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THE CISG – DIFFICULTIES IN ACHIEVING UNIFORMITY IN INTERNATIONAL TRADE LAW

WITH PARTICULAR REFERENCE TO THE DETERMINATION OF INTEREST RATES

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ABSTRACT

The purpose of this paper is to examine the difficulties of achieving uniformity in international trade law through the UN Convention on Contracts for the International Sale of Goods. Apart from the general problem of consistent application of the Convention, this paper will discuss the highly disputed issue of determining an appropriate interest rate under Article 78. After briefly reviewing the drafting history of the Convention, the scope of its application, and general drafting considerations, this paper will evaluate the various solutions that adjudicators have developed to decide what interest rate to apply under Article 78.

This paper will reveal that the majority of courts and arbitration tribunals have resorted to national law to settle the interest rate problem. This paper argues that this resort to national law to fix the rate of interest detracts from both the legislative intent of the Convention and its central theme of promoting uniformity. It demonstrates why judges and arbitrators should look instead to the underlying general principles of the Convention to remedy the problem. In conclusion, it will propose a solution to determine the interest rate under Article 78 that combines elements of the current approaches to bring interest rate disputes to a useful level of uniformity. Finally, this paper urges parties to international sales contracts to include provisions specifying the situations calling for interest and determining a specific interest rate in their contract to avoid the uncertainties arising from Article 78.

WORD LENGTH

The text of this paper (including footnotes, but excluding contents pages and bibliography) comprises approximately 12.500 words.

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I. INTRODUCTION

This paper refers to the United Nations Convention on Contracts for the International Sale of Goods[1] and its aim to promote international trade by removing legal barriers caused by the differences of municipal laws. The CISG attempts to unify international sales law by providing a common sales code which applies regardless of whether action is brought in the country of the seller's or the buyer's place of business.

The key element in the successful application of such a uniform text is its uniform interpretation. It is especially important to avoid differing constructions of the provisions of this Convention by national courts and arbitration tribunals, each dependent upon the concepts used in their domestic legal system. For that reason, Article 7 CISG itself emphasizes the international character of the Convention and directs domestic courts and arbitrators to interpret the CISG autonomously from domestic conceptions of sales law. However, a review of cases relating to the CISG reveals that judges, overlooking or misapplying Article 7 of the Convention, have often interpreted the Convention in light of domestic legal principles. In doing so, they actually harmed the goal of bringing uniformity and predictability to international sales law.

One of the most complex problems facing judges in adjudicating international commercial disputes falling under the CISG is the determination of an appropriate interest rate. Article 78 of the CISG provides that if a party fails to pay a sum that is in arrears, the other party is entitled to interest on it, but the text fails to stipulate how to determine what rate of interest to apply. Consequently, Article 78 raises difficult questions of interpretation and gap filling. It is an exemplar case that reveals the difficulties of judges applying the Convention uniformly. So far the majority of national courts have resorted to national law to settle the problem of interest rates. As a result of this, disputes surrounding Article 78 result in great uncertainties.

[1] Final Act of the United Nations Conference on Contracts for the International Sale of Goods (10 April 1980) UN Doc. A/CONF.97/18 [1980], 19 ILM 668; hereinafter Convention or CISG.

This paper will examine the difficulties of achieving uniformity in international trade law through the CISG. Specifically, it will discuss the highly disputed issue of determining an appropriate interest rate under Article 78. The first part looks at the creation of the CISG and the goals that it sets out to achieve. It deals with the interpretation of the Convention and examines Article 7. The second part presents a discussion of Article 78 and its appropriate application. The third section analyses significant cases that involved Article 78 and examines how they have dealt with Article 78 in light of potential sources of interpretation. The fourth part looks at these potential sources to interpret Article 78 and examines their applicability. The fifth part attempts to establish the most appropriate methodology to determine interest rates under the CISG. The last part contains drafting advice for practitioners in regard to contractual interest rate clauses.

II. QUEST FOR UNIFORMITY

A. Historical Background

Globalisation of most national economies in the twentieth century led to a dramatic increase in transnational trade and, therefore, to the increasing necessity of a body of law to regulate such transnational commerce.[2] By 1930 the International Institute for the Unification of Private Law (UNIDROIT) began specific efforts to establish an international treaty which would harmonize the law of international sales. That effort continued until the 1960s, when interested nations convened a conference in The Hague in 1964.[3] That conference adopted two uniform laws, one on the international sale of goods (ULIS),[4] and the other on the formation of contracts for international sales (ULF).[5] However, because these treaties are generally considered too complex, unclear and

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[2] Hannu Honka "Harmonization Of Contract Law Through International Trade: A Nordic Perspective" (1996) 11 Tulane Eur. & Civ. L. F. 111, 113.
[3] See UNIDROIT Web Page: Achievements (Rome, <http://www.unidroit.org/english/presentation/pres.htm#NR9>, last accessed 29 May 2002).
[4] Convention Relating to a Uniform Law on the International Sale of Goods (1 July 1964) 834 UNTS 107.
[5] Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (1 July 1964) 834 UNTS 169.

predominantly of the civil law tradition, most countries have refused to adopt them.[6]

The failure of the Hague treaties to gain widespread acceptance prompted the United Nations in 1968 to establish the Commission on International Trade Law (UNCITRAL) to promote *"the progressive harmonization and unification of the law of international trade"*.[7] One of its prior tasks was to draft the text for a new, more widely acceptable treaty on the international sale of goods.[8] The early discussions UNCITRAL focused on efforts to revise the two 1964 Hague Conventions.[9] Eventually, after a process of drafting, soliciting comments from UN members and international organizations and revising in light of those comments, UNCITRAL adopted the 1978 Draft Convention on Contracts for the International Sale of Goods.[10]

The draft was then debated at a diplomatic conference in Vienna in 1980. About 300 amendments were submitted to the UNICTRAL draft; only a few of them were considered in the final text. On 11 April 1980, the Final Act of the United Nations Conference on Contracts for the International Sale of Goods was adopted. The CISG became legally effective on the 1 January 1988. As of today, sixty-one States have ratified the Convention,[11] making it the most significant international treaty on international sales.[12] In all, the CISG is law in the nations that together generate more than two-thirds of the world's trade.[13]

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[6] Fritz Enderlein & Dietrich Maskow *International Sales Law* (Oceana, New York, 1992) 2.
[7] See U.N. Doc.A/CN.9/SER.A/1970, UNICITRAL Yearbook 65 (1970).
[8] John O. Honnold *Uniform Law for International Sales under the 1980 Convention* (3 ed, Kluwer Law International, The Hague, 1999) 9.
[9] John O. Honnold, above, 10.
[10] Kazuaki Sono "The Vienna Sales Convention: History and Perspective" in Petar Sarcevic & Paul Volken (eds) *International Sale of Goods:Dubrovnik Lectures 2* (Oceana, New York, 1986) 1, 5.
[11] As of 28 March 2002, the UNCITRAL reports that 61 States have adopted the CISG. See UNCITRAL Web Page <http://www.uncitral.org/english/status/status-e.htm> (last accessed 29 May 2002).
[12] Kevin Bell "The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods" (1996) 8 Pace Int'l L. R. 237, 237.
[13] Albert H. Kritzer "The Convention on Contracts for the International Sale of Goods: Scope, Interpretation and Resources" in Joseph P. Facciponti (ed) *Cornell Review of the Convention on Contracts for the International Sale of Goods* (Ithaca, New York, 1995) 147, 148.

B. Scope of the Convention

Unlike the 1964 Hague Conventions, the uniform law is embodied in the Convention itself, making it self-executable. Whenever its terms are met, court and arbitrators respectively must apply it.[14] The Convention governs contracts for the sale of goods between parties whose places of business are in different states and either both of those states are Contracting States to the CISG, or the rules of private international law lead to the law of the Contracting State (Article 1 (1) CISG). The uniform laws which it states regulates first the formation of international sales contracts and second the rights, obligations and remedies of the buyers and sellers under those contracts. When the CISG applies, it supersedes domestic sales law.

This construction avoids the often complex problems of first ascertaining the applicable domestic law in accordance with conflict of laws doctrines, and second determining what is required by the applicable domestic law once it has been ascertained. Business partners from different countries need not to be aware of all the vagaries of the foreign sales law, but only of the uniform sales law that all Member States transact business upon. [15] Such a uniform and hence more predictable sales law decreases the legal risks inherent in transacting business on an international scale and consequently creates more profitability in international trade.[16]

C. From Uniform Law to Uniform Application

In order to achieve uniformity in international trade law, however, it is not sufficient to enact uniform law conventions and implement them worldwide. It is equally important that the provisions of the CISG are interpreted in the same way in various countries.[17] It

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[14] Kazuaki Sono "The Rise of a National Contract Law in the Age of Globalisation" (2001) 76 Tulane L. R. 1185, 1188.
[15] Philip Hackney "Is the U. N. Convention on the International Sale of Goods Achieving Uniformity?" (2001) 61 Louisiana L. R. 473, 474.
[16] Peter Winship "Private International Law and the U.N. Sales Convention" (1988) 21 Cornell Int'l L. J. 487, 518.
[17] Cesare M. Bianca & Michael J. Bonell (eds) *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè, Milan, 1987) 74.

is believed that this is the key element of the successful application of the Convention. Only a uniform interpretation of the CISG will remove legal barriers, bring predictability and promote international trade.[18] In contrast, varying interpretations of the CISG will actually undermine the goal of bringing uniformity and predictability to international sales law.

