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2009年 2月

碩士學位論文

CISG 第78條 利子規程의 統一的  
解釋에 관한 研究

朝鮮大學校大學院

法學科

金 卓 泌

# CISG 第78條 利子規程의 統一的 解釋에 관한 研究

A Study on Filling the Gap of Interest Rate in CISG  
Article 78 through the Prism of Progressive Uniformity

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# CISG 第78條 利子規程의 統一的 解釋에 관한 研究

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## 抄 錄

### CISG 第78條 利子規程의 統一的 解釋에 관한 研究

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“국제물품매매계약에 관한 UN협약”(United Nations Convention on Contracts for the International Sale of Goods, 이하 “CISG” 또는 “유엔협약”으로 약함)이 1980년 제정이 되고, 1988년 가입국을 대상으로 발효가 된 후, 약 20년이 지났다. 우리나라는 2004년 2월 17일 동 협약의 가입 신청서를 UN 사무총장에게 寄託하여 체약 당사국이 되어, 2005년 3월 1일부터 유엔 협약은 우리나라에 대하여 효력을 발생하게 되었다.

CISG는 나라와 나라 사이의 동산 물품매매에 있어서 계약의 성립, 매도인과 매수인의 권리와 의무, 매도인의 담보책임, 위험의 이전, 계약의 해제, 손해배상 등 국제 동산 물품거래에서 발생할 수 있는 많은 부분의 법률적인 이슈들을 규율하고 있으므로 동 협약의 가입국에 대하여 매우 중요한 의미를 지니고 있다. 우리와 가장 큰 交易 규모를 가지고 있는 미국과 중국 또한 동 협약의 가입국이고, 이미 동 협약은 우리의 實定法 질서 내에 들어와 있으므로 이에 대한 실체법적 연구의 필요성은 새삼 강조할 필요가 없다 하겠다.

그러나 국제사회에서는 CISG의 제정과 탄생을 보기위해 당사국들의 복잡한 이해관계가 얽혀있는 여러 쟁점에 관하여 법률적인 欠缺 또는 留保條項을 존치시킴으로써 동 협약은 태생적으로 통일이라고 칭하기 어려운 불완전한 통일매매법이 되고 말았다. 이러한 내재적인 한계를 보충하는 규범으로서 UNIDROIT 등의 원칙이 일반적으로 거론되기도 하지만, 이 협약이 발효되고 난 후, 60여개의 가입국들이 동 협약을 해석 및 적용하는 과정에서 나타난 여러 가지 문제점 및 自國 偏向의인 현상들로 인하



여 국제매매법의 조화와 통일이라는 제정 목적의 의미는 다소 退色이 되었고, 일부에서는 동 협약이 統一賣買法으로서의 기능을 제대로 수행할 수 있겠는가에 대한 의구심마저 고개를 들게 되었다.

이러한 내재적인 한계와 자국 편향적 해석과 적용 등의 문제점들은 이 협약이 대륙법계 및 영미법계의 상호 異質的인 법문화를 조화 및 통일시키려고 한 점에서 기인하였다고 볼 수 있으나, 동 유엔 협약의 국제 법질서내의 安着은 향후 통일되지 않은 많은 국제거래 분야의 법질서 확립 및 통일에 큰 영향을 미치지 않을 수 없다는 점을 고려해 볼 때, 작금의 자국편향적 해석과 적용상의 문제점들을 동 협약의 내재적인 한계로만 인식하고 放置할 것이 아니라, 유엔 협약뿐만 아니라 향후 기타의 국제 법질서의 성공적인 미래를 위해 현재의 유엔협약의 규정과 그 제정 또는 입법취지에 반하지 않는 범위 내에서 법 해석론적인 측면에서 그 태생적 또는 내재적인 한계를 극복하려는 학계의 노력이 절실히 필요하다고 아니할 수 없다.

이 같은 측면에서 CISG 제78조상의 利子에 관한 이슈는 이질적인 법질서의 融化和 妥協을 보지 못하고 CISG의 대표적인 법률적 흠결로서 존치하게 된 조항 중의 하나로서 현재의 CISG 규정과 그 제정 목적에 따라 극복해야 할 내재적인 한계를 잘 보여주고 있다고 할 수 있다. 이에 따라 본 논문에서는 CISG의 국제법질서 내의 編入이래, 대륙법계와 영미법계의 각기 다른 Forum에서 동 규정을 해석하고 적용해 온 樣態와 동 협약의 입법적 沿革을 통해서 어떻게 CISG 제78조의 법률적 흠결(Legal Gap)이 존치하게 되었는가와 협상 당시의 당사국들의 이해관계를 살펴봄으로써, 동 협약의 적용과정에서 규정 본문과 제정목적의 틀 안에서 동 협약을 해석하고 적용하며 生來的인 한계를 극복하기 위해 우리가 지향하고 검토하여야 할 解釋論적인 방향에 대한 것을 논의하고자 한다.

첫 번째로, 예견가능성(foreseeability)과 법적 안정성의 측면에서 CISG 제7조 2항에서 제시하는 “일반원칙(general principle)”들을 CISG 제78조의 관련 규정본문과 제정 목적을 고려하여 가능한 범위 내에서 發掘, 검토하여 이에 대한 해석론적 效用性을 검토하고자 한다.

두 번째로, 법률적 흠결의 補正 메커니즘 내에 CISG 제7조 제2항이 편입하고 있는 “국제사법규정(the rules of private international law)”에 관한 접근방안을 CISG의 立法 精神과 비교하여 검토하고자 한다.

세 번째로, CISG 제76조의 규정을 類推 해석하여 대륙법계 및 영미법계의 국가들이 모두 공감할만한 CISG 제78조의 보정(gap-filling) 방안을 도출해낼 수 있을 것인가에 관한 가능성을 검토해 보고자 한다.

마지막으로, 국제 물품거래에 관한 統一賣買法으로서의 역할을 위해 제정된 CISG의 地上 優位の 목적인 統一性の 원칙을 제고함으로써, CISG 제78조의 利子에 대한 이슈와 관련하여 “general principle”과 “the rules of private international law” 그리고 기타 고려할만한 제 3의 접근 방안을 통해 통일성의 원칙과 조화시킬 수 있는 解釋論的 接近方法에 대하여 논의해 보고자 한다.

# **I. Introduction**

## **1. Problem of how to calculate interest rate in CISG**

Uniformity of the law is the paramount goal of the United Nations Convention on Contracts for the International Sale of Goods.<sup>1)</sup> However, its lofty goal of uniformity has sometimes been hampered by itself since many legal gaps were unavoidable for its drafters to see the birth of the Convention. When it comes to the issue of interest rate, the gap is more outstanding than the other.

Under CISG Article 78, interest is due whenever a party does not make a payment in time regardless of its fault.<sup>2)</sup> CISG Article 78 states "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." Therefore, under CISG Article 78, a party is entitled to not only a sum equal to the loss including loss of profit under CISG Article 74<sup>3)</sup>, but also interest on any sum which the other party fails to pay. This provision should be read to mean that it is as of the date payment of the "sum" in question becomes due that interest accrues.<sup>4)</sup> However, he

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1) Final Act of the United Nations Conference on Contracts for the International Sale of Goods, Apr. 10, 1980, U.N. Doc. A/CONF.97/18 (1980), reprinted in S. Treaty Doc. No. 98-9, (1983) and 19 I.L.M. 668 [hereinafter CISG or the Convention]. Sometimes it is also referred to as the "Vienna Convention"

2) CISG Article 78

3) CISG Article 74 states "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract."

4) Under CISG Article 78 U.S. Federal Court awarded a buyer prejudgment interest which was calculated as of the date the seller's performance. *See Delchi Carrier, SpA v. Rotorex Corp.*, 9 Sep 1994, WESTLAW 495787 (N.D.N.Y.), CLOUT Case 85; affirmed in part and revised in part, and remanded, 71 F.3d 1024 (2d Cir. 1995).

will soon find that it is not known in CISG Article 78 how much interest he is able to claim and there is a significant legal gap.

There are two circumstances in CISG where interest is due on the one party. The one is when it is due on overdue payments, as noted above, and the other is when a contract has been avoided after the purchase price has been paid. The problem of interest rate also may arise in the latter situations under CISG Article 84(1).

CISG Article 84(1) states "If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid." Therefore, under the same provision, a party must not only refund the price, but also pay interest on it. However, the provision is also silent on how to calculate the interest rate.

There can be various ways to resolve this problem. Relying on recognized general principles on which the CISG is based is the first to look at with scrutiny. The second solution is able to be found through the private international law. Lastly, the third alternative is by devising a **specific formula** from the parallel structure in the specific provision of the Convention, which can be said to be based on common legislative policy with the interest provision.

## **2. Scope and Method of Research**

This thesis focuses on the four criteria in determining the interest rate. Firstly, the interest rate should be clear and easily identifiable. Secondly, no unjust advantages or disadvantages should occur to any party. Thirdly, it should be based firmly on the Convention. Fourthly, the solution should be one promoting the ultimate goal of CISG - uniformity. Reviewing possible and potential solutions to this issue based on such

criteria, I would like to present an ideal proposal narrowing down viable solutions.

Part 2 will overview the legislative history of the CISG Article 78 highlighting the international efforts of representatives convened around from various countries. Part 3 will deal with the potential solutions which can be extracted in and outside the Convention. Part 4 will take a careful look at the ideal notion of uniformity and deal with a solution based on, or through the prism of progressive uniformity which will be presented at this part as well.

## **II. Legislative History of CISG Article 78**

### **1. The Working Group(1970~1977)**

The United Nations Commission on International Trade Law (hereinafter "UNCITRAL") established a Working Group in an effort to make a substantively uniform law on international sales of goods in international trade community. It tried to ascertain "which modification of the Hague Convention of 1964 relating to Uniform Law on the International Sale of Goods might render it capable of wider acceptance by countries of different legal, social and economic systems."<sup>5)</sup>

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5) Report of United Nations Commission on International Trade Law on the work of its second session (March 1 969), *Official Records of the General Assembly, Twenty-fourth Session Supplement*, No. 18 (A/7618) UNCITRAL Yearbook, vol. I: 1968~1970, part two, II, A.

After initial examination of the ULIS and consideration of proposals it decided to adopt ULIS Article 83 without any modification.<sup>6)</sup> The ULIS Article 83 states:

"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 arrears 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%."<sup>7)</sup>

According to this text, the issue of interest rate was expressly settled within the ULIS. However, it was viewed that the interest rate in this text was "an invitation to the debtor to delay payment" since the interest rate for commercial credits was often far more than 1 percent higher than the official discount rate.<sup>8)</sup> Thus, the Working Group decided to amend the text by adding and deleting as following:

"Where the breach of contract consists of delay in the payment of price, the seller shall in any event be entitled to interest on such sum as is in arrears at a rate equal to the official discount rate in the country where he has his place of business plus one per cent but his entitlement shall not be lower than the rate applied to unsecured short-term commercial credits in the seller's country."<sup>9)</sup>

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6) Progress report of the Working Group on the International Sale of Goods on the work of its fifth session (Geneva, January 21- February 1, 1974) (A/CN.9/87)

7) The Uniform Law on the International Sale of Goods(ULIC ) Article 83.

8) Id, supra note 5.

9) Revised text of the Convention on the International Sale of Goods as approved or deferred for further consideration by the Working Group on the International Sale of Goods at its first six sessions (A/CN.9/100)

After having reviewed the ULIS at its seventh session (January 1976, hereinafter the 1976 Draft Convention), the Working Group completed the Draft Convention on the International Sale of Goods<sup>10)</sup> which was called the 1976 Draft Convention. The Working Group now turned to the rules on making "formation" of the contract. The interest provision of Article 58 became as following with some words rephrased:

"If the breach of contract consists of delay in the payment of the price, the seller is in any event be entitled to interest on such sum as is in arrears at a rate equal to the official discount rate in the country where he has his place of business, plus 1 per cent, but his entitlement is not to be lower than the rate applied to unsecured short-term commercial credits in the country where the seller has his place of business."<sup>11)</sup> At its ninth session the Working Group completed its draft on formation of the contract.

## **2. The Commission of UNCITRAL (1977~1978)**

The text of the 1976 Draft Convention was sent to each government and international organizations and various comments were given. At the tenth annual session (Vienna, May 23~June 17, 1977), the UNCITRAL set up a "Committee of the Whole" to have it review the 1976 Draft Convention since various comments and proposals was submitted by governments and international organizations. The interest

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10) Draft Convention on the International Sale of Goods (A/CN.9/116).

