article 79 might excuse a seller’s delivery of non-conforming goods.⁸⁵ In a subsequent case, the *Bundesgerichtshof* similarly left open the possibility of Article 79 excusing delivery of non-conforming goods by refusing to pronounce a general principle and instead emphasizing the heavy burden of proof beholden on such petitions for exemption.⁸⁶

Consistent with a “plain language” interpretation of Article 79, these decisions strengthen the notion that a seller’s delivery of non-conforming goods is a violation of “any of his obligations” within the scope of Article 79(1).⁸⁷ Even if exemption from liability is possible for such a breach, however, the scope of the Article 79 exemption does not expand greatly because “it is generally and correctly considered that sellers implicitly assume the risks involved in the pro-

80. See CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, *supra* note 75 (indicating that cases in which a seller may be exempt from liability for delivering non-conforming goods are extremely rare).

81. See *Bundesgerichtshofes* [BGH] [Federal Court of Justice] Mar. 24, 1999, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2440, 1999 (Ger.), translated at <http://cisgw3.law.pace.edu/cases/990324g1.html> (stating that the defendant had not actually received and accepted or inspected the goods prior to delivery to plaintiff).

82. See *Oberlandesgericht* [OLG] [Court of Appeals] Mar. 31, 1998, translated at <http://cisgw3.law.pace.edu/cases/980331g1.html> (acknowledging that an impediment to performance may also be due to defective delivery).

83. See *id.* (concluding that the seller could not sustain facts that would have led to an exemption from liability under Article 79).

84. See *Bundesgerichtshofes*, *supra* note 81 (illustrating that the basic responsibility of defendant for plaintiff’s damages is not questioned by the appeal’s argument that the damage would have occurred in the same way if the defendant had delivered the same vine wax to plaintiff as it had delivered in prior years).

85. See CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, *supra* note 75.

86. See *Bundesgerichtshof*, *supra* note 81 (holding that Article 79 may actually excuse delivery of non-conforming goods).

87. See CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, para 10, *supra* note 75 (recalling an advisory opinion that argues that failure to deliver non-conforming goods may be a breach of duty under Article 79).

curement of the goods they sell.”⁸⁸ Thus, while exemption for delivery of non-conforming goods remains possible, it is likely to be rare in light of the demanding requirements.⁸⁹

Even if exemption from liability is possible for such a breach, however, the scope of the Article 79 exemption does not apply broadly because “it is generally and correctly considered that sellers implicitly assume the risks involved in the procurement of the goods they sell.”⁹⁰ Thus while exemption for delivery of non-conforming goods remains possible, it is likely to be rare in light of the demanding requirements.⁹¹

B. CISG Advisory Opinion No. 7

Recognizing the “considerable room for judicial appraisal and divergent interpretation of several words used in, and issues raised by, Article 79,”⁹² on October 12, 2007, the CISG Advi-

88. *Id.* at ¶ 13 (reiterating the Advisory Opinion’s argument that sellers assume the risk involved in the procurement of goods they sell).

89. *See id.*

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

See also Dionysios P. Flambouras, *The Doctrines of Impossibility of Performance and Clausula Rebus Sic Stantibus in the 1980 Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law—A Comparative Analysis*, 13 PACE INT’L L. REV. 276–78 (2001) (emphasizing the potential difficulty of an exemption from delivery of non-conforming goods).

90. *See* CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, *supra* note 75 at ¶ 13.

91. *See* Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People’s Republic of China, on 12 October 2007, <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html>.

92. CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, *supra* note 75 at ¶ 4 (concluding that decisions to date do not bear their initial concerns about judicial overbreadth and misapplication of proper procedures).

sory Council (CISG-AC)⁹³ released an advisory opinion attempting to address three areas of current and potential divergence and disharmony: the delivery of non-conforming goods, a party's liability for impediments arising from the actions of third-persons, and economic hardship as a ground for exemption.⁹⁴ The CISG-AC noted that the limited success parties have had invoking Article 79, the dearth of published cases decided thus far, and the limited utility of those cases⁹⁵ prevented strong conclusions regarding interpretative trends. Therefore, the CISG-AC relied heavily on the *travaux préparatoires* and scholarly opinions.⁹⁶ The CISG-AC's opinion first discusses the general treatment of each of the three issues by variegated national court and arbitral decisions, and then concludes with a theoretical extension of Article 79 to resolve hypothetical situations not yet addressed in published decisions.⁹⁷ By preemptively addressing points of possible divergence, the CISG-AC, laudably, attempts to provide the basis for uniform decisions in the future. Unfortunately, the CISG-AC may have thwarted its goal because its speculation on how to apply Article 79 to potential "hardship" situations⁹⁸ appears to invite an overly liberal basis for exemption and remedy that only provides grounds for further divergence and disharmony.⁹⁹

93. Composed of scholars specializing in international trade law and from diverse legal cultures, the CISG Advisory Council

is a private initiative which aims at promoting a uniform interpretation of the CISG. . . . Accordingly the group is afforded the luxury of being critical of judicial or arbitral decision and of addressing issues not dealt with previously by adjudicating bodies. The Council is guided by the mandate of Article 7 of the Convention as far as its interpretation and application are concerned: the paramount regard to international character of the Convention and the need to promote uniformity. . . . In practical terms, the primary purpose of the CISG-AC is to issue opinions relating to the interpretation and application of the Convention on request or on its own initiative.

These opinions, while not binding on any particular adjudicative body, are nonetheless viewed as highly influential. *See generally* CISG Advisory Council, <http://www.cisgac.com> (last visited Mar. 24, 2013) (providing a description of the CISG-AC's scope, uniformity, and mode of operation).

94. *See* CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, *supra* note 75 at para 6 (outlining Article 79's grant of protections to buyers and sellers in respect to aspects that may be beyond their control). For summaries of the CISG-AC's positions and a further discussion of these three topics, *see supra* II.A.3. for non-conforming goods; *see also, infra* II.C.1 and II.C.2 for economic hardships and for suppliers as third parties, respectively.
95. *See id.* at ¶ 4 (explaining that sellers filed more claims and that no trending impediment exists). "However, not every decision identifies facts that may become relevant to draw some tentative conclusions (e.g., the nationality of the parties, the type of goods involved or other details of the transaction), while others are incomplete in the sense that they merely state that the conditions of Article 79 have not been met.")
96. *See* CISG-AC Opinion No. 7, *supra* note 75 at ¶¶ 26–27, 29 (finding that there are only vague descriptions of what the intent of the drafters was located in scholarly and "preparatory works").
97. *Id.* (setting forth the standards for exemption of liability under Article 79 of the CISG).
98. *Id.* (providing some guidance as to what is meant by "hardship" under Article 79).
99. *See* Hof van Cassatie [Cass.] [Court of Cassation], June 19, 2009, <http://cisgw3.law.pace.edu/cases/090619b1.html> (Belg.), *see infra* III.A.–B. The Pace University CISG library reveals only 16 published cases with an Article 79 issue decided since Oct. 12, 2007 (the release date of CISG-AC Opinion No. 7). Pace University Article 79 Database, <http://www.cisg.law.pace.edu/cisg/text/digest-cases-79.html>. Of these 16 cases, the *Steel Tubes Case* (Steel Tubes Case (Netherlands v. France)), Hof van Cassatie, Belgium (19 June 2009), English translation, <http://cisgw3.law.pace.edu/cases/090619b1.html>, is the only case directly addressing issues discussed in the CISG-AC Op. hypotheticals.

C. Article 79(1) Requirements

Article 79(1) requires the non-performing party to prove: (1) an impediment to performance existed; (2) it prevented performance (causation); (3) it was beyond the party's control; (4) it could not reasonably have been taken into account at the time of the conclusion of the contract; and (5) it or its consequences could not have been avoided or overcome.¹⁰⁰ The following subsections discuss actual examples of impediments, causation, and the three other elements within Article 79(1) in order to better understand how courts and arbitral tribunals apply Article 79(1) in practice.

