RECOVERY OF INTEREST

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> *Today, interest is a standard form of compensation for the loss of the use of money. Ordinarily, it is recoverable without proof of actual loss; damages are presumed because the delay in payment deprives the claimant of the ability to invest the sum owed.*[1] *The determination of interest, [however], is not an issue to be simply resolved after the establishment of liability, but a question that deserves the strictest scrutiny.*[2]

1. INTRODUCTION

It is noted that the modern institution of interest is deeply rooted in Roman Law,[3] where it was a sum "due from a debtor who delayed or defaulted in repayment of a loan. The measure of the [amount] due for the default or delay was ... the difference between the [claimant's] current position and what it would have been had the loan been timely and fully repaid."[4] In other words, the measure of interest due for the delay or default was *id quod interest*.[5]

In the modern world, interest generally acts as compensation for the loss of use of money.[6] Interest is a sum paid or payable as compensation for the temporary withholding of money.[7] The rationale for this practice was articulated by the United States Supreme Court in 1896:[8]

> "It is a dictate of natural justice, and the law of every civilized country, that a man is bound in equity, not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach ... Every one who contracts to pay money on a certain day knows that, if he fails to fulfil his contract, he must pay the established rate of interest as damages for his non-performance. Hence it may correctly be said that such is the *implied contract* of the parties."

The following discussion will focus on the topic of interest in the application of CISG. There is good reason for this approach. First, from an economic point of view, interest is far from minor. The importance of this loss must not be understated.[9] Second, a review of CISG decisions of the last decades clearly demonstrates that there are very few topics which have been of more than occasional practical importance, and among these, interest is one of the most important. Interest under CISG, is the issue most often treated by both courts and commentators.[10]

2. OVERVIEW OF CISG APPROACH ON INTEREST

Regulations on interest under CISG are at the same time very clear and very unsatisfactory.[11]

The provisions on interest were the subject of great controversy and differences of opinion at the 1980 Vienna Diplomatic Conference, where the text of the present CISG was developed. On the one hand, there were those who wanted to delete these provisions altogether, whereas, on the other hand, others favored detailed provisions regulating the legal consequences in cases where the buyer fails to fulfill his major obligation, i.e., to pay the price.[12] The interest question provoked extraordinary difficulties at the Conference. The proposals at the Conference reflected differing beliefs and divergent theoretical approaches to the duty to pay interest as well as to the conflicting practical needs.[13]

Consequently, at the Conference, it was difficult to agree on a solution that would satisfy the majority. The present version of Article 78 is the result of a compromise reached at the Plenary session and reads as: "*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.*" Conflicting contradictory economical, political and religious views in the discussion of Article 78 CISG led to this provision.[14] It is said in this respect that:[15]

> "Art.78 is new and was added at Vienna at the request largely of various European delegates who felt keenly that the convention would be seriously incomplete without some provision on an aggrieved party's entitlement to interest. However, there were sharp differences of opinion about the content of such a provision and art. 78 represents an *uneasy compromise* between those who were altogether opposed to an interest provision and those who wanted a statement, however bland, at least recognizing the right."

CISG Art. 78 clearly provides that if a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it. As ruled by a Switzerland court [10 February 1999 *Handelsgericht* [Commercial Court] Zürich]: "Under Art. 78 CISG, interest is due on any sum in arrears based on a sales contract governed by the Convention."[16] But the text fails to stipulate how to determine what rate of interest to apply. In other words, Article 78 CISG grants the general right to interest but is silent on the question of the applicable rate. The purpose of this provision, therefore, as a result of its general language and the prior rejections of specific formulas for calculating damages, may be limited – simply to authorizing interest damages and to leaving to the courts the task of formulating a method of determining the rate of interest.[17]

It is to be noted that, on the other hand, the text of the CISG contains two specific references to interest. Art. 78 deals with the right to interest on "*the price or any other sum that is in arrears*", with the exception of the instance where the seller has to refund the purchase price after the contract has been avoided, in which case Article 84 of the Convention applies. While Art. 78 refers to interest that can be collected by *the seller or the buyer* and to interest *on the price or any other sum* that is in arrears, Art. 84(1) refers solely to interest that can be collected by *the buyer on the price* (a liquidated amount).

In other words, Article 78 must be read in conjunction with Article 84(1) of the Convention, which contains a provision corresponding to Article 78 for the case of the seller's obligation to refund the purchase price after avoidance of the contract. The question of interest is important in view of Art. 84(1) which provides that "*if the seller is bound to return the price, he must also pay the interest on it from the date on which the price was paid.*" This is the accepted practice, that has been applied in Muslim countries as well, and therefore it is indeed difficult to understand why the efforts to regulate this question met with such opposition.[18]

Nevertheless, the meaning of the general rule as stipulated either in Article 78 or in Article 84(1) of the CISG is at the same time unclear, except for a starting point of interest accrual is briefly indicated in the latter; their languages give few hints as to how interest is to be

computed and under what circumstances it is appropriate. In other words, the interest issue in the CISG itself is very brief, and perhaps vague, because during the legislative history of the Convention, there was controversy over this issue.[19] Indeed, as to be demonstrated in the following discussion, the interest issue under the CISG has been deemed so vague that in fact it is seen as a gap in the Convention, whose filling is again causing controversy.

In any event, however, interest is a remedy under the CISG.[20] In this regard, *Kritzer* notes that several provisions provide a support for a creditors right to interest and he makes the following statement:[21]

> "In assessing interest under the CISG, support for a creditor's right to interest is encountered under several provisions of the Chapter [V of PART III] on Provisions common to the obligations of the seller and the buyer:
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> - Under Article 74, a provision of the section entitled Damages. This article has to do with damages in general. It provides for recovery of the loss suffered as a consequence of a breach of contract.
> - Under Article 78, the provision of the section entitled Interest. This article has to do with the situation in which a party fails to pay a 'sum that is in arrears'. In this situation, 'the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under Article 74.'
> - Under Article 84(1), a provision of the section on Effects of avoidance. This article has to do with a situation in which 'the seller is bound to return the price'. In this situation, 'he must also pay interest on it, from the date on which the price was paid.'"

These regulations make it clear that interest is to be paid. Moreover, as to be demonstrated below, the entitlement to interest is generally established in both domestic and international law, not only under the CISG.

3. IN CONTRAST WITH DAMAGES

3.1 Generally Granted under the Heading of Damages

Considering the commercial fact that the failure to receive funds is always a loss, for the very frequent case of delay in payment of money, most countries, either by statute or judicial decision, provide for the awarding of compensatory interest when a debtor has defaulted on a money payment. A few countries have laws that prohibit the payment of interest, primarily because it is inconsistent with their religious beliefs. Even in some of these countries, however, exceptions allow interest in certain commercial transactions.[22]

A statutory duty to pay interest exists also under several international instruments. As mentioned in *Kritzer*'s remarks above, under the Convention, besides the general right to interest clearly granted under Arts. 78, 84(1), support for a creditor's right to interest is also encountered under Art. 74. As can be derived from the text of CISG Article 74, it is clear that Art. 74 grants damages for any breach of contract, including delay of payment. In this respect, *Behr* states that "from Article 74, it is clear that breach of contract damages cover the loss

suffered by the party as a foreseen or foreseeable consequence of the breach, including lost profits. Thus, in general, there is no problem in awarding interest under the heading of damages."[23] Another commentator also states pertinently:

> "The general principle that is abundantly clear in relation to the payment of price and a failure to comply is to compensate the aggrieved party fully in order to restore the benefit of the bargain. In addition, the aggrieved party can recover additional expenses incurred such as transportation costs, among others, because the aggrieved party's 'loss' includes not only the lost profits and other damages but also any interest it could have earned had the defaulting party paid promptly."[24]

These arguments are confirmed in the case law. For instance, in [31 August 1989 *Landgericht* [District Court] Stuttgart] it is ruled pertinently:

> "Plaintiff (seller) can recover loss of use of capital as damages. This is supported by Article 74 based on the assumption that, in the event of default, the debtor is obligated to pay interest."[25]

In order to confirm that the claim for interest was part of the general claim for damages, an ICC Arbitral Tribunal also held in [October 1998 *International Court of Arbitration*, Case 9333] as follows:[26]

> "Furthermore, one can consider the question whether interest does not after all constitute a part of the principal claim. For example, an author recently wrote: 'From a functional perspective, the interest claim in Art. 78 CISG, just as the one incorporated in Art. 7.4.9 of the UNIDROIT Principles, and any statutory interest claim constitutes *the minimum lump sum* compensation for damages in areas where the creditor need not prove the actual damage incurred. It is a long-standing practice of international arbitrators, as well as of the Iran-U.S. Claims Tribunal, to consider the interest claim as part of the general claim for damages.' (Klaus Peter Berger, "International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts", *American Journal of Comparative Law*, Vol. 46, 199, p. 135 s.)
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> [...]
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> "Under Article 104 of the Swiss Code of Obligations, to which the contract is subject, every debtor being in delay with a payment of an amount of money owes interest of 5% per year on the sum in arrears. Nothing in the contract suggested that the parties had intended to exclude the right to the payment of interest for delayed payment. Such an exclusion would have been difficult to reconcile with the *usages of international trade* which are echoed by, among others, the United Nations Convention on Contracts for the International Sale of Goods (CISG) and also the UNIDROIT Principles of International Commercial Contracts, referred to by the author mentioned above [as well as echoed by the PECL]."