11) U.N. Document A/CN.9/116, Annex 1 - Draft Convention on the International Sale of Goods. Annex 2 reproduces a Commentary on the draft Convention.

provision faced great changes at this stage since there were a lot of conflicting views among countries in regard to the interest rate, "the place at which interest should be calculated" and even there were proposals to delete the Article 58 of the 1976 Draft Convention.<sup>12)</sup>

These conflicting proposals arose from the fact that most countries had a law which prescribes a specified limit of interest in light of public policy and, in some countries, even charging the interest was prohibited. In addition, many countries had no "official discount rate" to which the Article 58 refers<sup>13)</sup>, and when it comes to the "rate applied to unsecured short-term commercial credits," there exists no such rate because the parties and the nature of the sale would make the rate vary.<sup>14)</sup> The issue of interest rate was extremely controversial and the Committee recommended that the Commission should get rid of the Article 58 of the Convention.<sup>15)</sup> The interest provision which is similar to the current CISG Article 78 could not be reached to an agreement among the delegations in the 1977 Draft Convention.

At the eleventh session, the Commission reviewed the 1977 "Formation" draft of the Working Group. Then, the UNCITRAL decided to integrate the drafts on "Formation" and "Sales," and set up a Drafting Group of ten States to implement this decision.<sup>16)</sup> The 1978 UNCITRAL Draft Convention on Contracts for the International

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12) *Id supra* note 8, pp.353

13) *Id.*

14) *Id.*

15) Report of the United Nations Commission on International Trade Law on the work of its tenth session (Vienna, May 23 - June 17, 1977)(A/32/17). The relevant paragraph of the report shows that the discussion was so controversial that the Committee decided to delete Article 58. 499 of the Report states: "In view of these difficulties, coupled with the fact that the article was, in any version, inherently unacceptable to a number of representatives, particularly those of developing countries, the Committee, after considerable deliberation, decided to delete article 58."

16) Report of the Eleventh Session (1978) (A/33/17)



Sale of Goods was produced at this stage. Here, the "Formation" and "Sales"drafts was consolidated to form the 1978 Draft Convention and this Draft Convention became the bases of the 1980 Vienna Conference.<sup>17)</sup>

The 1977 Draft Convention and the 1978 Draft Convention only provided for the seller to pay interest on the purchasing price when the contract is avoided and he is obliged to refund the price. However, no such similar provision as CISG Article 78 could be reached to an agreement for the reason of serious divergence of views among delegations.

### **3. The Diplomatic Conference (1980)**

An international conference of plenipotentiaries met in Vienna (March 10 to April 11 1980) pursuant to authorization of the U.N. General Assembly.<sup>18)</sup> The development and final approval of the law for international sales (Article 1 ~ Article 88) of the 1980 Convention are shown by nine documents C (1) ~ C (9).<sup>19)</sup> The "First Committee" was assigned the review of the divergent proposals to amend the 1978

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17) John Honnold, Documentary History of the Uniform Law for International Sales Kluwer Law and Taxation Publisher, 1989, pp.317

18) Id, pp.381

19) Id. C (1): The deliberations and actions were addressed to the provisions, and article-numbers, of the 1978 UNCITRAL Draft which the U.N. General Assembly referred to the Conference. C (2): An analysis of pre-Conference proposals made in response to the advance circulation of the 1978 Draft appears. C (3) is a Secretariat Commentary on the 1978 Draft circulated with the 1978 Draft. C (4) is the 197 page record of the deliberations of the "First Committee", and this committee included all participants in the Conference. C (5) gives the texts of the proposals made to the First Committee and briefly states the Committee's decision. C (6) gives the texts of drafts submitted to the Plenary. C (7) shows the Plenary's deliberations and actions on these proposals. C(8) is the formal Final Act summing up the results of the Conference. C(9) is the text of the 1980 Convention."

Draft Convention and here, the issue of interest was dealt with several meetings - 28<sup>th</sup> meeting(March 28, 1980), 29<sup>th</sup> meeting(March 31, 1980), 34<sup>th</sup> meeting(April 3, 1980) and 37<sup>th</sup> meeting(April 7, 1980). At its 29<sup>th</sup> meeting the Committee considered general question of provisions with regard to interest and it was also in connection with article 69 in which similar obligation to the current CISG Article 84 was worded. At its 34<sup>th</sup> meeting three alternatives were proposed by the ad hoc working group<sup>20)</sup> as following (now called Article 73 *bis*):<sup>21)</sup>

*Alternative I:*

"If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest thereon at the rate for a short-term commercial credit or at another similar appropriate rate prevailing in the main domestic financial centre of the party claiming payment."

*Alternative II:*

"If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest thereon at the rate for a short-term commercial credit or at another similar appropriate rate prevailing in the main domestic financial centre of the country of the party in default, or, in case the other party's actual credit costs are higher, at a rate corresponding thereto but not at a rate higher than the first said rate in his own country."

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20) Ad hoc Working Group on interest was composed of Argentina, Czechoslovakia, Ghana, Greece, India, Italy, Pakistan and Sweden, assisted by Denmark, United States of America and Yugoslavia. *See* U.N. Document A/CONF.97/C.1/L.247.

21) U.N. Document A/CONF.97/9

*Alternative III:*

"If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest thereon at the rate for a short-term commercial credit or at another similar appropriate rate prevailing in the main domestic financial centre of the party in default. However, in case the party claiming interest is not fairly compensated by such rate, he may claim interest up to the first said rate in his own country."

Simply put, Alternative I set the rate of interest based on the country of the creditor and that of Alternative II and III was based on the country of the defaulting party. The first part of the alternatives were mostly identical and "in view of the considerable differences involved, it was important, when determining interest rates, to establish a realistic scale of rates that were neither excessive nor artificial."<sup>22)</sup> Among the above three alternatives, most members of the Working Group were in favor of the first alternative, since it was very simple and reasonable for the injured party to be compensated on the basis of the interest rate prevailing in the country of his (namely, creditor) place of business. If the interest is settled at the rate prevailing in the party in default and the rate of the defaulting party is lower than that prevailing in the creditor's country, then the creditor runs the risk of not being fully compensated even if he is entitled to the interest. It was in this context that the second part of the second alternative take into accounts this problem stating that "in case the other party's actual credit costs are higher, at a rate corresponding thereto but not at a rate higher than the first said rate in his own country."<sup>23)</sup> The third alternative had not obtained

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22) U.N. Document A/CONF.97/C.1/SR.34

23) Id.

much preferential support in the Working Group.

Finally, the second alternative was adopted with some modification. The modification was proposed by Spain representatives.<sup>24)</sup> They proposed that it would be appropriate to clarify the rate of interest charged and to add "the word 'normal' before the word 'rate' in the second line since short-term commercial credit was affected by variable conditions and it was therefore important that the 'normal' rate of interest should be applied."<sup>25)</sup> Thus, the following text was submitted to the Plenary Conference by the First Committee:

*Article 73 bis*

"(1) 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 at the normal rate for a short-term commercial credit prevailing in the main financial centre in the State where the party in default has his place of business or, in the absence of such a rate, at another similar appropriate rate prevailing in that centre.

(2) However, if the other party's actual credit costs are higher, he is entitled to interest on the sum in arrears at a rate corresponding to such credit costs, but not in excess of the rate defined in the preceding paragraph prevailing in the main financial centre in the State where he has his place of business."<sup>26)</sup>

At the 37<sup>th</sup> meeting of the First Committee, amendments were submitted to article 69, and many countries proposed on the issue of interests on sums that were in arrears.

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24) Id.

25) U.N. Document A/CONF.97/C.1/L.247. The proposal of the Spain representatives was put to the vote and the amendment was adopted by 9 votes to 6.

26) U.N. Document A/CONF.97/11/Add.1 and 2(April 4, 1980)

(i) Denmark, Finland, Greece, Sweden proposed to add a new article 73 *bis* to read as follows:

"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."

"As a result, the title 'Section IV. Damages' should be amended to read 'Section IV. Damages and interest' "

(ii) Czechoslovakia proposed to add a new Article 60 *bis* to read as follows<sup>27)</sup>:

"(1) If the breach of contract consists of delay in the payment of the price, the seller is in any event 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, at the time of delay increased by one per cent or, if there is no such a rate, at the rate applied to unsecured short term international commercial credits increased by one per cent.

"(2) The seller may claim damages as provided in this Convention, if the loss is not covered by interests."

(iii) Japan proposed to add Article a new article 73 *bis* to read as follows<sup>28)</sup>:

"If a party has failed to pay the price or any other sum that is in arrears, the other party is presumed to have suffered damages equivalent to the amount calculated

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27) U.N. Document A/CONF.97/C.1/L.218

28) U.N. Document A/CONF.97/C.1/L.222

at the interest rate for [unsecured short-term commercial credits prevailing] at his place of business."

(iv) Pakistan proposed to add the following sentence at the end paragraph (1) of article 69:

"The rate of interest would be the one current at the seller's place of business."

(v) The United Kingdom proposed to get rid of paragraph (1) of Article 69 (now CISG Article 84) and add a new article in Part I, Chapter I (sphere of application), to read as follows:

"This Convention does not affect any right of the seller or buyer to recover interest on money."

However, the proposals of Denmark, Finland, Greece, Sweden, Czechoslovakia, Japan, Pakistan and the United Kingdom were withdrawn.

Later, as shown in the Documents C(6): Proposals Submitted to the Plenary, the United Kingdom, on the issue of the payment of interest, proposed to insert in Part I, Chapter 1 (sphere of application) a new article to read as "this Convention is not concerned with the payment of interest,"<sup>29)</sup> and delete article 73 *bis*, which was also withdrawn later.

At the 7<sup>th</sup> Plenary Meeting which is held on April 8, 1980, the issue of whether the scope of Article 45 (Remedies for breach of contract by the seller) should be interpreted as including a reference to Article 78 was discussed and the president invited the Conference to vote on the issue. The result was 20 in favor, 14 against and

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29) U.N. Document A/CONF.97/C.1/L.16

12 abstentions. Thus, the interpretation was not adopted and the issue of whether the Conference would adopt the contrary interpretation remained to be considered.

At the 8<sup>th</sup> Plenary Meeting, held on April 9, 1980, as the president said in the meeting, it was of no legal consequence whether or not article 73 *bis* was explicitly referred to in article 41 since it was not intended to provide an exhaustive list of remedies.

At the 10<sup>th</sup> meeting, on the proposal of omission of the interest provision, a view was expressed by Sweden representative, who said that to make no provision whatever in the Convention for the question of interest would be a great mistake. He said that:

"Such an omission would do nothing to facilitate its application, and would lead to a great amount of litigation by making it necessary in each case to refer to national legislations in order to determine which law was applicable to interest, and whether the problem posed was one of procedure or of substance."

Therefore, it was predicted that, if the conference rejected article 73 *bis*, there would be a significant gap in the Convention. The article 73 *bis* was put to the vote and there were 24 votes in favor, 17 against, and 10 abstentions. It failed to obtain the required two-thirds majority.

However, the Swedish representative argued that, although Article 73 *bis* cannot be adopted due to the lack of required two-thirds majority, given a substantial favorable attitude to the proposal, it would "indispensable to set up a working group in an attempt to remove the outstanding uncertainties in the text of paragraph 2."<sup>30</sup>) The

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30) Summary Records of the Plenary Meetings, 10th Plenary Meeting, April 10, 1980, also *available at* <<http://cisgw3.law.pace.edu/cisg/plenarycommittee/summary10.html>>.

proposal was put to vote and adopted by 16 votes to 12, with 16 abstentions. The Working Group was set up to prepare a new text for Article 73 *bis* and Canada, Egypt, Singapore, Sweden, the United Kingdom and the Union of Soviet Socialist Republics participated in the Working Group.

The Working Group set up at the previous meeting had agreed to submit the following proposals to the Conference:

"The words "and interest" should be deleted from the title of Section II, so that it would read: "Damages"

There should be a *new* section II *bis* entitled "*Interest*", consisting solely of article 73 *bis*

Article 73 *bis* should read:

"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 70 [it became CISG Article 74]."

As the Chairman of the Working Group which was set up at the previous meeting said, it had tried to work out on the basis of the text of article 73 *bis*, as it appeared in document A/CONF.97/11/Add.2.<sup>31)</sup> The Working Group had a hard time in coming to the conclusion due to the divergent views among different national legal systems. It also had difficulty in attempting to treat damages and interest under the same heading. Thus, it decided to recommend a provision on the highest common

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31) U.N. Document A/CONF.97/11/Add.1 and 2 (April 4, 1980).



factor. The first part of it "establish that a party which failed to pay the price or any other sum in due time was under obligation to pay interest on that sum to the other part" and "the second part of the article, intended to accommodate legal regulations under which interest was considered to be part of the damages recoverable in default situations, referred to the right of the second party to claim damages under article 70 (later became CISG article 74)"<sup>32)</sup>

Finally, Article 73 *bis* as proposed by the Working Group was adopted by 30 votes to 2, with 12 abstentions and the title of Chapter V, Section II, as amended by the Working Group, was adopted by 42 votes to none in the 11<sup>th</sup> plenary meeting.<sup>33)</sup>

### **III. Developing the solutions in and outside CISG**

There have been various suggestions made to set the interest rate in CISG from courts, tribunals and scholars. It seems to be an appropriate time at this point that the requirements for filling the gap of interest rate in the Convention should be established first to evaluate each potential solutions and evolve an ideal methods of calculating interest.