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

Non-performing parties governed by the CISG have argued, with varying degrees of success, that a wide variety of events constituted "impediments" within the meaning of Article 79, and therefore the party should be exempted from liability for its non-performance.¹⁰¹ Often, court decisions and arbitral tribunal awards do not specifically discuss the question of impediment. In such cases, inferences that the impediment requirement was met can be gleaned from either a grant of exemption (permitting an inference that the stated facts of the case satisfied all the elements for exemption, including an impediment) or from a denial of exemption on grounds that the impediment did not satisfy one or more of the additional Article 79(1) requirements.¹⁰² In many other decisions, however, courts and tribunals denied exemption on the basis of a separate Article 79(1) element and did not address the (potentially difficult) question of whether or not an impediment existed.¹⁰³ While this class of cases may not illuminate the nature of the impediment requirement, they nonetheless demonstrate the wide variety of impediments claimed by parties, many of which presumably were viewed by the tribunals to be valid impediments, though without explicit rulings to that effect.

In general, courts and arbitral tribunals have used language requiring "that an impediment be an unmanageable risk or a totally exceptional event, such as *force majeure*, economic impossibility, or excessive onerousness."¹⁰⁴ Exceptional conditions precipitating a delivery of non-conforming goods—such as the non-existence of a method to detect or prevent non-confor-

100. See U.N. Convention on CISG, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, at art. 79(1) (listing the exemptions that are acceptable under the Convention).

101. See generally UNCITRAL Digest, <http://cisgw3.law.pace.edu/cisg/text/anno-art-79.html> (last visited Mar. 25, 2013); see also <http://dspace.nwu.ac.za/handle/10394/4730>.

102. See A/Conf.97/C.1/SR.27 at 10 (showing the Norwegian attempt to allow for the "only" so when the impediment vanishes the resulting circumstances may lead to another impediment); see also UNCITRAL Digest, *supra* note 101 (providing an example of where an impediment argument was denied).

103. See UNCITRAL Digest, *supra* note 101 (citations omitted) (citing to various cases that denied a claimed exemption not based on impediments).

104. See *id.* at para. 10 (citing to the *Chinese Goods Case* (Ger. v. China), Schiedsgericht der Handelskammer Hamburg, Germany (1996), English-language abstract, <http://www.unilex.info/case.cfm?pid=1&do=case&cid=195&step=Abstract>; German full text, <http://www.unilex.info/case.cfm?pid=1&do=case&cid=195&step=Fulltext>).

mity prior to delivery¹⁰⁵—may also fall within the scope of impediment.¹⁰⁶ More specifically, successful impediments have included, *inter alia*: various typical *force majeure* events (such as fire, flood, or extreme weather);¹⁰⁷ a prohibition on exports by the seller's country;¹⁰⁸ a refusal by state officials to allow buyer to import the goods into its country;¹⁰⁹ military hostilities (the Second Iraq War) preventing inspection and acceptance of the goods pursuant to the terms of the contract;¹¹⁰ the delivery of defective goods manufactured by the seller's supplier where the supplier's manufacturing process was found to be beyond the seller's control;¹¹¹ the failure of a carrier to timely deliver the goods to the buyer where the seller duly arranged and timely transferred the goods to the carrier;¹¹² and a strike by the employees of the seller's supplier.¹¹³

In contrast, some tribunals refusing to grant an exemption have employed "language suggesting that there was not an impediment within the meaning of Article 79(1)."¹¹⁴ While not always clearly stating whether the rationale was due to failure of the impediment requirement or another element of 79(1), the decisions nonetheless give some indication of events that may not be considered impediments: a seller's failure to deliver due to an emergency shutdown at its

105. See *Bundesgerichtshof* [BGH] [Federal Court of Justice] Jan. 9, 2002, *Neue Juristische Wochenschrift* [NJW] 1651,2002 (Ger.), English translation, <http://cisgw3.law.pace.edu/cases/020109g1.html> (suggesting that the non-existence of means to prevent or identify a lack of conformity in the goods could be enough of an impediment to exempt a seller under Article 79).

106. See prior commentary in this article.

107. See *Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG*, No. 03 C 1154, 2004 WL 1535839, at 6 (N.D. Ill. July 7, 2004) (holding that, assuming it was foreseeable that such severe weather would occur and would stop even icebreakers from working properly, then the defendant's *force majeure* defense was an impediment); see generally UNCITRAL Digest, *supra* note 101 (citing to various cases where courts have ruled that there was an impediment).

108. See *Coal Case (Ukr. v. Bulg.)*, Bulgarian Chamber of Commerce and Industry Case No. 56/1995, at 4 (Apr. 24, 1996), English translation, <http://cisgw3.law.pace.edu/cases/960424bu.html> (providing an action by a seller country that serves as a lawful impediment).

109. See *Butter Case (Russ. v. Ger.)*, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce Case No. 155/1996, at 5 (Jan. 22, 1997), English translation, <http://cisw3.law.pace.edu/cases/970122r1.html> (Noting the fact that the buyer was exempted from damages stemming from failing to take delivery of the goods).

110. See *Hilaturas Miel, S.L. v. Republic of Iraq*, 573 F. Supp. 2d 781, 800 (S.D.N.Y. 2008) (describing how hostilities prevented complete fulfillment of the contract terms).

111. See *Flippe Christian v. SARL Douet Sport Collections (Switz. v. Fr.)*, Tribunal de commerce de Besançon Case No. 97 009265, *Sports Clothes/Judo Suits France Case*, at 5 (Jan. 19, 1998), English translation, <http://cisgw3.law.pace.edu/cases/980119f1.html> (emphasizing seller's lack of bad faith as additional justification for its Article 79 exemption).

112. See *Art Books Case (It. v. Switz.)*, Handelsgericht des Kantons Zürich Case No. HG 970238.1, at 2–3 (Feb. 10, 1999), English translation, <http://cisgw3.law.pace.edu/cases/990210s1.html> (finding seller exempt for damages from late delivery).

113. See *Coal Case (Ukr. v. Bulg.)*, Bulgarian Chamber of Commerce and Industry Case No. 56/1995, at 4–5 (Apr. 24, 1996), English translation, <http://cisgw3.law.pace.edu/cases/960424bu.html>. (recognizing the coal miners' strike as an impediment causing the seller's failure to deliver the goods but denying exemption from liability because seller had already breached its obligation to timely deliver when the strike occurred).

