

Gap filling on the basis of general principles (article 7.2. of the CISG) and Unidroit Principles

Denis PHILIPPE

Professor at the Catholic University of Louvain
Visiting Professor at the University of Paris Ovest
Lawyer at the Brussels and Luxemburg Bar¹

Gap filling on the basis of general principles (article 7.2. of the CISG) and Unidroit Principles ... 1

- 1.Introduction. 2
 - Article 7 has been considered as one of the most important provisions of the Convention(hereinafter CISG). 2
- 2.Relations with other provisions..... 3
 - 2.1. Usages 3
 - 2.2. Interpretation 4
 - 2.3.Relation with the conflict of law rules. 4
- 3 Gap filling. 4
 - a) Article 7.2 applies for matters governed but not expressly settled by the CISG. 5
 - b) This excludes also the matters not governed by the CISG..... 5
- 4. General principles: definition..... 6
 - 4.1. Definition. 6
 - 4.2. Evolving principles..... 7
 - 4.3. Other legal sources. 7
- 5. Most frequently recognized general principles. 8
 - 5.1.Good faith 8
 - 5.2.Reasonableness 9
 - 5.3. Estoppel 9
 - 5.4.Communication 10
 - 5.5.Favor contractus 10
 - 5.6 But the following example shows that reasoning by analogy did not always apply in the judgements. 10
 - 5.7.Mitigation 11
 - 5.8.Other principles. 11
- 6.Unidroit and gap filling..... 11
 - 6.1.Hardship 11
 - 6.1.1.Definition 12
 - 6.1.2. This matter leads to interesting but divergent decisions. 12

¹ dphilippe@philippelaw.eu

6.1.3. This decision and thoughts can be compared with the famous case of the Belgian Supreme Court dd.19 June 2009 which applied the Unidroit Principles.	12
6.2.Rate of interest	15
6.2.1. Provisions on interest and approach of the possible gap.	15
6.2.2. A gap.	16
6.2.3 Can the Unidroit Principles, also in the case of the rate of interest, fill the gap ?	17
6.2.4 Usage.....	20
Conclusion.....	20

1.Introduction.

Article 7 has been considered as one of the most important provisions of the Convention (hereinafter CISG).²

For the sake of clarity, I will reproduce the text of article 7 :

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law

This Convention is the fruit of a compromise and the cliché of the state of the law at a certain moment in time. Furthermore, the scope of the Convention is limited.

Compromise can render some provisions unclear whereas the law as the society is in constant evolution. Thus, general and open provisions are more than welcome. Furthermore, the CISG must apply in different legal systems and various cultures; thus, a certain uniformity of application is important. If the scope of application of the CISG is limited, a lot of questions must still find a solution in national concepts which differ evidently in the different parts of the world.³

² Lucia Carvalhal Sica, Gap-filling in the Cisg: may the Unidroit principles supplement the gaps in the convention? *Nordic Journal of Commercial Law*, issue 2006/1Sica, p.5.

³ André Janssen & Sörren Claas KIENE, *The CISG and Its General Principles*, 2009, in André Janssen / Olaf Meyer Editors, *CISG Methodology*, Sellier European Law Publishers, 261-286

This shows the importance of article 7. No wonder that the reference to general principles exists in other Conventions⁴

We know the Uniform Commercial Code ("UCC") in the United States, which governs the commercial law between the different States; it is not a federal law but a uniformly adopted state law. In the US, the courts disregard the importance of autonomous interpretation of the UCC and see no need to refer to general principles.⁵

Article 7(1) puts a principle of interpretation of the CISG not of the contract of the parties ; uniformity and good faith are the two pillars of these interpretation rules. We will not analyze these principles in this contribution.

Article 7(2) states that, in case of gap, the general principles underlying the CISG must apply and, in absence of principles, the rules of international private law. In this article, we will focus on the general principles and not in the rules of international private law.⁶

Sometimes, there is a parallel application of the different rules of article 7 and of course we will give our thoughts on this parallel application.

We will first shortly mention the relation of this article with other provisions (2) then we will ask what is a gap (3); then we will discuss the definition of general principles (4) we will have a look at underlying general principles frequently recognized by authors and case law (5) We will analyze whether the Unidroit principles can fill the gaps in the CISG at the hand of two cases; hardship and interest rate. (6)

2.Relations with other provisions.

2.1. Usages

According to article 9 of the CISG, the parties who at least "knew or ought to have known" the relevant usages would be bound by them, pursuant to article 9(2).

⁴ See, for example, article 4(2) of the Convention on International Factoring and article 6(2) of the Convention on International Financial Leasing ; see article 17 of the ULIS (Uniform Law on the International Sale of Goods adopted at a Hague Conference in 1964) ; see also the Uniform Commercial Code §1-103, that foresees that « the principles of law and equity shall supplement its provision »; John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, edited and updated by Harry Fletcher, 4th Edition, Kluwer,p.137. Lucia Carvalhal Sica, op.cit.,the author makes the distinction between the CISG and the Unidroit principles, p.9.

⁵ Shani Salama, Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, an Inter-American Application, 38 U. Miami Inter Am. L. Rev.225 (2006), p.230.

⁶ See for an application, United States: U.S. [Federal] District Court for the Northern District of Illinois; No. 01 CV 5938, *Ajax Tool Works, Inc. v. Can Eng Manufacturing Ltd.* (29 January 2003) , Clout case on Uncitral texts, 2006, 574 ; United States: U.S. [Federal] Court of Appeals, Fourth Circuit; No. 00 1125 21 June 2002, Clout case on Uncitral texts, 2006, 580 ; A

Professor Honnold went further and observed rightly that Article 9 of the CISG implies that, unless the parties otherwise agree, usages that are widely known in international trade and were known or ought to have been known by the parties are applicable to the parties' contract.⁷ Thus, it allows an extensive application of the usages which is favorable for a uniform application of the law in the international trade.

Also, some court decisions have applied this broad definition of the usages⁸ But usages reflect a practice whereas the principles are more fundamental legal norms.

2.2. Interpretation

Interpretation of the convention and gap filling are very near⁹; but interpretation of the contract and the will of *parties* regulated by article 8 of the CISG, differs from the determination of new legal norms applicable to all contracts governed by the CISG.

2.3. Relation with the conflict of law rules.

We know that, in case of gap, the general principles underlying the convention must apply and then, in the absence of general principles, the rules determined by the conflict of law rules. The general principles must prevail, because otherwise the uniform application of the Convention, prescribed by article 7 (1) will be put in jeopardy:

*"The general principle provision can have the narrow effect of guarding against the use of local (and divergent) legal concepts of domestic laws in construing the specific provisions and the broader effect of authorizing tribunals to create new rules not directly based on the textual provisions, but relying on principles, which are broad concepts."*¹⁰

Some judges, as we will explain later, who find the concept of general principles too uncertain, will revert to the international private law rules.¹¹

3 Gap filling.

There must be a gap to be filled.¹²

⁷ Donald J. Smythe, Reasonable Standards for Contract Interpretations under the CISG, 25 Cardozo Journal of International and Comparative Law 1 (2016), p.23.