However, the Convention does not provide for any superior body to provide the uniform interpretation of its rules. There is also little interest in creating a body to review decisions under the Convention because merchants generally prefer quick, efficient settlement to their disputes; such a body would create delay.[19] Therefore, the integrity of the Convention and its role as an international body of law to be respected and widely followed depends on its uniform application by domestic courts and arbitrators, which are the sole interpreters.

D. Obstacles to Uniformity

Diverse groups of countries are interpreting the Convention. Among the Contracting States are industrialised countries and developing countries; countries with market-economies and countries with planned economies; Islamic countries, where religion is part of the law, and 'western' countries, where religion and law are separated. Above all, the Contracting States can be divided into countries with Common Law jurisdictions and countries with Civil Law jurisdictions. Accordingly, national rules on the law of sales of goods throughout the Convention's member states are subject to sharp divergences in approach and concept.[20]

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[18] Harry M. Flechtner "The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7" (1998) 17 J. L. & Com. 187, 188.

[19] John O. Honnold "Uniform Laws for International Trade: Early 'Care and Feeding' for Uniform Growth" (1995) 1 Int'l Trade & Business L. J. 1, 5.

[20] John O. Honnold *Uniform Law for International Sales under the 1980 Convention* (3 ed, Kluwer Law International, The Hague, 1999) 114.

Judges and arbitrators, however, are often intimately familiar only with their own domestic law.[21] As a result of this, they are often inclined to read the Convention in light of domestic legal principles.[22] This tendency entails the risk of different constructions of the provisions of the CISG by national courts, each dependent upon the concepts used in their legal system. Therefore, one of the major obstacles to uniformity is the difficulty of getting national judges to interpret the Convention autonomously and not through the lens of domestic law.[23]

E. Article 7 of the Convention

Article 7 of the CISG itself undertakes the task of guiding the interpretation of the Convention. It reads as follow:

> Article 7
>
> (1) In the interpretation of this Convention, regard is to be had to its international character and the need to promote uniformity in its application and the observance of good faith in international trade.
>
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 7 (1) governs the rules of interpretation of the text of the CISG, while Article 7 (2) provides the rules for gap filling when a legal issue does not fall squarely within an article in the Convention. However, the wording of Article 7 is vague.[24] Considerable disagreement exits about its meaning, particularly the 'international character' of the CISG and the method of interpretation of the Convention by which Article 7 requires the

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[21] Phanesh Koneru "The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles" (1997) 6 Minn. J. Global Trade 105, 109.

[22] Bruno Zeller "The UN Convention on Contracts for the International Sale of Goods – A Leap Forward Towards Unified International Sales Laws" (2000) 12 Pace Int'l L. R. 79, 81.

[23] Bruno Zeller, above, 82.

[24] Nina M. Galston & Hans Smit (eds) *International Sales – The UN Convention on Contracts for the International Sale of Goods* (Matthew Bender, New York, 1984) 2-5.

promotion of uniformity.[25] Moreover, the line between interpretation (para.1) and gap filling (para.2) is not easy to draw. Furthermore, the distinction between gaps 'praeter legem' (issues to which the Convention applies but which it does not expressly resolve) and gaps 'intra legem' (matters that are excluded from the scope of application of the Convention) is often difficult to make.[26] In addition, Article 7 does not identify the sources one should resort to in a case of a gap in the Convention.[27]

Nevertheless, the general scheme of Article 7 is that judges and arbitrators should give an 'international' rather than a 'domestic' interpretation of the Convention. Most commentators agree that an international interpretation cannot be based on any domestic legal concepts.[28] However, the question of how to achieve an international interpretation remains unanswered. Without clear guidance from Article 7, national courts and arbitral tribunals have often struggled with an international interpretation of the Convention. When facing difficulties with the interpretation of the Convention, they usually resorted to their familiar domestic law, an option that has been uniformly rejected by most of the commentators who have evaluated Article 7 CISG.[29]

III. ARTICLE 78

The dispute surrounding Article 78 CISG, the Convention's interest provision, reveals the above-mentioned difficulties of judges and arbitrators applying the Convention uniformly and free from influences of domestic law.[30] Although Article 78

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[25] Franco Ferrari "Uniform Application and Interest Rates Under the 1980 Vienna Sales Convention" (1995) 24 Georgia J. Int'l & Comp. L. 467, 474.
[26] Ferrari, above, 474.
[27] Sunil R. Harjani "The Convention On Contracts for the International Sale of Goods in United States Courts" (2000) 23 Houston J. Int'l L. 49, 58.
[28] John O. Honnold *Uniform Law for International Sales under the 1980 Convention* (3 ed, Kluwer Law International, The Hague, 1999) 114.
[29] Philip Hackney "Is the U. N. Convention on the International Sale of Goods Achieving Uniformity?" (2001) 61 Louisiana L. R. 473, 475.
[30] Alan F. Zoccolillo "Determination of the Interest Rate under the 1980 United Nations Convention on Contracts for the International Sales of Goods: General Principles vs. National Law" (1997) 1 Vindobona J. Int'l Com. L. & Arb. 3, 4.

only consists of one single sentence, it appears to be one of the most disputed provisions in the entire Convention.[31]

The interest question provoked essential difficulties at the Vienna Conference. The dilemma was to find a uniform criterion regarding to interest acceptable to all Contracting States. Various proposals on the treatment of interest were put forth for discussion. They reflected differing beliefs and divergent theoretical approaches to the duty to pay interest as well as to the conflicting practical needs.[32] Interest payments were opposed in part for religious reasons.[33] Above all, interest was a matter on which differences between economic systems were involved. Interest rates in western industrialized countries were formed in the market and at the time of the Conference were very high. Interest rates in socialist countries were fixed by law and relatively low.[34] Agreements could not be made as to any of the various proposals.

Consequently, some delegations proposed to remove interest entirely from the Convention and leave its determination to national law, since it appeared that the topic was too complex and that resolution of conflicting opinions seemed impossible.[35] However, opponents of that proposal commented that its application would lead to problems in regard to conflicting national laws and depart from the uniformity desired by the Convention.[36]

Ultimately, the Drafting Committee decided to create an ad hoc working group on interest as an attempt to consolidate the various proposals into a single one. However, it emerged that this attempt was contrary to the central purpose of developing a clear and precise formula for the calculation of interest. The consolidated proposal was attacked as

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[31] Joanne M. Darkey "US Court's Interpretation of Damage Provisions Under the CISG: A Preliminary Step Towards an International Jurisprudence of CISG or a Missed Opportunity?" (1995) 15 J. L. & Com. 139, 149.
[32] Peter Schlechtriem *Commentary on the CISG* (2 ed, Clarendon, Oxford, 1998) 596.
[33] John O. Honnold *Documentary History of the Uniform Law for International Sales* (2 ed, Kluwer International Law, Deventer 1989) 637.
[34] Fritz Enderlein & Dietrich Maskow *International Sales Law* (Oceana, New York, 1992) 310.
[35] John O. Honnold *Documentary History of the Uniform Law for International Sales* (2 ed, Kluwer International Law, Deventer 1989) 610.
[36] Erwin Riezler (ed) *Staudingers Kommentar zum Buergerlichen Gesetzbuch, Wiener UN-Kaufrecht* (13 ed, de Gruyter, Berlin, 1994) 613.

being too complex, incomprehensible and obscure.[37] Therefore, the working group finally decided to recommend a provision *"based on the highest common factor, so that the Convention might at least contain a clear statement on the question of interest."*[38] The result of this compromise is the present version of Article 78. It reads as follow:

Article 78

> If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 78.

This provision deals with the right to interest with the exception of the instance where the seller has to refund the purchase price after the contract has been avoided, in which case Article 84 of the Convention applies. The entitlement to interest under Article 78 CISG does not depend on any formal notice given to the debtor. Therefore, most decisions are in accord that interest accrues from the time the payment is due. [39] The entitlement to interest also does not depend on the creditor being able to prove to have suffered any loss. Therefore, interest can be claimed pursuant to Article 78 independently from the damage caused by the payment in arrears.[40] Article 78, however, is silent on the question of the applicable rate. Therefore, it leaves a gap in the Convention that creates uncertainty about how to compensate a creditor when parties fail to pick either a rate or a national law to cover gaps in the contract.