114. See UNCITRAL Digest, *supra* note 101 (noting that it is not always clear whether tribunals that refused to find exemptions did so due to an impediment within the meaning of article 79(1) or due to an element related to the character of the impediment).

supplier's plant;¹¹⁵ a seller's failure to deliver after its supplier ceased production due to extreme financial difficulties;¹¹⁶ a buyer's refusal to pay for delivered goods because of negative market developments, currency reevaluation, and other adverse economic events;¹¹⁷ a buyer's failure to pay the purchase price because of inadequate currency reserves that could be freely converted into the payment currency;¹¹⁸ and a buyer's failure to open a letter of credit where buyer's government ordered a general suspension on the payment of foreign debts.¹¹⁹

Within this variety of claimed impediments, the decisions reveal three classes of impediments claimed with frequency. First, governmental actions—such as custom restrictions, trade sanctions, or an embargo—appear to be favored as impediments.¹²⁰ Similarly, civil actions unrelated to the contract—such as a sufficiently disruptive strike—can also be impediments.¹²¹ Second, a seller's breach caused by its supplier's default creates a special class of impediment.¹²² Third, forces creating particularly onerous economic hardship may also be grounds for

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115. *See* *Metallic Sodium Case* (Ger. v. Russ.), Award 155/1994 (Int'l Comm. Arb. 1995), <http://cisgw3.law.pace.edu/cases/950316r1.html> (explaining that a seller should avoid liability because the factory shut-down was beyond the seller's control).
 116. *See* *Chinese Goods Case* (Ger. v. China), (Int'l Comm. Arb. 1996), <http://www.unilex.info/case.cfm?pid=1&do=case&id=195&step=Abstract> (indicating that financial impediments are not considered impediments beyond an individuals control).
 117. *See* *Steel Ropes Case* (Russ. v. Bulg.), Award 11/1996 (Bulg. Comm. Ct. 1998), <http://cisgw3.law.pace.edu/cases/980212bu.html> (listing the buyer's reasons for defaulting on payment, including worsening market conditions, inflation, and distribution and storage issues).
 118. *See also* *Equipment/Automatic Diffractometer Case* (Ger. v. Russ.), Award 123/1992 (Int'l Comm. Arb. 1995), <http://cisgw3.law.pace.edu/cases/951017r1.html> (concluding that because inadequate sums of foreign currency in the buyer's account were not listed, the buyer is responsible to make full payment to the seller).
 119. *See* *Failure to Open Letter of Credit and Penalty Clause Case* (Austria v. Bulg.), Award 7197/1992 (Int'l Comm. Arb. 1992), <http://cisgw3.law.pace.edu/cases/927197i1.html> (stating that a seller had the right to demand performance due to a buyer's failure to open a letter of credit in accordance with their contract).
 120. *See* *Hilaturas Miel v. Republic of Iraq*, 573 F. Supp. 2d 781, 788, 791–92 (S.D.N.Y. 2008) (noting that a yarn manufacturer attempted to rescind performance of a contract due to the Iraq War); *see also* *Failure to Open Letter of Credit and Penalty Clause Case* (Austria v. Bulg.), Award 7197/1992 (Int'l Comm. Arb. 1992), <http://cisgw3.law.pace.edu/cases/927197i1.html> (discussing a tribunal's sanctioning of Bulgaria for the failure to comply with a contract); *Coal Case* (Ukr. v. Bulg.), Award 56/1995 (Bulg. Comm. Ct. 1996), <http://cisgw3.law.pace.edu/cases/960424bu.html> (regarding an impediment to a contract as a result of the Ukrainian government's trade restrictions on the export of coal); *Butter Case* (Russ. v. Ger.), Award 155/1996 (Int'l Comm. Arb. 1997), <http://cisgw3.law.pace.edu/cases/970122r1.html> (detailing a seller's claim that he should be exempt from performance due to overly restrictive testing by Russian Customs).
 121. *See* *Coal Case* (Ukr. v. Bulg.), Award 56/1995 (Bulg. Comm. Ct. 1996), <http://cisgw3.law.pace.edu/cases/960424bu.html> (discussing a claim that a Ukrainian coal workers' strike was sufficient impediment to excuse performance of a contract).
 122. *See* *Metallic Sodium Case* (Ger. v. Russ.), Award 155/1994 (Int'l Comm. Arb. 1995), <http://cisgw3.law.pace.edu/cases/950316r1.html> (stating that a manufacturers refusal to supply a seller with necessary goods is not a sufficient impediment to excuse performance); *see also* *Chinese Goods Case* (Ger. v. China), (Int'l Comm. Arb. 1996), <http://www.unilex.info/case.cfm?pid=1&do=case&id=195&step=Abstract> (noting that Article 79 states that a party will not be held liable for failure to perform if their failure is due to circumstances beyond their control).

excuse.¹²³ Governmental actions and civil counteractions appear to be particularly fact dependent, and further discussion is outside the scope of this comment. Breaches by suppliers and economic hardship considerations, however, warrant deeper analysis.

2. Breach by Suppliers as a Particular Impediment

At first glance, a seller's supplier (or subcontractor) appears to be a "third party" implicating Article 79(2) and, indeed, in some circumstances a tribunal may find that to be the case.¹²⁴ In general, however, a seller (or the buyer) retains responsibility for the performance of those within its sphere of risk; "for example, the seller's own staff or personnel and those engaged to provide the seller with raw materials or semi-manufactured goods."¹²⁵ Third parties within the seller's sphere of risk include those third parties "who, while not entrusted with the performance of the contract vis-à-vis the buyer, nevertheless enable, assist, or create the preconditions for the seller's delivery of conforming goods."¹²⁶ A consistent line of decisions concludes that the seller bears the risk that these third-party suppliers or subcontractors on which the seller depends may breach their own contract with the seller, so that the seller will not be excused when failure to perform was caused by its supplier's default.¹²⁷ Because these are not the types of third persons "engaged to fulfill a whole or a part of the contract"¹²⁸ contemplated in Article

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123. See Steel Ropes Case (Russ. v. Bulg.), Award 11/1996 (Bulg. Comm. Ct. 1998), <http://cisgw3.law.pace.edu/cases/980212bu.html> (examining a buyer's attempt to void a contract for construction material due to worsening economic conditions); see also Equipment/Automatic Diffractometer Case (Ger. v. Russ.), Award 123/1992 (Int'l Comm. Arb. 1995), <http://cisgw3.law.pace.edu/cases/951017r1.html> (observing a Russian buyer who wished to void a contract because of the turbulent economic conditions within the USSR).
 124. The author is unaware of a published case where a seller's supplier or subcontractor was found to be a "third party" implicating Article 79(2). The CISG-AC Advisory Opinion No. 7 could not cite a case supporting this proposition but suggests that a supplier's monopoly may be such a situation. See CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, para 6, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007, <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html> (declaring that a party who assists in the creation of conditions that inhibit contractual performance will fall under Article 79).
 125. See *id.* at para 2.2(a), (stating that courts will rarely grant a claim of exemption for a third party's failure to deliver when that breach was foreseeable).
 126. See *id.* at para 18 (defining third parties within the sphere of risk as subcontractors, suppliers, and auxiliary agents).
 127. See, e.g., Vine Wax Case II (Austria v. Ger.), *Bundesgerichtshof*, Germany (1999), <http://cisgw3.law.pace.edu/cases/980331g1.html> (noting that delivery of defective goods is an impediment that seller produced); *Flippe Christian v. Douet Sport Collections* (Switz. v. Fr.), Tribunal de commerce de Besançon, France (1998), <http://cisgw3.law.pace.edu/cases/980119f1.html> (ordering the seller to reimburse the buyer a percentage of the price).
 128. See U.N. Convention on CISG art. 79(2), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (declaring that a party will not be held liable for the actions of a third party if it is shown that the third party's failure was beyond the seller's control).

79(2),¹²⁹ “Article 79(1) remains the controlling provision to ascertain the liability of the seller for the acts or omissions of that type of ‘third persons’ whose default cannot be invoked by the seller to excuse his own failure to deliver conforming goods.”¹³⁰

Some commentators argue that a seller’s sphere of risk does not extend to situations where the seller cannot control the choice of supplier or its performance—perhaps in situations where the supplier holds a monopoly, although this has not been addressed in a decision.¹³¹

In this way, “sphere of risk” analysis appears to be a proxy for the “control” element of Article 79(1) to the extent that a seller controls its choice of supplier (as contrasted with a supplier chosen by the buyer).¹³² Therefore, potentially subject to the narrowest of exceptions, a supplier’s default does not constitute a genuine impediment with regard to the seller’s performance.¹³³

3. Economic Hardship as a Particular Impediment

Non-performing parties have frequently claimed that significant changes in the financial aspects of a contract that cause performance to become extraordinarily burdensome should qualify as an “impediment” exempting the party from liability.¹³⁴ Such “hardship” arguments appear to be grounded in both national legal doctrines (such as *imprévision*, frustration of contract, commercial impracticability, *Wegfall der Geschäftsgrundlage*, *excesiva onerosita sopravve-*

129. Article 79(2) contemplates “third persons” to be those “‘independently’ engaged by the seller to perform all or part of the contract directly to the buyer” and who, unlike third-party suppliers or subcontractors “for whose performance the seller is fully responsible, are not merely separate and distinct persons or legal entities, but also economically and functionally independent from the seller, outside the seller’s organizational structure, sphere of control or responsibility.” See CISG-AC Opinion No. 7, *supra* note 124 at para 19 (citing DENIS TALLON, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 545 (M. Bianca & M.J. Bonell, eds., 1987)).