⁸ Sica, op.cit., p.19.

⁹ See on the very narrow links between interpretation of the Convention and gap filling, Janssen & Kiene, III.

¹⁰ Sica, . p.6.

¹¹ See Bertrams & Van der Velden, Overeenkomsten in het internationale privaatrecht en het Weens Koopverdrag, Tjeenk Willink, 1999, p.183; see for an application of the International private law rule (article 7(2) CISG) to time bar, Court of appeal of Paris, 6 November 2001, 2000, 046/07, Clout, A/CN.9/SER.C/ABSTRACTS/42

¹² Gyula Eörsi, General Provisions, in *International sales: the United Nations Convention on contracts for the international sale of goods* 2-1, 2-9 (Matthew Bender ed. 1984), available at <<http://cisg.law.pace.edu/cisg/biblio/eorsi1.html>> captured on 27th of December 2020.

M. J. Bonell considered that there were two conditions for the application of Article 7(2): first, the matter is governed by CISG; secondly, the matter is not clearly resolved by CISG¹³.

a) Article 7.2 applies for matters governed but not expressly settled by the CISG. 14

Thus, excludes expressly settled or those are the matters not *intra legem* but *praeter legem*.¹⁵ For example, article 79 CISG recognizes the force majeure ; this matter is thus settled and there is no reason to apply article 7.2 on this item.

b) This excludes also the matters not governed by the CISG.

The CISG cannot govern the entire scope of relations between seller and buyer. We can then speak of gap *intra legem*. For instance, extra contractual liability does not fall within the scope of the convention.

Article 4 of the GISG excludes *expressly* certain topics; "consent" or the validity of clauses like "exemption clauses." Other matters are clearly not dealt with and thus not governed by the limitation of claims¹⁶. Agency is also excluded.¹⁷

We can argue that set off is included derivation from the contractual dimension of the convention but this is disputable.¹⁸

Some matters can also be excluded by **parties**¹⁹ or a **state** can formulate a reservation.²⁰

In these cases, there is no gap to fill because the matter is not governed by the CISG.²¹

We can give a more specific example. Do attorney fees constitute a damage? The (lower) U.S. Federal District Court in Zapata held that the Zapata buyer should recover its attorneys' fees,²² on the basis of article 74 CISG.

¹³ See M. J. Bonell, in *Commentary on the International Sales Law: The 1980 Vienna Sales Convention*, Giuffrè, Milan, 1987 (Co-editor and Co-ordinator), p. 75-76.

¹⁴ John Loofkosky, Walking the article 7(2) tightrope between CISG and domestic law, *Journal of Law & Commerce*, no. Volume 25, Issue 1, pp. 87-105.

¹⁵ Sica, *intra legem* means that the matter must be solved by national law and rules of international private law ; it is an external gap ; whereas *praeter legem* means that the gap is hidden ; see Janssen & Kiene, *op.cit.*, II. These authors underline that this distinction is subject to criticism because the distinction is not so clear.

¹⁶ Janssen & Kiene, *op.cit.* n°II.Terminology.

¹⁷ Janssen & Kien, *op.cit.* n°II.

¹⁸ Janssen & Kiene, *op.cit.* II.

¹⁹ Article 6 of the CISG.

²⁰ Janssen & Kiene, *op.cit.* n°II ; see on the reservations,

https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status

²¹ John Honnold, p.98. On the disputed question of application of the Convention on the rules of proof, see John Honnold, p.99. Quid of the representations made on quality of the goods for instance, falls this matter within the scope of the Convention, it is not certain (see John Honnold, p.100) but as a civil law lawyer, we think that representations are parts of the obligations of the sellers and thus ruled by the CISG. See D.PHILIPPE, Warranties and representations –Material adverse change, Faux amis et innovation, in *La rédaction des contrats internationaux*, Ed. Denis PHILIPPE, DAOR 2011/98, pp.255-274.

²² 2001 WL 1000927 (N.D. Ill. 2001), also available at <http://cisgw3.law.pace.edu/cases/010828u1.html>.

The decision was reversed by Judge Posner (himself) in the U.S. Court of Appeal. In Zapata, the court of appeal reversed the decision awarding attorney's fees as damages under Article 74 on the ground, *inter alia*, that the Convention did not implicitly overturn the "American rule" that the parties to litigation normally bear their own legal expenses, including attorneys' fees. Posner finds that it is a matter of procedure not of contract and thus applied the American rule²³

4. General principles: definition 24

4.1. Definition.

We can speak of gaps *praeter legem*.

The drafters did not explain what they meant by general principles.

Dworkin gives a broad definition and calls "a principle a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality"²⁵

Femelgas wrote "A general principle stands at a higher level of abstraction than a rule, or might be said to underpin more than one such rule"²⁶

Most principles can be derived from one provision of the CISG or from various provisions. ²⁷

Let us give an example of a principle derived from one provision. Janssen & Kiene writes that the principle of will autonomy can find his source in article 6 of the CISG which allows the parties to exclude the application of the Convention or to vary the effect of any of its provisions.

But we will see later on that most of the principles find their source in different articles.

Some authors contend that the general principles should be "moored to premises that underline specific provisions of the Convention."²⁸

²³ Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., 313 F.3d 385 (7th Cir. 2002), reversing 2002 WL 398521 (N.D. Ill. 2002), CLOUT Case No. 434 ; see Lookofski, p.96.

²⁴ See Uncitral, Digest of case law on the United Nations Convention on the international sales of goods, 2016, p.44.

²⁵ Ronald Dworkin, The Model of Rules, 35 U.CHI.L.REV.14,23(1967-1968) ; Sica, p.8.

²⁶ John Femelgas, The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation, available at <<http://cisg.law.pace.edu/cisg/biblio/felemegas.html>> ; Sica, op.cit.,p.8.

²⁷ Sica, p.7 ; John Honnold p.102. Janssen n°3 ; See Laura Lassila, General Principles and Convention on Contracts for the International Sale of Goods (CISG) – Uniformity under an Interpretation Umbrella?, 5(2) Russian Law Journal 113–128 (2017). op.cit., p.116 ; Ulrich Magnus, Harmonization and Unification of Law by the Means of General Principles in Unification and Harmonization of International Commercial Law, Interaction or Deharmonization? 162 (M.M. Fogt (ed.), Alphen aan den rijn,Kluwer Law international, 2012).

²⁸ Donald J. Smythe, op.cit., p.20, quoting John Honnold, p.146.