Indeed, as indicated by another ICC Arbitral Tribunal [1994 *International Court of Arbitration, Case 7331*], "[i]t is [ac]knowledged in international law that claimants prevailing on the merits are entitled to receive interest on the *principal amount awarded*."[27] For instance, it is said that PECL Art. 9:508(1) confers a general right to interest on *primary contractual obligations* to pay interest.[28] Particularly, there is no cogent reason for objecting to awarding interest in international law because of the absence of a settled rule as to the rate of interest or the date from which it begins to run. And it is usually the special reasons that are adduced by arbitrators in those cases in which interest is disallowed – for instance, if the claimants are guilty of delay in the prosecution of their claim, or if the award of interest is expressly excluded by the arbitration convention.[29] However, the widely accepted rule is the one according to which the harm resulting from delay in the payment of a sum of money is subject to a special regime.[30]

3.2 Recoverable Independently without Proof of Actual Loss

As stated above, under the Convention, Arts. 78, 84(1) make it clear that interest is to be paid. It is also clear that interest can be recovered with or *without demonstration of actual damages*.[31] In other words, the entitlement to interest also does not depend on the creditor being able to prove to have suffered any loss. Therefore, interest can be claimed pursuant to Article 78 independently from the damage caused by the payment in arrears.[32] In this respect, it is observed in pertinent part by *Behr* as follows:[33]

> "Interest as part of damages must be distinguished from legal interest. Interest is addressed by Article 78 while damages are governed by Article 74 CISG. Quite a significant number of the cases reviewed had to decide the question of interest under the heading of damages. This is because in many European countries legal interest rates are very low, and are independent from market developments. [...] Obviously, plaintiffs – generally unpaid sellers – want to recover interest at higher rates.
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> "Claims of this type have been successful at times. In a significant number of cases, however, interest under the heading of damages has been denied. In no case has this happened because the court misunderstood Article 78 of CISG. One questionable case involved an intermingling of Article 74 and Article 78. In all the other cases, the courts correctly applied Article 78 of CISG.
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> [...]
> "The reason most often given for not awarding damages was that plaintiffs either were unable or unwilling to prove damages arising from reliance on bank credit at higher interest rates. Why plaintiffs failed to prove these damages is open to speculation. Either, they in reality did not work on bank credit, which would call into question the argument some scholars have made that it is common practice to work on bank credit, or plaintiffs did not want to reveal financial information.
>
> "The practical problem of claiming interest by way of damages thus seems to be limited to the proof. [...] "

Indeed, under the Convention, it takes the position of those countries in which interest is not necessarily a component of damages when Art. 78 states that interest is recoverable "*without prejudice to any claim for damages recoverable under Article 74*".[34] It is said in this respect:

> "While in some countries interest is not considered part of damages, the Convention obviates any such discussion by expressly providing for it in Article 78, emphasized by the phrase 'without prejudice to any claim for damages recoverable under Article 74.' Thus, it is irrelevant whether interest is considered part of damages because the general principle of full compensation compels that interest should be paid on *all* amounts due."[35]

As is upheld in an ICC case [1992 *International Court of Arbitration*, Case 7585] where it is stated:

> "Article 78 of Vienna Sales Convention provides that the creditor is entitled to interest 'without prejudice to any claim for damages'. The purpose of this provision is to make a distinction between interest and damages and to give compensation for the financial loss due to the mere fact that delay in payment has a financial cost. The same general idea is at the origin of Article 84 which obliges the seller who is bound to refund the price, to pay interest on it from the date on which he received money."[36]

It is even stated in another case [17 September 1993 *Oberlandesgericht* [Appellate Court] Koblenz]: "The claim of interest is legally based on Art. 78 CISG. If a party to a contract fails to pay a price when due, the other party has a right to interest on this according to that regulation, *without regard to a claim of damages under Art. 74 CISG*."[37] Thus, under the CISG, "neither the exemptions of Article 79 nor other requirements necessary to invoke the right to damages apply to Article 78"[38] Similar approaches are adopted under the two sets of Principles. In this context, the Official Comment on PECL Art. 9:508 even states: "Interest is not a species of ordinary damages. Therefore the general rules on damages do not apply. Interest is owed whether or not non-payment is excused under Article 8:108. Also, the aggrieved party is entitled to it without regard to any question whether it has taken reasonable steps to mitigate its loss."[39]

3.3 Entitled Absolutely Even in case of Impediments

It is recalled that at the Vienna Conference, the goal of the delegations that believed that a special interest provision was necessary was precisely to prevent interest from being considered as damages and thereby to maintain the obligation to pay interest in case of exemptions under Article 79.[40] In this regard, *Enderlein & Maskow* observe that the entitlement to interest under the CISG is characterized above all by two features: its normativity and its absoluteness; and the *absoluteness*, another characteristic clarifying the independence of interest from damages, is make clear by them as follows:[41]

> "*Absoluteness* means that the existence of grounds for release cannot remove the entitlement to interest. But, a reservation has to be made here, namely that this is not true of a failure caused by the other party's act or omission (Article 80). The impediments under Article 79,

> however, do not free from the obligation to pay interest (see also Schlechtriem, 94, and following him somewhat restrainedly, Nicholas/BB, 571, and Stoll/Freiburg, 279). A point in favour of this is that the entitlement to interest is not mentioned in Article 79, paragraph 5, but could be explained with the genesis of the Convention. We believe, however, that the economic background is also justification for such a solution. The party who does not pay a debt that is due, disposes of the sum of money required for it and/or does not have to procure it. He thus has an advantage vis-à-vis the other party which is compensated by the entitlement to interest of that party. This applies, in particular, to restrictions in the transfer of currency, often cited as an example, which shall not have the effect of a reason for exemption here.
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> "But there are also voices who, assuming that interest is a part of the damages, want to permit an *exemption* on the ground of impediments (van der Velden, 405). But, for the reasons given above, we cannot join them."

Similar to the view of *Enderlein & Maskow* mentioned above, *Flambouras* holds with this regard:[42]

> "It is accepted that interest is owed even if the delay in the payment of price (or any other monetary obligation in general) is due to a *force majeure* event, since payment of interest is one of the rights that are referred to in CISG Article 79(5). One point of view is that interest is not considered compensation, therefore the obligation to pay interest continues even if the debtor of the monetary obligation is discharged from his liability to pay compensation for breach of contract. The opposing view stresses that the obligation to pay interest may be classified as compensation. Therefore, the debtor of the obligation will not have to pay interest when the impediment ceases to exist.
>
> "The former opinion appears preferable since (a) the CISG clearly distinguishes between interest payment obligation and damages and (b) the obligation to pay interest commences where payment has been delayed even if the creditor of the payment obligation has not suffered any damage from such delay and the debtor is not liable."

In *Schlechtriem*'s view, it is even believed that:

> "The Convention's interest provision will probably have practical impact only in the exceptional cases where the debtor can claim an exemption under Article 79 for his default, such as when some impediment – for example, unforeseeable currency restrictions in the country of the debtor – temporarily relieves the debtor of his duty to pay under Article 79(1) and (3). Otherwise, it will generally be easier and more promising for the creditor – at least in countries with a free capital market – to claim the lost use of capital as damages in the amount of his own costs of credit according to Article 74 rather than to expose himself to uncertainties as to the applicable law and its interest provision."[43]

With great reservation about this argument bearing in mind the practical problem of claiming

interest by way of damages which seems to be limited to the proof, the present author does not disagree with *Schlechtriem* in his view that the entitlement to interest is not freed where the debtor can claim an exemption under Article 79 for his default.

In any event, CISG Art. 78 conceives the obligation to pay interest as a general rule, so that a debtor still remains liable for interest payments even if his default is due to an impediment beyond his control and he is, therefore, not liable for damages under Article 79. Indeed, Art. 7.4.9(1) of the UNIDROIT Principles expressly provides that "*the aggrieved party is entitled to interest* [...] *whether or not the non-payment is excused*". Moreover, on the other hand, the *force majeure* provision (Art. 7.1.7(4)) of the UNIDROIT Principles clearly sets out: "*Nothing in this article prevents a party from exercising a right to* [...] *request interest on money due.*" However, it is to be noted that if the delay is the consequence of *force majeure*, interest will still be due not as damages but as compensation for the enrichment of the debtor as a result of the non-payment as the debtor continues to receive interest on the sum which it is prevented from paying.[44]

Thus, it may be concluded that the separation of interest from damages will allow a party to recover interest when there is no other evidence of damage suffered or when impediments under have excused the other party from being liable for damages.[45] Nevertheless, on the other hand, each of the three international instruments indicates that damage which exceeds interest can be claimed, hence interest can be counted towards the damages even when the two claims have different features.[46] The following discussion will focus on the recoverability of such additional damages.