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[37] John O. Honnold *Documentary History of the Uniform Law for International Sales* (2nd, Kluwer International Law, Deventer 1989), 758.
[38] Statement of the Chairman of the working group on interest, see Honnold, above, 761.
[39] See for example Schiedsgericht der Handelskammer Hamburg, Germany (21 March 1996), case number unknown, CLOUT Case No. 166; Cour d'appel de Grenoble, France (26 April 1996), case number unknown, CLOUT Case No. 152; Pretore della giurisdizione di Locarno-Campagna, Switzerland (16 December 1991), case number unknown, CLOUT Case No. 55.
[CLOUT cases are available at the online database *Case Law on UNCITRAL Texts*, <http://www2.gov.si/uncitral/clout.nsf/fb00297722d20b67c12566c300318a4f?OpenView> (last accessed 29 May 2002)].
[40] John O. Honnold *Uniform Law for International Sales under the 1980 Convention* (3 ed, Kluwer Law International, The Hague, 1999) 420.

IV. CASE STUDY

This section will review selected case law arising under Article 78 CISG. It will provide an impression of the different approaches taken by courts in handling the problem of determining the rate of interest under the CISG – and the different results achieved.

A. Resort to the Law of the Forum: US Federal Court of Appeal, New York

The defendant, an American manufacturer of compressors for air conditioners (Rotorex), agreed to sell 10800 compressors to the plaintiff, an Italian manufacturer of air conditioners (Delchi). The sales contract provided for delivery in three shipments. Rotorex made the first shipment. While the second shipment was en route, Delchi discovered that the compressors contained in the first shipment were nonconforming with contract specifications. Delchi rejected the second shipment and, after having tried unsuccessfully to cure the defects, sued demanding damages for breach of contract pursuant to Article 74 CISG. The District Court, applying the CISG as the governing law of the dispute (Article 1 (1) (a) CISG), awarded summary judgement to Delchi.[41] Pursuant to Article 78 CISG, the court held that the plaintiff was entitled to prejudgement interest; as the CISG does not specify an interest rate, the court resorted to domestic law and applied the rate applicable for U.S. treasury bills.[42] The next instance, the Second Circuit, principally affirmed the District Court's decision.[43]

With regard to the interpretation of the Convention, however, the Second Circuit made a positive step towards a uniform interpretation. While referring to Article 7 CISG, the Court recognized the importance of *"looking to the language of the Convention and to the general principles upon which it is based"*.[44] However, in the absence of a specific provision for calculating interest rates in the CISG, the Court of Appeal stated that the

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[41] Delchi Carrier S.p.A. v. Rotorex Corp. (1994) WL 495787 1 (ND NY).
[42] Delchi Carrier S.p.A. v. Rotorex Corp. (1994) WL 495787 1, 7 (ND NY).
[43] Delchi Carrier S.p.A. v. Rotorex Corp. (1995) 71 F3d 1024 (2d Cir).
[44] Delchi Carrier S.p.A. v. Rotorex Corp. (1995) 71 F3d 1024, 1028 (2d Cir).

District Court was correct to award interest at the US Treasury Bill rate.[45] The Court did not explain how Article 78 CISG leads to American law. There is no hint as to whether the Court examined the legislative history of Article 78. Neither did the Court seem to have looked at any academic commentary or foreign case law. Instead, although recognizing the need to preserve the international character of the Convention, the Court was content to escape into the niche of domestic law when the Convention was silent.[46]

This case is far from being unique. Several other courts have simply applied the law of the forum to determine the interest rate. In one judgement, for example, a German Court of Appeal held that it could see no reason why the law of the forum should not be applicable to the issue of interest rates.[47] Similarly, an Italian court applied the Italian statutory interest rate without referring to Article 78 CISG even though the Convention was held to be applicable.[48] Neither of these decisions stated any rationale for the application of the lex fori. However, at least one legal author also favours this approach.[49]

B. Resort to Private International Law: Appellate Court Hamm, Germany

The plaintiff, an Italian manufacturer of in-line skates, made a series of deliveries of in-line skates and skate accessories to the German buyer, defendant under a contract of sale. The seller sued the buyer for the total outstanding purchase price. The buyer sought set-off with damages arising from deliveries unconnected to the seller's claim. The German Appellate Court, with which an appeal was lodged by the buyer, found the CISG to be applicable to the sales contract according to Article 1 (1) (a) of the Convention. It held that the plaintiff's claim for payment was justified under Article 53 CISG. It furthermore held that the buyer's claim for set-off was not admissible due to lack of

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[45] Delchi Carrier S.p.A. v. Rotorex Corp. (1995) 71 F3d 1024, 1030 (2d Cir).
[46] Sunil R. Harjani "The Convention on Contracts for the International Sale of Goods in United States Courts" (2000) 23 Houston J. Int'l L. 49, 81.
[47] LG Goettingen, Germany (19 November 1992) 3 O 100/92, CISG online case 51 [CISG online cases are available at the online database *CISG online*, <http://www.jura.uni-freiburg.de/ipr1/cisg/> (last accessed 11 June 2002).
[48] Pretura circondariale di Parma, sez.di Fidenza, Italy (24 November 1989) 77/89, CLOUT case 90.
[49] Henry Gabriel *Practitioner's Guide to the Convention on Contracts for the International Sale of Goods (CISG) and the Uniform Commercial Code (UCC)* (Oceana, New York, 1994) 237.

jurisdiction. Additionally, the seller was entitled to interest according to Article 78 of the Convention.[50]

The lack of a specific formula to calculate the rate of interest led this Court to determine the rate of interest according to the law that would govern the contract in the absence of the CISG. In order to determine the law applicable to the contract, the Court referred to the forum's rules of private international law. According to Article 28 (2) EGBGB (Introductory Act to the German Civil Code – German private international law) Italian law was applicable. Consequently, the court ordered the defendant to pay interest at the rate of 10 %, which was the rate under the Italian Codice Civile.[51]

However, Article 7 (2) CISG clearly requires, where a matter is governed by the Convention, that the general principles on which the Convention is based have priority over any reference to rules of private international law.[52] Only if the solution of the problem cannot be found in the CISG's general principles, one should resort to private international law.[53] The Court, however, did not make any reference to Article 7 (2) CISG. Apparently, the Court considered the question of determining the interest rate as being outside the scope of the Convention (gap 'intra legem'). Concordantly, the majority of courts that had to deal with Article 78 CISG considered the matter as being outside the scope of the Convention since it does not expressly fix a rate of interest.[54] All these decisions referred immediately to private international law, without paying attention to Article 7 (2) CISG and the general principles of the Convention. Several scholars are also favouring this approach, stating that the rate of interest should be governed by the domestic law chosen by the rules of private international law.[55]

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[50] OLG Hamm, Germany (5 November 1997) 11 U 41/97, CISG online case 381, A. I. 2.
[51] OLG Hamm, above, A. I. 2.
[52] See Part II E *Article 7 of the Convention.*
[53] Alejandro Garro "The Gap Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principle and the CISG" (1995) 69 Tulane L. Rev. 1149, 1155.
[54] See, e.g. OLG Frankfurt am Main, Germany (13 June 1991) 5 U 261/90, CISG online case 23; Handelsgericht Zuerich, Switzerland (9 September 1993) HG 930138, CISG online case 79; *V.o.f. Galerie Moderne v. J.M.M. Waal,* Arrondissementsrechtbank Amsterdam, The Netherlands (15 June 1994) H 92.3572, CISG online case 452; Tribunale di Pavia, Italy (29 December 1999) case number unknown, CLOUT case 380.
[55] See, e.g. Peter Schlechtriem "Recent Developments in International Sales Law" (1983) 18 Israel L. Rev. 309, 324; Jeffrey S. Sutton "Measuring Damages Under the United Nations Convention on the International Sale of Goods" (1989) 50 Ohio St. L. J. 737, 750.

However, there is merit to the view of other courts[56] and many scholars[57] who consider the gap 'praeter legem', and believe that the question should be resolved within the Convention itself. They argue that interest payment is itself not excluded from the Convention (matter governed by the Convention), but rather the matter of accomplishing it is not expressly resolved.[58] In addition, they refer to the drafting history of the Convention. The drafters of the Vienna Conference rejected the British proposal to expressly leave the determination of the interest rate to the law made applicable by the rules of private international law.[59] This rejection suggests that the drafters saw the question at issue not outside the Convention but rather wanted it to be governed by Article 7 (2) CISG.[60] Furthermore, they refer to the purpose of Article 7 CISG. Recourse to the non-uniform national law of the Contracting States should always be the last resort.[61] This maxim should also apply to the determination of whether an issue is outside the scope of the Convention.[62] Moreover, they refer to Article 4 CISG, which states that the "*Convention governs ... the formation of the contract and the rights and obligations of the seller and the buyer arising from such a contract*". Therefore, the question of the obligation to pay interest usually should be governed by the Convention even though it is not expressly settled in it. Thus, according to Article 7 (2), judges and arbitrators in deciding on an applicable rate of interest in a decision should try to find a solution on the basis of the Convention's general principles in the first place. Only if there is an absence of general principles to provide a solution, one should refer to private international law.