The rules "are applicable in an all-or-nothing fashion": "[i]f the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision."²⁹

4.2. Evolving principles

It constitutes a too narrow of a construction,' **and was** not the intention of the drafters

Honnold underlines the uncertainty linked to a too broad approach of the general principles

However Honnold writes : « Nor will the references to domestic law contribute to a body of international case-law under the Convention. Thus a generous response to the invitation of Article 7 (2) to develop the Convention through the "general principles on which it is based" is necessary to achieve the mandate of Article 7(1) to interpret the Convention with regard to "the need to promote uniformity in its application."³⁰

An international convention is a living document, a maturing body of law, founded on certain fundamental values but capable of adapting new interpretations for changed environments.³¹ The "general principles" should be interpreted as evolving with and following the changes and transitions in international commerce.³²

4.3. Other legal sources.

To find the general sources, we can have regard to foreign case law but of course, it is a mere source of inspiration.

International codifications like Unidroit could also be referred to.

So we can find the following principles in the Unidroit Principles of International Commercial Contracts :

- freedom of contract and party autonomy;
- the principle that international sales contracts should not be subject to formal writing requirements;
- good faith and fair dealing

²⁹ Ibid. p.25 ; Sica, p.8.

³⁰ John Honnold, p.147, n°102.

³¹ Shani Salama ,Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, an Inter-American Application, , 38U. Miami InterAm. L. Rev.225 (2006), p.242.

³² See Sylvette Guillemard, *A Comparative Study of the UNIDROIT Principles of European Contracts and Some Dispositions of the CISG Applicable to the Formation of International Contracts from the Perspective of Harmonisation of Law*, Laval University, May 23, 1999, <http://www.yorku.ca/osgoode/cisg/writings/guille.htm>.

5. Most frequently recognized general principles.

In the next paragraphs, we will highlight some well recognized general principles of the CISG and we will then focus in the next paragraph, on two specific matters, interest rate and hardship.

5.1. Good faith ³³

We already saw that the Treaty itself must be interpreted following the good faith principle.³⁴ Thus, some authors write that the CISG does not impose a duty of good faith to the parties, but only to the interpreter of the CISG.^{35,36}

This restrictive interpretation is not expressly mentioned in the CISG which foresees in article 7.1. that the Convention must be interpreted following the principle of good faith ;

There are also provisions in the CISG referring to good faith and in particular to Arts. 16(2) and 29(2) CISG. ³⁷

Professor Kelly³⁸ makes a persuasive argument that the CISG should impose a general good faith requirement on the parties: "The CISG outlines rights and obligations of parties to an international sale of goods. Article 7(1) provides that the principle of good faith must be

³³ See Bertrams & Van der Velden, *Overeenkomsten in het internationale privaatrecht en het Weens Koopverdrag*, Tjennk Willink, 1999, p.183.

³⁴ See Colombian Constitutional Court, *Dulces Luisi v. Seoul International* (decision of the Comision para la Proteccion del Comercio Exterior de Mexico [Mexican Commission for the Protection of Foreign Trade] [Compromex], *Diario Oficial de la Federacion* [D.O.], Tomo DXLIV No. 20, 29 de enero de 1999, Pagina 69 (Mex.), Alejandro Osuna Gonzdlez, trans., available at <http://www.cisg.law.pace.edu/cisgtwais/db/cases2/981130ml.html>.the Mexican decision, *International* which applies the good faith referring to 7.1.

³⁵ Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments?*, 1 *uniform l.rev.* 26, 30-31 (1996). ; John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* 146-147 (2d ed. 1991).

³⁶ See Michael Bridge, *Good faith, common law and the CISG*, *Uniform Law Review*, 22 (1). pp. 98-115. ISSN 1124-3694

³⁷ Secretariat Commentary [on Article 7 of the 1978 Draft], *United Nations Conference on Contracts for the International Sale of Goods*, official records:documents of the conference and summary records of the plenary meetings and of the meetings of the main committees (vienna, 10 march – 11 april 1980) 17-18, (1981), available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-07.html> (last visited December 27 2020) (citing articles 16(2) b, 21(2), 29(2), 37 & 38, 40, 49(2), 69(2), 82, 85 to 88 of the Convention). We have to nuance : good faith is not mentioned expressly in thes articles but they required a behaviour based on the good faith.

³⁸ Troy Keily *Good Faith and the Vienna Convention on Contracts fbr the International Sale of Goods (CISG)*, 3 *vVndobona j. of int'l com. l. & arb.* 15, 24-25 (1999).

referred to in the uniformization of the Convention.³⁹ Thus good faith, following many authors,⁴⁰ and courts⁴¹, must guide the conduct of contracting parties.

Article 1.7.1 of the Unidroit Principles prescribes “each party must act in accordance with good faith and fair dealing in international trade”⁴²

Good faith has known an important development in numerous world jurisdictions, also in common law,⁴³ and we think also that it must be recognized as a general principle underlying the CISG.

5.2. Reasonableness 44

The term reasonable is often used in the CISG⁴⁵ and professor Schlechtriem as others consider that it is a general principle of the Convention.⁴⁶,

5.3. Estoppel

The estoppel principle that a party cannot effectively contradict its own statement on which the other party has relied; ⁴⁷ Estoppel is a common law concept which has already been recognized in jurisdictions of civil law.⁴⁸

³⁹ Against, Donald J. Smythe, op.cit., p.24

⁴⁰ Sica, p.13 and the references ; see Laura Samilla who quoted the Colombian Constitutional Court considering that by virtue of article 7 of the CISG, parties must respect good faith in the performance of their obligations (See Pace University School of Law, CISG Database, Country Case Schedule, Colombia, <http://www.cisg.law.pace.edu/cisgtext/casecit.html#colombia>.)

⁴¹ See besides the Colombian Constitutional Court, Dulces Luisi v. Seoul International (decision of the Comision para la Proteccion del Comercio Exterior de Mexico [Mexican Comision for the Protection of Foreign Trade] [Compromex], Diario Oficial de la Federacion [D.O.], Tomo DXLIV No. 20, 29 de enero de 1999, Pagina 69 (Mex.), Alejandro Osuna Gonzdlez, trans., available at <http://www.cisg.law.pace.edu/cisgtwais/db/cases2/981130ml.html>.(capture of 27 December 2020)

⁴² See Sica, p.11.

⁴³ See Christina Perry, Good Faith in English and US Contract law : Divergent Theories, Practical Similarities, Business Law International, International Law Association, 2016, p.27 ; in a recent decision, [Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v. Ioannis Kent (Aka John Kent)], [2018] EWHC 333 (Comm) (Al Nehayan v. Kent) 22 February 2018, the judge underlined that good faith in the performance of a contract can be an implied term.

⁴⁴ Sica, p.14 ; See Bertrams & Van der Velden, Overeenkomsten in het internationale privaatrecht en het Weens Koopverdrag, Tjennk Willink, 1999, p.183.