130. See CISG-AC Opinion No. 7, *supra* note 124 at para 18 (describing third persons as suppliers of raw material or subcontractors of semi-manufactured parts).

131. See *id.* at ¶¶ 18–20 (citing to HANS STOLL & GEORG GRUBER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) Article 79, 819–22 (Peter Schlechtriem et al. eds., 2d ed. 2005)) (suggesting an exemption from liability where a seller deals with an independent third person).

132. See Harry Flechtner, *Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods*, 19 PACE INT’L L. REV. 29, 33–39 (2007) (noting that sellers bear the risk of non-conforming goods provided by a supplier even where sellers have no opportunity to inspect the goods); see also Carla Spivack, *Of Shrinking Suits and Poison Vine Wax: A Comparison of Basis for Excuse Under U.C.C. §2-615 and CISG Article 79*, 27 U. PA. J. INT’L ECON. L. 757, 795–98 (2006) (highlighting that Article 79 applies a strict liability standard on sellers for non-conforming goods provided by suppliers).

133. See Flechtner, *supra* note 132 at 36–38 (comparing arguments for and against a fault based approach to a seller’s liability for non-conforming goods received via a supplier); see also Spivack, *supra* note 132 at 776–79 (contrasting the U.C.C. and CISG provisions regarding third-party failures).

134. See Dionysios P. Flambouras, *The Doctrines of Impossibility of Performance and Clausula Rebus Sic Stantibus in the 1980 Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law—A Comparative Analysis*, 13 PACE INT’L L. REV. 261, 277–80 (2001) (noting that the CISG lacks specific provisions allowing for renegotiation in light of unforeseen economic hardship); see also Article 79(1): “Impediment” Requirement, 2012 UNCITRAL DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS (2012), <http://cisgw3.law.pace.edu/cisg/text/digest-2012-79.html> (stating that an impediment could arise from economic or political impossibility).

nuta) and conflicting scholarly opinions about the extent of “impediment.”¹³⁵ Although some early commentators argue that the drafting history of Article 79 indicates that “hardship” cannot fit within the “insurmountable obstacle” concept of “impediment,”; in actuality “such history evidences that the discussions were not conclusive on this question.”¹³⁶ Because Article 79 does not define “impediment” as an event that renders performance absolutely impossible, an impediment may be represented by “a totally unexpected event that makes performance excessively difficult.”¹³⁷

In practice, courts and tribunals have routinely denied petitions for Article 79 exemption grounded in hardship stemming from changes in market prices: sellers’ failure to deliver the goods caused by an increase in cost,¹³⁸ sellers’ failure to deliver the goods where the market price of the goods increased dramatically,¹³⁹ and buyers’ refusal to accept delivery and pay the seller because of a dramatic decrease in the value of the goods being sold.¹⁴⁰ When denying such petitions, courts have generally commented that “a party is deemed to assume the risk of market fluctuations and other cost factors affecting the financial consequences of the con-

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135. See CISG-AC Opinion No. 7, *supra* note 124 (noting that most of the legal doctrines can be traced back to the doctrine of *rebus sic stantibus*); see also David J. Bederman, *The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View of the Law of Nations*, 82 AM. J. INT’L L. 1, 2 (1988) (summarizing *rebus sic stantibus* as the notion that treaties cease to bind nations when there is a fundamental change in circumstance).
136. See CISG-AC Opinion No. 7, *supra* note 124 at ¶¶ 27–28, 30 (concluding that “economic hardship” was not discussed as such when rejecting the Norwegian proposal); see also Joseph Lookofsky, *Not Running Wild With the CISG*, 29 J.L. & COM. 141, 157–58 (2011) (highlighting the inconclusive nature of economic hardship in context of Article 79). For an extremely thorough discussion of the drafting history of Article 79 as it relates to the concept of “hardship,” see CISG-AC Opinion No. 7, *supra* note 135 at ¶¶ 24–40, nn. 27–40 (referencing isolated discussions and court decisions related to Article 79).
137. See CISG-AC Opinion No. 7, *supra* note 124 at ¶ 28 (claiming “ample support” for the idea that the Convention did not intend to make the exemption from non-performance easy); see also Francesco G. Mazzotta, *Why Do Some American Courts Fail to Get It Right?*, 3 LOY. U. CHI. INT’L L. REV. 85, 108 (2005) (positing that relevant case law suggests the Article 79 exemption is closer to the “impossibility” standard).
138. See, e.g., Tomato Concentrate Case (Fr. v. Ger.), Oberlandesgericht Hamburg, Germany (1997), <http://cisgw3.law.pace.edu/cases/970704g1-.html> (holding the seller liable for failing to supply contracted tomato concentrate when prices increased); Steel Bars Case (Egypt v. Yugoslavia), Award 6281, (ICC Int’l Ct. Arb. 1989), <http://www.unilex.info/case.cfm?pid=1&do=case&cid=11&step=FullText> (applying Yugoslav law to determine that the increase in price was predictable); Iron Molybdenum Case (U.K. v. Ger.), Oberlandesgericht Hamburg, Germany (1997), <http://cisgw3.law.pace.edu/cases/970228g1.html> (emphasizing that the seller bears the risk of increasing market prices); Chinese Goods Case (Ger. v. China), (Int’l Comm. Arb. 1996), <http://www.unilex.info/case.cfm?pid=1&do=case&cid=195&step=Abstract> (declaring that difficulties in delivery due to the seller’s financial problems are not an impediment so beyond the seller’s control to permit exemption under Article 79).
139. See Ferrochrome Case (It. v. Swed.), Tribunale Civile di Monza, Italy (1993), <http://www.unilex.info/case.cfm?pid=1&do=case&cid=21&step=Abstract> (denying a claim of hardship because it was not expressly excluded under CISG); compare with Carla Spivack, *Of Shrinking Sweatsuits and Poison Vine Wax: A Comparison of Basis for Excuse Under U.C.C. S 2-615 and CISG Article 79*, 27 U. PA. J. INT’L ECON. L. 757, 792 (2006) (suggesting the door has been left open to determine what price increases would satisfy an exemption under Article 79).
140. See Frozen Raspberries Case (Chile v. Belg.), Rechtbank van Koophandel, Hasselt, Belgium (1995), <http://www.unilex.info/case.cfm?pid=1&do=case&cid=263&step=Abstract>, Dutch full text, <http://www.unilex.info/case.cfm?pid=1&do=case&cid=263&step=FullText> (remarking that a drop in market price did not exempt the buyer from non-performance under Article 79); see also Steel Ropes Case (Russ. v. Bulg.), Award 11/1996 (Bulg. Comm. Ct. 1998), <http://cisgw3.law.pace.edu/cases/980212bu.html> (explaining that the worsening of market conditions was not a sufficient reason for the buyer to ask the seller to stop making deliveries).

tract.”¹⁴¹ Indeed, it was not until June 2009, almost twenty years after the CISG’s entry into force, that a court granted an Article 79 petition expressly on grounds of “hardship” stemming from a rise in the cost of raw materials.¹⁴²