3.4 Without Prejudice to Generally Recoverable Damages

As can be derived from concerned texts, the entitlement to interest on sums in arrears is without prejudice to any claim by the creditor for damages generally recoverable. For instance, Article 78 of the Convention clearly provides that the creditor is entitled to interest "*without prejudice to any claim for damages recoverable under article 74*".

Consequently, while the provisions of Art. 78 do not mean much to many, on the other hand, others consider them to be useful since they enable the creditor to claim not only interest but also compensation under Art. 74, which is not possible in some countries.[47] Furthermore, as the entitlement to interest and the claim for damages both exist, the claim for damages can compensate for the lack of an interest rate in the CISG, as proves the ruling in a case before the Landgericht Aachen (Judgment of Apri1 3, 1990 - 41 O 189/89, in: RIW, 1990/6, p. 491 fol).[48]

It is also noted that:

> "Article 84(1) contains a provision corresponding to Article 78 for the case of the seller's obligation to refund the purchase price after avoidance of the contract. Although it is not explicitly stated, the creditor should also - on the basis of Article 7 in conjunction with Article 78 - be able to claim damages for a violation of the duty to refund the price and measure his damages from the time the refund was due and in the amount of his own credit costs."[49]

Thus, damage claims under CISG remain unaffected even if they exceed the relevant interest rate.[50] This approach is followed under the UNIDROIT Principles, where Art. 7.4.9(3) reads: "*The aggrieved party is entitled to additional damages if the non-payment caused it a greater harm.*" Similarly, PECL Art. 9:508(2) provides that: "*The aggrieved party may in addition recover damages for any further loss so far as these are recoverable under this Section.*" These provisions make it clear that the aggrieved party's remedy for non-payment or delay in payment is not limited to interest. It extends to additional and other loss recoverable within the limits laid down by the general provisions on damages. This might include, for example, loss of profit on a transaction which the aggrieved party would have concluded with a third party had the money been paid when due; a fall in the internal value of the money, through inflation, between the due date and the actual date of payment, so far as this fall is not compensated by interest.[51]

Indeed, in CISG case law several courts correctly stated that Article 78 and 74 of CISG allow claims for damages when a claimant incurs additional interest costs and when losses are incurred because capital is tied up in the transaction at issue.[52]

For instance, in a case before a Switzerland court [21 September 1995 *Handelsgericht* [Commercial Court] Zürich], although the applicable Austrian statutory interest rate amounted to 5%, the Court held that the seller was entitled to the higher interest rate of 9.75% as further damages (Arts. 78 and 74 CISG). In this respect, the Court observed that the seller had only to prove the recourse to bank loans since it can be assumed that companies normally resort to external sources of credit to finance their activities.[53] In another Switzerland case [28 October 1998 *Bundesgericht* [Federal Supreme Court]], the Court finally held that the sellers were entitled to recover interests. Since CISG does not determine the interest rate (Art. 78 CISG), the Court applied the statutory interest rate provided by German law, as the law otherwise applicable to the contract. The sellers were also awarded a higher interest rate as further damages pursuant to Arts. 78 and 74 CISG, since they provided sufficient evidence of recourse to bank loans.[54]

This issue is also dealt with by several German courts. For instance, in [24 April 1990 *Amtsgericht* [Lower Court] Oldenburg][55] and in [14 January 1994 *Oberlandesgericht* [Appellate Court] Düsseldorf][56], the courts both granted additional interest as damages (Arts. 78 and 74 CISG). Similarly, the UNICITRAL Abstract on an ICC case [1992 *International Court of Arbitration*, Case 7197] states:

> "The tribunal held that the interest rate to be awarded may be higher than the legal rate since the entitlement to interest under Article 78 CISG was independent of any claim for damages under Article 74 CISG. In the case in question, the tribunal found that the seller operated on the basis of credit for which it had to pay interest at the rate of 12% and applied that rate since the seller would have to obtain credit in order to replace the funds missing due to the non-payment by the buyer."[57]

In a Russian case [4 April 1998 Arbitration award 387/1995], when the arbitration tribunal

held the right of the seller to interest on the overdue sum, the ground is made on that interest could be regarded *neither as penalties nor like damages* according to Art. 78 CISG under which the creditor is entitled to interest, without prejudice to any claim for damages recoverable under Art. 74 CISG.[58]

Of course, in order for this claim for damages to be successful, all requirements set forth in Article 74 must be met.[59] Therefore, when the plaintiff has no shown evidence of any further loss, the court in [18 January 1994 *Oberlandesgericht* [Appellate Court] Frankfurt] did not award such additional damages:

> "The [seller's] claim for default interest at an amount of 13.5% could not be awarded. CISG, Article 78 does not bar a claim for damages under CISG, Article 74 to recover additional loss resulting from finance charges (Herber/Czerwenka, Article 78, Rn. 8). However, the [seller] has no shown evidence of any further loss caused by using credit (as to the burden of proof: von Caemmerer-Stoll, Article 74, Rn. 41). The submitted certificates issued by the Banca d'Italia only refer to the discount [rate] fluctuations."[60]

Indeed, the reason most often given for not awarding further damages claimed by the plaintiffs is that they either were unable or unwilling to prove damages arising from reliance on bank credit at higher interest rates. Why plaintiffs failed to prove these damages is open to speculation.[61] As to be furthered below when examining the applied interest rate in CISG case law, the practical problem in this context seems to be limited to the proof.

In any event, on the other hand, that "[i]f the requirements of Article 74 are fulfilled, the creditor, thus, may claim the full interest under Article 74 CISG. Article 78 CISG, therefore, mainly becomes important if the requirements for a damage claim are not fulfilled."[62]

3.5 Conclusions

As indicated by the above discussions, on the one hand, in general, there is no problem in awarding interest under the heading of damages. It is a long-standing practice to consider the interest claim as part of the general claim for damages, which even is regarded as a usage of international trade echoed by, among others, the prevailing international instruments such as the CISG, UNIDROIT Principles and PECL.

However, on the other hand, the two claims have different features. Interest as part of damages must be distinguished from legal interest. The separation of interest from damages will allow a party to recover interest when there is no other evidence of damage suffered or when impediments under have excused the other party from being liable for damages. Indeed, the practical problem of claiming interest by way of damages in most cases seems to be limited to the proof. In other words, the aggrieved party may not prove that it could have invested the sum due at a higher rate of interest or the non-performing party that the aggrieved party would have obtained interest at a rate lower than the legally applicable rate. Thus, the harm is calculated as a lump sum.[63]

Consequently, the aggrieved party's remedy for non-payment or delay in payment is not limited to interest. It extends to additional and other loss recoverable within the limits laid down by the general provisions on damages.[64] In other words, interest is intended to compensate the harm normally sustained as a consequence of delay in payment of a sum of money. Such delay may however cause additional harm to the aggrieved party for which it may recover damages, always provided that it can prove the existence of such harm and that it meets the requirements of certainty and foreseeability.[65]

4. INTEREST ON DAMAGES

As stated above, one of the main ideas of CISG Art. 78 is the general entitlement to interest which is rather far-reaching in substance.[66] As to the sphere of application, Article 78 CISG undoubtedly applies to interest on the purchase price.[67] It is acknowledged in international law that claimants prevailing on the merits are entitled to receive interest on the *principal amount awarded*.[68]

Of greatest practical relevance is interest on price claims. It was, however, useful to go beyond ULIS and mention other claims, if only to avoid reverse conclusions.[69] Consequently, Article 78 grants the right to interest on the purchase price or "*any other sum that is in arrears*".[70] This reference intimates that parties may seek interest in a broad spectrum of situations. In this context, however, it is questionable whether this language also extends to claims for damages, that is to say whether interest on damages can be claimed. The question arose among authors from the Anglo-American legal family whether other sums were only meant to be such which are already liquidated, for which interest could be claimed under that legal system, or sums that have not yet been specified.[71] In this respect, legal scholars seem to agree that one has a right to interest on damage claims under Article 78 if the amount in question has been liquidated vis-à-vis the other party. Whether this right to interest also applies to unliquidated sums, is controversial, however. The pertinent question, thus, does not appear to be if Article 78 applies to damages at all, but rather when damages can be considered as being "in arrears" under Article 78.[72]

In *Thiele*'s discussion on this issue,[73] it is firstly noted that whereas, for example, the lack of the applicable interest rate in the Convention clearly constitutes a gap, Article 78 CISG at least states that interest has to be paid on "any other sum in arrears". Since this expression is ambiguous, the issue whether Article 78 also applies to unliquidated damages, is a question of interpretation of the text of Article 78 CISG rather than a problem of gap-filling; therefore, Article 7(1) instead of Article 7(2) of the CISG should apply. Leave open whether it is impossible or appropriate to distinguish, as *Thiele* does, between questions of interpretation on the one hand and problems of gap-filling on the other, in applying CISG Art. 7(1), *Thiele* correctly points out that the primary method of interpretation remains the textual interpretation; in addition, the purpose of the Convention, the legislative history, and the drafters' intent may be taken into account.