⁴⁵ Articles 8 (1),(2) and (3), 35(1), 38(3), 39(1), 43(1), 46(3), 48(1) and (2), 49(2)(a), 60(a), 65(1), 79(1). Sica, p.14.

⁴⁶ See Donald J.Smythep.24 ; Peter Schlechtriem, Uniform Sales Law - the UN-convention on contracts for the international sale of goods, 38 (1986)

⁴⁷ Estoppel. See for an application of estoppel as general principle, International Schiedsgericht der Bundeskammer der Gewerblichen Gesellschaft, CLOUT cases No and No. 94 SCH-4318 of 15 June 1994. See also the Case Digest, supra note 2, relating to Article 7, paragraph 2 (headed Gap-filling and General Principles), paragraph 10, text with notes 21 and 22. See Peter Schlechtriem, in COMMENTARY, supra note 10, at 314-15; Markus Müller-Chen, Analysis of Specific Performance (Art. 28) and Remedies for Breach of Contract by the Seller (Arts. 45-52), in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 525 (Peter Schlechtriem & Ingeborg Schwenzer ed., 2d ed. 2005).

⁴⁸ See in French law, Cass. 3è Ch, 7 September 2017, nr 16-19.543. Mehdi Kebir, Estoppel, Absence de contradiction en cas d'allégations contraires, Dalloz Actualités, 5 July 2017

5.4. Communication 49

Several provisions of the CISG organize a fluent communication between parties. For instance, in case of minor modifications of an offer, the offeror must object without undue delay.⁵⁰ offer by the offeree (article 19(2)).

Delay in the transmission of an acceptance (article 21 (2))⁵¹.

According to Article 49, a buyer faced with a fundamental breach can avoid a CISG contract by making a "declaration" to that effect

From these numerous provisions can be evinced a general principle calling for the communication of information needed by the contracting party in situations similar to these abovementioned.

When a principle is expressed frequently in the CISG, authors infer that it can become a principle underlying the CISG.

5.5. Favor contractus .

Several articles of the CISG take care for the preservation of contract⁵². The right to cure, the additional period of time given to the seller to comply with his obligation are good examples of this principle which is often considered as a principle underlying the CISG.

5.6 But the following example shows that reasoning by analogy did not always apply in the judgements.

We can refer to the decision of *Oberlandesgericht Hamburg*,⁵³ which recognized the buyer's right to avoid, even though no "explicit" avoidance declaration was made. The court held that an explicit declaration of avoidance was unnecessary once the seller refused to perform its delivery obligation and that to insist on such a declaration would be contrary to the principle of good faith (Article 7(1) CISG). Such a declaration is dispensable as long as the avoidance of the contract is possible in principle and it is certain that the seller will not perform its obligations at the time the substitute purchase is made⁵⁴

This decision shows that the last-mentioned principles (communication and preservation of the contract) do not apply on a predictable manner and maybe this decision puts in doubt their

⁴⁹ John Honnold, n100

⁵⁰ Article 19 (2)

⁵¹ Art 26 Avoidance of contract, 39(1) notification of the defects, 48(2) buyer must respond to whether he will accept late performance ; art 68 disclose transit damages ; notify suspension of performance art 71(3) & 79 (4) in case of force majeure. 88(1) resale of the goods

⁵² Janssen, n°II.1, article 37 CISG on the right to cure; the additional time to perform is foreseen in article 47; : Sica, p.14 Alejandro Garro, The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG, 69Tulane Law Review.1149,at p.1185.

⁵³ Hanseatisches Oberlandesgericht Hamburg (Germany), 28 February 1997, available on unilex.

⁵⁴ J. Lookofsky, Walking the article 7(2) tightrope between CISG and domestic law, *Journal of Law & Commerce*, no. Volume 25, Issue 1, pp. 87-105.

recognition as general principle.⁵⁵ It shows any way the difficulties encountered when applying the general principles.

5.7.Mitigation

The duty to mitigate is expressed in article 77 of the CISG and applied in specific cases (article 85 : obligation of the seller to preserve the goods in case of late in-taking by the buyer) obligation of the buyer to preserve the non-conforming goods .⁵⁶⁵⁷

5.8.Other principles.

Finally, are often mentioned as general principles, the will autonomy⁵⁸ and the absence of formalism⁵⁹ and also the principle of full compensation.⁶⁰⁶¹

6.Unidroit and gap filling

6.1.Hardship⁶²

⁵⁵ Lookofsky criticized this decision because it was classified in the Clout Digest(n°277) under 7(2)whereas the Court invoked article 7(1). Janssen means that the reference to the general principles and especially the good faith was not appropriate; he considered as Lookofsky that a clear distinction must be drawn between the application of article 7(1) and 7(2) CISG. (op.cit., n°C2)

⁵⁶ See on the application to penalty clause of the Unidroit principles Laura Lassila op.cit.,p122. We think that the regime of the penalty clause is simply not governed by the Convention. ;Sica, p.14

⁵⁷ Lookofsky, op.cit.

⁵⁸ Ibidem. ; see article 6 CISG ; Sica, p.15 (parties can derogate from provisions of the Convention)

⁵⁹ Ibidem. Sica, p.15 ; Ulrich Magnus, General Principles of UN-Sales Law, Max-Planck-Institute for foreign and international Private Law *Rebels Zeitschrift for foreign and international Private Law*,Hein Kötz,in honor of his 60th Birthday,Part I,Volume 59 (1995)Issue 3-4 (October) available at <http://www.cisg.law.pace.edu/cisg/biblio/magnus.html> (captured on the 27th of December 2020)

⁶⁰ Sica, op.cit., p.15. However article 74 CISG underlines that the damages, to be compensated, must be foreseeable, what constitutes a limitation of compensation.

⁶¹ For a comparison between the principles in the CISG on one hand and in the Unidroit Principles on the other hand, see Sica, p.11 a.f. ; for an exhaustive list of general principles, see Ulrich Magnus, General Principles, loc.cit.

⁶² Anna Veneziano, "UNIDROIT Principles and CISG : Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court." *Uniform Law Review* 15 (2010): 137-149 ; Erika Rigó(2017) Interpretation hardships regarding the CISG, in particular Article 7. First BRNO Arbitration Conference 2017,Current Issues of International Commercial Arbitration. pp.80-94.

6.1.1..Definition

The doctrine of unforeseen circumstances is intended for having the adjustment of the contract admitted when circumstances with the following characteristics arise:

- unaccountability to the party that invokes it;
- unpredictability and unavailability;
- inevitably leading to an upheaval in the contractual economy.⁶³

Hardship leads to renegotiation of the contract.

There is no express provision on hardship in the CISG ; force majeure is, as we have seen, well regulated by article 79 CISG ; force majeure supposes an impediment ; thus a mere upheaval in the contractual economy as in the hardship doctrine cannot necessarily constitute an impediment.