Specifically addressing the concept of hardship, the Belgian Hof van Cassatie (Supreme Court) contemplated whether or not a 70% rise in the market price of steel tubes constituted sufficient hardship to excuse the seller from liability for declining to perform its obligation to deliver steel tubes to the buyer.¹⁴³ First, the Hof van Cassatie opined that Article 79 can govern situations of hardship: “Changed circumstances that were not reasonably foreseeable at the time of the conclusion of the contract and that are unequivocally of a nature to increase the burden of performance of the contract in a disproportionate manner, can, under circumstances, form an impediment in the sense of [Article 79].”¹⁴⁴ Such an opinion accords with the leading scholarship and cases addressing the issue.¹⁴⁵

Next, the Hof van Cassatie applied this general theory to the facts before it and determined that the market fluctuation of 70 percent was, indeed, sufficient hardship to warrant

141. See Article 79(1): “Impediment” Requirement, 2012 UNCITRAL DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS (2012), <http://cisgw3.law.pace.edu/cisg/text/digest-2012-79.html> (noting that courts have denied parties to break contracts due to economic circumstances).

142. See Hof van Cassatie [Cass.] [Court of Cassation], June 19, 2009, AR C070289N, <http://cisgw3.law.pace.edu/cases/090619b1.html> (Belg.) (summarizing due to the sudden 70% increase in the price of steel the buyer was required to renegotiate the contract); see also Amin Dawwas, *Alteration of the Contractual Equilibrium Under the UNIDROIT Principles*, PACE INT’L L. REV. ONLINE COMPANION 1, 8–11 (2010) (discussing that the Court of Cassation for Belgium ordered the renegotiation of a purchase contract due to market inflation hardship), Hof van Cassatie, Belgium (19 June 2009).

143. See Hof van Cassatie [Cass.] [Court of Cassation], June 19, 2009 (analyzing CISG Article 79 and UNIDROIT Principles Articles 7(1) and (7)(2) to determine whether parties must conform to a purchase contract).

144. See Hof van Cassatie [Cass.] [Court of Cassation], June 19, 2009 (stating that Article 79 is applicable to circumstances where parties breach a contract due to unforeseeable circumstances). But note that renegotiation of a contract is a remedy neither within the scope of Article 79 specifically (which only grants an exemption from damages), nor the CISG generally. See U.N. Convention on CISG art. 79(2), Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (lacking any mention of a renegotiation requirement).

145. See authorities cited within this article, *supra* II.C.

exemption under Article 79 and ordered that parties renegotiate the contract!¹⁴⁶ Such a holding, however, not only was the first instance of hardship successfully justifying excuse in a published decision, but also directly contradicts established decisions stating that economic fluctuations cannot be an “impediment” to the extent that they reflect the risk inherent in international trade.¹⁴⁷ Indeed, according to the decisions addressing hardship under Article 79 prior to the *Steel Tubes Case*, a price increase or decrease of more than 100 percent does not suffice.¹⁴⁸ Moreover, even a scholar that accepts the *Steel Tubes* principle in extreme cases argues that the 100% threshold may be based on domestic markets and should actually be greater for international markets, perhaps as high as 150%–200%.¹⁴⁹ Thus, when determining how substantial an economic change must be to fall within the scope of “impediment,” courts and tribunals now must determine whether the Belgian court’s new, lenient threshold is an aberration or the emergence of a trend.

III. Discussion

Within the overall goal of harmonizing international commercial trade law, Article 79 aspires to “bridge the differences between the civilian principles of hardship and force majeure with the common law’s limited recognition of impracticability, frustration, and impossibility.”¹⁵⁰ Such a bridge requires uniform interpretation to succeed; accordingly, Article 79 “must

146. See Hof van Cassatie [Cass.] [Court of Cassation], June 19, 2009 (affirming the Appellate Court’s judgment ordering the parties to renegotiate the terms of the contract). Also remarkable is the remedy prescribed by the court; the text of Article 79 purports only to excuse liability from damages. See U.N. Convention on CISG art. 79(2), April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (codifying the circumstances that may exempt parties from liability for not fulfilling obligations under a contract). For a more detailed discussion, see this comment, *infra* III.A.

147. See Ingeborg Schwenzer, *Wider Perspective: Force Majeure and Hardship in International Sales Contracts*, 39 VUWLR 709, 716, n. 44 (2008), <http://www.austlii.edu.au/nz/journals/VUWLawRw/2008/39.pdf> (citing to CIETAC, 10 May 1996, No 21, CISG-online 1067; Bulgarian Chamber of Commerce and Industry, 12 Feb 1998, No 11, CISG-online 436; Rechtbank van Koophandel, Hasselt, 23 Feb 1994, No 1849, CISG-online 371; Cour d’Appel de Colmar, 12 Jun 2001, CISG-online 694; Cour de Cassation, 30 Jun 2004, No 964, CISG-online 870) (arguing that a price increase is foreseeable for an individual involved in international trade). Note also that in the *Ferrochrome Case*, the Italian Court did not believe Art. 79 provided for an excuse on the grounds of hardship at all, and specifically not for a 30% increase in the price. See *Ferrochrome Case* (It. v. Swed.), Tribunale Civile di Monza, Italy (1993), <http://www.unilex.info/case.cfm?pid=1&do=case&id=21&step=Abstract> (denying a claim of hardship because such a remedy is not located within Article 79 or elsewhere within the CISG).

148. See *Steel Ropes Case* (Russ. v. Bulg.), Award 11/1996 (Bulg. Comm. Ct. 1998), <http://cisgw3.law.pace.edu/cases/980212bu.html> (examining a buyer’s attempt to void a contract for construction material due to worsening economic conditions); see also *Equipment/Automatic Diffractometer Case* (Ger. v. Russ.), Award 123/1992 (Int’l Comm. Arb. 1995), <http://cisgw3.law.pace.edu/cases/951017r1.html> (observing a Russian buyer who wished to void a contract because of the turbulent economic conditions within the USSR).

149. See Schwenzer, *supra* note 147 at 709, 717 (suggesting that due to the risks inherent in international trade, contracts should include provisions that account for greater fluctuations in price); see also Rodrigo Momberg Uribe, *Change of Circumstances in International Instruments of Contract Law. The Approach of the CISG, PICC, PECL and DCFR*, 15 VJ 233, 244 (2011) (providing that market fluctuations in international trade are foreseeable because they are greater).

150. See Peter J. Mazzacano, *Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG*, 2011 NORDIC J. COM. L. 1, 49 (2011), http://www.njcl.utu.fi/2_2011/peter_j_mazzacano.pdf (addressing the compromise in Article 79 between civil and common law principles).

be read and interpreted without reference to domestic legal principles.”¹⁵¹ Perhaps the most self-evident method of promoting harmony and ensuring uniform interpretation is for a court or tribunal to rely on the body of previous interpretations, both academic and judicial. Years of decisions influenced by domestic legal doctrines, however, have resulted in contradictory treatment of several issues: what, exactly, constitutes an impediment; whether or not delivering non-conforming goods may ever be excused; and when non-performance can be attributed to the actions of a third party. These contradictions necessarily reduce the predictability of Article 79 application and therefore reduce the utility of the CISG to the businesses who transact under its governance.¹⁵²

In other areas, such as “hardship,” the body of previous Article 79 judicial and arbitral interpretations overwhelmingly support a uniform interpretation despite differing domestic legal doctrines. Because such sources are typically only persuasive on the court or tribunal tasked with applying Article 79, the courts and tribunals may instead reinterpret Article 79 through the lens of domestic legal doctrines, reintroducing disharmony in the application of Article 79, as happened in the *Steel Tubes Case*.¹⁵³

The CISG Advisory Council, in its Advisory Opinion No. 7, attempted to increase harmony by identifying three areas of potential fracture—non-conforming goods, third-party liability, and hardship—and reconciling or recommending, as appropriate, a uniform solution.¹⁵⁴ Yet, rather than promoting harmony by establishing a uniform interpretation, the Advisory Opinion may have actually increased disharmony.