Following these approaches, *Thiele* analyzes mainly as follows:

(a) Even if the amount of damages to be paid is not fixed yet, the claim for damages is still a claim for a "sum". In case of a breach of contract, the breaching party has to compensate the other party for the loss which that party has suffered. When it fails to do so, this "sum" may be considered as being "in arrears". Therefore, the *textual interpretation* may not be used as an argument against the application of Article 78 to unliquidated damages.

(b) The *legislative history* does not reveal that the drafters of the Convention proceeded on the assumption that Article 78 do not apply to damages unless those damages have been liquidated vis-à-vis the other party. In fact, the drafters did not even talk about the problem of unliquidated damages. Therefore, the legislative history appears to be inconclusive as to the issue in question.

(c) It does not matter whether *the purpose* of Article 78 is intended to prevent undue enrichment on the debtor´s part, or on the other hand, to protect the creditor and indemnify him or her for the loss incurring from the debtor´s withholding of the sum in dispute. Both purposes are best served when interest on damages can be recovered from the time the breach of contract occurs. Regardless of whether the exact amount of damages has been specified yet, the breaching party still owes compensation to the other party from the time of the breach. Because the aggrieved party is deprived of the use of the money from the moment of the loss, even though that amount has not been specified yet.

Finally, *Thiele* concludes that: "Damages under Article 78, therefore, become due at the moment the contract is breached and the initial loss occurs. Consequently, Article 78 applies not only to liquidated but also to unliquidated damages." This conclusion sounds persuasive when case law on this issue is examined.

Although most published decisions in which interest has been sought seem to deal with actions for the purchase price, in a dispute between a German seller and a Swiss buyer decided in Germany [5 April 1995 *Landgericht* [District Court] Landshut], the court held pertinently that: "The [buyer's] claim for interest is provided basically by Art. 78 CISG. *According to the prevailing opinion, Art. 78 CISG also applies to claims for damages* (cf. von Caemmerer / Schlechtriem - Eberstein/Bacher, Kommentar zum einheitlichen UN-Kaufrecht, Art. 78, Annotation 15). The claim comes into existence with the occurrence of the loss. [...]"[74] In another action decided in Switzerland [21 October 1999 *Kantonsgericht* [District Court] Zug], it is similarly held that: "According to Art. 78 CISG, 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, from the due date. *Interest accrues from the due date for claims of damages as well,* i.e., from the original date of breach."[75]

Thiele's conclusion mentioned above also seems persuasive when UPICC Art. 7.4.10 is taken into account, which clearly grants the right to interest on damages and gives further guidance by providing that: "*Unless otherwise agreed, interest on damages for non-performance of non-monetary obligations accrues as from the time of non-performance.*" The Official Comment thereon states in

pertinent part as:[76]

> "This article determines the time from which interest on damages accrues in cases of non-performance of obligations other than monetary obligations. In such cases, at the time of non-performance the amount of damages will usually not yet have been assessed in monetary terms. The assessment will only be made after the occurrence of the harm, either by agreement between the parties or by the court.

The present article fixes as the starting point for the accrual of interest the date of the occurrence of the harm. This solution is that best suited to international trade where it is not the practice for businesspersons to leave their money idle. In effect, the aggrieved party's assets are diminished as from the occurrence of the harm whereas the non-performing party, for as long as the damages are not paid, continues to enjoy the benefit of the interest on the sum which it will have to pay. It is only natural that this gain passes to the aggrieved party."

Unfortunately, however, under the PECL it is stated that while Art. 9:508(1) confers a general right to interest on primary contractual obligations to pay; the provision does not cover interest on *secondary monetary obligations, such as damages or interest*.[77] No further clarification is given concerning why interest on damages is not covered under PECL Art. 9:508(1). Nevertheless, it is to be made clear that the PECL's restriction on interest on interest, i.e. compound interest, in Art. 9:508(1) may not be questionable. Under the UNIDROIT Principles, Art. 7.4.10 also takes no stand on the question of compound interest, which in some national laws is subject to rules of public policy limiting compound interest with a view to protecting the non-performing party.[78]

Indeed, it is also said that Article 78 CISG does not apply to interest payments on interest and, thus, gives no right to compound interest. One reason for this restriction is that compound interest does not appear to be widely accepted in international business transactions.[79] In this respect, *Enderlein & Maskow* observe that:

> "Interest is usually calculated on an annual basis. Hence the question arises whether it should be capitalized respectively after one year, or whether the annual interest rate should be used as the multiplying factor and be multiplied by the entire delay period. In other words: whether compound interest can be claimed, in our view, this is not the case because, among other things, it is not customary in international sales law. There would have to be specific clues for it."[80]

Support for these scholars is also found in the CISG case law. For instance, in [November 1996 *International Court of Arbitration*, Case 8502], the Tribunal did not award the compound interest stating that the granting of compound interest is not a universally recognised principle in international trade.[81] In [December 1998 *International Court of Arbitration*, Case 8908], the Arbitral Tribunal did not award the capitalization of interest and held: "However, capitalization of interest is excluded, as from Respondent's arbitration answer, since this is not provided for in the Vienna Convention and does not appear to be in keeping with international trade

usages. Revaluation is also included in the above mentioned rate."[82]

5. PREREQUISITE FOR ENTITLEMENT TO INTEREST

5.1 No Need for Culpable Default

Under the Convention, the claim for interest payment stems from Art. 78 CISG. It is held in [16 September 1991 *Landtgericht* [District Court] Frankfurt] pertinently:

> "According to Art. 78 CISG, one party can claim payment of accrued interest if the other party does not meet his obligation to pay the due and payable purchase price. It is sufficient enough that such a mature claim has not been paid at the agreed payment day. Further, it is worth noting that there is no need for a default under German law (see Eberstein, in: Schlechtriem, Art. 78 No. 11 CISG)." [83]

Indeed, the Convention regulates the problem of interest very briefly in Art. 78, it is quoted in [16 December 1991 *Pretore della giurisdizione* [District Court] Locarno] that:

> "This Article sanctions the principle that the run of interest does not depend on arrearage, but rather simply on the lack of payment of the price on time (cf Berner Tage für die Juristische Praxis 1990, Wiener Kaufrecht, page 208)."[84] As is supported in [20 July 1995 *Landgericht* [District Court] Aachen], where it is held: "According to this provision [CISG Art. 78], the maturity of the obligation to pay the price or any other sum in arrears is sufficient for the right to request interest. A default must not be present (*cf.* Eberstein/Bacher, *op. cit.*, Annotation 9 to Art. 78)."[85]

In [11 March 1996 *Tribunal Cantonal* [Appellate Court] Vaud [01 93 1061]], it is also ruled:

> "The Vienna Convention contains a rule concerning the principle of interest and damages in case of breach of contract (arts. 74 and 78). Pursuant to this rule, compensation is due as from the moment of occurrence of the damage or of the breach of contract. Therefore, the obligation to pay the interest does not depend on the fact that the defaulting party was put into arrears; it is sufficient that the sum due was not paid within the term of payment (Weber, Vertragsverletzungsfolgen, in Wiener Kaufrecht, Berne 1991, p. 208). Other scholars are of the same opinion (Wiegand, Die Pflichten des Käufers und die Folgen ihrer Verletzung, in Wiener Kaufrecht, op. cit., p. 156; Tercier, Les contrats spéciaux, 2ème éd., 1995, p. 161, n. 1286)."[86]

More clearly, it is said in [12 December 2002 *Kantonsgericht* [District Court] Zug] that the fact that a sum *is* in arrears is *the only requirement* for interest on arrears:

> "[...] 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 Art. 74 (Art.78 CISG). Consequently, the fact that a sum *is* in arrears is *the only requirement* for interest on arrears; a culpable delay in the meaning of Swiss law with all its prerequisites is not necessary (*cf.* v.Caemmerer/Schlechtriem, Kommentar zum Einheitlichen

> UN-Kaufrecht, 3rd ed., Munich 2000, Art. 78 n. 7 *et seq*.). [...]"[87]

5.2 Not Subordinate to Formal Request

As indicated above, as to the requirements of Article 78 CISG, it is said "the only condition is that the amount in question is 'in arrears'"; there is no need for a culpable default in the meaning of many domestic systems, on the one hand. On the other hand, "[a]bsent any further requirements in the text of Article 78 CISG, it is important to note that Article 78 (unlike the legal systems of many other countries) does not require any formal notice of the claim in order to invoke the right to interest."[88] A look at the CISG case law will again provide a sound basis for this proposition.