6.1.2. This matter leads to interesting but divergent decisions.

A first decision was rendered by the Italian Tribunale Civile di Monza, on January 14 1993.⁶⁴ It concerns a sales contract between an Italian seller and a Swedish buyer ; the seller invoked hardship doctrine due to the increase of the price of the goods by 30%. The CISG did not apply because it was not yet in force in Italy at that time and national Italian law applied.

In an *obiter dictum*, the court said however that even if the CISG would apply, the tribunal would not have applied the hardship doctrine because such a remedy is not to be found in the CISG.

Mr. Lookofsky in his article⁶⁵ wrote that hardship and force majeure have different functions, that hardship is a matter of validity, not regulated by the CISG.⁶⁶

The author added :

“Since the Convention drafters were not ready (in 1980) to legislate on sales contract validity, they can hardly have intended to put hardship into the Convention “through the back (Article 7(2)) door,”⁶⁷

We cannot share this view ; hardship is a question of performance of the contract and not of validity of the contract. But he nevertheless concludes that, if Dutch law would apply, where hardship is recognized, the Dutch court will apply concurrently the Dutch law and would then apply hardship.⁶⁸

6.1.3. This decision and thoughts can be compared with the famous case of the Belgian Supreme Court dd.19 June 2009 which applied the Unidroit Principles. 69

⁶³ See for a comparative analysis, Denis Philippe, *Changement de circonstances et bouleversement de l'économie contractuelle*, Bruylant, 1986, Unexpected circumstances in European contract law, Ed Eward Hondius and Hans Christoph Grigoleit, Common core of European private law, Cambridge University Press, 2011, France and related jurisdictions by Denis Phillippe, p.144 a.f.

⁶⁴ CLOUT Case No. 54

⁶⁵ P.102

⁶⁶ Ibid.

⁶⁷ Op. cit., p.102.

⁶⁸ Ibid. p.103.

⁶⁹ See for a comment, D. PHILIPPE, « Renégociation du contrat en cas de changement de circonstances : une porte entrouverte ? », Note under Cass. (1^{ste} k.), 19 June 2009, D.A.O.R.,

A French seller enters into a long-term sales of steel contract with a Belgian buyer. The steel price increased sharply (70%) at the beginning of this century due to a rise of the demand in the emerging countries, more particularly in China. The seller asked a renegotiation of the price to the buyer due to hardship. It was refused by the buyer.

The seller brought the case before the trade court of Tongeren. The judge considered that the CISG applied; article 79 of this Convention deals with exemption in case of events beyond the control of the parties. But the exemption required the presence of an impediment; a mere rise of the price, concluded the judge, does not constitute an impediment and the claim was dismissed.

In appeal, the court of Antwerpen considered that the Convention did not address the hypothesis of hardship, thus there was a gap. Article 7.2. of the CISG applies. In case of gap-filling, the Convention prescribes to find the rules applicable firstly in the general principles which underly the convention and secondly in the law applicable by virtue of the rules of international private law.

The court considered that no general principle could apply and referred to the law applicable on basis of the international private law, i.e. the French law.

The French case law introduced an obligation of renegotiation of the contract in case of hardship⁷⁰. The buyer refuses the renegotiation and was thus liable for the damage suffered by the seller. The damage was fixed *ex aequo et bono* at 450.000euros

The buyer introduced an appeal before the Supreme Court. The petition exposed that the appeal court violates the principle *pacta sunt servanda* which is sanctioned by the CISG.

The Court rejected the petition. Two main elements in the motivation of the Court were the following:

1. Article 79 of the CISG applies in case of hardship and not only in case of force majeure.
2. Applying also article 7.2., the Court considered that in case of gap (the CISG did not organize the renegotiation of the sales contract in case of hardship) the Convention must be filled with the principles underlying the Convention.

The Supreme Court stated that the Unidroit principles are principles underlying the CISG; article 6.2.2. of the Unidroit principles foresees the renegotiation of the contract in case of change of circumstances; thus, in this case, the Belgian buyer has the obligation to renegotiate the contract with the French seller.

This decision has been criticized by some authors⁷¹ who argued that the Unidroit principles do not constitute principles underlying the CISG.⁷² They come first with an easy argument: Unidroit principles have been adopted after the entry into force of the CISG.⁷³ But we think, as already exposed, that international trade law is in evolution⁷⁴ and we cannot stick to the sole principles

n°94 (Juin 2010), pp.156 – 162 ; PHILIPPE D., ANCEL P., FAUVARQUE-COSSON B., WINTGEN R., « Droit comparé des contrats. Renégociation du contrat en cas de changement de circonstances dans la vente internationale, *Revue des contrats*, R.D.C. 2011, pp. 963-985 ; see also D. PHILIPPE in *La rédaction des contrats internationaux*, Larcier, 2012 pp. 181 e.s.

⁷⁰ Cass. com, November 3 1992, 'arrêt Huard', *Bull.* 1992 IV n° 338 p. 241, *J.C.P.*, 1993-11-24, n° 46-47, p. 469. See also, Cass. com. November 24 1998, *Bull.* 1998 IV n° 277 p. 232, *J.C.P.E.*, 1999-07-22, n° 29, p. 1242, Obs. C. JAMIN. Since then, the new civil code has recognised the doctrine of imprévision or change of circumstances (article 1195Ccivil).

⁷¹ See Denis Philippe, in *Revue des contrats*, *loc.cit.*

⁷² See o this, Lucia Carvalhal Sica, p.2.

⁷³ See for more details on this, Denis Philippe, *loc.cit.*; Anna Veneziano, *op.cit.*,p.141.

⁷⁴ Lucia Carvalhal Sica p.10

of law in force in 1980; otherwise the CISG would become a frozen piece of law what was certainly not the intention of the drafters of the CISG. As excellently written by Professor Veneziano:

*The chronological argument, however, fails to take into account the need to encourage the practical application and further development of any hard law international instrument. If taken seriously, it would probably reach a result contrary to the wishes of its proponents, undermining the use of CISG instead of fostering it.*⁷⁵

Some authors contend that hardship has not been ruled by the CISG and only national law must govern this matter.⁷⁶ Thus hardship is not governed by the CISG.

Professor Veneziano suggests that, even if we would accept these arguments, renegotiation of the contract is possible on the basis of the principle of good faith which underlies the CISG.⁷⁷

Unidroit Principles are also viewed by these authors, as outside the CISG; thus, they concluded that the Principles cannot, be principles underlying the Convention.⁷⁸ We cannot follow this argumentation.

Unidroit Principles play a very important role in the international trade, they have been drafted by renowned academics from the various world legal systems under the aegis of a reputed scientific institution Unidroit, they have been very clearly codified, they are easily accessible and regularly updated; they constitute an important reference in the arbitral awards⁷⁹. the solutions are coherent, accessible, clear, well commented and one of their function is "interpreting and supplementing international uniform law instruments..