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

151. *See id.* (defining what the compromise between civil and common law principles means within Article 79).

152. “By enhancing predictability regarding the content of governing law, the CISG can help parties to assess the costs and risks of entering into an international commercial sales contract, thus facilitating commercial exchanges.” *See* Charles R. Calleros, *Toward Harmonization and Certainty in Choice-of-Law Rules for International Contracts: Should the U.S. Adopt the Equivalent of Rome I?*, 28 WIS. INT’L L.J. 639, 645 (2011) (outlining all of the positive characteristics of CISG and indicating CISG provides enhanced predictability).

153. *Scafom International v. Lorraine Tubes S.A.S. (Neth. v. Fr.)*, Hof van Cassatie Case No. C.07.0289.N, *Steel Tubes Case*, (June 19, 2009), English translation, <http://cisgw3.law.pace.edu/cases/090619b1.html> (indicating that French law was applied to the facts of this case where CISG was not on point).

154. *See* CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, at para 3.2, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People’s Republic of China, 12 October 2007, <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html>. (emphasis added) (discussing how the Advisory Council has ushered CISG towards the goal of uniformity); *see also* ANDRE JANSSEN & OLFAF MEYER, *CISG METHODOLOGY*, 38 (2009) (discussing the high quality of CISG judgments concerning the correct application of the CISG provisions).

A. Disharmony: Fracture Through Liberalization of the Requirements for Excuse

The recent *Steel Tubes* case¹⁵⁵ presents perhaps the best example of the potential disharmony fostered by liberal (in the “too lenient” sense) interpretations of Article 79 elements. When asked to determine if a 70% rise in the cost of steel constituted sufficient hardship to become an “impediment” and excuse a Belgian seller,¹⁵⁶ the *Hof van Cassatie* case was faced with a substantial, consistent body of prior decisions and scholarship indicating that excuse was not warranted. Undaunted, it decided sufficient hardship existed, applied Article 79, and excused the Belgian seller from liability for damages.¹⁵⁷

Rather than being persuaded by the prior decisions, the *Hof van Cassatie* case may be justifying its interpretation on CISG Advisory Opinion No. 7. Despite concluding that market fluctuations “are a normal risk of commercial transactions,” the CISG-AC refrained from excluding them altogether under the theory that “the theoretical possibility of such radical and unexpected changes admits the application of Article 79 in those rare instances.”¹⁵⁸ By declaring the theoretical possibility without setting a threshold despite the clear decisions to the contrary, the CISG-AC may have emboldened the *Hof van Cassatie* case to break from the otherwise international uniformity against such instances of claimed hardship.¹⁵⁹

Admittedly, if market fluctuations can theoretically precipitate sufficient economic hardship, then in practice that threshold will necessarily vary based on the specific facts of the transaction, the effect the transaction would have on the parties, and the industry within which the transaction occurs.¹⁶⁰ Such variances, however, undermine the uniformity and predictability of application sought after by the member states of the CISG. This becomes especially problematic where, as it currently stands, a Bulgarian steel manufacturer cannot find relief from even a

155. *Scafom International v. Lorraine Tubes S.A.S. (Neth. v. Fr.)*, Hof van Cassatie Case No. C.07.0289.N, Steel Tubes Case, (June 19, 2009), English translation, <http://cisgw3.law.pace.edu/cases/090619b1.html> (serving as an example of application of domestic law during a CISG dispute).

156. *Id.* (illustrating the types of disputes that come before courts tasked with interpreting CISG).

157. *See Scafom International v. Lorraine Tubes S.A.S. (Neth. v. Fr.)*, *supra* note 155 (holding that the Belgian seller was excused from liability on a hardship theory).

158. *See CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG*, at ¶ 40, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People’s Republic of China, on 12 October 2007, <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html> (CISG-AC Op.) (stating that rare instances allow for market fluctuations to be considered an impediment); *see also* Peter Schlechtriem, *Uniform Sales Law—The UN-Convention on Contracts for the International Sale of Goods*, 101 n.422a (Manz, Vienna 1986), <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html> (noting that radically changed circumstances should be treated as impediments).

159. *See CISG-AC Opinion No. 7*. This is not cited in the court’s decision, but it had been available for approximately 18 months; *see* Harry M. Flechtner, *The Exemption Provisions of the Sales Convention, Including Comments on “Hardship” Doctrine and the 19 June 2009 Decision of the Belgium Cassation Court* 13 (Univ. of Pittsburgh Sch. of L., WORKING PAPER NO. 2011–09, 2011) (emphasizing that the Belgian Cassation Court is likely to cause non-uniformity).

160. *See* Ingeborg Schwenzer, *Wider Perspective: Force Majeure and Hardship in International Sales Contracts*, 39 VICT. U. WELLINGTON L. REV. 709 (2008) (noting that price fluctuations can be unforeseeable); *see also* Flechtner, *supra* note 159 at 84, 85 (2011) (stating the threshold requirements for Article 79).

200% increase in market prices¹⁶¹ in a Bulgarian court while its Belgian buyer could be relieved of at least a 70% (and perhaps smaller) change in prices if pursued in a Belgian court. Such trade imbalances, if allowed to spread, would severely undermine the commercial utility of the CISG.¹⁶² Thus, even if some variance must be expected between industries, some baseline standard must emerge to prevent spreading fractured interpretations of the CISG.

B. Disharmony: Regional Fracture Through Adaptations of Domestic Interpretations

Although not the first instance of a national court adapting domestic excuse doctrines into its interpretation of the CISG,¹⁶³ the Belgian *Steel Tubes Case* was the first judicial application of Article 79 to justify an additional remedy other than exemption from liability for damages. Consequently, it again provides a terrific example of “what not to do” if desiring uniformity in the interpretation of Article 79 specifically, and the CISG generally.¹⁶⁴ After determining hardship applicable under Article 79, the *Hof van Cassatie* determined that the CISG’s failure to provide for the remedy of an obligation to renegotiate constituted a “gap” in the CISG that the court must fill.¹⁶⁵ Citing Article 7(2),¹⁶⁶ the *Hof van Cassatie* “determined that the convention itself, rather than applicable international law, required a court to adapt the terms of the parties’ contracts in light of the seller’s hardship” and affirmed the intermediate appellate court’s order increasing the price the buyer was obliged to pay.¹⁶⁷