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[56] See, e.g. LG Hamburg, Germany (26 September 1990) 5 O 543/88 CISG online case 317; Tribunal Cantonal Valais, Switzerland (20 December 1994) case number unknown, CISG online case 302.

[57] See, e.g. Alexander Vida "Zur Anwendung des UN-Kaufrechtsuebereinkommens in Ungarn" (1993) 4 Praxis des Internationalen Privat- und Verfahrensrechts 263, 264; Alan F. Zoccolillo "Determination of the Interest Rate under the CISG: General Principles vs. National Laws (1997) 1 Vindabona J. Int'l Com. L. & Arb. 3, 8.

[58] Phanesh Koneru "The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles" (1997) 6 Minn. J. Global Trade 105, 123.

[59] Erwin Riezler (ed) *Staudingers Kommentar zum Buergerlichen Gesetzbuch, Wiener UN-Kaufrecht* (13 ed, de Gruyter, Berlin, 1994) 613.

[60] See III. *Article 78 of the Convention.*

[61] Rolf Herber & Beate Czerwenka *Internationales Kaufrecht* (Beck, Muenchen, 1991) Article 7, para 31.

[62] Joanne M Darkey "US Court's Interpretation of Damage Provisions Under the CISG: A Preliminary Step Towards an International Jurisprudence of CISG or a missed Opportunity?" (1995) 15 J. L. & Com. 139, 150.

C. Reference to the General Principles of the Convention

The following cases provide examples of courts that applied Article 7 (2) CISG and tried to settle the matter of the rate of interest in conformity with the general principles on which the CISG is based. The Convention does not provide a list of these principles, nor does it indicate where any are to be found. Again, different courts did reach different results in trying to find useful general principles in the Convention.

1. Principle of Full Compensation: Arbitral Tribunal Vienna, Austria

An Austrian seller and a German buyer concluded contracts for the sale of rolled metal sheets. The seller allowed the buyer to take delivery of the goods in installments. The buyer resold the goods and had to pay the price promptly after receiving each invoice. The buyer took delivery of some of the goods without paying, and refused to take delivery of other goods. Pursuant to an arbitration clause contained in the sales contract, the seller commenced arbitral proceedings, demanding payment of the price. In addition, the seller demanded damages arising from a resale of the goods that the buyer refused to accept. The sole arbitrator held that, since the parties had chosen Austrian law, the contracts were governed by CISG as the international sales law of Austria, a Contracting State (Article 1 (1) (b) CISG). The arbitrator found that claim for payment was justified under Article 53 CISG. Regarding the resale made by the seller, the arbitrator held that the seller had the right to mitigate its losses (Article 77 CISG). As a result, the seller was found to be entitled to the difference between the contract price and the substitute sale price.[63]

The arbitrator further held that interest on the price accrued from the date payment was due (Articles 78 and 58 CISG). Moreover, the arbitrator held that, since the interest rate was a matter governed but not expressly settled by CISG, it should be settled in conformity with the general principles on which CISG is based (Article 7(2) CISG). Referring to Articles 74 – 77 CISG, the arbitrator found that full compensation was one

[63] Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft Vienna, Austria (15 June 1994) SCH-4366, CISG online case 121, para 5.

of the general principles underlying CISG. Accordingly, he stated that an interest rate should be chosen that fully compensates the aggrieved party. This led to interest based on the aggrieved party's actual credit costs, since "*it is the creditor who has to borrow money in order to be as liquid as it would be had the debtor paid the sum it owed in due time*".[64] According to the arbitrator, the seller would resort to bank credit at the interest rate commonly practiced in its own country with respect to the currency of payment. Thus, the interest rate awarded was the average prime rate in the seller's country (Austria), with respect to the currencies of payment (US dollars and German marks).

In fact, one can derive a general principle of "full compensation" from Article 74 CISG. It is beyond doubt that Article 74, placing the injured party in the position he would have been had the contract not been breached, aims to fully compensate the injured party of all the disadvantages it suffered.[65] This consideration is of particular importance since "*[n]o aspect of a system of contract law is more revealing of its underlying assumptions than is the law that prescribes the relief available for breach.*"[66] Accordingly, this principle of full compensation may lend assistance in the determination of the interest rate. However, the arbitrator's decision did not take into account the line that the Convention expressly draws between the damages to be awarded on the basis of Articles 74-77 and interest on sum in arrears. The text of the Convention speaks of interest as something distinct from damages. Interest and damages are governed by different sections of the Convention. Above all, Article 74 requires the claimant to prove the loss it has suffered,[67] while the entitlement to interest pursuant to Article 78 does not depend on the creditor being able to prove to have suffered any loss.[68] Simply applying the general principle of full compensation from the CISG's damage provisions within the context of interest would confuse this allocation of the burden of proof.[69] Therefore, the general principle of full compensation also does not lead to an appropriate determination of interest rates under Article 78 CISG.

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[64] Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft Vienna, Austria (15 June 1994) SCH-4366, CISG online case 121, para 8.
[65] Peter Schlechtriem *Commentary on the CISG* (2 ed, Clarendon, Oxford, 1998) 553.
[66] E. Allan Farnsworth "Damages and Specific Relief" (1979) 27 Am. J. Comp. L. 247, 247.
[67] Peter Schlechtriem *Commentary on the CISG* (2 ed, Clarendon, Oxford, 1998) 571.
[68] See Part III *Article 78 of the Convention.*
[69] Fritz Enderlein & Dietrich Maskow *International Sales Law* (Oceana, New York, 1992) 313.

2. International Trade Usage:

Commercial Court of First Instance, Buenos Aires, Argentina

In judicial proceedings for composition before bankruptcy, an Argentinean Court was called to decide on the reconcilability of credits for interest on the payment of price deriving from two international sales contracts concluded by the same Argentinean buyer with, respectively, a Spanish seller and a Czech seller. With respect to interest accruing on the credit deriving from the performance of the first sales contract, the Court gave recognizance to the credit for interest at the rate of 24 %, which is corresponding to the rate agreed upon by the parties. The Court held this on the ground that the Convention (applicable pursuant to Article 1 (1) (a) CISG), as envisaged by its Article 6, grants the parties with the widest possibility of determining the contents of their contract.[70]

With respect to interest accruing on the credit deriving from the performance of the second sales contract, the Court determined interest at the rate of 12 %, as a rate generally recognized in international trade. The Court stated that, since the CISG does not determine the interest rate, reference should be made to international trade usages *"which are assigned by the CISG itself a hierarchical position higher than the very same CISG provisions (Art. 9 CISG)"*.[71] In an earlier judgment that dealt with the same matter, the Court also filled the gap with an applicable trade practice. The Court held that *"it is international usage to fix the rate of interest according to the prime rate if the debt was in US dollars"*.[72] The Court awarded a creditor the prevailing 'Prime Rate' of 10 % because it was considered a widely accepted practice in international trade under Article 9 (2) CISG. These two decisions have also sought a solution on the basis of general principles on which the Convention is based. They invoked Article 9 of the Convention and did fill the interest rate according to the relevant trade usages.

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[70] Bermatex srl. v. Valentin Rius Clapers SA v. Sbrojovka (6 October 1994) Juzgado Nacional de Primera Instancia en lo Comercial No 10 Buenos Aires, Argentina, CISG Online case 378, para. 4.

[71] Bermatex, above, para. 5.

[72] Aguila Refractarios S.A. / Conc. Preventino (23 October 1991) Juzgado Nacional de Primera Instancia en lo Comercial No 10 Buenos Aires, Argentina, CISG Online case 460, para.7.

Trade usages offer a plausible basis for filling gaps in incomplete contracts.[73] The consideration of such usages in determining terms of commercial contracts does also conform to the Convention's general principles. Trade usages have traditionally played an important role in developing international trade and are increasingly accepted as a source of international commercial law.[74] In fact, the role of the contract construed in the light of commercial practice and usage can be seen as the dominant theme of the Convention.[75] Therefore, one of the general principles of the Convention may be inferred from Article 9 CISG.