Firstly, the way to find an interest rate and interest rate itself should be clear and

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32) Summary Records of the Plenary Meetings, 11th Plenary Meeting, April 10, 1980, also available at <<http://cisgw3.law.pace.edu/cisg/plenarycommittee/summary11.html>>.

33) *Id.*

easily identifiable. Secondly, by the evolved mechanism, no unjust advantages or disadvantages should accrue to any of the parties to the contract. Thirdly, it should be firmly based on the Convention. Fourthly, the solution should be one that promotes the uniformity on which has been the ultimate goal of the Convention. This part will attempt to find a solution for the gap of interest rate in a couple of ways first based on CISG Article 7(2) which describes internal and external paths to go through the issue.

The CISG Article 7(1) sets out the general goals of its interpretation, whereas the CISG Article 7(2) mandates that the primary source of its interpretation should be firmly based on the Convention describing specific guidelines for the general goals of its interpretation. The guidelines require that the 'rule' of the Convention address matters. If the 'rule' does not expressly settle an issue, "general principle on which the Convention is based" should be the next step to turn to. Only if it is not possible to come up with any solution either in the first or in the second step is the interpreter allowed to turn to domestic law as determined by the rules of private international law.<sup>34)</sup> On the other hand, if a matter is beyond the scope of the Convention, the matter must be settled "in conformity with the law applicable by virtue of the rules of private international law" without consulting the general principles of the Convention.<sup>35)</sup>

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34) Phanesh Koneru, The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An approach based on General Principles, 6 Minn. J. Global Trade, 1997, pp.106.

35) Franco Ferrari, Harry Flechtner, Ronald A. Brand (Ed.), the Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention, 2005, pp.814

**1. Internal solutions to fill the gap of interest rate:** Are there any general principles to be drawn from the Convention for setting an interest rate?

General principles are often assertively used to extract a solution to the gap in CISG. For this solution to apply in filling the gap of interest rate, whether the matter is within the scope of the Convention or, whether the Convention can be applied to the issue but does not expressly resolve it should be ascertained first<sup>36)</sup>, since CISG Article 7(2) states that "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."

Under CISG Article 78, it can be said that the payment of interest itself is governed by the Convention since the issue of payment of interest is not excluded from the Convention. It should, however, also be noted that the issue is not expressly resolved by the Convention.<sup>37)</sup> Therefore, as the CISG Article 7(2) clearly states, questions concerning this issue "are to be settled in conformity with the general principles on which it is based." This provision, as a matter of course, leads us to ask what the general principles are. The Convention does not provide a list of general principles. There is no mention regarding where they are able to be found as well.

However, the general principles are able to be found in the text of the Convention on a close scrutiny. Several principles that can possibly amount to "the

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36) Franco Ferrari, *Uniform Application and Interest Rates Under the Vienna Sales Convention*, 24 GA. J. Int'l & Comp. L., 1983, pp.471

37) *Id.*, supra note 34, pp.123.

general principles" are scattered in the text of the Convention. This way of extracting general principles in the internal text of the Convention should be considered to be the first direction to take, since the issue of interest is governed by the Convention and it should be ascertained first whether it is able to be resolved by this internal text of the Convention. In this vein, there should be external ways to find them outside the text of the Convention but again the internally scrutinized principle has priority over the external references.

Various sources of internal principles exist in the Convention. At the stage of contract formation, "freedom of contract"<sup>38)</sup> prevails as an important general principle which is explicitly mentioned in the Convention. In addition to CISG Article 6, some articles dispense with formalities that impede the parties from freely accomplishing their goals.<sup>39)</sup> "Timely and definite communication" between the buyer and the seller also operates as an important general principle at this stage.<sup>40)</sup> Sometimes one party's "reasonable reliance" on the other party or contract should be protected.<sup>41)</sup>

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38) CISG Article 6 announces the Convention's allegiance to the principle of freedom of contract by stating that "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."

39) Robert A. Hillman, *Applying the United Nations Convention on Contracts for the International Sale of Goods: The Illusive Goal of Uniformity*, 1 *Review of the Convention on Contracts for the International Sale of Goods*, 1995, pp.21-49. Here, the professor mentions that CISG Article 11 eliminates the statute of frauds, CISG Article 29(1) eliminates the writing requirement as well as consideration requirements for enforceable modifications and CISG Article 19(2) partly eliminates the "mirror image rule" of contract formation.

40) For example, CISG Article 60(a), the buyer must cooperate in facilitating the seller's delivery. It states that "The buyer's obligation to take delivery consists (a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery" Also, under CISG Article 32(3), the seller must provide information so that the buyer can obtain insurance for goods when the seller is not required to insure them in transit. CISG Articles 18(2), 39(1), 65(1), 71(3), 72(2) measure the various notice requirements in the Convention by their reasonableness as to content and time. Articles 16(2)(b), 29(2), and 47(2) also safeguard a party's reasonable reliance on the other party's communications. Generally, see Robert A. Hillman, *Applying the United Nations Convention on Contracts for the International Sale of Goods: The Illusive Goal of Uniformity*, 1 *Review of the Convention on Contracts for the International Sale of Goods*, 1995, pp.21-49

41) *Id.*, supra note 34, pp.118.

Once an agreement is reached by the parties, most of the risk allocation is fixed by the general principle of "freezing the distribution of risk"<sup>42)</sup> which can be derived from the text of the Convention itself.<sup>43)</sup> In breach of the contract, the general principle of "the duty to mitigate damages" or the loss, including loss of profit, resulting from the breach is recognized from the Convention.<sup>44)</sup> The general principle of "good faith

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42) Id, pp.119.

43) CISG Article 10(a) "if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract" 31(b) "if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place - in placing the goods at the buyer's disposal at that place", (c) "in other cases - in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract" 42 (1) "The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property" 42(2)(a) "at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim" 55 "Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller" 73(2) "If one party's failure to perform any of his obligations in respect of any installment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future installments, he may declare the contract avoided for the future, provided that he does so within a reasonable time" 74 "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract" 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 and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences"

44) CISG Article 77 "A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss sh

and fair dealing" and "preservation of the contract" has been recognized as universal and unifying principles which persist throughout the whole international sales transactions. Others, such as "protecting restitution, reliance, expectation and interests of the aggrieved party" are evident from the text of the Convention.<sup>45)</sup>

However, for the general principles to apply to fill the controversial gap in the CISG Article 78, what matters is certainty and specificity rather than generality in its application since "generality" of the general principle sometimes does not provide any specific standards for any given case. To ascertain its viability, the question of which general principle closely interact with the interest provision and how much it will contribute to calculate the specific issue of interest rate should be first answered.

## **1.1. General principle of Good Faith**

CISG Article 7 provides for a guide when one interprets the Convention by stating that "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." The general principle of good faith can be found on the various provisions of the Convention through its variant form of language such as "reasonable reliance", "unreasonable delay", "fair dealing" and so on.<sup>46)</sup>

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ould have been mitigated."

45) Id, supra note 34, pp.119.

46) Reasonableness is mentioned in about 37 provisions of the Convention, see also Honnold, Uniform Law for International Sales (2d ed. 1991), supra note 3, arts. 16 (b) (reasonable reliance); 18(2), 33(c), 39(1), 43(1), 46(2), 46(3), 47(1), 48(2), 49(2), 63(1), 64(2)(b), 65(1), 65(2), 73(2), 75, 79(4), (reasonable time); 34, 37, 86(2) (unreasonable inconvenience or expense); 88(1) (unreasonable delay); 76(2) (reasonable substitute); 75 (reasonable manner); 79(1) (reasonable expectations); 85 (reasonable steps); 88(2) (reasonable measures to sell); 72 (reasonable time for notice); 35(2)(b) (unreasonable reliance); 38(3) (reasonable opportunity for examination); 88(2)

Some delegates were in the negative position to include good faith principle in the text of the Convention because it generally does not provide any specific solution to a given situation.<sup>47)</sup> A typical example can be found in recent court of US.<sup>48)</sup> The court just left the question to the jury relying on their "reasonableness." It was nothing more than directly resorting to domestic law of each nation, from the sole perspective of consequence, which is clearly prohibited from the Convention. "Reasonableness" is not clear in legal interpretation and not easily identifiable as well in itself thereby rendering the uniformity unstable.<sup>49)</sup> Furthermore, it can be considered contradictory to the notion of uniformity because it should be determined on a case-by-case-basis.

Others also objected that the Convention does not specify the sanctions for failure in complying with the good faith principle and that will result in inconsistency when the domestic courts impose sanctions by its domestic law.<sup>50)</sup> It is true that uniformity will be seriously hampered in this case.

Last but most importantly, the concept of good faith is evidently different in

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(unreasonable expense); 8(2), 25 (reasonable person); 48(1) (unreasonable delay, inconvenience or expense); 44 (reasonable excuse); 72(2), 88(1) (reasonable notice); 77, 86(1) (reasonable steps in the circumstances); 85, 86 (1), 87, 88(2), 88(3) (reasonable expenses).

47) John Honnold, *Documentary History of the Uniform Law for International Sales* Kluwer Law and Taxation Publisher, 1989, pp.369

48) Assuming "reasonableness" is variant type of "good faith", a typical example can be found in the United States District Court for the Northern District of Illinois. The court asked the jury to find the applicable interest rate based on a general principle of "reasonableness" by instructing in No. 28 that "unless you find that the parties agreed otherwise, either expressly or through a course of conduct, seller is also entitled to recover interest on the amounts past due. If interest is recoverable, the rate of interest is that rate, if any, to which the parties agreed. If you find that no rate was agreed to by the parties, then the rate is that which you determine to be reasonable." See, *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 2001 WL 1000927, pp.3 (N.D. Ill).

49) Some tribunals simply referred to a commercially reasonable rate such as the London Interbank Offered Rate (LIBOR). See ICC Court of Arbitration, award No. 8769, published on the Internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=401&step=FullText>>

50) Id, pp.369

various legal cultures. Even within the similar legal structure, it is dealt with quite distinctly. For example, the United Kingdom and the United States have dealt with the concept in quite a different way. While the latter included the concept in U.C.C. Article 1-304, the former felt it is an onerous obligation.<sup>51)</sup> In civil law countries, Germany deals with good faith as having specific contents, whereas France views the concept broadly as having no specific contents.<sup>52)</sup>

However, this fundamental principle is universally recognized in domestic and international trade and so pervasive a concept that it must be a general principle of the Convention.<sup>53)</sup> Indeed, this general principle provides a good solution when the standard is applied in combination with other general principles even if it may not be used as the only guiding principle so as to determine the appropriate interest rate.<sup>54)</sup> Further the good faith principle not only directs the contracting parties to be in good faith, but also it should be said to direct the judiciary to interpret and apply the Convention in good faith and require both parties to participate in good faith thereby promoting the uniformity in interpretation of the Convention.

As one court expressly recognized the role of good faith in the Convention, it will be a good guide in the interpretation of the Convention.<sup>55)</sup> However, it can not be

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51) Benedict Sheehy, Good Faith in the CISG: The Interpretation Problems of Article 7, Review of the Convention on Contract for the International Sale of Goods (CISG) 2005-2006, pp.155

52) See at <http://cisg3.law.pace.edu/cisg/biblio/sim1.html>. See also Disa Sim, The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods, Review of the Convention on Contracts for the International Sale of Goods (CISG), 2002, pp.19.

53) Id, supra note 34, pp.140.

54) Francesco G. Mazzotta, CISG Article 78: Endless disagreement among commentators, much less among the courts, July. 2004.

55) See Arbitral Award SCH-4318 (F.R.G. v Aus.), Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Wien (June 15, 1994), reprinted in Recht der Internationalen Wirtschaft (RIW), 1994, pp.591-592. The court recognized the nature and the attending disagreement among the authorities on the role of the general principle of good faith in the Convention. The court held that, notwithstanding the disagreement, the pri



denied, at least when it comes to calculating the interest rate under CISG 78, its role appears not to be outstanding. As mentioned earlier, general principle of "good faith" alone does not present any standard to a given case and it should not be confused with the concept of "interpretational guidelines."<sup>56)</sup>

## **1.2. Full compensation for damages**

One general principle can be derived from CISG Article 74 in which damages for breach of contract is prescribed. CISG Article 74 states that "damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach." Here, the interest is construed as being included in the damages the aggrieved party has incurred.

The underlying principle of CISG Article 74 is to place an injured party in the position that he would have been if the other party had not breached the contract.<sup>57)</sup> The injured party is entitled to "full compensation" under CISG Article 74 in which the interest is calculated in the context of the damage assessment.<sup>58)</sup> An Austrian court derived the general principle from this provision and filled the gap of interest rate in the Convention.<sup>59)</sup> This approach sometimes was applied in combination with national

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nciple of estoppel or the prohibition of *venire contra factum proprium*, represents an application of the general principle of good faith and that it, without doubt, is seen as one of the general principles on which the Convention is based.