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161. See *Steel Ropes Cases* (Russ. v. Bulg.), Bulgarian Chamber of Commerce and Industry Case No. 11/1996 (Feb. 12, 1998), <http://cisgw3.law.pace.edu/cases/980212bu.html> (citing the Bulgarian tribunal’s holding that any amount of market fluctuations for these steel products is foreseeable, and thus not sufficient hardship under the CISG); see also Carla Spivack, *Of Shrinking Suitsuits and Poison Vine Wax: A Comparison of Basis for Excuse Under U.C.C. 2-615 and CISG Article 79*, 27 U. PA. J. INT’L ECON. L. 757 (2006) (stating that the Bulgarian tribunal refused the market fluctuation argument).
162. See Flechtner, *supra* note 159 at 15 (concluding that varying interpretations of the CISG would mean a failure of its goals); see also Schwenger, *supra* note 160 at 709 (stating that the unification of laws would be undermined with local interpretation).
163. See *Supermicro Computer, Inc. v. DigiTechnic, S.A.*, 145 F. Supp. 2d 1147, 1151 (N.D. Cal. 2001) (asserting that the CISG does not address disclaimers of the implied quality obligations imposed by CISG Art. 35(2) and applied under domestic law, U.C.C. § 2-316).
164. See *Scafom International v. Lorraine Tubes S.A.S.* (Neth. v. Fr.), Hof van Cassatie Case No. C.07.0289.N, *Steel Tubes Case*, (June 19, 2009), English translation, <http://cisgw3.law.pace.edu/cases/090619b1.html> (justifying an additional remedy other than the exception from liability for damages); see also Flechtner, *supra* note 159 at 84, 97 (showing that the Belgian *Steel Tubes Case* was the first judicial application of article 79 in this situation).
165. See *Scafom International v. Lorraine Tubes S.A.S.* (Neth. v. Fr.) (determining that the Court must fill the gap left by the CISG); see also Flechtner, *supra* note 159 at 84, 90 (explaining why the Court decided to fill the gap left by CISG).
166. Recognizing their inability to foresee (and perhaps to agree on) all potential situations that could arise, the drafters of the CISG included Article 7(2) to prescribe the methodology for answering questions governed by the CISG that are not expressly addressed therein: “(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.” See U.N. Convention on CISG art. 7(2), Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M.
167. See *Scafom International v. Lorraine Tubes S.A.S.* (Neth. v. Fr.) (determining that the convention required the Court to adapt the terms of the parties contracts in light of the sellers hardship); see also Flechtner, *supra* note 159 at 84, 93–94 (highlighting that the international law required the sellers hardship to be taken into account).

Potentially inconsistent methodology for gap-filling aside,¹⁶⁸ the Belgian *Hof van Cassatie* effectively determined that the CISG contained a gap to be filled because Article 79's only remedy is exemption from liability from damages stemming from non-performance. Renegotiation of contractual terms or adaptation by the court—modification without the parties' agreement—is a national remedy for hardship (albeit one common to civil law jurisdictions),¹⁶⁹ and not a remedy within the CISG. Moreover, this exact remedy was *rejected* by the drafters of the CISG.¹⁷⁰ If predictability and uniform interpretation are goals of the CISG, then a court's ability to incorporate its own domestic legal doctrines into the range of potential remedies must surely be anathema to parties contracting under the CISG.

Like its landmark finding of sufficient economic hardship, the Belgian court's application of a domestic remedy for hardship may be related to the CISG Advisory Opinion. Specifically, the final paragraph of the Advisory Opinion tackles the issue of hardship remedies and concludes: “[i]n a situation of hardship under Article 79, the court or arbitral tribunal may provide *further relief* consistent with the CISG and the general principles on which it is based” (emphasis added).¹⁷¹ The Belgian Hof van Cassatie makes no indication that it has considered the CISG Advisory Opinion, but it does track the Advisory Opinion closely in contradiction to any previous decisions.¹⁷² Despite explicitly noting the absence of “guidelines under the Convention for a court or arbitrator to ‘adjust,’ or ‘revise’ the terms of the contract so as to restore the balances of the performances,” the Advisory Opinion allows for the theoretical possibility

168. Such methodology is not within the scope of this comment. For a detailed analysis of the topic, see Flechtner, *supra* note 159 at 84 (noting that adhesion should be used to uniformly fill the gaps); see also Sarah Howard Jenkins, *Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles—A Comparative Assessment*, 72 TUL. L. REV. 2015, 2017 (1998) (commenting that there are two prevailing views on which methodology the courts should use in gap-filling).

169. See Schwenzler, *supra* note 160 at 709, 721–25 n. 44 (indicating that in cases of hardship, some civil law legal systems call upon the court primarily to adapt a contract to changed circumstances); see also Rodrigo Momberg Uribe, *Change of Circumstances in International Instruments of Contract Law. The Approach of the CISG, PICC, PECL and DCFR*, 15 VINDOBONA J. INT'L COM. L. & ARB. 233, 242 (2011) (noting the possibility for varying outcomes exists depending on the method used for distributing losses among the parties).

170. See HONNOLD, DOCUMENTARY HISTORY, *supra* note 58 at 350 (noting that Honnold recalls that a proposal aimed at incorporating an article allowing a party to “claim an adequate amendment of the contract or its termination” on account of “excessive difficulties” was expressly rejected by UNCITRAL's Working Group); see also Larry A. DiMatteo & Daniel T. Ostas, *Comparative Efficiency in International Sales Law*, 26 AM. U. INT'L L. REV. 371, 381 (2011) (explaining that the CISG expressly rejects the use of any analogous national jurisprudence and instead adopts the original understanding of its rules).

171. See CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, at ¶¶ 3.2, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007, <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html> (emphasis added) (stating that “in a situation of hardship under Article 79, the court or arbitral tribunal may provide further relief consistent with the CISG and the general principles on which it is based.”); see also Joseph Lookofsky, *Not Running Wild With the CISG*, 29 J.L. & COM. 141, 162 (2011) (defining further relief as renegotiation and/or contract adjustment that is specifically tailored to hardship).

172. See *Scafom International v. Lorraine Tubes S.A.S. (Neth. v. Fr.)*, Hof van Cassatie Case No. C.07.0289.N, Steel Tubes Case (June 19, 2009), English translation, <http://cisgw3.law.pace.edu/cases/090619b1.html> (noting that the Belgian court will look to national law on matters where CISG is not on point); see also Sofie M.F. Geeroms, *Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal Should Not be Translated . . .*, 50 AM J. COMP. L. 201, 209 (2002) (observing that the Belgian Hof van Cassatie acknowledges the possibility of replacing its own reasoning when a lower court's judgment is legally correct but poorly explained).

of stretching either the good-faith requirement of Article 7(1)¹⁷³ or Article 79(5)'s¹⁷⁴ preservation of rights to allow a court or tribunal to determine the obligations of the parties and “adapt” the terms of the contract to fit the changed circumstances.¹⁷⁵ Mirroring the process described in the Advisory Opinion, the Belgian *Hof van Cassatie* cites Article 7(1)'s good faith requirement as the basis for allowing a remedy of judicial adaptation.¹⁷⁶ Thus, the Advisory Opinion may again be implicated in inadvertently harming the very uniformity it seeks to preserve.

C. Harmony: Suggestions for Creating and Strengthening Uniformity

The CISG's strength and purpose comes from its harmonizing effects on international trade law. Promoting uniformity and predictability not only benefits contracting parties, but manifests the intent of the member states. One way in which the CISG creates this harmony is by relying on principles of guarantee between contracting parties irrespective of fault for breaches that arise. However, the “principle of *rebus sic stantibus* and concept of changed circumstances [had been] widely recognized by arbitral tribunals and the courts of most jurisdictions.”¹⁷⁷ Logically, then, the CISG's inclusion of Article 79's provisions for excuse from liability for damages stemming from non-performance serves to appease such concepts of fairness and equity when unforeseeable and uncontrolled events prevent contractual perfor-

173. “(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.” See U.N. Convention on CISG art. 7(1), Apr. 11, 1980, 1489 U.N.T.S. 3 (citing the Convention's intent to preserve uniformity and promote good faith in international commercial transactions).

174. “(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.” See U.N. Convention on CISG art. 79(5), Apr. 11, 1980, 1489 U.N.T.S. 3 (referring to the Convention's limitation on parties' actions to only claiming damages).

175. See Schwenger, *supra* note 160 at 723–24 (2009) (explaining that arguments exist which advocate for expanding the good-faith requirement); see also CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, at ¶ 40, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on Oct. 12, 2007, <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html> (describing an Advisory Opinion allowing courts to interpret contracts for international transactions to fit certain circumstances).