Absent any special agreement as to usage, Article 9 (2) CISG states that a sales contract under the Convention is subject to a *"usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned"*. Thus, trade usages can bind the parties when their regularity of observance meets the standards of Article 9 (2). Therefore, if such a kind of usage applicable to the parties' contract provides a specific interest rate, this usage should be used to supplement Article 78 of the Convention.[76]

Accordingly, a possible approach to identify an appropriate interest rate is to look at the practice that typically prevails when parties specify interest rates in advance in that particular area of international trade. The adjudicator has to examine what parties in similar situations actually do. However, custom is inherently vague so that its formal elaboration by courts may often be doomed to misstate the actual practice of transactors.[77] Furthermore, Article 9 (2) is limited to widely understood customs. Thus, Article 9 (2) requires not only a qualitative inquiry into the conditions under which the custom applies, but also a quantitative inquiry about the universality of the custom,

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[73] Clayton P. Gilette "Harmony and Stasis in Trade Usages for International Sales" (1999) 39 Virginia J. Int'l L. 707, 709.

[74] Mark Garavaglia "Search of the Proper Law in Transnational Commercial Disputes (1991) 12 New York L. Sch. J. Int'l & Comp L 29, 32.

[75] John O. Honnold *Uniform Law for International Sales under the 1980 Convention* (3 ed, Kluwer Law International, The Hague, 1999) 3.

[76] Burghard Piltz "Neue Entwicklungen im UN-Kaufrecht" 47 Neue Juristische Wochenschrift (1994) 1101, 1105

[77] Lisa Bernstein "The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study" (1999) 66 U. Chicago L. Rev. 710, 760.

which makes the judicial inquiry even more difficult.[78] Adjudicators may require the use of experts.[79] Even with that evidence, adjudicators may be inclined to construe the practice through their own national perspective or misperceive the level at which the custom should apply.[80]

Often there may simply be no established practice that fulfils the requirements of Article 9 (2). Especially trade usages in developed, industrialised regions might not be known or appropriate in other parts of the world.[81] In a dispute between a French Seller and a Syrian buyer, for example, the arbitrator applied the London InterBank Offered Rate (LIBOR), an interest rate that is used in international trade transactions.[82] Admittedly, the application of the LIBOR would have the advantage of guaranteeing uniformity to the interest rate issue. However, the general application of specific rates such as the LIBOR is problematic. The LIBOR cannot be introduced to the Convention by classifying it as a "usage" under Article 9 (2) CISG. As stated above, usage under Article 9 (2) CISG requires that the usage is regularly observed by parties to contracts of the type involved *in the particular trade concerned.* The LIBOR, however, is the deposit or lending rate, determined in the London money market, at which financial institutions are willing to offer.[83] Whether parties to regular international sales transactions have reason to know of the LIBOR is therefore doubtful. To extend the application of the LIBOR to all international sales transactions, thus, would stretch the meaning of usage under Article 9 (2) CISG.[84]

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[78] Clayton P. Gilette "Harmony and Stasis in Trade Usages for International Sales" (1999) 39 Virginia J. Int'l L. 707, 719.
[79] Karin L. Kizer "Minding the Gap: Determining Interest Rates Under the CISG" (1998) 65 U. Chicago L. Rev. 1279,1298.
[80] Richard Craswell "Do Trade Customs Exist?" in Jody S. Kraus & Steven D. Walt (eds) *The Jurisprudential Foundations of Corporate and Commercial Law* (Cambridge University Press, Cambridge, New York, 2000) 118, 125.
[81] John O. Honnold *Uniform Law for International Sales under the 1980 Convention* (3 ed, Kluwer Law International, The Hague, 1999) 117.
[82] Court of Arbitration of the International Chamber of Commerce, Paris, France (1993) 6653/1993, CLOUT case 103.
[83] See *Concise Dictionary of Business* (2nd, Oxford University Press, Oxford 1996) 237.
[84] Volker Behr "The Sales Convention In Europe: From Problems in Drafting to Problems in Practice" (1998) 17 J.L. & Com. 263, 297.

D. Resort to the Domestic Law of the Creditor: Arbitration Court of the International Chamber of Commerce, Paris, France

A Yugoslav seller and an Italian buyer concluded a contract for the sale of cowhides. The contract provided that the buyer would give the seller notice of the lack of conformity of the goods within one month of their arrival, together with an expert statement. Upon their arrival in Italy the goods were examined by the expert, who apparently found them defective. The buyer failed to give notice thereof to the seller. Subsequently the parties held a meeting, agreeing that the Russian supplier of the seller should inspect the goods and possibly pay the buyer's debt. The Russian supplier failed to proceed with the agreed examination. The buyer then informed the seller that, due to the Russian supplier's omission, it was released from the obligation to pay the price: in its opinion the subsequent agreement amounted to a true novation of the original obligation to pay, by virtue of which the Russian supplier assumed the debt, releasing the buyer. The seller commenced arbitral proceedings, demanding payment of the price. The Convention was applicable as the parties had their places of business in Contracting States (Article 1 (1) (a) CISG). The ICC Tribunal, applying Article 8 CISG, held that the parties did not intend to novate their relationship releasing the buyer from its obligations under the original contract. As to the matter of lack of conformity of the goods, the Arbitral Tribunal stated that the buyer had lost its right to rely on a lack of conformity, since it had not given notice of the defects within the contractual period (Article 39 CISG); moreover, since the defective nature of the goods was easy to discover, the contractual notice period was reasonable. The buyer could not either rely on Article 44 CISG, since it had not provided evidence of having a reasonable excuse for its failure to give timely notice.[85]

The Tribunal thus decided in favor of the seller, who was also awarded interest. The interest was to be determined according to the law of the country in which the damage resulting from the delayed payment was suffered: in this case, the seller's country. The Tribunal stated:[86]

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[85] Court of Arbitration of the International Chamber of Commerce, Paris, France (1994) 7331/1994, CLOUT case 303.
[86] Court of Arbitration, above, para. 12.

> "The Vienna Convention only generally provides that parties are entitled to interest without specifying any particular rate of interest. It is, however, acknowledged in international law that where the parties are silent as to choice of law with respect to the payment of interest, the law of the State applies in which the damage resulting from the delayed payment is suffered. It is furthermore acknowledged in international law that such damage is suffered at the place of the creditor and in the creditor's market. Therefore, this Tribunal shall apply the rate of interest effective for commercial matter in the country of the creditor, the seller."

Correspondingly, two German courts held that the interest should be determined at the rate of the seller's country, since the seller was the party wrongfully deprived of funds.[87] A similar approach was taken in two decisions issued by a court in Belgium which applied the average lending rate at the creditor's place of business.[88] Again, all these decisions did not make any reference to Article 7 CISG.

Remarkably, the conclusion of this approach is rather similar to the conclusion of the Austrian arbitrator who referred to the Convention's general principle of full compensation.[89] Both approaches did fill the interest gap according to the law of the seller's country. This solution, however, reintroduces through interpretation an approach that was already suggested at the Vienna Conference 1980. One of the Conference's various proposals on the treatment of interest, the so-called "joint proposal", reads as follows: [90]

> If a party fails to pay the price or any other sum as is in arrears, the other party is entitled to interest thereon at the customary rate for commercial credits at his place of business.

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[87] Landgericht Stuttgart, Germany (31 August 1989) 3 KfH O 97/89, CLOUT case 4; Landgericht Aachen, Germany (3 April 1990) 41 O 198/89, CLOUT case 46.
[88] *SPA Ca'Del Bosco v. Francesco NV*, Rechtsbank van Koophandel, Hasselt (8 November 1995) AR 1970/95, CISG case 363; *Margon S.R.L. v. NV Sadelco*, Rechtsbank van Koophandel, Hasselt (9 October 1996) AR 2012/96, CISG case 361.
[89] See Part IV.C.1. *Principle of Full Compensation: Arbitral Tribunal Vienna, Austria.*
[90] John O. Honnold *Documentary History of the Uniform Law for International Sales* (2 ed, Kluwer International Law, Deventer 1989) 709.

This proposal received wide support from most western delegations. As mentioned above, interest rates in western industrialized countries were at the time of the Conference considerably high, while interest rates in socialist countries were relatively low.[91] Under the joint proposal, western countries would enjoy both the higher interest rates as sellers when dealing with late payment from a buyer residing in a socialist country, and conversely, enjoy the extremely low interest rates as buyers when transacting with socialist State sellers.[92] However, the majority of the Conference's delegates rejected the joint proposal.[93] The ICC Arbitration Court, interpreting into the Convention a proposal that was rejected at the Conference, thus disregarded the Convention's legislative history.