Traditionally international uniform law has been interpreted on the basis of, supplemented by, principles and criteria of domestic law...

Recently, both courts and arbitral tribunals have increasingly abandoned such a "conflictual" approach, seeking instead to interpret and supplement international uniform law by reference to autonomous and internationally uniform principles and criteria...

*Until now, such autonomous principles and criteria for the interpretation and supplementing of international uniform law instruments have had to be found in each single case by the judges and arbitrators themselves on the basis of a comparative survey of the solutions adopted in the different legal systems. The Principles could considerably facilitate their task in this respect."*⁸⁰

The Unidroit Principles could also be used in order to clarify already existing principles.⁸¹

We think that this progressive decision of the Belgian Supreme Court and its application of the Unidroit Principles are most welcome.⁸²

⁷⁵ Anna Veneziano, op.cit.,p.141.

⁷⁶ See the Italian decision, hereabove and Anna Veneziano, p.142 and the references.

⁷⁷ Anna Veneziano, op.cit.,p.146.

⁷⁸ Anna Veneziano, op.cit.,p.141. and the references.

⁷⁹ See Denis Philippe, Arbitration, Unidroit principles and the CISG, CYIL – Czech Yearbook of Arbitration, 2020.

⁸⁰ Unidroit principles, op.cit., p.5 ; see also for an application of the Unidroit principles to fill the gap in the Convention, Netherlands arbitration Institute, the Netherlands, 10 February 2005, available on www.cisg.law.pace.edu.

⁸¹ Anna Veneziano, op.cit.,p.142 and the references.

⁸² See also in favour of the application of the Unidroit principles to fill the gaps in the CISG, Alejandro Garro, The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG, 69Tulane Law Review.1149,at

6.2. Rate of interest 83

6.2.1. Provisions on interest and approach of the possible gap.

In the Hague Convention (ULIS, Uniform law on International Sales of Goods) of 1 July 1964, article 83 foresaw that: "*Where the breach of contract consists of delay in the payment of the price, the seller shall in any event be entitled to interest on such sum as is in arrear at a rate equal to the official discount rate in the country where he has his place of business or, if he has no place of business, his habitual residence, plus 1%*"

Article 78 of CISG foresees that:

*"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 74."*⁸⁴

The CISG text, contrary to ULIS, is silent on the interest rate.

In fact, article 58 of the 1976 UNCITRAL Working Group's Draft Convention took over the rule of the Hague Convention. The two drafts of CISG, the 1978 Draft and the 1977 UNCITRAL Sales Draft, omitted a rule on interest.

The discussions at the Conference reflected differing beliefs and divergent theoretical approaches to the duty to pay interest (we know that interest is in principle prohibited in the Islamic world) as well as to the conflicting practical needs⁸⁵. The Conference finally designated an ad hoc working group to seek a compromise; one of the proposals of the group established in general terms the right to receive interest on sums in arrears; this was approved (30 to 2, with 12 abstentions) and gave birth to Article 78 of the Convention⁸⁶. But the text was silent on the interest rate.

p.1185; Franco Ferrari, Gap-filling and Interpretation of the CISG: Overview of International Case Law, 7 VJ 63, 79 (2003).

⁸³ Denis Philippe, "The Rate of Interest under CISG and Peculiarities of International Commercial Arbitration", in *Arbitragem e Comércio Internacional – Estudos em Homenagem a Luiz Olavo Baptista*, Quartier Latin, 2013, pp. 625-651; See Christian Thiele, *Interest on Damages and Rate of Interest Under Article 78 of the U.N. Convention on Contracts for the International Sale of Goods*, 2 Vindobona Journal of International Commercial Law and Arbitration 3-35 (1998). Another example is the determination of the interest rate. See DEFORCHE, D., VIGGRIA, A., « La fixation du taux d'intérêt applicable aux retards de paiements dans le cadre de la Convention des Nations Unies sur les contrats de vente internationale de marchandises (CVIM) », *Revue de Droit Commercial (belge)*. 2009, liv. 10, 1063; Janssen & Kiene, op.cit. IV,1.

⁸³ See Karin L. Kizer, Minding the Gap: Determining Interest Rates Under the UN Convention for the International Sale of Goods, 65 U.CHI.L.REV.1279, 1295-1296 (Fall, 1998) (making reference to the principle of full compensation and, as an alternative, to the principle of unjust enrichment). Sica, op.cit., p.4.

⁸⁴ See also article 84 CISG.

⁸⁵ Peter Schlechtriem, Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods, part G, paragraph 1. Available at <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem-78.html>.

⁸⁶ John O. Honnold, comments on Article 78, paragraph 4. Available at <http://www.cisg.law.pace.edu/cisg/biblio/ho78.html>.

UNIDROIT Principles foresee that interest is due if the payment of a sum of money is delayed⁸⁷.

"Article 7.4.9 (Interest for failure to pay money)

(1) If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment whether or not the non-payment is excused.

(2) The rate of interest shall be the average bank short-term lending rate to prime borrowers⁸⁸ prevailing for the currency of payment at the place for payment, or where 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.

(3) The aggrieved party is entitled to additional damages if the non-payment caused it a greater harm."

The question is : is the provision of an interest rate a gap that can be fulfilled ? Secondly can it be fulfilled by the Unidroit principles ?

6.2.2. A gap.

We think that the absence of interest rate constitutes a gap that can be filled.⁸⁹

If the CISG does not expressly exclude the matters from its scope, we should keep conservative attitude to extend its exclusion unless it is obvious that the questioned matters are outside of its scope. For the rate of interest, it is not convincing to treat it as a gap *intra legem* only because CISG does not mention it. Given such interpretation is right, Article 7 seems useless. In addition, the rate of interest is a necessary component of interest. Since CISG governs the interest to payment in arrears, it is reasonable to consider that the rate of interest also falls under the scope of CISG.

On the other hand, if the negotiators could not find an appropriate rule on the interest rate as mentioned earlier, it does not mean that the rate of interest falls outside the scope of the CISG; we think then that the matter is governed but not settled by the CISG.

We have to recognize however most of decisions do not consider the rate of interest as a gap to be filled but apply simply their national laws concurrently with article 78.⁹⁰

⁸⁷ UNIDROIT Principles of International Commercial Contracts, 2010 edition, Article 7.4.9.

⁸⁸ We underlined.