Although there may be different voices,[89] the controlling voice as demonstrated by the case law is that, unlike under many national laws, the entitlement to interest under the Convention does not depend on any formal notice given to the debtor. Many courts have ruled that it does not require any formal notice of the claim in order to invoke the right to interest. For instance, in [14 October 1992 *Amtsgericht* [Lower Court] Zweibrücken], the Court awarded the seller interest (Art. 78 CISG) and observed that under CISG the duty to pay interest for the delay in payment for the price is not conditional upon a formal request.[90] In [24 January 1994 *Kammergericht* [Appellate Court] Berlin], the Court also held that the right to interest is not subordinate to a formal request:

> "To the extent stated in the decision's tenor, the [seller]'s assignee may claim interest on the purchase price as compensation under Arts. 78 and 74 CISG, from the time payment was due according to Art. 58 CISG. A payment reminder notice was not necessary for this claim to arise. [...]"[91]

Also, in [20 March 1995 *Landgericht* [District Court] München], it is held: "The [seller] is entitled to interest for the mature claims for payment of the purchase price without having to send a reminder of payment, Art. 78 CISG. [...]"[92] In [29 March 1995 *Cour d'appel* [Appellate Court] Grenoble], the Court observed:

> "Whereas, as to the interest, that Article 78 CISG provides that the interest on overdue payments is owed when the debtor is in arrears; That, unlike French law, a formal request is not necessary;[...]"[93]

In [26 April 1995 *Cour d'appel* [Appellate Court] Grenoble (*Marques Roque v. Manin Riviére*)], the court ruled:

> "[...] Article 78 of the CISG provides that any delay in payment gives rise to the payment of interest, without a legal demand being necessary. [...]"[94]

Similarly, in [11 March 1996 *Tribunal Cantonal* [Appellate Court] Vaud [01 93 0661]] the court observed that according to Art. 78 CISG, the obligation to pay interest for the delay in payment of the price is not subject to a formal request by the seller.[95] In [30 November 1998

Handelsgericht [Commercial Court] Zürich], the seller was further awarded interest on the price (Art. 78 CISG), without the need of a formal request by the seller.[96] It is also ruled in [24 March 1999 *Landgericht* [District Court] Flensburg] that: "Under Art. 78 CISG the [seller] has a right to interest on the purchase price in arrears without sending a request for payment."[97]

In brief, no formal request for payment was considered necessary under CISG.[98] Interest is to be paid according to Art. 78 CISG, without the need to make any request or comply with any formality.[99] Also, in [6 April 1995 *Cour d'appel* [Appellate Court] Paris], the appellate Court held that the Arbitral Tribunal's decision to require the seller to pay interest on the refunded price even in the absence of a formal request by the buyer was supported by Art. 84 CISG, which states that if the seller is bound to refund the price, it "must" (and not "may") also pay interest on it from the date on which the price was paid.[100]

Thus, contrary to what is sometimes provided in several legal systems, the right to interest doesn't need a formal notice.[101] In sum, interest is payable whenever the delay in payment is attributable to the non-performing party, and this as from the time when payment was due, without any need for the aggrieved party to give notice of the default.[102]

5.3 Conclusion: The only prerequisite is a sum in arrears.

As indicated in the case law, "the fact that a sum *is* in arrears is *the only requirement* for interest on arrears".[103] As it is held in [12 November 1996 *Amtsgericht* [Lower Court] Koblenz]: "Contrary to [what is sometimes provided in several legal systems, for instance,] German law, the only prerequisite for a claim for interest under Art. 78 CISG is the maturity of the sum in arrears."[104] If a debtor does not pay an amount due, he, without a further demand being necessary, becomes obligated to pay interest according to Art. 78 CISG.[105]

In other words, as ruled in [24 April 1997 *Oberlandesgericht* [Appellate Court] Düsseldorf]:

> "According to Art. 78 CISG, the interest claim generally exists where a party fails to pay the due purchase-money claim. Neither a reminder nor fault within the meaning of the German law is required therefore (cf. von Caemmerer/Schlechtriem/Eberstein, loc. cit., Art. 78 CISG, No. 9; Herber/Czerwenka, loc. cit., Art. 78 CISG, No. 3). On the contrary, interest must be paid on the purchase price from the maturity date onward, whereas the maturity depends on the agreement of the parties [or, in the absence of such agreement, according to the Convention]. [...]"[106]

Thus, the following conclusion may be drawn:

> "The only prerequisite for the entitlement to interest is the debtor's failure to comply with its obligation to pay the price or any other sum by the time specified in the contract or, absent such specification, by the Convention."[107]

6. STARTING POINTS OF INTEREST ACCRUAL

6.1 For Interest on Purchase Price: Date of Payment

As indicated above, the interest issue in the CISG itself is very brief and perhaps vague. Art. 78 CISG only sets forth the obligation to pay interest as a general rule but it does not set forth a time starting from which interests may be calculated. Nevertheless, it is noted that the obligation to pay interest ends with the time of payment which is relatively uncomplicated.[108] Therefore, the following discussion will focus on the starting point of interest accrual.

The general principle of full compensation requires that the plaintiff be paid interest from the date that payment should have been made.[109] Indeed the case law mentioned above also followed this approach. However, it is to be emphasized that, this date from which the interest accrues should be first of all determined in accordance with an agreement of the parties.[110] This is noted, for instance, in [15 June 1994 Vienna Arbitration award SCH-4366] where the tribunal held:

> "The interest is payable from the effective date of the obligation for payment of the purchase price. According to Art. 58(1) of the CISG, this time is primarily determined by the agreements between the parties themselves; only in the absence of such a special agreement is it the time when the seller places the goods at the buyer's disposal in accordance with the contract. [. . .]."[111]

Nevertheless, the court in [14 June 1994 *Amtsgericht* [Lower Court] Nordhorn] has pointed out that:

> "The [seller]'s claim for interest is justified under Art. 78 CISG. According to that provision, interest is due from the time the claim was mature; a reminder of payment is not necessary. Consequently, it would have been up to the [buyer] to submit that the parties reached a different agreement regarding the payment of interest. As the [buyer] failed to make an according submission, the interest was granted according to the [seller]'s request. [...]"[112]

In any event, as ruled in [6 May 1993 *Arrondissementsrechtbank* [District Court] Roermond], the entitlement to interest under Art. 78 CISG, accrues from the date when payment was due which, in the absence of an agreement between the parties, was the date of delivery of the goods (Art. 58 CISG).[113]

On the other hand, CISG Article 84 (1) expressly stipulates that on a price to be refunded, interest must be paid from the date on which the price was originally paid. The same should apply to the refunding of the reduced price under Article 50.[114] In [1993 *International Court of Arbitration*, Case 6653] the tribunal ruled that according to this text, interest is due for respondent [seller] to be paid to claimant [buyer] starting from the day of payment. The starting point of the interest is therefore the date of the payment of the item concerned. The interest aspired to by Art. 84 is due even it had not been formally requested because, among others, Article 84 of the Convention sets forth that the seller must and not "can" pay interest.[115]

6.2 For Interest on Secondary Obligations: Date of Non-performance

The above discussion shows that the basic starting point for interest accrual is the date of

payment, which has been fixed by or determinable from the contract or in the absence of an agreement between the parties, is to be determined by the applicable law. However, it is less clear when most of the other claims become due.