F. Resort to the Domestic Law of the Debtor: Reference to the General Principle of Preventing Unjust Enrichment

Another approach that has been suggested by one author leads to the domestic law of the debtor.[94] This approach treats the late payment as a loan from the creditor to the debtor because the debtor, by not paying, can use these funds interest-free. It suggests that the purpose of requiring interest payments is to prevent the debtor from taking advantage of the funds withheld. This theory of 'unjust enrichment' considers the obligation to pay interest as a restitutionary concern rather than one of damages for the buyer. Therefore, the rate of interest payable should be based on the current rate at the seller's place of business.[95]

This approach, however, ignores the legislative history of the Convention in an analogous manner as the approach that resorts to the domestic law of the creditor. It

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[91] See Part III. *Article 78 of the Convention.*
[92] Fritz Enderlein & Dietrich Maskow *International Sales Law* (Oceana, New York, 1992) 310.
[93] John O. Honnold *Documentary History of the Uniform Law for International Sales* (2 ed, Kluwer International Law, Deventer 1989) 611.
[94] Hans Stoll "Internationalprivatrechtliche Fragen bei der landesrechtlichen Ergaenzung des einheitlichen Kaufrechts" in Andreas Heldrich (ed) *Festschrift fuer Murad Ferid zum 80. Geburtstag* (Verlag fuer Standesamtswesen, Frankfurt am Main, 1988) 495, 509.
[95] Hans Stoll, above, 511.

reintroduces the Czechoslovakian proposal that was submitted at the Vienna Conference on behalf of socialist countries. This proposal stated as follows:[96]

> If the breach of contract consists of delay in the payment of the price, the seller is … entitled to interest on such sum as is in arrears at a rate equal to the official discount rate prevailing in the country where the buyer has his place of business … .

This proposal attempted to allow sellers from socialist countries to take advantage of the higher western rates. A socialist seller, in dealing with a western buyer, could enjoy the high rates of interest of a western buyer's country on any delayed payment of the price. On the other hand, buyers from socialist countries with low interest rates would pay interest at far below what a western seller would have borrowed at to cover his expenses or would have earned in interest.[97] As a matter of course, the proposal was opposed by the western industrialized countries and rejected by the majority of the Conference's delegates. Therefore, determining the interest rate according to the domestic law of the debtor also contrasts with the Convention's legislative history.

The dispute between the two last-mentioned approaches is really a continuation of the arguments at the Vienna Conference, where the different interest rates in various countries played the central role.[98] However, the tendency to introduce rejected proposals by way of interpretation is dangerous. Other countries could then be inclined to interpret into the Convention their own rejected proposals.[99] This would lead to even more disharmony in the taking of decisions.

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[96] John O. Honnold *Documentary History of the Uniform Law for International Sales* (2 ed, Kluwer International Law, Deventer 1989) 637.
[97] Fritz Enderlein & Dietrich Maskow *International Sales Law* (Oceana, New York, 1992) 313.
[98] Peter Schlechtriem *Commentary on the CISG* (2 ed, Clarendon, Oxford, 1998) 596.
[99] Fritz Enderlein & Dietrich Maskow *International Sales Law* (Oceana, New York, 1992) 313.

G. Resort to the Domestic Law of the Payment Currency: Arbitral Tribunal, Budapest, Hungary

A Hungarian seller concluded a master agreement with an Austrian buyer for the supply of waste containers to be produced by the seller. A dispute arose between the parties as the buyer did not pay the invoices issued by the seller for the delivery of several containers. The seller commenced arbitration proceedings claiming payment of the price. The buyer counterclaimed for reduction of price and damages. As to the delivery of some containers, the buyer requested damages for defects concerning the painting. The sole arbitrator applied the CISG since in accordance with the contract between the parties, the law of the country of the seller was applicable (the Convention was enacted in the seller's country and thus part of the Hungarian law). The arbitrator found that as the buyer had failed to give notice of the painting defects it had lost its right to rely on the lack of conformity of the goods (Article 39 CISG). In regard to the delivery of another two defective containers, the sole arbitrator held that the buyer was entitled to reduce the price under Article 50 CISG.[100]

Furthermore, the arbitrator found that the seller was entitled to interest on the unpaid price. As CISG does not determine the interest rate, the arbitrator held that it would be improper to determine the interest rate according to the law of a State other than that of the currency of payment, in particular when this other State has a weak currency and a high inflation figure.[101] In a similar case, the Arbitration Tribunal's ruling was the same.[102] In both decisions the Tribunal took into account the different inflation figures in the two countries involved (Hungary and Austria). Since payment was to be made in Austrian Shillings, the Court disregarded the provisions of the Hungarian Civil Code fixing the interest rate at 20 % and granted interest at 5 % in accordance with the law of the State in whose currency payment was to be made. Similarly, a Dutch Court, dealing

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[100] Arbitration Court attached to the Hungarian Chamber of Commerce & Industry, Budapest, Hungary (5 December 1995) VB/94131, CISG online case 163, para. 12.
[101] Arbitration Court, above, para. 21.
[102] Arbitration Court attached to the Hungarian Chamber of Commerce & Industry, Budapest, Hungary (17 November 1995) VB/94124, CISG online case 250, para. 18.

with a dispute between a German seller and a Dutch buyer, held that German law was applicable since the parties had agreed for payment of the price in German currency.[103]

This approach takes into account that interest rates are usually linked to the rate of inflation. 'Strong' currency is subject to much less inflation than 'weak' currency. Interest rates in countries with 'strong' currency are usually lower than interest rates in countries with 'weak' currency. Accordingly, if the sum in question had to be paid in a 'strong' currency, the low interest rates of the country with the 'strong' currency would compensate the creditor best for the delay of payment.[104] To award the creditor the high interest rate of the country with the 'weak' currency may, for example, result in overcompensation and, thus, may lead to unjust results.[105] Therefore, the selection of an interest rate that applies to the currency in which payments will be made would compensate the creditor adequately for any loss in the payment's value resulting from depreciation. Insofar as the 'lex monetae' does prohibit the payment of interest – for religious reasons, for example – Article 78 CISG, consequently, will have no effect.[106] In this case the interest claim becomes unenforceable. However, the creditor will still have the possibility to claim the lost use of capital as damages according to Article 74 CISG, provided that the creditor is able to prove this loss.[107]

By basing the selection of the rate on the payment's currency, this solution represents a more uniform international approach.[108] However, this approach has also its weaknesses. As mentioned above, business partners from different countries are facing two main problems that the CISG aims to resolve: In order to predict the legal risks of an international business transaction, they first have to ascertain the applicable domestic law in accordance with conflict of laws doctrines. Second, they have to determine what the applicable domestic law requires once it has been ascertained.[109] The 'lex monetae'

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[103] *Nieuwenhoven Viehandel GmbH v. Diepeveen - Dirkson B.V.,* Rechtbank Arnheim, The Netherlands (30 December 1993) 1992/1251, CLOUT case 100.
[104] Peter Schlechtriem *Commentary on the CISG* (2nd, Clarendon, Oxford, 1998) 597.
[105] John Y. Gotanda "Awarding Interest in International Arbitration" (1996) 90 Am. J. Int'l L. 40, 59.
[106] Peter Schlechtriem *Uniform Sales Law* (Manzsche Verlags- und Universitaetsbuchhandlung, Vienna, 1986) 100.
[107] Erwin Riezler (ed) *Staudingers Kommentar zum Buergerlichen Gesetzbuch, Wiener UN-Kaufrecht* (13 ed, de Gruyter, Berlin, 1994) 616.
[108] Karin L. Kizer "Minding the Gap: Determining Interest Rates Under the CISG" (1998) 65 U. Chicago L. Rev. 1279, 1297.
[109] See II. B. *Scope of the Convention.*

approach resolves the first problem: the applicable domestic law will always be the 'lex monetae'. However, the second problem remains unresolved: if the price has to be paid in a foreign currency, one still has to be familiar with the provisions of the particular foreign law that govern the applicable rate of interest.

In addition, the 'lex monetae' decisions lacked of dogmatic distinctness. Again, it is not clear if the decisions viewed the interest rate gap as a gap 'praeter legem' or a gap 'intra legem'. The decisions did not refer to Art. 7 CISG nor did they mention whether their approach was based on the general principles of the Convention.

V. INTERPRETATIVE ANALYSIS

As mentioned above, the wording and the drafting history of Article 78 CISG and the purpose of the Convention suggest considering the interest rate gap as a gap within the Convention.[110] Consequently, Article 7 (2) CISG applies. Article 7 (2) leads to the question whether there are any general principles in the Convention which may lend assistance in the determination of the interest rate. The following section will examine these general principles and their relationship to the true purpose of Article 78 CISG.

A. The General Principles

As stated above, the resort to trade usages conforms to the Convention's general principles and can be used to supplement Article 78 CISG. However, resort to trade usages will not be possible in all cases.[111] In this case, one has to look for other general principles of the Convention.

In this context, one has to analyse the interplay between the principle of full compensation[112] and the principle of preventing unjust enrichment.[113] On the one hand,

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[110] See IV. B. *Resort to Private International Law.*
[111] See IV. C. 2. *International Trade Usage.*
[112] See IV. C. 1. *Principle of Full Compensation.*
[113] See IV. F. *Resort to the Domestic Law of the Debtor.*

Article 78 CISG can be read in conjunction with Article 74, the CISG's general damage provision. Article 74 places the injured party in the same economic position he would have been in if the contract had been performed. In other words, the Convention seeks to compensate the injured party fully by giving him the '*benefit of the bargain*'.[114] The strict application of this principle would lead to the law at the creditor's place of business. On the other hand, however, Article 78 CISG can be read in conjunction with Article 84 CISG. At the Vienna Conference, a main concern of the delegates was to protect against parties purposely delaying payment so as to take advantage of the other party and the availability of either high interest rates or cheap credit.[115] To prevent these types of deceitful behaviour, Article 84 sets forth a general principle protecting against the '*unjust enrichment*' of one of the parties.[116] The strict application of this principle would lead to the law of the debtor's place of business.