56) Camilla Baasch Andersen, *Uniform Application of the International Sales Law*, Kluwer Law international, 2007, pp.129.

57) Giulio Ponzanelli, Article 78, in: Bianca (ed.), *Convenzione di Vienna sui Contratti di Vendita Internazionale di Beni Mobili*, pp.309.

58) Id.

59) Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien, 15 June 1994 (SCH-4366 and SCH-4318) (Austria).

law by other courts and tribunals.<sup>60)</sup>

This approach provides a clear solution to this controversial problem. However, in this approach, one might find the fact that the interest is prescribed separately with the damage provision under separate section is not taken into account.

One must take into account that the corresponding provision of interest in the Hague Convention was included among damage provisions.<sup>61)</sup> There are also criticisms to this approach from some authorities. It is said in the criticism the provision of interest is confused with the distinct provision of damages in this application of the general principle of full compensation.<sup>62)</sup> The layout of the Convention implies in various way that the interest can be a separate notion of damages whereas CISG Article 74 indicates that interest is also damages the aggrieved party has incurred.

The consequence of this relocation is that claims for exemption under CISG Article 79 are not applicable.<sup>63)</sup> One might say the CISG Article 78 clearly states that a party is entitled to interest without prejudice to any claim for damages, therefore, the issue whether interest is part of damages might appear to be immaterial.<sup>64)</sup> However the analysis cannot end there. The issue is a critical point in the approach of full compensation since the general principle of "full compensation" rests on the

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60) Amtsgericht (hereinafter AG) Oldenburg, 24 April 1990 (5 C 73/89) (Germany); Landgericht (hereinafter LG) Hamburg, 26 September 1990 (5 O 543/88) (Germany), reprinted in: *Praxis des Internationalen Privat- und Verfallensrechts* 1991, pp.400, *Arbitral Award* 7197 (Aus. v. Bulg), ICC Ct. Arb. (1993), reprinted in: *J. du Droit Int'l.* 1993, pp.1028-1037

61) Convention relating to Uniform Law on the International Sales of Goods (ULIS) Article 83.

62) Fritz Enderlein & Dietrich Maskow, *International Sales Law*, Oceana, 1992, pp.313.

63) Heinz Strohbach, Zinsen, in *FRITZ ENDERLEIN'S & DIETRICH MASKOW'S INTER-NATIONALES KAUFRECHT: KAUFRECHTSKONVENTION, VERJÄHRUNGSKONVENTION, VERTRETUNGSKONVENTION, RECHTSANWENDUNGSKONVENTION*, 1991, pp.243.

64) Alan F. Zoccolillo, Jr, *Determination of the Interest Rate under the 1980 United Nations Convention on Contracts for the International Sale of Goods: General Principles vs. National Law*, 1997, pp.31.

presumption that the interest is within the scope of what a breaching party "foresaw or ought to have foreseen at the time of the conclusion of the contract."<sup>65)</sup>

Whether interest is part of damages results in significant consequence. In "full compensation" principle, it is reasonable that interest rate is calculated by the rate of the aggrieved party's place of business, since the rate of the breaching party's place of business might not fully compensate what the other party has incurred and the aggrieved party will be able to be fully compensated only if interest rate is based on the rate of his place of business.<sup>66)</sup> On the other hand, if interest can be seen as unjust enrichment, as discussed below, it will be reasonable that the rate of breaching party's place of business should be considered to calculate the amount of interest.

Even if it might be irrelevant whether interest is considered part of damages because the Convention obviates any such controversy by emphasizing "without prejudice to any claim for damages recoverable under Article 74", it still takes a role in determining all amounts due within this general principle of full compensation.

### **1.3. Full restitution of benefits**

CISG Article 84 states "if the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid." This provision was

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65) CISG Article 74

66) For an example of arbitration case of "full compensation", see Arbitral Award SCH-4318 (F.R.G. v. Aus.) (June 15, 1994), Internationales Schiedsgericht der Bundeskammer Der Gewerblichen Wirtschaft, Wien, reprinted in *Recht Der Internationalen Wirtschaft (RIW)*, 1994, pp.591-92. The arbitrator stated one of the general principles underlying the Convention is the requirement of full compensation of the loss caused and also stated the creditor must be expected to resort to bank credit as a result of the delay in payment, so he is entitled to interest at the rate commonly practiced in its country with the currency of the creditor's country or any other foreign currency agreed upon by the parties.

drafted to prevent deceitful behavior of a party in which the payment is delayed on purpose in order to take advantage of high interest rate. Where interest rate is different between the parties, one party may be unjustly enriched whether or not it is on purpose.

Thus, in circumstances where the seller is bound to refund the price, any interest that he has earned from the date on which the price was paid should disgorge to the buyer so that the unjust enrichment of the seller may not occur.

As noted above, the consequence of each general principle between full compensation and unjust enrichment is significant. In the latter approach, the interest rate should be calculated based on the current rate at the seller's place of business since what matters in that scenario is for the seller to pay the interest as a restitutionary concern rather than a damage concern. Thus the rate at the seller's place of business will be sufficient to reflect the intention of the initial drafters. If one adopt this approach as a general principle in calculating the interest, it will be a clear and easily identifiable way. However, the analysis should continue due to the existence of imbalance between the parties.

In a circumstance where one party disgorged his unjust enrichment based on the rate of his place of business, full compensation may not be achieved by the other party if the rate of his place of business is higher than that of the disgorging party.

Now the scenario gives rise to an issue of which principle should take precedence over the other.<sup>67)</sup> Both of the general principles, as noted above, create a significantly opposite consequence with regard to which interest rate should apply. This

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67) Id, pp.32.

issue of precedence seems to be able to be resolved by relying on the general principle of good faith in CISG Article 7(1).<sup>68)</sup>

It has been argued that the only reason of requiring interest payments is to prevent the debtor from taking advantage of the funds while he possesses them.<sup>69)</sup> It seems clear that the purpose of the CISG is to remedy the injured party fully. Thus, the general principle of full compensation should be preceded by the purpose of unjust enrichment, and if that precedence gives rise to imbalance, for example, granting the disgorging party remaining enrichment, then the general principle of good faith intervenes and he is not stripped of all benefit derived from the lack of performance, only if he has complied with the good faith requirement but has been unable to perform except for force majeure cases. By that method both general principles will be available. But there still remains a fallacy when the general principle of "full compensation" has a priority over the other as discussed above even if one might argue it is available when no imbalance exists between the parties. It cannot be accepted as a general principle and even that argument can be challenged by at least one example.<sup>70)</sup>

Let's say one seller avoids a contract after receiving the contract price fully. He must return the contract price and pay the interest under CISG Article 84. The interest rate is due from the time the payment received to the time the contract is avoided, without having been in arrears at all. When no immediate return of the contract price

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68) CISG Article 7 (1) states that "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."

69) Case 5 U 261/90 (Fr. v. F.R.G.), Oberlandesgericht Frankfurt am Main, (June 13, 1991), *Recht der Internationalen Wirtschaft* (RIW), 1991, pp.591.

70) Andre Corterier, *Interest in Uniform Application – How to Solve the UN Sales Law's Interest Rate Problem under CISG Article 78 and CISG Article 84*, pp.7.

occurs, after the contract is avoided, then finally the sum is in arrears. In that case, the interest is due from the time the contract was avoided to the time the payment is returned under CISG Article 78. The example shows both provisions function differently, therefore general principle of CISG Article 84 can not provide help to the gap of CISG Article 78.

Consequently, notwithstanding its analogical scrutiny, this approach of extracting a general principle can not avoid criticism. It also does not take into account the way the Convention is organized. First of all, CISG Article 84 is located under Section V which deals with effects of avoidance. Indeed, this provision relates only to cases of avoidance. Further, its structure is different from CISG Article 78 that relates to a payment in arrears.<sup>71)</sup> Applying "full restitution of benefit" to calculate interest rate is not persuasive given the limited scope of CISG Article 84. Therefore, extrapolating a general principle from CISG Article 84 seems to lack generality due to its inherent inapplicability to payment in arrears. Finally, due to its legal nature, it not only cannot be relied on independently, but also lacks existential validity when combined with others.

## **1.4. Trade Usages**

Another general principle which can be found in the text of the Convention is to look at the practice which prevails when both parties agree on how to calculate interest

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<sup>71)</sup> Id, pp.11.

rate in advance. According to the CISG Article 9(2), trade usages can be incorporated into a contract when both parties know or ought to have known of a customs which "is widely known to and regularly observed by parties to contracts."<sup>72)</sup>

Some arbitral tribunals relied on trade usages indirectly. In an International Chamber of Commerce case, the arbitrator ruled that the Yugoslavian creditor was entitled to interest under CISG Article 78 and also reasoned by using the general principle of trade usage that damage caused by delayed payments is, under international law, generally assumed to occur in the creditor's place of business.<sup>73)</sup> He awarded the interest rate "effective for commercial matters" in the creditor's country.<sup>74)</sup> One court also awarded a prevailing 10% prime rate since the rate was thought of as a widely accepted trade practice in international trade under CISG Article 9(2).<sup>75)</sup>

It goes without saying that the trade usage is a good source of general principle in CISG. Moreover, it cannot be denied that trade usages by their nature will change over time and it will improve its dynamic adaptability to changing circumstances.

However, this approach lacks persuasiveness and even not available when an adjudicator has a hard time in obtaining sufficient evidence of the trade custom. In addition, it lacks at least certainty and predictability in its application since whether the

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72) CISG Article 9(2) states "the parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation 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."

73) ICC Award No 7331 (International Court of Arbitration 1994) (Paris), reprinted in UNILEX E1994-33, pp.456.3.

74) This award was overturned by a French Court for a reason that trade usages are inappropriate for filling the gap in CISG Article 78. Thyssen Stahlunion GmbH v. Maaden General Foreign Trade Organisation Building Materials (CA Paris, 1ère ch 1995) (France), reprinted in UNILEX E1995-12.1, pp.456.3.

75) Aguila refractarios SA s/Conc preventivo (Juzgado Nacional de Primera Instancia en lo Comercial No 10 1991) (Argentina), reprinted in UNILEX E1991-10.1, pp.80.1.

evidence is sufficient is a matter of subjective examination by the adjudicator.<sup>76)</sup> There is no guarantee that his perception and decision are free from his own subjective view.<sup>77)</sup>

## **1.5. Sphere of Control of the Creditor**

CISG Article 57 contains text that could provide another general principle which could assist in filling the CISG Article 78. CISG Article 57 states that "if the buyer is not bound to pay the price at any other particular place, he must pay it to the seller at the seller's place of business or, if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place." The text of the CISG Article 57 indicates that payment of any sum must be done in the "sphere of control of the creditor."<sup>78)</sup> Under this approach, interest rate will be based on the rate of the creditor's place of business, or at the place where the handing over of the goods or of documents takes place.

However, this approach is decidedly one-sided to solving the problem. In addition, it does not provide any explanation why buyer's obligations in this provision justify the way by which interest is calculated. The fact that the buyer is obligated to make a payment at the seller's place of business when the buyer is not bound to pay the price

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76) Of course, if a party proves a trade usage, it will be applied, and if he fails to prove the existence, it will not be applied. However, one thing should be noted that here is the fact that it is the adjudicator to determine whether it is a truly existing trade usage.

77) Richard Craswell, Do Trade Customs Exist? Unpublished manuscript on file with U Chi L Rev, 1996, pp.3-6.

78) Pilar Perales Viscasillas, La determinación del tipo de interés en la compraventa internacional, Cuadernos Jurídicos, julio-agosto, 1996, pp.8.



at any other specific place does not simply amount to a general principle in which the interest rate is set based on the rate of the seller's place of business.

## **2. External alternatives to fill the gap of interest rate**

### **2.1. Invoking general principles of UNIDROIT and PECL**

It is notable that some arbitral awards evidence usefulness of UNIDROIT principle in drawing a solution outside the Convention.<sup>79)</sup> The International Court of Arbitration recognized that the interest gap should be filled by the general principles on which the Convention is based. However, the general principle applied by the court was not from the text of the Convention. The court held "it is admitted that it is possible, in the framework of Article 78 of the Vienna Convention 1980, to apply an international interest rate such as LIBOR which is applicable to inter-bank operations in London market."<sup>80)</sup> Further, the court relied on UNIDROIT principle by stating that "UNIDROIT Principles provide in Article 7.4.9 (2) that the interest rate corresponds to the average bank short-term lending rate to prime borrowers."<sup>81)</sup>

The reason for the court to rely on the external principle can be explained by the wording of the principle. UNIDROIT Principles deal with the same issue as CISG Article 78 under Article 7.4.9 by the title of "Interest for Failure to Pay Money." The

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79) ICC Arbitration Case No. 8128 of 1995 available at <<http://cisgw3.law.pace.edu/cases/958128i1.html>>

80) Id.