Without being able to enter into detail in respect of each concrete claim, *Enderlein & Maskow* believe that in regard to claims for damages, reimbursement of expenses and reduction of the price, hence *secondary claims* which emerge only when primary obligations under the contract are breached, from the aspect of interest, one should proceed on the assumption that *they become due when they have been liquidated vis-à-vis the other party and in the amount in which later they turn out to be justified*. Another aspect is that they should have accrued at the time *when they were charged* and were not just expected in the future. The principle developed here for secondary claims is, in their view, also applicable to primary claims whose becoming due is not determined otherwise, like claims for reimbursement of auxiliary/additional expenses which are not included in the price, hence expenses for packaging, transport and insurance, as well as customs duties and taxes. They would become due with the issuance of the invoice.[116]

Indeed, it is recalled that when discussing above whether interest on damages is granted, the pertinent question appears to be rather the accrual of interest on damages. In this respect, a court [21 October 1999 *Kantonsgericht* [District Court] Zug] ruled that

> "According to Art. 78 CISG, 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, from the due date. *Interest accrues from the due date for claims of damages as well, i.e., from the original date of breach.* [...]"[117]

The CISG practice is codified in Art. 7.4.10 of the UNIDROIT Principles, where it is stated: "*Unless otherwise agreed, interest on damages for non-performance of non-monetary obligations accrues as from the time of non-performance.*" The present Article fixes as the starting point for the accrual of interest the date of the occurrence of the harm. This solution is that best suited to international trade where it is not the practice for businesspersons to leave their money idle. In effect, the aggrieved party's assets are diminished as from the occurrence of the harm whereas the non-performing party, for as long as the damages are not paid, continues to enjoy the benefit of the interest on the sum which it will have to pay. However, when making the final assessment of the harm, regard is to be had to the fact that damages are awarded as from the date of the harm, so as to avoid double compensation, for instance when a currency depreciates in value.[118]

6.3 Dates Determined According to Relevant Circumstances

For the lack of a clear specification in CISG Art. 78, the time from which to award interest is an issue producing divergent results in the courts. The case law demonstrates that different tribunals produce variations on the time for accrual. Several courts have ruled that the interest accrued from the date determined according to relevant circumstances in the case.

For instance, in [20 December 1994 *Tribunal Cantonal* [Appellate Court]], the Court observed that since the seller had expressly claimed interest accruing from the date when he formally

requested payment from the buyer, it could not award interest accruing from an earlier time.[119] Similarly, in [16 December 1996 *Rechtbank van koophandel* [District Court Kortrijk], the Court, though observing that CISG does not require a formal request for payment, decided that under the circumstances of the case interest accrued from the date of the seller's formal request for payment.[120] In [28 March 1997 Arbitration award 38/1996] it is held that:

> "[...] Since prior to institution of the action, the [seller] did not claim annual interest from the [buyer], the Tribunal has reached the conclusion that annual interest shall be paid on the principal sum of debt under the contract starting on the *date of filing the action*. As to the other amounts claimed for recovery from the [buyer], annual interest on them shall be awarded starting from the *date of rendering of the present decision*. [...]"[121]

Also, when a buyer sued for a refund of the purchase price [24 November 1989 *Pretura circondariale* [District Court] Parma], contrary to what is provided in Art. 84(1) CISG with regard to time of accrual of interest (from the date the buyer paid the purchase price to the seller), the Court held that interest was payable from the date of avoidance of the contract.[122] Similarly, in [1995 *International Court of Arbitration*, Case 8128], the tribunal ruled that interest related to the reimbursement of the cost of the sacks accrued from the time of partial avoidance of the contract, while interest related to the expenses due to the substitute purchase accrued from the time in which the bank of the buyer executed the payment for the replacement goods.[123]

Yet another court in [1994 *International Court of Arbitration*, Case 7565] ruled that interest should be awarded from the time when the aggrieved seller would "normally have resold" the goods after the buyer's breach: "Interest shall be computed from January 1, 1992, on the assumption that the cargo would normally have been resold to [buyer's] customers by the end of December 1991. It shall accrue and be paid until full payment of the awarded amount."[124] Still another variation was that interest should accrue from the expiration of the additional period of time fixed by the seller for performance.[125]

Finally, the ruling in another case, [20 May 1991 *Juzgado Nacional de Primera Instancia en lo Comercial* [National Commercial Court of First Instance]], deserves a separate attention. In the case, the Court found that Arts. 53, 54, 57 and 58 CISG do not set down an explicit rule as to whether interest should accrue during the contractual term for deferred payment. Nevertheless, accrual of interest during the agreed period in case of deferred payment constitutes a usage widely known and regularly observed in international trade (Art. 9(2) CISG).[126] The court ruled as follows:[127]

> "[...]
>
> "4) Articles 53, 54, 57 and 58 of the 1980 Vienna Convention refer to the buyer's obligation to pay the price as well as the place and time of payment. However, there is no express norm of the Convention which can indicate the source or origin of [the amount of] of interest when payment was agreed to at a fixed period of time. Payment of interest on

such transactions is a widely spread and accepted practice in international commerce (art. [9(2)] 1980 Vienna Convention).

"5) There are basically three types of international sale payment: documentary credit, documentary collection and/or bank transfer (Boggiano op. cit., volume II, p. 811). In this case, the adopted type was a documentary collection by Banco Quilmes, which was issued by a 180 days draft of exchange. This is clearly shown in the commercial invoice from p. 43 of the court file. [...] In documentary collections, banks do not underwrite any payment obligations; instead, they act as a post office to the seller, handing over the documents that will allow the buyer to withdraw the goods (commercial invoice and bill of lading in this case), against the acceptance of the bills of lading drawn by the exporter, according to the time periods used in international trade, especially for manufactured goods or against bills of exchange payments.

"6) As an established commercial practice, interest is not included in the commercial invoice, but it is instrumented separately either in a note of credit, or in another bill of exchange, or directly with a bill of exchange issued separately as the one used to draw operating capital. The procedure described takes place not only with a documentary collection, but also when a documentary credit is opened. Commercial invoices used in international sales of goods never include interest. The Trustee recommended dismissal of the [seller's] claim for the sum corresponding to interest. The Trustee recommended that the interest claim be dismissed as it is recorded in a separate document. This position of the Trustee is surprising [and incorrect] as international commercial practice accepts interest recorded in a separate document.

"7) Usages of international commerce have long been accepted in the commercial jurisprudence – as an example, by the FOB, C&F, CIF clauses regulated by the International Chamber of Commerce Incoterms. Usages of international commerce are presently accepted as a source of law applicable to international sales, even over the 1980 Vienna Convention, as the rule of the Convention mandates in its art. 9(2).

"8) On the other hand, the invoice corresponding to the price of the sale (p. 43) and that corresponding to the interest (p. 48), have both been issued on the same date, 23 January 1989, as is argued in the incidental proceeding (p. 1). Such amounts of interest are instrumented in the bill of exchange whose copy is shown on p. 51. Both bills of exchange were drawn on the same date, 9 February 1989 and, according to the copies at hand, they were accepted by the [buyer], even though the Trustee expresses that they have not (p. 841 item b.). On the contrary, the Court cannot see how the [buyer] could have withdrawn the sold goods - 300 gloves - on arrival in Buenos Aires, without acceptance of the bills of exchange by the [buyer].

> "9) Consequently, the interest claim filed by the [seller] is duly justified for it corresponds to declare the credit admissible for the sum of US $283.93 corresponding to 180 days interest since 9 February 1989. The sum of US $3,065.61 will be verified, as no challenge has been claimed in this respect. Both sums are considered unsecured credits. [...]"

In all events, from the formulation of CISG Art. 78 that interest is to be paid on sums in arrears, we can draw the conclusion that interest is to be paid from the time when the respective sum is due.[128]

7. GENERAL REVIEW OF INTEREST RATE

7.1 Gap in the Convention

As stated above, CISG recognizes the duty to pay interest (Arts. 78, 84(1)), which exists under most legal systems and several international instruments such as the UPICC and the PECL.

> "Contrary to all other conventions and statutes, CISG does not, however, fix a rate of interest because it proved impossible to agree upon a standard: the discount rate was thought to be inappropriate for measuring credit costs; nor could agreement be reached on whether the credit costs in the seller's or the buyer's country were to be selected."[129]

The present Art. 78 CISG states only the principle obligation to pay interest and is silent on the details of the interest rate: it "only sets forth the obligation to pay interest as a general rule" but it does not, as discussed above, set forth a time starting from which interests may be calculated; nor does it, as to be discussed in this section, stipulate the rate of interest or how the rate is to be determined by a tribunal in the absence of explicit guidance from the Convention. The lack of a specific interest rate or method to determine such an interest rate is especially aggravating, because Article 78 CISG mandates an obligation to pay interest every time a payment is in arrears, without regard to fault. For this reason, a party will demand interest in addition to its demand for price, reduction of the price or damages almost every time a suit is brought under the CISG. It will be able to point to Article 78 CISG to legitimate its title to interest, but the legitimacy of the claimed rate of interest remains in doubt.[130]

It is also noted that since the CISG does not state a specific interest rate in other provisions either. This shortcoming is to be compensated above all by agreement between the parties.[131] It is said: "A contract clause that clearly spells out the method for calculating the rate of interest and those scenarios in which interest may be included in a damages award should eliminate much of the uncertainty surrounding this provision."[132] However, where the parties have agreed nothing, it is to some extent complex on what basis the amount of interest under the CISG will have to be calculated. As to be demonstrated below in the case law, some court decisions have deemed it so vague, that in fact, it is seen as a gap.