176. See *Scafom International v. Lorraine Tubes S.A.S. (Neth. v. Fr.)*, *supra* note 172 (providing an English translation of the Belgian Supreme Court's decision in the Steel Tubes Case holding that Article 7(1)'s good-faith requirement serves as a basis for allowing a remedy of judicial adaptation); see also Joseph Lookofsky, *Not Running Wild with the CISG*, 29 J.L. & COM. 141, 167 n.138 (2011) (indicating how the *Steel Tubes* court expanded on the 7(1) good-faith provision and similar principles in order to render a decision).

177. See Peter J. Mazzacano, *Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG*, 2 NORDIC J. COM. L. 1, 12 (2011) (demonstrating that *rebus sic stantibus* and the concept of changed circumstances are widely recognized by courts); see also Charles Tabor, Comment, *Dusting Off the Code: Using History to Find Equity in Louisiana Contract Law*, 68 LA. L. REV. 549, 555–58 (2008) (presenting the history of the concepts of changed circumstances and *rebus sic stantibus* that make them widely accepted today as basic truths by courts and tribunals).

mance.¹⁷⁸ But, because domestic legal doctrines governing excuse vary so greatly—from *force majeure* to impossibility, *eccessiva onerosità sopravvenuta* to impracticability, *Wegfall der Geschäftsgrundlage* to economic hardship—harmony requires member states to set aside their specific doctrines in favor of autonomous and internationally uniform standards.¹⁷⁹

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

Fortunately for the forces of harmony, because most sources of Article 79 interpretations are persuasive rather than authoritative, courts and tribunals preferring to promote uniformity have the ability to ignore decisions from other jurisdictions anathema to international harmony. Indeed, in the interests of uniformity, courts and tribunals not required to follow the Belgian *Steel Tubes Case* should ignore the decision or other divergent interpretations of the CISG.

Additionally, courts and other tribunals interpreting Article 79 can promote further harmonization by staying true to the international principles inherent in the CISG and explicitly promoted by Article 7.¹⁸⁰ While protecting immediate national interests (such as a company seated in the state and requesting excuse under Article 79) will always hold great appeal, courts should take a longer view and realize that protecting the international character at the expense of their national legal doctrines helps create uniformity, predictability, and harmony benefitting their businesses in future transactions.

Further, harmony can be created and preserved by refraining from stretching the definition of “impediment” to fit circumstances divergent from the established strict doctrine. Indeed, the CISG-AC Advisory Opinion, itself, may be guilty of stretching “impediment.” By expounding a theoretical teaser based on academic hypotheticals, the CISG-AC may inadver-

178. See Dionysios P. Flambouras, *The Doctrines of Impossibility of Performance and Clausula Rebus Sic Stantibus in the 1980 Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law—A Comparative Analysis*, 13 PACE INT'L L. REV. 261, 263–66 (2001) (detailing the purpose and aim of Article 79 of the Convention as limiting liability for non-performance of a contract in the face of insurmountable difficulties); see also Lisa M. Ryan, *The Convention on Contracts for the International Sale of Goods: Divergent Interpretations*, 4 TUL. J. INT'L & COMP. L. 99, 112 (1995) (delineating the intent of Article 79).

179. See Mazzacano, *supra* note 177 at 49–52 (acknowledging that CISG has been the foremost push in international commercial law towards uniformity among diverging law and regulations); see also Harry Flechtner, *Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) As Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods*, 19 PACE INT'L L. REV. 29, 43 (2007) (indicating it is neither a novel nor new idea to suspend or limit domestic interpretations of international commercial laws in the CISG arena).

180. “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.” See U.N. Convention on CISG art. 7(1), Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M. (promoting interpretations under the CISG that account for the international and multinational character of the agreement and situations it governs).

tently be providing the theoretical framework necessary for courts and tribunals to liberalize the concept of “impediment” and the scope of Article 79. The *Steel Tubes Case* acts as a prime example of how such academic gymnastics can lead to fragmentation and discord, especially when contrasted with the relatively uniform applications of impediment established in case law and the current scholarly literature.¹⁸¹ Consequently, the CISG-AC would better serve its mission to promote uniform interpretation of the CISG if it more carefully articulated its academic speculation on the potential extent of interpretations—especially for Article 79 where it has admitted that the relative paucity of case law renders predicting trends in interpretation treacherous. Perhaps the CISG-AC could amend Advisory Opinion No. 7 to better reflect the strictness of the decisions published thus far instead of speculating on how courts and tribunals might someday stretch the provisions of Article 79 to expand its current narrow applications, as happened in the subsequent *Steel Tubes Case*. Such an amendment would likely help curtail future disharmony by eliminating language that currently provides an overly liberal basis for exemption that allows “gaps” to be filled by a variety of applications based on domestic legal standards.

To address the potential for courts and tribunals to fragment interpretation of Article 79 by interpreting new remedies into suspect “gaps,” the CISG-AC should specifically amend the final paragraph of Advisory Opinion No. 7.¹⁸² Alternatively, and perhaps to greater effect, a new advisory opinion concerning the extent of “gaps,” especially regarding remedies, may help prevent future nationalistic interpretations and restore some harmony to applications of Article 79. In the meantime, courts and tribunals must have the intellectual integrity to preserve the international character in their interpretations of excuse under the CISG by following the mandate of Article 7(1): “[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.”¹⁸³

IV. Conclusion

Where certainty is the currency of business, then the uncertainty of exactly how governing laws will be applied must be an inefficiency needlessly increasing the costs of international trade. By harmonizing international trade law, the CISG has been largely successful at creating uniformity and reducing the cost of doing business. Article 79, as the compromise between numerous domestic excuse doctrines, promotes uniformity by delimitating exactly when a con-

181. See Harry M. Flechtner, *Another CISG Case in the U.S. Courts: Pitfalls for the Practitioner and the Potential for Regionalized Interpretations*, 15 J.L. & COM. 127, 136 (1995) (questioning the validity and functionality of a system where regionalized interpretations of an international agreement are granted such a large degree of deference); see also Paul Amato, *U.N. Convention on Contracts for the International Sale of Goods—The Open Price Term and Uniform Application: An Early Interpretation by Hungarian Courts*, 13 J.L. & COM. 1, 21 (1993) (opining on shortcomings of the CISG that arise as a byproduct of lenient interpretations and projecting potential solutions aimed at creating a more uniform system of interpretation under CISG).

182. Where the advisory opinion suggests that courts and arbitral tribunals can use Article 79(5) to justify “adapting” the contract terms. See CISG-AC Opinion No. 7, *supra* note 175 (describing potential remedies and procedures once courts have determined that hardship does in fact exist).

183. See U.N. Convention on CISG art. 7(1), Apr. 11, 1980, 1489 U.N.T.S. 3, I.L.M. (indicating that interpretations under CISG should lean toward an international medium).

tracting party's non-performance can be excused. But to achieve uniformity, Article 79 relies on good faith interpretations made with regard to its international character.

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

If nothing is done, courts and tribunals, sensing the beginnings of a trend towards nationalistic or liberal interpretations, may very well engage in a race to the bottom as they protect perceived national interests. Such an evisceration of the uniformity, predictability, and harmony of the doctrine of excuse would undoubtedly be against the intent of the member states and would seriously weaken the CISG.¹⁸⁴ After all, what state would force its businesses to bow to the whims of foreign courts and tribunals, adding extra layers of expense and unpredictability? If the CISG is to accomplish the goals of its member states—blessing business transactions with the benefit of universal and uniform rules—then harmony, including within the doctrines for excuse, must be preserved, even at the expense of entrenched domestic legal doctrines and short-term nationalistic gains.

184. See Georg Gruber & Hans Stoll, *Article 79*, in 2 COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 807, 807 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2010); see also UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 615 (John O. Honnold & Harry M. Flechtner, eds., 4th ed. 2009)