81) Id.

principle states "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."<sup>82)</sup> It mostly concerns what is voiced at the Convention and with no doubt conforms with the CISG Article 78 since it expressly mentions the aggrieved party's right to interest without regard to whether the duty to pay the sum was a byproduct of what is beyond the debtor's control. This conforms to the interpretation of CISG Article 79 which excuses the payment of damages only in a situation of force majeure but not the interest.<sup>83)</sup>

However, under UNIDROIT, interest is considered as a kind of damage.<sup>84)</sup> It is meant to fully compensate the aggrieved party of the benefit of the agreement in combination with the actual damage.<sup>85)</sup> By contrast, interest and damages, as mentioned, are dealt with separately under the Convention.<sup>86)</sup> Therefore the UNIDROIT principle may not be invoked to construe the CISG Article 78 even if it can be useful to corroborate a solution which is reached through the application of the Convention.<sup>87)</sup>

In the same arbitral award the arbitrator considered "it justified to apply to the dispute identical rules contained in the UNIDROIT Principles and the PECL(Principles of European Contract Law) as general principles in the sense of Article 7(2) of the

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82) UNIDROIT Principle Article 7.4.9- "Interest for Failure to Pay Money"

83) Alan F. Zoccolillo, Jr. Determination of the Interest Rate Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: General Principles vs. National Law, *Vindobona Journal*1997, pp.37.

84) UNIDROIT Principle Article 7.4.9 is located under Section 4 "damages"of chapter 7 "non-performance" available at <<http://cisgw3.law.pace.edu/cisg/principles.html>>

85) Francesco G. Mazzotta, CISG Article 78: Endless disagreement among commentators, much less among the courts, 2004

86) Id.

87) Franco Ferrari, Interpretation of the Convention and gap-filling: Article 7, in *THE DRAFT UNIDITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION*, Franco Ferrari et al. eds., 2004, pp.170

Vienna Convention 1980."<sup>88)</sup> Therefore it is worthy of noting that one might resort to the PECL as contrary to the intent of the framers of the Convention.

PECL Article 9:508(1) states that "if a payment of a sum is delayed, the aggrieved party is entitled to interest on that sum"<sup>89)</sup> Here, interest is not considered to be a kind of ordinary damages. The Article does not deal with the interest as a secondary monetary obligation.<sup>90)</sup>

To put it short, it is notable that PECL Article 9:508 can operate as a useful tool for construing how to calculate the interest rate in CISG Article 78.<sup>91)</sup> Further, it should be also noted that both external principles does not leave the issue of interest rate out of itself as contrary to CISG Article 78.<sup>92)</sup> Nevertheless, given the fact that the CISG Article 78 was an intentional result of compromise among international representatives, adopting those external principles as a method of computing interest seems to be little more than ignoring their deliberateness and original intention.

One possible comment is that the arbitral award deserves attention since it paved a way for finding an external solution which appears to be based on general principle "on which the Convention is based."It is true that general principle does not have to be

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88) ICC Arbitration Case No. 8128 of 1995 available <<http://cisgw3.law.pace.edu/cases/958128i1.html>>

89) PECL Article 9:508(1) states "If payment of a sum of money is delayed, the aggrieved party is entitled to interest on that sum from the time when payment is due to the time of payment at the average commercial bank short-term lending rate to prime borrowers prevailing for the contractual currency of payment at the place where payment is due."See also PECL Article 9:508 available at <<http://cisgw3.law.pace.edu/cisg/text/textef.html#a9508>>

90) Mazzotta, regarding whether PECL Article 9:508(1) may be of assistance in the interpretation of CISG Article 78. He says in its conclusion that "The PECL cannot be used in construing CISG Article 78 to determine the proper rate of interest. The PECL counterpart provisions, however, are quite useful in clarifying the nature of interest and its relationship to the damage provisions. Under both CISG and PECL, interest cannot be calculated based on damage provisions. Pursuant to both PECL Article 9:508(2) and CISG Article 78, the recovery of interest does not preclude a recovery for damages."

91) Id.

92) Id, supra note 85.

from the text of the Convention.<sup>93)</sup>

## **2.2. Turning to 'the rules of private international law'**

As noted above, at least two factors imply that interest of the CISG Article 78 is an independent notion of remuneration which is supposed to be separately dealt with damages in the Convention. In the text of the CISG Article 78, "without prejudice to any claim for damages" indicates interest is not presumed to be a substitute for damages but is legally distinguishable from damages which are generally awarded when it is incurred and proven.<sup>94)</sup> Additionally, separate location of both sections within the text demonstrates that flat interest is to be treated differently.<sup>95)</sup>

Having illustrated those two factors, careful examination on CISG Article 7(2) appears to tell that there may be governing general principles concerning the interest rate or the law applicable to the rate of interest. But, as a matter of fact, it is not that there is an applicable general principle which is always viable in each differing case. To conclude, what the CISG Article 7(2) clearly says in the absence of such principles is to rely on "the law applicable by virtue of the rules of private international law."

In the absence of general principles, CISG Article 7(2) directs us to the choice-of-law rules that will determine the governing domestic law. However, it will

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93) However, to make use of other sources, there should be a link between those. Just because different sources deals with the same subject matter does not establish a sufficient link and the threshold issue of whether the external solution is in conformity with the general principle on which the CISG is based still remains to be solved.

94) Volker Behr, THE SALES CONVENTION IN EUROPE: FROM PROBLEMS IN DRAFTING TO PROBLEMS IN PRACTICE, *Journal of Law and Commerce*, Spring 1998, pp.297.

95) *Id.*

with no doubt undermine the spirit of the Convention. Nevertheless, it is prescribed in the CISG. It is ironic that a solution which might possibly undermine uniformity is prescribed in the Convention and actually conforms to the standards of the Convention of which paramount goal is the uniformity.

Turning to the law applicable by virtue of private international law leads to the private international law of the forum and it will undoubtedly give rise to different outcomes and not unified methods notwithstanding reservations with exceptional cases.<sup>96)</sup> Therefore, even if one might find the absence of general principles in the Convention, whether the issue was something that was deliberately assigned to national laws in light of the drafters' intention should be asked before directly turning to the private international law.<sup>97)</sup> It is beyond any doubt that the drafters wanted the private international law to be the last resort. Regrettably, the reality does not live up the expectations of the drafters.

Another disadvantage of this approach to point out is the fact that the private international law does not reflect the intention of the parties. Once the private international law intervenes, it is not hard to expect that approaches under the last resort presumably come to legal interest rate. The drafter's intention and the goals of the Convention are perhaps best served by applying the market interest rate because that will best reflect the needs of each contracting party.

A couple of hypotheticals can also show its absurdity. Let us assume the law of

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96) At least, under European private international law such as the Hague Convention or EEC Convention, the law applicable will be the law of the seller's place of business only if contracting parties were silent on choice of law provisions.

97) John Y. Gotanda, AWARDING DAMAGES UNDER THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS: A MATTER OF INTERPRETATION, *Georgetown Journal of International Law* Fall, 2005, pp.123.

the creditor's place of business applies to finding the interest rate. It means that the interest is considered to be a kind of damages. The same criticism which is discussed in the general principle of "full compensation of damages" does not hold true here since this way does not try to define the legal nature of interest in the context of the Convention.<sup>98)</sup> But I do not think this relatively clear way will absolutely solve the issue of interest rate since it is still one-sided. The same criticism falls within another hypothetical approach in which the law of the debtor's place of business applies to compute the interest.

More importantly, what is most threatened by this approach is uniformity as mentioned before. Nevertheless, solving this legal gap by virtue of the applicable domestic law is clearly provided for as a default rule (only in such cases that there is an absence of applicable general principles) in the Convention, while resorting to any other means is expressly beyond the scheme of the Convention at that stage.

Therefore, its application must be acknowledged in the absence of the general principle subject to the general principle of the good faith. In addition, international character should also be carefully taken into consideration in its application and interpretation as set forth in CISG Article 7(1) so as not to threaten the uniformity.

At this point, I cannot help throwing a question. Are there only two ways to solve the matters such as the issue of interest rate which are governed by this Convention but are not expressly settled in it? If there are no general principles on which the Convention is based, should we have no choice but to turn to the private

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98) Andre Cortier, Interest in Uniform Application – How to Solve the UN Sales Law's Interest Rate Problem under CISG Article 78 and CISG Article 84, Review of the Convention on Contracts for the International Sales of Goods, 2002-2003, pp.8.

international law, although it seems to be clear that we should do so under CISG Article 7(2)?<sup>99)</sup>

### **3. Solutions in the middle between "general principle" and "private international law"**

The text of the CISG Article 7(2) expressly presents two solutions to fill the legal gaps in the Convention. First is relying on the general principles on which the Convention is based. The other is by relying on the private international law in the absence of such principles. However, let us assume that scrupulous interpreters ask for themselves, in the absence of such general principles, whether a disputed issue was one that was deliberately left to domestic laws in light of the drafter's original intention. Of course his intention is to reflect that "regard may 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" The answer might be "no." Then, alternatives must be provided from the internal text of the Convention even if there is absence of such general principles.

Arguably, two means can provide possible answers to the hypothetical somewhere in the middle between "general principle" and "private international law." Firstly, by interpreting the general principle in such a broad way that potential principles which are not sufficient to be "general" or on which the Convention is not based on may work alone or together as gap-filling tools in international trade.<sup>100)</sup> Secondly,

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<sup>99)</sup> Of course, even if we turn to the private international law, the issue of which rules of private international law should be applied remains to be dealt with.

distinguishing "such principles" from "general principles" which is mentioned expressly in the text of the CISG Article 7(2) can be arguably another way leading to the same effect compared to the former.

The other is extrapolating some viable and practical formula from specific provisions of the Convention by extension of analogy. The latter is distinguished from the general principle, in that such solutions are often used in Civil Law countries and that a formula is usually drawn from one or more provisions using analogy which are sometimes not associated with each other or have nothing to do with at times in light of reason for being (according to the view of minority), but mostly, extension to the other provision should be restricted to its particular context. If this analogical way is to be used to fill the gap of interest rate, its legal basis to justify the usage can be found either in the CISG Article 7 (1) "to promote uniformity" or in the context of general interpretative methodology of law.<sup>101)</sup>

Whether it be "formula" which is extended by analogy or it be "principle", it should not be confused with general principles since "general principles of law express a general truth which serves as a basic guideline for the application of the law."<sup>102)</sup>

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100) One should take a good care in adopting this way so as not to broaden the scope of the general principle too far. ICC Arbitration Case No. 8128 of 1995 is a good example for this case. It expanded it into the level of comparative law. Different opinions are available at <<http://cisgw3.law.pace.edu/cisg/biblio/felemegas.html#ch45>>

101) For example, when one try to find the legal ground for applying "extension by analogy" in the interpretative methodology of law, he will face a trouble between heterogeneous legal systems. When one try to find the legal ground in CISG Article 7(1) he will face the criticism how that way which is not agreed upon among representatives can promote uniformity.

102) "General principles of law thus express a general truth which serves as a basic guideline for the application of the law, whereas rules are the practical formulation of the principle and, for reasons of expedience, may vary and depart, to greater or lesser extent, from the principle from which they spring." Berger, "The Creeping Codification of the Lex Mercatoria," Kluwer, 1999, pp.164, also available at <<http://cisgw3.law.pace.edu/cisg/text/principles7.html#rules>>



On careful examination of the text of the CISG 7(2), one might find that the paramount goal of uniformity runs the risk of being undermined due to the limited selection of tools in deriving the applicable interest rate. On top of that, even those limited tools are within the domain of "quasi-law-making power" of the courts.<sup>103)</sup> Both general principles and private international law are not such tools that carries guarantee of its subsequent uniform application in practice.

Therefore, from the legislative viewpoint, I think the text of CISG Article 7(2) needs to be amended in order that the text can provide the third way by which neutral authorities are able to find a solution in the text of the Convention itself to promote uniformity in its interpretation. Current text of the same provision does not literally provide the third way such as "extension by analogy" with a sufficient legal ground.

Such an opinion is premised on the international character of the Convention. The Convention is the very result of long discussion and compromise among drafting representatives convened around from heterogeneous legal, social and economic cultures. Thus, even if the analogical methodology can be an efficient means to one community, it might carry relatively unfamiliar impression to the other.

To take an illustration, in essence, analogical interpretation in codified legal system should be distinguished from common law legal system in that, while analogy in the former must be firmly based on the text or specific provision of "given law", that of the latter is from the law which is already within the domain of so called, law making power of judges. Thus, the nature of analogical interpretation should not be viewed as same in different legal systems. Its distinction is fine but clear.

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103) Id.

Such concern, as noted above, should be "literally" eliminated in the text of the Convention,<sup>104)</sup> and I believe that can be one of the ways for the Convention to evolve toward uniformity.