Accordingly, the question has been raised whether the drafters' omission of a specific interest rate in the CISG has to be dealt with as a "*lacuna praeter legem*" or as a "*lacuna intra legem*". While the former type of gap relates to issues that are governed by, but not expressly settled in the Convention, the latter type of gap refers to issues that fall completely outside the scope of

the Convention. Thus, in filling this gap in the Convention, one must above all, technically, ascertain whether the gap is considered *lacuna intra legem,* as opposed to a *lacuna praeter legem*. In this respect, *Thiele* observes as:[133]

> "This distinction between '*lacunae intra legem*' and '*lacunae praeter legem*' has important consequences when one tries to fill the gaps. If a gap is to be treated as relating to an issue that is governed by the Convention but not expressly settled in it, Article 7(2) CISG applies. According to this provision, '*lacunas praeter legem*' are to be settled in conformity with the general principles on which the Convention is based. Only when such principles cannot be determined, gaps of this kind may be filled by recourse to 'the law applicable by virtue of the rules of private international law'. Gaps '*intra legem*', on the other hand, are not governed by the Convention, and, thus, may be settled only by reference to the law otherwise applicable which, again, is to be determined according to the rules of private international law of the forum."

Undoubtedly, the setting forth of a criterion to be used to decide whether a gap must be considered a *lacuna intra legem* or *praeter legem* would have favored the uniform application of the Vienna Sales Convention. Indeed, the solutions to the same problem can widely differ from each other depending on whether they were perceived as gaps *intra legem* or *praeter legem.*[134] Legal scholars and courts of different nations are in dispute on the question whether the lack of an interest rate in the Convention has to be treated as a "*lacuna praeter legem*" or a "*lacuna intra legem*". This remains a controversial subject for at least the following reasons:

Above all, the Convention itself does not identify any clear criterion to determine when a matter has to be viewed as outside the scope of the Convention as opposed to when the Convention applies to the issue in question but does not expressly resolve it. Moreover, in order to determine whether the lack of a fixed interest rate in the Convention constitutes a gap *praeter legem* or a gap *intra legem*, the legislative history appears to be of not much avail. In any event, the legislative history appears to be unclear as to this matter.[135] In a case of such doubt as to the drafters' intent, one may conclude from the purpose of the CISG, like every international convention, is to provide uniformity in a specific area of law, that the drafters did not want to preclude courts from attempting to find a uniform solution under Article 7(2) CISG to the issue in question. However, even if one proceeds from the assumption that the issue of interest rates is governed by the CISG, and, thus, Article 7(2) CISG applies, it is not clear if there are any general principles in the Convention that may help to determine the applicable interest rate. Again, courts and legal scholars split on this point.[136]

In addition, as to be demonstrated below, there are a considerable number of decisions dealing with the issue of determining the appropriate interest rate under Article 78 CISG. However, only few of these decisions engage in a thorough discussion of the problem in question. Especially, very few decisions expressly state if they view the lack of a specific interest rate in Article 78 as a gap "*intra legem*" or a gap "*praeter legem*". Nevertheless, from these decisions´ point of view, this question might not have great relevance.

7.2 Clear Specification under UNIDROIT Principles and PECL

In contrast with the gap in the Convention, the two sets of Principles provide clear guidance as to the rate of interest. UPICC Art. 7.4.9(2) provides that:

> "*The rate of interest 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.*"

The Official Comment on this provision states:[137]

> "Para. (2) of this article fixes in the first instance as the rate of interest the average bank short-term lending rate to prime borrowers. This solution seems to be that best suited to the needs of international trade and most appropriate to ensure an adequate compensation of the harm sustained. The rate in question is the rate at which the aggrieved party will normally borrow the money which it has not received from the non-performing party. That normal rate is the average bank short-term lending rate to prime borrowers prevailing at the place for payment for the currency of payment.
>
> "No such rate may however exist for the currency of payment at the place for payment. In such cases, reference is made in the first instance to the average prime rate in the State of the currency of payment. For instance, if a loan is made in pounds sterling payable at Tunis and there is no rate for loans in pounds on the Tunis financial market, reference will be made to the rate in the United Kingdom.
>
> "In the absence of such a rate at either place, the rate of interest will be the 'appropriate' rate fixed by the law of the State of the currency of payment. In most cases this will be the legal rate of interest and, as there may be more than one, that most appropriate for international transactions. If there is no legal rate of interest, the rate will be the most appropriate bank rate."

In this regard, *Zoccolillo* notes that careful examination of UNIDROIT Principle 7.4.9, shows that the wording of the text remedies most concerns that were voiced at the Convention. The author states pertinently:[138]

> "Paragraph two of 7.4.9 stipulates that the rate of interest shall be the average bank short-term lending rate for prime borrowers prevailing for the currency of payment at the place of payment, or where no such rate exists, at that place, then the same rate in the State of the currency of payment. This formula, although similar to the 'joint proposal' raised at the Diplomatic Conference, is distinctly different. The main concern of the socialist and developing nation delegations was that by fixing the rate of interest in the seller's country, socialist and developing nations who used their foreign export earnings to pay for their imports would be disadvantaged. This occurred since they would normally have to resort to credit on foreign markets well above what they would be compensated for under their own

> interest rates. UNIDROIT Principle 7.4.9 remedies this concern by fixing the applicable interest at a rate equal to the lending rate prevailing for the *currency of payment at the place of payment.* Thus, socialist and developing nations, that maintain foreign accounts to pay for their imports and must resort to credit on those markets if a party defaults on the payment of the purchase price, are assured that they will receive adequate protection and an equal return of interest.
>
> "However, one problem could arise for nations that do not maintain foreign accounts for imports and require payment in their own States. These States would undoubtedly be duly compensated by a rate of interest fixed at the place of payment, i.e., their own State, but 7.4.9 does not guard against a debtor's purposeful delay in payment so as to obtain cheap credit or accrue extra sums. Thus, if the UNIDROIT Principles are to be applied to fix an interest rate, judges and arbitrators must prevent buyers from taking advantage of such situations. By applying the general principle of 'unjust enrichment' in Article 84 in conjunction with 7.4.9, the aggrieved party would be made whole and the party in bad faith disgorged of all unduly received benefits."

Also, PECL Art. 9:508(1) follows briefly the approach adopted under the UNIDROIT Principles and reads in pertinent part that the applicable rate is "*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*". It is stated in the Comment:

> "The rate of interest is fixed by reference to the average commercial bank short-term lending rate. This rate applies also in the case of a long delay of payment since the creditor at the due date cannot know how long the debtor will delay payment. Since interest rates differ, the lending rate for the currency of payment (Article 7:108) at the due place of payment (Article 7:101) has been selected because this is the best yardstick for assessing the creditor's loss. Unless otherwise agreed, interest is to be paid in the same currency (cf. Article 9:510 Comment D) and at the same place as the principal sum. The parties are free to exclude or modify paragraph (1) e.g. by fixing the rate of default interest and/or its currency in their contract."[139]

However, it remains questionable whether and how the rate contained in the two sets of Principles could now be applied when the creation of a single rule on fixing the rate of interest could not be agreed upon at the Vienna Conference. The absence under the Convention of a specific formula to calculate the rate of interest has led courts, as well as legal scholars, to argue for different approaches concerning the applicable rate under the Convention. This will be evidenced by the CISG case law with different solutions proposed by concerned tribunals.

8. RATES APPLIED IN CISG CASE LAW

8.1 Gap-filling in General

8.1.1 *Overview*

As indicated above, the rate issue under the Convention has been deemed so vague that it is often seen as a gap. In [20 July 1995 *Landgericht* [District Court] Aachen], the court noted that Art. 78 CISG provides only for an obligation to pay interest. This norm does not say anything about the interest rate to be paid. *Thus there is a gap in the law; there is dispute about how to fill it.*[140]

In filling this gap, *Thiele* believes that, technically, a three-prong approach should be applied. Following such a three-prong approach, the first step is to determine if the lack of a specific interest rate in Article 78 CISG constitutes a gap "*intra legem*" or a gap "*praeter legem*".[141] However, courts and legal scholars split on this question, which is generally observed in [15 June 1994 Vienna Arbitration award SCH-4366] as follows:[142]

> "Article 78 of the CISG, while granting the right to interest, says nothing about the level of the interest rate payable. In international legal writings and case law to date it is disputed whether the question is outside the scope of the Convention - with the result that the interest rate is to be determined according to the domestic law applicable on the basis of the relevant conflict-of-laws rules (see inter alia Herber/Czerwenka, Internationales Kaufrechts, 1991, 347; Oberlandesgericht Frankfurt, 13 June 1991 in Recht der Internationalen Wirtschaft 1991, 591) - or whether there is a true gap in the Convention within the meaning of Article 7(2) so that the applicable interest rate should possibly be determined autonomously in conformity with the general principles underlying the Convention (see in this sense, for example, J.O. Honnol, Uniform Sales Law, 2nd edition, Deventer, Boston 1991, 525-526; ICC arbitral award No. 6653 (1993), Clunet 1993, 1040). [...]"