⁸⁹ See Janssen, op.cit. Secretariat of United Nations Commission on International Trade Law UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, 2008 revision. Paragraph 8 of Article 78. Available at <http://www.uncitral.org/pdf/english/clout/digest2008/article078.pdf>, last visit on June 22, 2011

⁹⁰ See also Oberlandesgericht Munchen , Germany 7 U 4419/93, CLOUT case No. 83 (the court ordered the defendant to pay the purchase price plus interest. As the CISG doesn't set an interest rate, the court applied the statutory interest rate of 8% according to the applicable Swedish Law.). For more cases in which the courts held the same opinion, please visit CLOUT Case, e.g. case No. 79, No.81, No.82, No.634; GmbH Lothringer Gunther Grosshandels-gesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepco International, Hof van Beroep, Antwerpen, 2002/AR/2087, 24.04.2006. Available at <http://www.unilex.info/case.cfm?id=1152>; see tribunal d'instance de Luxembourg, 18 March 2011, BIJ, 4/2011, August, p.61 which applies the rate of the law applicable to the contract of sale.

The Supreme Court of Poland considered that there was no general principle governing the interest rate and applies the rules of international private law on the basis of article 7(2) second branch.⁹¹

Other decisions apply simply national law without reference to article 7; some choose the interest rate of the place of business of the debtor, some others the place of business of the creditor.⁹² Some authors favor also the national law approach.⁹³ Some authors argue that interest rates or not governed by the CISG⁹⁴

Some decisions, fortunately, apply article 7(2) and considered that the interest rate is governed but not settled by the CISG.⁹⁵

6.2.3 Can the Unidroit Principles, also in the case of the rate of interest, fill the gap ?

Some authors, as does the present author, share this view.⁹⁶

Professor Eiselen wrote in this regard: *“Due to the controversies and uncertainties which surrounds Article 78, the provisions of the UNIDROIT Principles must be considered as one appropriate way of solving these issues. This has been suggested by some commentators⁹⁷ and has even been used by arbitral tribunals to justify a certain approach to the awarding of interest and referred to by others⁹⁸*

⁹¹ Poland: Supreme Court I CSK 105/08, L.M. v. Grażyna S. (17 October 2008).

⁹² See the references quoted by Janssen & Kiene, footnotes 26 to 28.

⁹³ Janssen & Kiene, IV1, and footnote 30.

⁹⁴ Sica *ibid* p.2

⁹⁵ Arbitration Award SCH 4318, *op.cit.*

⁹⁶ Eiselen, *loc.cit.*; D. Philippe, *Revue des contrats*, 2011, n°14, p.971 ; DAOR, 94 and *obs.* D. Philippe, p.192. A. Corterier, *Interest in Uniform application, how to solve the United Sales law's interest problem under Article 78 CISG and 84 CISG, Review of the convention on contracts for the international sales of goods (2002-2003)*, 2004, 1_18. ; C. THIELE, *Interest on damage and rate of interest under Article 78 of the UN Convention on contracts for international sale of goods*, *Vindobona Journal of international commercial law and arbitration*, 1998, 3-35, www.cisg.law.pace.edu/cisg/biblio/thiele.html (visited on 27th of December 2020)

⁹⁷ Corterier A., 'A New Approach to Solving the Problem of the Interest Rate Under Art 78 CISG' 5 (2002) *International Trade and Business Law Annual* 33-42 also available online at <<http://cisgw3.law.pace.edu/cisg/biblio/cortierier.html>>; spec. 41; Liu C., 'Recovery of Interest' 2003 *Nordic Journal of Commercial Law of the University of Turku* Issue 1, also available online at <<http://cisgw3.law.pace.edu/cisg/biblio/chengwei.html>>., 246-250.

⁹⁸ . ICC Arbitration Case No. 8769 of December 1996 available online at <<http://cisgw3.law.pace.edu/cases/968769i1.html>>; ICC Arbitration Case No. 8128 of 1995 available online at <<http://cisgw3.law.pace.edu/cases/958128i1.html>>; Austria 15 June 1994 Vienna Arbitration proceeding SCH-4366 available online at <<http://cisgw3.law.pace.edu/cases/940615a3.html>>. ; the two last quotations are from professor Eiselen ; G. WEISZBERG, *Vingt ans d'interprétation et de comblement des lacunes dans la Convention international de vente de marchandises du 11 avril 1980*, Janvier 2009, <http://www.cisg.law.edu/cisg/biblio/weiszberg.html> ; André JANSSEN & Sörren Claas KIENE, *The CISG and Its General Principles*, 2009, in André JANSSEN / Olaf MEYER Editors, *CISG Methodology*, Sellier European Law Publishers, 261-286 ; Franco FERRARI, *Das Verhältnis zwischen den UNIDROIT-Grundsätzen und den allgemeinen Grundsätzen internationaler Einheitsprivatrechtinvention. Zugleich ein Beitrag zur Lückenfüllung durch staatliche Gerichte* [The Relationship between the UNIDROIT Principles and the General Principles of International Conventions Unifying Private Law - in German], 53 *Juristen Zeitung* (1998)

Whether the use of the UNIDROIT Principles in these cases were justified will be considered below"⁹⁹

We think therefore that the abovementioned rule of the Unidroit principles for the determination of interest must apply to fill the gap of article 78.

Article 7.4.9(2) of UNIDROIT Principles fixes the interest rate by closely connecting to the currency and the place of payment.

Why is the solution of the Unidroit principles in conformity with international trade law?

Since the function of interest under Article 78 is to provide lump-sum minimum compensation to the creditor, which rate of interest could be best suited to this function and which general principles in CISG could be used to conclude such rate?

The solution under Article 7.4.9(2) of UNIDROIT Principles could be found in general principles in CISG itself. As the official comment of Article 7.4.9(2) of UNIDROIT Principles states, this solution has been widely accepted in international trade. This solution was already adopted in the first edition of UNIDROIT Principles in 1994. 2004 edition and 2010 and 2016 editions of UNIDROIT Principles did not make any change to Article 7.4.9.¹⁰⁰ To some extent, it means that this solution accords with the development of international transaction. Aiming to promote uniformity of CISG in application, this solution is also supported by its general principles.

We can conclude that the solution presented by the Unidroit principles is in conformity with the general principle underlying the CISG.¹⁰¹

Is the prime rate of the Unidroit principle similar to LIBOR (London Interbank Offered Rate)?

Libor is defined as follows:

"The rate at which an individual Contributor Panel bank could borrow funds, were it to do so by asking for and then accepting inter-bank offers in reasonable market size, just prior to 11.00 London time."

This definition is amplified as follows:

- The rate at which each bank submits must be formed from that bank's perception of its cost of funds in the interbank market.
- Contributions must represent rates formed in London and not elsewhere.
- Contributions must be for the currency concerned, not the cost of producing one currency by borrowing in another currency and accessing the required currency via the foreign exchange markets.
- The rates must be submitted by members of staff at a bank with primary responsibility for management of a bank's cash, rather than a bank's derivative book.
- The definition of "funds" is: unsecured interbank cash or cash raised through primary issuance of interbank Certificates of Deposit.