To conclude, priority of gap-filling should be first given to "general principles on which the Convention is based" in the absence of "rule", and the secondary gap-filling priority should be given to the third way such as "analogical methodology" in the absence of "such general principles." Only when no analogical solutions are able to be extracted from provisions of the Convention should the interpreter lastly resort to "private international law" in gap-filling with a view to deterring divergent national interpretation.<sup>105)</sup>

### **3.1. Is the analogical Methodology viable for gap-filling?**

As noted, one of the solutions to determine interest rate in CISG can be derived from the way of gap filling in codified legal systems. It generates a solution to a legal gap out of CISG itself by using an analogy to existing provisions.<sup>106)</sup> It is distinguished from other solutions in that this "formula" does not equal to the 'rule' or

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104) Such an opinion can be criticized by the interpretative viewpoint. As noted above, general principle can be bridged to the analogical formula by the interpretative methodology. Extension by analogy is an indispensable instrument to complement rigidity of codified legal system in the interpretative methodology.

105) The reason why analogical solution should not be the first is because CISG Article 7 (2) states "Questions concerning matters governed by this Convention which are not expressly settled in it..." Here, "not expressly settled in it" should be translated into "not expressly settled by the 'rule' of the CISG." Analogical solutions should be distinguished with rule. See generally Michel J. Bonell, Introduction to the Convention, in *Commentary on the International Sales Law* 79 (Cesare M. Bianca & Michael J. Bonell, eds. 1987). Also for opposite opinion that "reasoning by analogy takes precedent when a solution provided in one code provision is analogous to an issue which is presented under another provision, *See Id*, supra note 34.

106) *Id*, supra note 98, pp.10.

‘general principle’ and it also does not rely on ‘private international law.’ Instead, it is firmly based on the text of the Convention which is not a strict rule or general principle but is derived from specific provisions.

Extension by analogy pays an attention on the fact that the interest rate was left unsolved intentionally and further that this legal gap cannot justify or at least mandate the application of conflict-law. In other words, the non-regulation of the interest rate cannot be identified as the intention to place all questions which may arise in relation to the interest rate in the domain of each legal system’s private law.<sup>107)</sup>

There are some potential provisions in the text of CISG which might present a solution to interest rate by analogy.<sup>108)</sup> Among those provisions, CISG Article 76 is worth taking a careful look at, since it has a similar structure to compare with CISG Article 78 in light of calculating a monetary obligation of a party.

To extend the analogy to specific provisions, it should be preceded that the language of CISG Article 78 itself and its meaning are structurally analyzed so that those solutions can be available without legal fallacy. For the next step, whether those provisions are viable approaches to fill the legal gap should be examined in terms of analogy.

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<sup>107)</sup> Id.

<sup>108)</sup> For example, CISG Article 84 is worth analyzing to see if it is a viable solution, since the first subsection of this provision mentions interest in its language by stating "If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid." In addition to CISG Article 84, Article 74 and Article 76 deserve to be taken into account.

### 3.2. Analogical interpretation by extending the rule of CISG Article 76

Article 78 of CISG states "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 damage recoverable under article 74."<sup>109)</sup> In various respects, this provision is similar to the spirit of CISG Article 76.<sup>110)</sup> Basically both provision intends to compensate the creditor for the abstract value which "possession of the owed amount would have had."<sup>111)</sup>

First of all, CISG Article 78 deals with a circumstance where one party has not made a payment(contract price or any other sum) timely even though it is due,<sup>112)</sup> and it intends for the other party(or the creditor) to recover the amount of value which payment of the debtor would have made. By the same token, CISG Article 76 refers to goods instead of the delayed payment in CISG Article 78 and the spirit of CISG Article 76 is to award the deprived party "a payment of a hypothetical substitute purchase" without regard to whether such purchase has been made.<sup>113)</sup> In other words, it kind of equates non-delivery of goods to the non-payment of sum when each of them are due.

Consequently, it can be said that extending the rule of CISG Article 76 deserves

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<sup>109)</sup> CISG, Article 78

<sup>110)</sup> CISG Article 76 (1) states "If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance."

<sup>111)</sup> Id, supra note 98, pp.13.

<sup>112)</sup> Id, pp.11.

<sup>113)</sup> Id, pp.11.

to be taken into consideration,<sup>114)</sup> since the way money can be treated as goods makes sense in that it has market price as well as trading market in which money can be bought in the form of a loan.<sup>115)</sup> Thus, the market price can be thought of as the interest rate.

Second, the interest provision of CISG Article 78 permits the aggrieved party to get additional damages by stating that "without prejudice to any claim for damage recoverable under article 74." as the CISG Article 76 clearly allows further damages pursuant to the CISG Article 74 by stating "as well as any further damages recoverable under article 74." Both provisions have a common parallel structure to compare in the context of spirit of the Convention by indicating the "value(or interest)" incurred due to the non-performance is to be dealt separately with damages.

Thirdly, the interest which is entitled by the aggrieved party under CISG Article 78 is tied to the sum in arrears and the delay of payment imposes on the other party an obligation to pay interest.<sup>116)</sup> Likewise, in the CISG Article 76, non-delivery of goods causes a party the obligation to pay "the difference between the price fixed by the contract and the current price at the time of avoidance"<sup>117)</sup>

Therefore, it can be said that both provisions have, in various respects, a common way of measuring the abstract worth (or value) of a breached obligation.<sup>118)</sup> Accordingly, when a party is entitled to interest under CISG Article 78, it can be possible that the interest is calculated based on the market interest rate for the sum and

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114) Id, pp.12.

115) Id.

116) Id.

117) CISG Article 76

118) Id, pp.15.

currency owed when or where the payment should have occurred under CISG Article 76.<sup>119)</sup>

This solution is clear and easily identifiable. It also makes sense in that the Convention itself adopts this way when it computes the abstract value of goods in their current market. Secondly, no unjust advantages or disadvantages occur to any party because this solution is within "parameters" defined by the contracting parties.<sup>120)</sup> More importantly and interestingly, this attempt is mostly in accordance with other international efforts such as UNIDROIT principles to bring uniformity into application of commercial law worldwide.<sup>121)</sup> Although relying on the UNIDROIT principle does not provide infallible legal grounds to fill the gap of interest rate, it is of useful and important to corroborate a solution which is reached through the application of the Convention as noted above.<sup>122)</sup>

### **3.3. Downside of the analogical methodology**

It goes without saying that the spirit of uniformity can better be achieved through the self-derived solutions which are firmly based on the Convention. The third solution, in this regard, is worthy of careful attention since it resulted from deliberate efforts to

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<sup>119)</sup> Id, pp.12.

<sup>120)</sup> Id, pp.15.

<sup>121)</sup> International Institute for the Unification of Private Law, Principles of International Commercial Contracts, Rome 1994, various versions of language are available at <http://www.unidroit.org/english/principles/contracts/main.htm>. UNIDROIT principle 7.4.9. (2) states the interest rate "shall be the average bank short-term lending rate to prime borrowers 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." See also id pp.13.

<sup>122)</sup> See supra note 53.

avoid directly resorting to private international law in the absence of general principles on which the Convention is found. However, one should take care in applying the analogical interpretation in order for it not to be viewed as a sheer attempt to justify prejudgments of courts.

If any solution tends to be relied upon by private international law forum simply because it reinforces pre-made decisions, or complements ignorance of other international case-laws, it will not be of any help in the context of progressiveness of uniformity.

On the other hand, a possible criticism which may be raised, although it is critical or a little extreme to point out, is that this solution must not be taken advantage of solely for the purpose of justifying unreasonable interests of specific countries. Some countries must have yielded to see the honorable birth of the Convention with leaving many issues still controversial and unsolved. Assuming the issue of interest is one of them, I hope the "third" ways including analogical methodology may not be utilized in order to realize their unilateral interests since it should be worried that the parties, having conceded not to include interest rate in the Convention with the other parties, still proceed to set up the interest rate by means of interpretative methodology in its favor.

One should also take into account another possible criticism that may voice doctrine of default rule in solving the legal gap of the Convention. As to the legal nature, the international treaty can arguably be viewed closer to the contract rather than inherently binding law. To take the extreme position as to the nature of international treaties, the Convention can be viewed as a contract in some respects. Generally

speaking, when a "contract" has a gap which is governed by it but not expressly settled in it, one should turn to "law" to fill the gap as a matter of course. In this case, the voice can insist that domestic law of each legal system can naturally operate as a governing law to fill the gap as a default rule.

It can be also possibly said that the issue should go to the private international law by default since no drafting fathers agreed upon the way to calculate the interest regardless of legal nature of the Convention.

Ultimately, given the bright and dark side of any solution, it seems that each and every potential solution shades off into a utopian notion of uniformity to which the Convention is pursuing as a paramount goal. In other words, it is not a matter of how to come up with a viable interest rate, but a matter of how to improve uniformity in its interpretation and application of CISG Article 78.

## **IV. Finding the Interest rate from Scratch**

There were optimistic visions for Uniform private international law among international representatives from different countries of legal, economic and social regimes when the Convention came into force on January 1, 1988. After twenty years of case law, however, it seems that there are not many commentators who actually believe in a Uniform set of law on international sales transactions. Notwithstanding some degree of success at unifying international law on sales of goods, the



accomplishment for the common goal of Uniformity appears to be a little remote one at the present, given the misleading homeward interpretation in some jurisdictions, the insufficient case law in the specific area and the ignorance of the Convention where it should have been applied.

Indeed, on the way toward achieving the attractive idea of Uniformity, there were many barriers. It was a big deal and worth appreciating for the international community to have all the different nations get to the negotiating table and agree on a system of law. For some countries it was undoubtedly foreign to their legal systems and caused conflicts of interests among representatives at times. For this reason, they could not help leaving some issues unsolved and compromised, thereby now leading the Convention to have a hard time maintaining the uniformity at an ideal level in its interpretation.

The concerns for the uniformity in interpretation of this Convention are expressed in CISG Article 7 which states "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." Moreover, subsection two of the CISG Article 7 also directs us to a solution with respect to the questions concerning matters which are governed by this Convention but not expressly settled in it. It states that those questions 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 rule of private international law."

However, one might easily notice that the utopian notion of Uniformity is not specifically defined by drafters anywhere in the text of CISG in the first place. On the

one hand the inherent deficiency should imply something that specifies how the Uniformity should go forward. On the other hand, there are also some commentators who claim, the Convention itself actually harms the goal it attempts to promote due to some defects including uniformity itself. Therefore, uncovering the identity of uniformity to which the CISG is pursuing should be preceded before considering which side to take between acknowledging the success of CISG at unifying sets of international sales law and complaining its incompleteness or unpredictability.

## **1. Uniformity by which drafters envisioned Uniform private international law**

The goal of "uniformity" is a utopian but concrete notion which should be said still, so called, "in progress" reflecting drafters' intention and expectation of international legal community. In the context of the "progress", supplementary comments must be addressed to the substantive factors of the "progressive uniformity." For such an ideal notion to improve uniform interpretation and application of the Convention, much consideration should be given to the following condition precedent of uniformity: (1)international character and liberal approach, (2)relative and dynamic adaptability (3)good faith, (4)declaratory but binding nature, (5)respect for various views from heterogeneous bodies of authority.

The CISG, in fact, is the only and first treaty of international law on sales of goods to win "broad participation" on a global scale.<sup>123)</sup> Now of all the whole amount

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123) It cannot be true that there were pre-CISG sincethose international efforts saw only limited success. Under

of international trade, more than two-thirds is from more than 60 CISG Contracting states. In this regard, First thing to mention to identify the ultimate goal of uniformity is its "international character." Since the CISG had already been taken into effect, the interpretation and application of the Convention has now assumed the mandate to complete the uniformity whatever it may be defined. Thus, it is closely connected with the ultimate goal of the Convention to take its international character into consideration in its interpretation.

It was an appropriate decision for the drafters to have required in CISG Article 7(1) that "regard is to be had to its international character." It should be also true that, as more contracting states adopt the Convention, more careful regard is to be required to its international character. Thus, it was quite intuitive to include international character in the text of the Convention.

The consequence of realizing this character is well expressed by Professor Bonell:

"Instead of sticking to its literal and grammatical meaning, courts are expected to take a much more liberal and flexible attitude and to look, wherever appropriate, to the underlying purpose and policies of individual provisions as well as of the Convention as a whole."<sup>124)</sup>

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the Uniform Law for the International Sale of Goods (ULIS)/the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) treaties which date back to 1964 and were signed in Hague, when parties faced with certain disputing issues in international sales transactions, the domestic courts have to make a decision on which domestic law they should apply. See Joseph Lookofsky, *Understanding CISG in the USA*, Kluwer Law International, 2008, pp.3.

124) Bruno Zeller, *The UN Convention on Contracts for the International Sale of Goods (CISG) - A Leap Forward Towards Unified International Sales Laws*, 12 *Pace Int'l L. Rev.* 2000, pp.105-106 also available at <http://www.cisg.law.pace.edu/cisg/biblio/zeller3.html>.