In filling the interest rate gap with these two principles, the question arises: which principle should take precedence in cases where the creditor should be fully compensated and the debtor disgorged of its unjust enrichment? Both principles can lead to very different results in regard to which rate of interest should apply.[117] For example, in a scenario where the interest rate at the seller's place and buyer's place are 5 % and 10 % respectively, the buyer does not pay the sum that is in arrears. Should the seller be compensated for his actual loss, which is 5 % at his place of business, in which case he is fully compensated, or should he get the buyer's unjust enrichment of 10 %? If the seller gets the 10 % rate, the buyer's unjust enrichment is taken away, but the seller is certainly being overcompensated and arguably is being unjustly enriched. If the seller gets the 5 % interest rate, he is fully compensated, but the buyer's unjust enrichment is not completely taken away.

The rather indefinite wording of Article 78 CISG can be used to support the precedence of either the principle of full compensation or the principle of preventing

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[114] Phanesh Koneru "The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles" (1997) 6 Minn. J. Global Trade 105, 125.
[115] John O. Honnold *Documentary History of the Uniform Law for International Sales* (2nd, Kluwer International Law, Deventer 1989) 636.
[116] Koneru, above, 127.
[117] Koneru, above, 128.

unjust enrichment. However, most commentators state that the broader and primary goal of the Convention is to compensate the aggrieved party fully.[118] Once this goal is accomplished, if there is still unjust enrichment on the part of the breacher, such unjust enrichment should be disgorged depending on the facts.[119] In this regard, judges and arbitrators should differentiate between the debtor who has withheld the money due to some circumstances beyond his control and the debtor who has purposely delayed payment.[120] It has been stated that this approach not only satisfies the principles of full compensation and unjust enrichment, but also promotes good faith and reasonable behaviour between the parties in international trade, thereby fulfilling the mandates of Article 7 of the Convention.[121] However, it is doubtful whether this approach conforms with the purpose of Article 78 CISG.

B. The Purpose of Article 78

Article 78 CISG is contained in its own section of the Convention. The purpose of this separate creation of an interest provision at the Vienna Conference was to draw a clear line between interest and damages.[122] Article 78 CISG is wholly independent of any claim for damages. More precisely, the Convention distinguishes between *interest as part of damages* on the one hand and *legal interest* on the other hand.[123] The interest provision's text clarifies that interest claims can be based not only on Article 78, but also on Article 74 (*" ... without prejudice to any claim for damages recoverable under Article 74."*).

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[118] See e.g. Erwin Riezler (ed) *Staudingers Kommentar zum Buergerlichen Gesetzbuch, Wiener UN-Kaufrecht* (13 ed, de Gruyter, Berlin, 1994) 581; Cristian Thiele „Interest on Damages and Rate of Interest Under Article 78 of the UN Convention on Contracts for the International Sale of Goods" (1998) 2 Vindabona J. Int'l Com. L. & Arb. 3, 17.

[119] Phanesh Koneru "The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles" (1997) 6 Minn. J. Global Trade 105, 129.

[120] Alan F. Zoccolillo "Determination of the Interest Rate under the CISG: General Principles vs. National Law" (1997) 1 Vindabona J. Int'l Com. L. & Arb. 3, 17.

[121] Koneru, above, 129.

[122] Erwin Riezler (ed) *Staudingers Kommentar zum Buergerlichen Gesetzbuch, Wiener UN-Kaufrecht* (13 ed, de Gruyter, Berlin, 1994) 612.

[123] Peter Schlechtriem *Commentary on the CISG* (2 ed, Clarendon, Oxford, 1998) 598.

If a plaintiff requests the interest rate that compensates him fully, he claims for *interest as part of damages*. In such a case, he has to invoke the Convention's damage provision Article 74, which compensates him fully for all the damage that is caused by the delayed payment, but gives him the burden of proving his damages. Article 78 CISG, in contrast, grants interest irrespective of the damage which is caused by the arrears in payment.[124] It depends solely on whether the other party is in arrears in regard to a payment obligation. It simply aims to compensate the aggrieved party with a lump sum for the lost use of capital.[125] The purpose of this *legal interest* without proof of damages is to encourage voluntary performance.[126] The above-mentioned proposal of strictly applying the principle of full compensation to the interest rate issue negates this distinction between *interest as part of damages* (governed by Article 74) and *legal interest* (governed by Article 78). Thus, it does not conform with the purpose of Article 78 CISG.

Article 78 CISG conceives the obligation to pay interest as a general rule independently from actual damages. Therefore, the impediments under Article 79 CISG, which exempt from the obligation stemming from Article 74, do not free from the obligation stemming from Article 78.[127] This derives from Article 79 (5) CISG, which does not mention the entitlement to interest:

> Article 79
>
> (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control … .
> (5) Nothing in this Article prevents either party from exercising any right other than to claim damages under this Convention.

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[124] Fritz Enderlein & Dietrich Maskow *International Sales Law* (Oceana, New York, 1992) 311.
[125] Erwin Riezler (ed) *Staudingers Kommentar zum Buergerlichen Gesetzbuch, Wiener UN-Kaufrecht* (13 ed, de Gruyter, Berlin, 1994) 612.
[126] John O. Honnold *Uniform Law for International Sales under the 1980 Convention* (3ed, Kluwer Law International, The Hague, 1999) 465.
[127] Peter Schlechtriem *Commentary on the CISG* (2 ed, Clarendon, Oxford, 1998) 594.

Accordingly, a debtor still remains liable for *interest* payments even if his default is due to an impediment beyond his control and he is, therefore, not liable for *damage* under Article 79 CISG.[128]

In sum, the purpose of Article 78 of the Convention is simply to authorize interest claims and hence to encourage voluntary performance of contract parties which are in arrears with a payment. Furthermore, Article 78 prevents interest from being considered as damages and hereby maintains the obligation to pay interest in case of exemptions under Article 79 CISG. Article 78 fails in formulating a method of determining the rate of interest. However, as the entitlement to interest and the claim for damages both exist, the claim for damages can usually compensate for the lack of an interest rate in the CISG. It will generally be easier and more promising for the creditor to claim the lost use of capital as damages according to Article 74 CISG rather than to expose himself to the uncertainties of Article 78 CISG.[129]

Article 78, therefore, will probably have practical impact only in two exceptional cases. The first case occurs when the creditor is not able to prove the damages he suffered from the delayed payment. The second case occurs where the debtor can claim an exemption under Article 79 for his default, such as when some impediment – for example, unforeseeable currency restrictions in the country of the debtor – temporarily relieves the debtor of his duty to pay under Article 79.[130] In both cases, the creditor still can claim interest under Article 78 without having to proof his loss.

VI. THE MOST APPROPRIATE METHODOLOGY

Article 6 of the Convention states: *"The parties may exclude the application of this Convention or ... derogate or vary the effect of any of its provisions."* Accordingly, the Convention applies subject to contrary agreement by the parties. If a contract states an

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[128] Peter Schlechtriem *Uniform Sales Law* (Manzsche Verlags- und Universitaetsbuchhandlung, Vienna, 1986) 100.
[129] Peter Schlechtriem, above, 100.
[130] Fritz Enderlein & Dietrich Maskow *International Sales Law* (Oceana, New York, 1992) 313.

interest rate or provides a way to determine the rate, it will enjoy priority over Article 78 CISG.[131] Therefore, the applicable interest rate should be determined first by the interpretation of the contract. In doing so, judges and arbitrators should not only take the wording of the contract into account. According to Article 8 (3) CISG, the contract should be interpreted in light of all relevant circumstances, which may help to determine the actual intent of the parties, "*... including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.*" Usages and practices in terms of Article 8 (3) are usages and practices that have been developed between the parties over a longer period of time in similar business relations.[132] However, it is important to note that the function of Article 8 (3) is different from that of Article 9 (2) CISG:[133] It does not address gap filling of the contract, but rather the interpretation of the parties' statements.[134]

When the interpretation of the wording of the contract and all relevant circumstances does not reveal an agreement between the parties about the amount of interest, Article 78 CISG applies. Its failure to establish a method to determine the interest rate leaves a gap in the Convention and hence leads to Article 7 (2) CISG. According to this provision, this gap 'praeter legem'[135] should be filled with the general principles of the Convention. First, one should try to resort to applicable trade usages. As mentioned above, however, the scope of Article 9 (2) CISG and thus the application of trade usages are limited.[136] Absent such trade usages, one has to consider other general principles to fill the gap. These are the principles of full compensation and unjust enrichment.