⁹⁹ See Appeal court Paris, 25 February 2020, n° 17/18001.

¹⁰⁰ See 2010 Edition, p.279.

¹⁰¹ See ICC Arbitration, 8128/1995, CISG On line, 526 ; ICC Arbitration, 8769/1996,CISG on line, 775 ; see Schelchtriem, p.1057.

Although some specialists put in doubt the reliability of these interests, it appears that they are widely recognized and applied in many countries¹⁰²

Commercial interests are normally defined in function of LIBOR.

Prime rate chosen by the Unidroit principles is defined as the interest applied to bank for prime customers; it seems thus that the definition of Libor is different from the definition of interest to prime customers; however, we think that Libor or the interest rate proposed by the Unidroit will come to the same solution due to the fact that the commercial prime rate is based on LIBOR; the prime rate is the rate that commercial banks charge their most creditworthy customers; Libor is the interest rate at which major global banks lend to one another and more and more commercial contracts, not only loans, make reference to the Libor interest rate; thus these two interest rates (prime rate and libor rate) are very near; besides the judge, when applying Libor, adds sometimes one or two percent of interest to better reflect the commercial interest rate.¹⁰³

We think that the Libor overnight rate in the money of the currency of payment must be chosen.¹⁰⁴ But the choice of the Libor rate can vary in function of the duration of the delay of non-payment by the buyer in the CISG. And the currency must also be taken into consideration because the interest rate varies in function of the currency.

Furthermore, the choice of the Libor rate gives also an economical input in the application of the CISG. Besides, Libor is also an easily accessible source and updated every day.

Some case law follows this view and applies this Unidroit article to fill the gap of interest rate.¹⁰⁵

In ICC Arbitration case No. 8769¹⁰⁶, the sole arbitrator decided to apply an interest rate that he deemed commercially reasonable and in support of his finding he referred with no further explanation to Art. 7.4.9 (2) of the Unidroit Principles.

In the case Arbitral award of the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce of January 28, 2009,¹⁰⁷ the arbitrator considered the purpose of achieving uniform application of the CISG while applying Article 7(1); he rejected the application of national law and applied Article 7 §2 while filling the gaps regarding the question of interest; he applied the principle of full compensation but rejected the application of national Serbian law because it would result in overcompensation of the seller.¹⁰⁸ Finally the

¹⁰² See contra, C. THIELE, Interest on damage and rate of interest under Article 78 of the UN Convention on contracts for international sale of goods, *Vindobona Journal of international commercial law and arbitration*, 1998, 3-35, www.cisg.law.pace.edu/cisg/biblio/thiele.html (visited on 27th of December 2020)

But since 1998, time and usages have changed on this field

¹⁰³ See ICC Arbitration Case No. 8128 of 1995, *loc.cit.*

¹⁰⁴ See the rates published by ICE Benchmark Administration; see <https://www.theice.com/iba/libor#>:

¹⁰⁵ See Court of Arbitration of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), *Unilex*.

¹⁰⁶ Available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=397&step=Abstract>, captured on the 27th of December 2020.

¹⁰⁷ No. T-8/08 <https://cisgw3.law.pace.edu/cases/090128sb.html>

¹⁰⁸ International Schiedsgericht der Bundeskammer der Gewerblichen Gesellschaft, *CLOUT cases No. 93, SCH-4366 of 15 June 1994* The arbitrator considered also that the seller was entitled to full compensation; the arbitrator applied the interest rate of the average prime rate in the seller's country; he considered that in case of late payment, the seller would revert to

arbitrator applies an interest "regularly used for savings, such as short-term deposits in the first class banks at the place of payment (Serbia) for the currency of payment," thus it was the Unidroit rule.

6.2.4 Usage

Application of LIBOR could also be considered as an usage within the meaning of 9.2 CISG because it is internationally recognized and applied.¹⁰⁹ We think however that fixing a rate following international trade norms is more than a usage and it is a true normative complement to the provisions of the CISG.

Conclusion

The preamble of the CISG puts the following goal :

"...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...".

Article 7 contributes substantially to the achievement of this goal.¹¹⁰

Self-evidently, autonomy of parties remains the first rule. Parties can complete themselves the contract and a well drafted contract will avoid the unpredictability thanks to the contractual gap-filling.

But it will not be always the case because business must operate rapidly especially in a digital world; then the general principles underlying the CISG will play an important role.

But are the principles rigid or flexible? On one side, we cannot imagine that the CISG would be updated constantly; the negotiations took years and years but, on the other side, the legal environment is in full evolution ; thus, the general principles governing the convention must reflect this evolution and must be in line with the evolution of the society; Thus the text of the CISG cannot be the unique source of these general principles and Principles which reflect and express the international trade law like the Unidroit principles can be a source of inspiration in ascertaining the general principles of the CISG.

The concept of general principles is present in other legal systems and are not related to the text of the statutes self. Particularly, the good faith recognized in many countries as general principle or on the basis of a statutory provision must be also constitute a general principle underlying the CISG.

bank credit at the interest rate commonly practiced in its own country for the same currency ; finally, he underlined that application of the Unidroit principles would reach the same result ;

¹⁰⁹ Christian Thiele, op.cit. 3,aa)

¹¹⁰ Erika Rigo, op.cit.

Of course, the application of general principles can lead to uncertainties¹¹¹ and the solutions of the case law are diverse; so we saw that certain jurisdictions considered that the non-regulation of hardship constitutes a gap in the CISG whereas other jurisdictions denied it and considered that the CISG rejected hardship ; other jurisdictions applied article 7 (2) and referred to the Unidroit principles whereas other applied the rules of international private law. But we have to avoid – and it is the message of article 7(1)- that national courts take advantage of these uncertainties to apply their own law, narrowing the scope of application of the CISG.¹¹²

The CISG has highlighted the international trade usages by giving them a broad definition and recognition. Although usages are based on an international practice, they can contribute, in synergy with the general principles to the development of international trade law.

Good knowledge of the foreign literature and a good dissemination of the decisions is needed for a good approach of the general principles. The data bases o.a.Clout, Unilex, Pace university, the CISG advisory council ¹¹³ are important initiatives. Scientific contributions on the general principles and debate on them, on their coherence is also indispensable and will be the best source of inspiration for the judges and arbitrators.

Finally I formulate a dream ; a world jurisdiction in charge of uniform interpretation and application of the CISG, which a role similar to the Court of Justice of the European Union for Europe would be utmost welcome.¹¹⁴

¹¹¹ See Donald J. Smithe, Reasonable Standards for Contract Interpretations under the CISG Reasonable Standards for Contract Interpretations under the CISG, 25 Cardozo Journal of International and Comparative Law 1 (2016), p.5.

¹¹² Ibid. and also p.22.

¹¹³ <https://www.cisgac.com/about-us/>

¹¹⁴ See also Salama, op.cit., p.228.