As Professor Bonell pointed out, a "liberal and broad approach" to the interpretation of the Convention is required, given the international uniqueness of it including common law and civil law system. It is no doubt that only such a liberal approach can harmonize each conflicting economic, legal, religious and social regimes.<sup>125)</sup>

However, a liberal and broad approach should not be confused with acknowledging divergent national views and their results since liberal and broad approaches reflect concerns in regard to identifying the solutions which will bring more uniformity to its interpretation in the first place. Acknowledging divergent national interpretation means nothing more than ignoring the autonomous nature of the Convention. As to the gap of interest rate in the Convention, in this respect, it is necessary to take a liberal and broad approach but it should be fully limited to the extent it is justified and reasonable in freely accomplishing its ultimate goal of uniformity.

Secondly, it is clear that drafters never intended to mean uniformity as having strictness or absoluteness. CISG Article 7(1) states in somewhat passive tone that "regard is to be had to the need to promote uniformity." Thus, it can be said that the language of CISG Article 7(1) supports the view that it does not mean strict uniformity.<sup>126)</sup> In light of its international character, its level of strictness can be

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125) John Felemegas, The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation available at <[http://cisgw3.law.pace.edu/cisg/biblio/felemegas.html#N\\_430](http://cisgw3.law.pace.edu/cisg/biblio/felemegas.html#N_430)> Also available at Pace Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International, 2000-2001, pp.115-265.

126) Larry A. DiMatteo, THE INTERPRETIVE TURN IN INTERNATIONAL SALES LAW: AN ANALYSIS OF FIFTEEN YEARS OF CISG JURISPRUDENCE, Northwestern Journal of International Law and Business, Winter 2004, pp.299, 310.

relatively ascertained. As previously noted, more careful regard is to be given to the international character of the Convention, as it gets more heterogeneous entity as contracting states. Moreover, the result of that regard should be something that lessens legal obstacles<sup>127)</sup> to international trade because it is absurd to stick to strict interpretation at the expense of the very purpose of the Convention. Therefore, it can be said the success of the Convention can be measured by "a standard of relative uniformity"<sup>128)</sup> which has a dynamic characterization rather than a static or strict distinction.

The Relativeness of uniformity can be explained not only as an opposite notion of strict uniformity, but also as having connection with substantively evolving value. Due to the fast changing nature of modern society, a standard of application reflecting international character of the Convention is subject to what is thought to be the most "international" and "uniform" at the time it is applied. It is in this context that "a standard of relative uniformity" has a dynamic characterization rather than a static or strict distinction. Its dynamic adaptability would be willing to meet international expectations through which the uniformity is to be seen.

In connection with the gap of interest, what the relativeness and dynamic characterization of the uniformity implies is the urgent need for the Convention itself to provide various possible approaches to the issue with various legal bases so that such expectation of the community may not be frustrated. If one acknowledges the notion of uniformity is not a static being, he would also recognize the need of flexible legal

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127) In its preamble the CISG states that "THE STATES PARTIES TO THIS CONVENTION ... BEING OF THE OPINION that the adoption of uniform ... would contribute to the removal of legal barriers in international trade and promote the development of international trade ..."

128) Id, supra note 95.

grounds in realizing its ideal status. However it goes without mentioning that flexible legal ground to apply should be based on good faith.<sup>129)</sup>

To summarize, what matters in solving the gap of interest rate in CISG is recognizing relativeness, dynamic distinction and international character of the ultimate goal of the Convention in unifying the possible solutions to the issue. What I emphasize by "unifying the possible solutions" does not necessarily mean there should be only one way, rather, it means unification through diversification. Diversification of solutions will lead the uniformity in progress to the ultimate status. All potential solutions should be filtered through the relative uniformity that best reflects expectations of international community.

A couple of points to add are the fact that uniformity provision can be viewed as a declaratory provision due to the lack of sanction of international community in reality. As noted above, the mandate of uniformity is up to the interpretation and application of the Convention. Thus, consequence of realizing this point leads us to view the visionary notion of uniformity as not having a legally binding implication thereby defeating any attempt to define it from the legal perspective that seeks its binding power. However its binding nature should be found in the contracting state's intention of being bound by adopting the Convention.

On the other hand, it can be also said that the notion of uniformity is a "general principle" which could not amount to the "general principle on which the CISG is based" but rather the Convention itself so created at the time it was born as to be the fundamental principle which penetrates each and every policy of individual provisions

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<sup>129)</sup> Because the CISG Article 7 also states "regard is to be had...to the observance of good faith in international trade."

of the Convention. Admitting declaratory role of the uniformity provision but binding nature of it in the Convention I would like to leave it with a mandate of progress which is declared in order to promote the need of uniform application of the Convention.

Last but most importantly, given the previously pointed international character and relativeness of the uniformity, among the practical means to achieve the goal is to disseminate decisions of domestic courts and foreign literatures.<sup>130)</sup> In furtherance of the ways to achieve the goal, respect for other courts' views is important as well. As the German Federal Court stated, "in the application of conventions or convention-based statutes" courts should "rely on foreign court decisions, not only in discussing them, but even in emphasizing uniformity."<sup>131)</sup> It is true that the goal of uniformity is often emphasized in the various legal literature in light of application and interpretation of the Convention, however, when it comes to the problem of interest rate, it is very rare to see any reference to this goal.<sup>132)</sup> That means alternatives to the interest rates have often been established through the interpreter's own "better solutions."<sup>133)</sup> It is clear that such controversial issues as interest rate should be approached in line with whole international expectation and views to progressively keep up the uniformity.

In conclusion, when any above-mentioned points regarding progressive uniformity are not taken into account by any solutions in filling the gap of interest rate, it can be said that it does not live up to the current international expectation and evolving value

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130) Volker Behr, The Sales Convention in Europe: from Problems in Drafting to Problems in Practice, *Journal of Law and Commerce*, Spring 1998, pp.292

131) Bundesgerichtshof, BGHZ 10, pp.155.

132) Id, *supra* note 99, pp.291.

133) Id, *supra* note 19.

of progressive Uniformity.

## **2. Review of Interest rate in Zapata through the prism of progressive Uniformity**

One U.S. federal case dealing with the issue of interest rate shows how the spirit of the progressive uniformity can be hampered. In Zapata, a Mexican enterprise sold cookie tins to the plaintiff company, Maurice Lenell Cooky which was incorporated in the United States.<sup>134)</sup> The buyer deliberately refused to pay the seller the purchase price of nearly US\$850,000 for the 1.6 million cookie tins which were delivered to and used by the seller. The amount of US\$850,000 amounted to 110 invoices of the seller. In addition, it also refused to pay interest which was payable on the amounts overdue, because the buyer had never paid interest before.

The seller filed the lawsuit claiming the payment of the goods, interest on the overdue amounts under CISG Article 78 and recovery of its attorneys' fees under CISG Article 74 CISG. On the issue of interest, jury awarded Zapata a disputed pre-judgment interest in the amount of US\$355,560.91.<sup>135)</sup>

In Zapata, the U.S. District Court properly chose the CISG as an applicable law.<sup>136)</sup> It also correctly applied CISG Article 78 as an appropriate statute since the

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134) Zapata Hermanos, S.A. v. Hearthsides Baking Co. Inc., d/b/a Maurice Lenell Cooky Company, 2001 U.S. Dist. Ct. LEXIS 11698, at paragraph 2 n.1 (N.D. Ill. July 18, 2001)

135) *See id.*, supra note 19.

136) i.e., the court considered the issue of interest rate as a matter which the Convention applies to but does not expressly give a solution to it. See Franco Ferrari, Uniform Application and Interest Rates Under the Vienna Sales Convention, 24 GA. J. Int'l & Comp. L., pp.471.



court considered the payment of interest as *lacuna praeter legem*.<sup>137)</sup> Further, it was seemingly proper to utilize general principles of "full compensation" or "reasonableness" in addressing the issue of interest rate in that the need to rely on domestic law was substantially reduced.<sup>138)</sup> However, on the condition that there exists a legal gap of interest rate in Zapata, the federal district court decision definitely failed to contribute to establishing uniform application of the Convention from the perspective of progressive uniformity which is presented immediately above.<sup>139)</sup>

As to the issue of interest rate, the court left the issue on the jury with instruction relying on the general principle of reasonableness.<sup>140)</sup> The reasonable interest rate was decided by the "reasonableness" of the jury. All the evidence presented from both parties was weighed by the jury and it awarded in seller's favor. In a word, the courts' opportunity to show respect for foreign courts' view was not utilized thereby causing the lack of careful regard to international character of the Convention. I doubt if any reference to other foreign court's view regarding the disputed interest rate could be found in the decision of the court.

Moreover, it seems that there would have been no difference in the court decision even if the dispute in Zapata had been in the domain of UCC. As the Constitution of the United States provides that treaties made at an international level are the "supreme

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137) Arther B. Colligan, Applying the General Principle of the United Nations Convention on Contracts for the International Sale of Goods to Fill the Article 78 Interest Rate Gap in Zapata Hermanos, S.A. v. Hearthside Baking Co. Inc. (2001), Vindobona Journal of International Commercial Law & Arbitration, 2002, pp.56.

138) The ruling of the District Court on attorney's fees was reversed and remanded by the the U.S. 7<sup>th</sup> Circuit Court of Appeals, which is handed down on 19 November 2002.

139) See, id, supra note 19, regarding jury instruction of the court.

140) The Constitution of the United States Article VI., Clause 2 states that " this Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land..."

law of the land,"<sup>141)</sup> judges from the united states as well as judges from other cultural backgrounds are required to view the Convention through the prism of progressive uniformity, not through the lens of domestic sales law such as the Uniform Commercial Code of the United States. The court did not show reflexes of foreign court's perspectives as well as persuasive reasons why the parties could not but accept the same consequences when there was an international set of sales law to be applied.

Secondly, as discussed previously in the paragraph of general principle, same criticism must be addressed to the application of the principles. The general principle relied on by the court could not provide any concrete solution to the given case. The jury thought that 1% compound rate should be an applicable interest rate not because it was stated on Zapata's invoices or Lenell's purchase orders, but because it was considered as reasonable rate. In light of the consequence of the decision, I doubt if the court was bound by the uniformity at all or has given any thought to the declaratory but binding nature of uniformity. When it comes to the issue of interest rate, the substantive uniform application of the Convention concerning the issue of the interest rate can not be found anywhere in the decision even though it can be referred to as a typical case of significantly retrograded uniformity.

Thirdly, the solution in Zapata is also contrary to the previously presented criteria, in that it is not a clear and identifiable solution. Assuming the case is filed in civil law country or some other foreign court, the solution can not guarantee both potential disputing parties to predict the outcome of claims with any degree of

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141) Decision of the Vienna Court of Appeal of 26 Jan. 1982 cited by Franco Ferrari, GENERAL PRINCIPLES AND INTERNATIONAL UNIFORM COMMERCIAL LAW CONVENTIONS: A STUDY OF THE 1980 VIE NNA SALES CONVENTION AND THE 1988 UNIDROIT CONVENTIONS ON INTERNATIONAL FACTOR ING AND LEASING, Pace International Law Review Summer 1998, pp.183.

certainty. Sometimes the general principles might operate as a proper solution when it shows practical value in addressing disputed issue. However, the courts are required to be careful in basing a decision merely on these general principles because, as an arbitral award annulled by the Vienna Court of Appeal in 1982 shows, it is, more often than not, impossible "to infer concrete solutions directly from general principles."<sup>142)</sup>

Lastly, the third criterion which is presented in the beginning and requires that the method of calculating interest should be firmly based on the Convention was not met as well. Even if the court's solution might be designed for or directed toward achieving uniform application of the Convention by the judge<sup>143)</sup> by relying on the instrument of general principles, it overlooked the fact that taking advantage of general principle should be justified in freely accomplishing its ultimate goal of uniformity. In other words, it misunderstood what should be given the priority in considering possible solutions.

Therefore, it can be said that the court should have given a second thought to the solution regarding whether relying on the general principle of reasonableness or full compensation was in the direction of the progressive uniformity. Simultaneously, had the court correctly thought the recourse to the rules of private international law should not be abused, it could have come up with a solution which was undeniably based on the text of the Convention by means of analogical interpretation thereby defeating potential challenge based on the cause of uniformity. Of course, it should be also evaluated

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142) The judge was Milton I. Shadur, and the tribunal was U.S. District Court, Northern District of Illinois, Eastern Division (federal court of 1st instance)

143) Tom McNamara, U.N. Sale of Goods Convention: Finally Coming of Age?, 32-FEB Colo. Law, February, 2003, pp.19

whether the analogical application conforms to the progressive uniformity.

## V. Conclusion

The issue of interest, while "relatively mundane-sounding," accounts for much portion of total CISG cases on global scale<sup>144)</sup>, and many decisions of every domestic court has been the subject of great controversy. Indeed, the Uniform modern *lex mercatoria* has been hindered by the diversity of various and heterogeneous legal systems. The international effort to unify international sales law is desirable since such attempts not only promote the communication and peace of international community, but also contribute to reducing the costs of international transactions of the parties and conflicts among countries of differing cultural backgrounds. Even though such efforts deserve to be complimented, it is a different task and a long way to achieve subsequent uniformity in interpretation and application of the Convention. The accomplishment of textual uniformity alone does not guarantee the elusive goal of the Convention in practice.