The above mentioned 'lex monetae' approach[137] seems to be most appropriate to satisfy both these principles without contravening the purpose of Article 78 CISG. According to supporters of this approach, the decisive factor in determining an appropriate interest rate should be the fact that the usual rate of interest is normally

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[131] Erwin Riezler (ed) *Staudingers Kommentar zum Buergerlichen Gesetzbuch, Wiener UN-Kaufrecht* (13 ed, de Gruyter, Berlin, 1994) 101.
[132] Fritz Enderlein & Dietrich Maskow *International Sales Law* (Oceana, New York, 1992) 66.
[133] See IV. C. 2. *International Trade Usage.*
[134] Peter Schlechtriem *Uniform Sales Law* (Manzsche Verlags- und Universitaetsbuchhandlung, Vienna, 1986) 40.
[135] See IV. B. *Resort to Private International Law.*
[136] See IV. C. 2. *International Trade Usage.*
[137] See IV. G. *Resort to the Domestic Law of the Payment Currency.*

related to a particular currency, in particular the relevant inflation rate for that currency.[138]

For example, if the seller has his place of business in a country with a high inflation rate and the price has to be paid in the currency of that country, it is sensible both from the point of view of damages and of compensation for benefits received that he should be allowed to claim the rate of interest at his place of business (which is usually adjusted to the inflation rate and therefore high). Otherwise the buyer would have an additional incentive to delay until the exchange rate induced by high inflation has once again fallen. On the other hand, if the price is payable in 'hard' currency, a seller is not harmed to the same extent by a delay in payment. To allow him the – possible exorbitant – interest rate at his place of business would seem inappropriate.[139]

By basing the determination of the interest rate on the payment's currency, the 'lex monetae' approach compensates for the financial loss of the creditor due to the fact that delay in payment has a financial cost and prevents the debtor from taking advantage of the funds withheld. Furthermore, because most traders borrow to cover deficiencies when payments are late, it may be what most parties would contract for.[140] Moreover, by referring to the fixed statutory interest of the 'lex monetae', it is straightforward in application and hence encourages voluntary fulfillment of contractual obligations.

The foregoing analyses results in the following conclusion: Aggrieved persons claiming interest should invoke both Article 78 and Article 74. Where a person claims interest at, for example, 12 % before a tribunal that, pursuant to Article 78, is likely to grant only 7 % in accordance with the domestic law of the payment currency, the recommended path is the following: The aggrieved person should rely upon Article 78 to claim the statutory interest rate of 7 % and rely upon Article 74 for recovery of the remaining 5 % of the interest rate, provided the claimant is able to present proof of such additional damage and provided that the exemption of Article 79 CISG does not apply.

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[138] Peter Schlechtriem *Commentary on the CISG* (2 ed, Clarendon, Oxford, 1998) 597.
[139] Schlechtriem, above, 597.
[140] Karin L. Kizer "Minding the Gap: Determining Interest Rates Under the CISG" (1998) 65 U. Chicago L. Rev. 1279, 1297.

This approach is consistent with the premise that Article 78 CISG is wholly independent of any claim for damages.

VII. DRAFTING OPTIONS

A party to a contract controlled by the convention relies on Article 78's rule on interest on his own risk.[141] Sellers and buyers are not bound to accept the default settings found in the Convention. Article 6 of the Convention explicitly endorses the principle of freedom of contract. Thus, the parties to an international contract for the sale of goods may exclude the Convention in whole or in part and agree on the applicability of a national substantive law of sales, or of some general conditions and trade usages.[142]

Parties should pay particular attention to contract clauses with regard to interest. While drafting an international sales contract, they should include specific and explicit clauses if interest is a potential problem. Interest clauses in contracts should specify the situations calling for interest and state the method for calculating the rate of interest or determine a specific rate respectively.

Interest clauses in international sales contracts could be formulated in the following ways:

> Sample Clause 1:
>
> If a party to this contract fails to pay any sum in arrears under this contract, the other party is entitled to recover interest on the sum at the judgment rate in the jurisdiction of the country in which currency the sum had to be paid. Interest at this rate shall begin to accrue from the time of default. This right to recover interest is without prejudice to any claim for damages recoverable under the Convention.

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[141] Jeffrey S. Sutton "Measuring Damages Under the CISG" (1989) 50 Ohio St. L. J. 737, 745.
[142] Willibald Posch "On the Law of International Sale of Goods: An Introduction" in Louis Lafili & Franklin Gevurtz (eds) *Surveyof the International Sale of Goods* (Kluwer, Deventer, 1986) 3, 9.

Sample Clause 2:

> The buyer shall pay interest at _____ % per annum on delay in paying for any sum in arrears under this contract. Interest at this rate shall begin to accrue from the time of default. This right to recover interest is without prejudice to any claim for damages recoverable under the Convention.

The International Chamber of Commerce recommends the following interest rate clause in its ICC Model International Sale Contract:[143]

> Article 6 – Interest in case of delayed payment
>
> 6.1 If a party does not pay a sum of money when it falls due the other party is entitled to interest upon that sum from the time when payment is due to the time of payment
>
> 6.2 Unless otherwise agreed, the rate of interest shall be 2% above the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place of payment, or when no such rate exists at that place, then the same rate in the state of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.

The practice found in other standard form contracts for the international sale of goods often corresponds with the recommendations of the ICC. Practitioners drafting interest rate clauses often refer to the average prime rate at the place of payment with respect to the currency of payment.[144] Alternatively, they refer to the judgment rate in the jurisdiction in which the aggrieved party has its place of business.[145] Other practitioners

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[143] ICC Model International Sale Contract, ICC Publication No. 556 (International Chamber of Commerce, Paris 1997).
The ICC Model International Sale Contract is primarily directed at contracts for the sale of manufactured goods intended for resale where the purchaser is not a consumer.

[144] See, e.g. International Trade Centre, Juris International Contracts: Models and Drafting. International Commercial Sale of Goods: Form Contract and User's Guide <http://www.jurisint.org/pub/02/en/doc/src/339.pdf> (last accessed 10 June 2002).

[145] See, e.g. James M. Klotz *International Sales Agreements – An Annotated Drafting and Negotiation Guide* (James M. Klotz, Aurora, Ontario, 1997) 98.

simply determine a specific interest rate in the contract.[146] All these various interest rate clauses in international sales contracts have one thing in common: they eliminate much of the uncertainty surrounding Article 78 CISG.

VIII. CONCLUSION

The United Nations Convention on Contracts for the International Sale of Goods reflects a diversity of legal traditions. Although this diversity was necessary in order to create a truly international sales law, the Convention necessarily includes areas of compromise that point to a lack of consensus. Article 78 CISG, failing to identify a uniform solution concerning the determination of interest rates, is the result of such a compromise. Quite contrary to the Convention's aim of promoting predictability in international commercial transactions, it complicates settlement by making agreement difficult when there is no solution specified by the parties. Furthermore, it increases costs to the parties by requiring them to spend additional resources to litigate disputes over interest.

An amendment of Article 78 CISG might be the solution. The amended version should at least provide guidelines as to how determine the rate of interest. However, as the drafting history of Article 78 CISG reveals, it may not be possible to find a uniform criterion. Moreover, a uniform criterion, if found, may be not acceptable to all Contracting States. However, as long as an agreement upon the uniform criterion has not been reached, it will be necessary for judges and arbitrators to fill the gap according to Article 7 of the Convention.

Viewing the interest rate gap as a gap 'praeter legem' and therefore relying on domestic laws selected by applying private international law rules may achieve some

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[146] James M. Klotz *International Sales Agreements – An Annotated Drafting and Negotiation Guide* (James M. Klotz, Aurora, Ontario, 1997) 98.

procedural uniformity, but only at the price of substantive inconstancy. Judges and arbitrators should therefore regard the application of domestic law in determining the interest rate as inappropriate. Instead, they should try to fill the gap in conformity with the Convention's general principles.

The principles of full compensation and unjust enrichment may provide some guidance to the issue in question. However, their strict application will often lead either to overcompensation or undercompensation of the injured party. The solution proposed by this research paper, awarding the interest rate according to the law of the payment currency, would accord with the Convention's general principles and with the purpose of Article 78 CISG itself without overcompensating or undercompensating the injured party. This solution may not bring to interest rate disputes before tribunals a perfect level of uniformity but this is not to say that it will not provide a useful level of uniformity. Absent such a perfect solution, it seems to be the most appropriate solution.

However, because of the unlikeness of an amendment of Article 78 CISG and the failure of judges and arbitrators in practice to fill the interest rate gap uniformly, parties to international sales contracts can only be urged to include provisions specifying the situations calling for interest and determining a specific interest rate in their contract.

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