This thesis evaluated appropriateness of present possible approaches that the CISG Article 7 provides to the issue of interest rate in and out of the Convention, before advancing an analogical methodology and developing the notion of progressive

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144) Obviously, one should be noted that the general principles should not be conflicted with the goals of the Convention. The underlying principles must first be identified within the text of the Convention, then they could be applied in specific contexts in a way that will further the goals.

uniformity.

CISG Article 7(2) directs that any legal gaps which can be considered to be *praeter legem* be resolved in accordance with the general principles. The main problem of the first solution is a danger to the unification which has been thus far achieved. Nowhere in the Convention are these general principles explained and it is very dangerous to identify it based on such a vague and ambiguous text in terms of foreseeability as well as predictability. The present writer argues that the necessary general principles should be interpreted and treated at the same level or in the similar context of the progressive uniformity as a "goal" of the Convention, with a view that both notion or paramount goal came into existence with the advent of the Convention, unless the sound way how such a general principle should be relied on and extrapolated is established by the international community who themselves created the Convention.<sup>145)</sup> However, its role as a potential gap-filling function to the issue of interest rate should not thoroughly be denied as far as it has a practical value in addressing the issue and, at the same time, is in accordance with the direction of progressive uniformity.

CISG Article 7(2) also placed the rules of private international law into the gap-filling mechanism of the Convention. Obviously such last-resort rule would hinder the spirit of the Convention. It was in this context for the present writer to strive finding alternatives through the notion of progressive uniformity before a court is obliged to turn to the private international law. When interpreters take into account the critical factors or purposes of the progressive uniformity in finalizing their decisions,

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145) Id, supra note 81, pp.15.

such decisions as ignoring binding nature of uniformity and other foreign court's view would not be settled as a referable precedent. In other words, an interpreter's view should be filtered through the progressive uniformity when turning to the last resort. Moreover, if a viable alternatives which should be evaluated in, and filtered through the context of the progressive uniformity can be extrapolated from the internal text of the Convention within the fence of lawful grounds whether it be a form of "principle" or a "formula", it would greatly enhance the status of the Convention as a true uniform law in international community.

The present writer argued that general interpretative methodology might provide such practical principles or a viable formula can be drawn based upon the analogical interpretation of specific provisions in the Convention and that can yield affirmative results that go a long way towards reducing the need to turn to the conflict of laws solutions for gaps *praeter legem*. Among the potential alternatives, extension by analogy based on the CISG Article 76 was emphasized on. To evaluate the solution in the context of the progressive uniformity and through the criteria that has been presented in the beginning of this article, it deserves, in many respects, to be considered for authoritative bodies to apply.

According to the analogy to the CISG Article 76, applicable interest rate is the market interest rate for the sum and currency owed at the time and place where the payment should have been made.<sup>146)</sup> First of all, the solution is obvious from the

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146) CISG Article 57 states that (1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller: (a) at the seller's place of business; or (b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place. (2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract. *See, id* pp.12.

contract of the parties because it reflects the time and place at which the payment should have been made. It is also in line with the CISG Article 57.<sup>147)</sup> Further, under the analogical application of CISG Article 76, interest rate in CISG Article 78 need not be defined as either damages or unjust enrichment. Thus, previously mentioned criticism in paragraphs of general principles does not hold true here. Second, the solution is not only clear and easily identifiable to provide for predictability and foreseeability to the contracting parties, but also firmly based on the internal text of the Convention. Third, this solution is based on the "parameters defined by the parties." Thus, it can be said that neither party is unreasonably placed at an advantage or disadvantage. Last and most importantly it does not conflict with the concept of the progressive uniformity.

Notwithstanding the practicability of analogical solutions to the gap of interest rate, what should be focused on is not how to come up with an appropriate interest rate, but rather, how to improve uniformity in application of CISG Article 78. Thus, it is also argued that limited selection of tools in current interpretation of the Convention needs to be expanded and improved from the legislative viewpoint so that the presented progressive uniformity can better be achieved by interpreters with flexibility. Even though the reality, in which the recourse to rules of private international law is made, shows the regression into uncertainty, it can not be denied that an expansive comparative search for the "third" way in combination with existing tools of interpretation and solutions would enhance the original spirit of the Convention. Only such an approach pays an appropriate regard, in resolving legal gaps *praeter legem*, to the paramount goal of uniformity in the application of the Convention.

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147) Id pp.15.

## REFERENCES

- Alan F. Zoccolillo, Jr. Determination of the Interest Rate Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: General Principles vs. National Law, *Vindobona Journal* 1997
- Andre Corterier, Interest in Uniform Application - How to Solve the UN Sales Law's Interest Rate Problem under CISG Article 78 and CISG Article 84, *Review of the Convention on Contracts for the International Sales of Goods*, 2002-2003
- Arther B. Colligan, Applying the General Principle of the United Nations Convention on Contracts for the International Sale of Goods to Fill the Article 78 Interest Rate Gap in *Zapata Hermanos, S.A. v. Hearthside Baking Co. Inc.* (2001), *Vindobona Journal of International Commercial Law & Arbitration*, 2002
- Benedict Sheehy, Good Faith in the CISG: The Interpretation Problems of Article 7, *Review of the Convention on Contract for the International Sale of Goods (CISG)* 2005-2006
- Berger, "The Creeping Codification of the Lex Mercatoria," Kluwer, 1999
- Bruno Zeller, The UN Convention on Contracts for the International Sale of Goods (CISG) - A Leap Forward Towards Unified International Sales Laws, 12 *Pace International Law Review*, 2000
- Camilla Baasch Andersen, *Uniform Application of the International Sales Law*, Kluwer Law international, 2007
- Disa Sim, The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods, *Review of the Convention on Contracts for the International Sale of Goods (CISG)*, 2002
- Final Act of the United Nations Conference on Contracts for the International Sale of Goods, Apr. 10, 1980, U.N. Doc. A/CONF.97/18 (1980)
- Franco Ferrari, Harry Flechtner, Ronald A. Brand (Ed.), *the Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N.*



Sales Convention, 2005

Franco Ferrari, Interpretation of the Convention and gap-filling: Article 7, in THE DRAFT UNIDITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION, Franco Ferrari et al. eds., 2004

Franco Ferrari, GENERAL PRINCIPLES AND INTERNATIONAL UNIFORM COMMERCIAL LAW CONVENTIONS: A STUDY OF THE 1980 VIENNA SALES CONVENTION AND THE 1988 UNIDROIT CONVENTIONS ON INTERNATIONAL FACTORING AND LEASING, Pace International Law Review, Summer 1998

Franco Ferrari, Uniform Application and Interest Rates Under the Vienna Sales Convention, 24 GA. J. Int'l & Comp. L., 1983

Fritz Enderlein & Dietrich Maskow, International Sales Law, Oceana, 1992

Giulio Ponzanelli, Article 78, in: Bianca (ed.), Convenzione di Vienna sui Contratti di Vendita Internazionale di Beni Mobili, 1992

Heinz Strohbach, Zinsen, in FRITZ ENDERLEIN'S & DIETRICH MASKOW'S INTER-NATIONALES KAUFRECHT: KAUFRECHTSKONVENTION, VERJAHRUNGSKONVENTION, VERTRETUNGSKONVENTION, RECHTSANWENDUNGSKONVENTION, 1991

John A. Spanogle, Peter Winship, International Sales Law: A Problem-Oriented Coursebook, ST. PAUL, MINN., 2000

John Felemegas, The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation, Pace Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International, 2000-2001

John Honnold, Documentary History of the Uniform Law for International Sales, Kluwer Law and Taxation Publisher, 1989

John Y. Gotanda, AWARDING DAMAGES UNDER THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS: A MATTER OF INTERPRETATION, Georgetown Journal of International Law Fall, 2005

Joseph Lookofsky, Understanding CISG in the USA, Kluwer Law International, 2008

Larry A. DiMatteo, THE INTERPRETIVE TURN IN INTERNATIONAL SALES LAW: AN ANALYSIS OF FIFTEEN YEARS OF CISG JURISPRUDENCE, Northwestern Journal of International Law and Business, Winter 2004

Michel J. Bonell, Introduction to the Convention, in Commentary on the International Sales Law, 1987

Phanesh Koneru, The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An approach based on General Principles, 6 Minn. J. Global Trade, 1997

Pilar Perales Viscasillas, La determinación del tipo de interés en la compraventa internacional, Cuadernos Jurídicos, julio-agosto, 1996

Richard Craswell, Do Trade Customs Exist? Unpublished manuscript on file with U Chi L Rev, 1996

Robert A. Hillman, Applying the United Nations Convention on Contracts for the International Sale of Goods: The Illusive Goal of Uniformity, 1 Review of the Convention on Contracts for the International Sale of Goods, 1995

Tom McNamara, U.N. Sale of Goods Convention: Finally Coming of Age?, 32-FEB Colo. Law, February, 2003

Volker Behr, The Sales Convention in Europe: from Problems in Drafting to Problems in Practice, Journal of Law and Commerce, Spring 1998

## ***Websites***

Bruno Zeller, The UN Convention on Contracts for the International Sale of Goods (CISG) – A Leap Forward Towards Unified International Sales Laws, 12 Pace Int'l L. Rev, 2000:  
<http://www.cisg.law.pace.edu/cisg/biblio/zeller3.html>

Berger, "The Creeping Codification of the Lex Mercatoria," Kluwer, 1999:  
<http://cisgw3.law.pace.edu/cisg/text/principles7.html#rules>

Francesco G. Mazzotta, CISG Article 78: Endless disagreement among commentators, much less among the courts, July. 2004:  
<http://www.cisg.law.pace.edu/cisg/biblio/mazzotta78.html>

ICC Court of Arbitration, award No. 8769:  
<http://www.unilex.info/case.cfm?pid=1&do=case&id=401&step=FullText>

ICC Arbitration Case No. 8128 of 1995:  
<http://cisgw3.law.pace.edu/cases/958128i1.html>

ICC Arbitration Case No. 8128 of 1995:  
<http://cisgw3.law.pace.edu/cases/958128i1.html>

International Institute for the Unification of Private Law, Principles of International Commercial Contracts, Rome 1994 :  
<http://www.unidroit.org/english/principles/contracts/main.htm>

John Felemegas, The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation:  
[http://cisgw3.law.pace.edu/cisg/biblio/felemegas.html#N\\_430](http://cisgw3.law.pace.edu/cisg/biblio/felemegas.html#N_430)

PECL Article 9:508: <http://cisgw3.law.pace.edu/cisg/text/textef.html#a9508>

Summary Records of the Plenary Meetings, 10th Plenary Meeting, April 10, 1980:  
<http://cisgw3.law.pace.edu/cisg/plenarycommittee/summary10.html>

Summary Records of the Plenary Meetings, 11th Plenary Meeting, April 10, 1980:  
<http://cisgw3.law.pace.edu/cisg/plenarycommittee/summary11.html>

UNIDROIT Principle Articles: <http://cisgw3.law.pace.edu/cisg/principles.html>

저작물 이용 허락서				
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논문제목	<p>한글 : CISG 第78條 利子規程의 統一的 解釋에 관한 研究</p> <p>영문 : A Study on Filling the Gap of Interest Rate in CISG Article 78 through the Prism of Progressive Uniformity</p>			
<p>본인이 저작한 위의 저작물에 대하여 다음과 같은 조건아래 조선대학교가 저작물을 이용할 수 있도록 허락하고 동의합니다.</p> <p>- 다 음 -</p> <ol style="list-style-type: none"> <li>1. 저작물의 DB구축 및 인터넷을 포함한 정보통신망에의 공개를 위한 저작물의 복제, 기억장치에의 저장, 전송 등을 허락함</li> <li>2. 위의 목적을 위하여 필요한 범위 내에서의 편집·형식상의 변경을 허락함. 다만, 저작물의 내용변경은 금지함.</li> <li>3. 배포·전송된 저작물의 영리적 목적을 위한 복제, 저장, 전송 등은 금지함.</li> <li>4. 저작물에 대한 이용기간은 5년으로 하고, 기간종료 3개월 이내에 별도의 의사표시가 없을 경우에는 저작물의 이용기간을 계속 연장함.</li> <li>5. 해당 저작물의 저작권을 타인에게 양도하거나 또는 출판을 허락을 하였을 경우에는 1개월 이내에 대학에 이를 통보함.</li> <li>6. 조선대학교는 저작물의 이용허락 이후 해당 저작물로 인하여 발생하는 타인에 의한 권리 침해에 대하여 일체의 법적 책임을 지지 않음</li> <li>7. 소속대학의 협정기관에 저작물의 제공 및 인터넷 등 정보통신망을 이용한 저작물의 전송·출력을 허락함.</li> </ol> <p>동의여부 : 동의( ○ )    반대(    )</p> <p style="text-align: center;">2009년    2월    일</p> <p style="text-align: center;">저작자:       김   탁   필                    (서명 또는 인)</p> <p style="text-align: center;"><b>조선대학교 총장 귀하</b></p>				