Arguably, the lack of a specific formula to calculate the rate of interest has led some courts to consider this matter as one governed by, albeit not expressly settled in, the Convention. Other courts consider this matter one that is not governed at all by the Convention. This difference in qualifying this matter has led to diverging solutions as to the applicable interest rate, since under the Convention, the matters governed by, but not expressly settled in, the Convention have to be dealt with differently than those falling outside the Convention's scope.[143]

8.1.2 *Gap intra legem*

If, on the one hand, the issue of interest rate is not governed by the Convention at all, i.e., if a gap "*intra legem*" exists, it must be settled in conformity with the law applicable by virtue of the rules of private international law, without any recourse to the "general principles" of Article 7(2) CISG first.

Some courts consider the interest rate issue as one falling outside the Convention's scope and

therefore tend to apply directly applicable domestic law by virtue of private international law. For instance, in [15 January 1998 *Tribunale d'appello* [Appellate Court] Lugano], the Court ruled: "The rate of the interest is not governed by the Convention, and must therefore be determined by internal law resulting from the application of the pertinent rules of conflict of laws (Honsell, op. cit., n. 10 to Art. 84 CISG), [...]"[144] In [July 1999 *International Court of Arbitration*, Case 9448], the court stated: "According to art. 78 CISG, 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. The rate to be applied is, however, a matter, in the first place, for the domestic law (Farnsworth, in Bianca-Bonell, Commentary an the International Sales Law, The 1980 Vienna Sales Convention, page 570). Therefore, the Swiss Code of Obligations (CO) is applicable, [...]"[145] Also, it is further stated in [29 December 1999 *Tribunale* [District Court] Pavia] as:[146]

> "As far as interest on the sums not paid, it will be observed that the United Nations Convention provides only a general right to interest, without specifying which rate is to be applied. In light of the fact that the drafters of the Convention have intentionally left the problem of the applicable rate unresolved, as one evinces from the *travaux préparatoires*, it cannot be maintained that this is an issue dealing with one of the areas which, by virtue of Article 7(2) of the Convention, should be governed by the general principles upon which the Convention is based. Instead, it is a question not at all addressed by the Convention and which hence is to be resolved in light of the applicable law, that is to say, in light of [internal] Italian law – such being the law of the seller, which Art. 3(1) of the Hague Convention of 1955 beckons to. This solution corresponds besides to that adopted by foreign case law (see, for example, Pretore della giurisdizione Locarno-Campagna 16 December 1991 [of Switzerland] [<http://cisgw3.law.pace.edu/cases/911216s1.html>]) which, although not binding, is however to be taken into consideration as required by Art. 7(1) of the CISG. Consequently, interest is determined according to the measure of the legal rate in force in Italy."

8.1.3 *Gap praeter legem*

If, on the other hand, a gap *praeter legem* exists, i.e., interest rate is considered to be an issue that is governed by, albeit not expressly settled in, the Convention, then Article 7(2) CISG applies. Before determining the law applicable to the issue of interest rates by invoking the rules of private international law of the forum, Article 7(2) CISG requires the decision-maker to determine whether there are any general principles in the Convention providing guidance to the issue in question. Only if such principles cannot be found, the private international law of the forum may be invoked.[147]

There are decisions that hold that, under the Convention, this interest rate constitutes a gap *praeter legem*; and therefore Art. 7(2) applies. For instance, after indicating the divergent views concerning how to fill this gap, the court in [15 June 1994 Vienna Arbitration award SCH-4366] ruled:

> "[...] This second view [there is a true gap in the Convention within the meaning of Article

> 7(2) so that the applicable interest rate should possibly be determined autonomously in conformity with the general principles underlying the Convention] is to be preferred, not least because the immediate recourse to a particular domestic law may lead to results which are incompatible with the principle embodied in Art. 78 of the CISG, at least in the cases where the law in question expressly prohibits the payment of interest. [...]"[148]

However, some courts display the intent to follow Article 7 but do not pay sufficient attention to the general principles. They simply state that the Convention has no general principles that are applicable to the interest rate problem. For instance, in [1994 *International Court of Arbitration*, Case 7565], although the court also noted that, on the one hand: "According to Article 7.2 of the Convention, questions not expressly settled by it shall be determined either in accordance with the general principles on which it is grounded or by the law which shall be elected according to private international law." On the other hand, the same court held that: "*As the general principles do not settle the matter* [...] and the parties have referred to the laws of Switzerland, it seems justified to refer to Article 73 of the Swiss Code of obligations whereby, in the absence of a determination of the rate of interest by agreement or law or usages, that rate shall be 5% per annum."[149]

Indeed, most courts considered, on the one hand, that interest rate is a gap covered under CISG Art. 7(2); on the other hand, that it is an issue to be determined by the law applicable by virtue of private international law instead of under so-called general principles. For instance, the court in [20 December 1994 *Tribunal Cantonal* [Appellate Court] Valais] considered the interest rate to be a question governed, but not expressly settled, by CISG (Art. 7(2) CISG), but directly, without first reference to general principles underlying the CISG, applied the statutory rate of the State whose law would have been the governing law of the contract in the absence of CISG (Italy).[150] In [21 March 1996 Hamburg Arbitration award], the Court held: "The claim to interest arises *ex* Art. 78 CISG. As to the interest rate, national law applies subsidiarily, in the absence of a more specific regulation in the CISG, according to its Art 7(2); here, it is the legal rate for bilateral commercial transactions."[151]

Similarly, in [29 June 1998 *Tribunal Cantonal* [Appellate Court] Valais], the Court observed that, pursuant to Art. 7(2) CISG, the interest rate should be determined in accordance with the law otherwise applicable to the contract. As the Swiss rules of private international law led to the application of Italian law, the Court applied the Italian statutory interest rate.[152] In [25 May 1999 *Landgericht* [District Court] Berlin], it is also held: "[...] Pursuant to Art. 7(2) alt. 2 CISG, the amount of interest payable according to the CISG is based upon the law applicable by virtue of the rules of private international law (Schlechtriem/Herber, Art. 7 CISG, n. 39). [...]"[153]

In any event, in the case of gap *praeter legem*, as it was summarized in [20 July 1995 *Landgericht* [District Court] Aachen]:[154]

> "It has been argued that the interest rate must be determined by having recourse to the general principles of the CISG in order to achieve an internationally uniform regulation (*cf.*

> Eberstein/Bacher in von Caemmerer / Schlechtriem, Kommentar zum einheitlichen UN-Kaufrecht, 2nd ed., Art. 78, Annotation 21, Footnote 30). Against this, it has been argued that a uniform solution could not be achieved at the conferences for the drafting of the CISG, as the different opinions about the interest obligation were irreconcilable (*cf. op. cit.*, Annotation 2).
>
> "Preferable is the opinion that the interest rate is to be taken from the applicable national law supplementing the CISG, which in turn is to be determined in accordance with the conflict of laws rules of the forum State (*cf. op. cit.*, Annotation 21, Footnote 31). [...]"

8.1.4 *Summary*

In international legal writings and case law to date it is disputed whether the question of interest rate is outside the scope of the Convention or whether there is a true gap in the Convention within the meaning of Article 7(2). In other words, it is questionable whether the lack of a specific interest rate in Article 78 constitutes a gap "*intra legem*" or a gap "*praeter legem*". Nevertheless, from the CISG decisions´ point of view, this question might not have great relevance. Particularly, it is noted that there is not one governing principle governing the rate of interest or the law applicable to the rate of interest. Consequently, even starting with the Article 7(2) approach, courts ultimately have to rely on the applicable domestic law by virtue of general private international law approach.

Indeed, the most significant difference, is not whether the issue at hand is a gap "*intra legem*" or a gap "*praeter legem*", rather, the one as noted in [5 November 2002 *Handelsgericht* [Commercial Court] des Kantons Aargau]:

> "[...] The amount of interest is not laid down in the UN Sales Law. It is controversial, whether one must aim for autonomous contract gap-filling and a uniform solution or if recourse must be made to national law. In regard to national law, the mainly recommended recourse, it is again uncertain how the determination of that law within the scope of the conflicts of law is supposed to take place (Schlechtriem/Bacher, *op. cit.*, note 27 and 32 to art. 78 CISG). [...]"[155]

8.2 Determined by the Applicable Domestic Law

8.2.1 *Overview*

A vast majority of national courts and arbitral tribunals have thus far concluded that the rate of interest is to be calculated on the basis of the applicable domestic law. To date, 73 of the 148 cases involving CISG interest issue collected and published on the UNILEX Database follow this approach.[156] In this context, the recourse, in filling the interest rate gap, is frequently made to "the law governing the contract in the absence of CISG", or with further guidance to "the law applicable by virtue of the rules of private international law".

As indicated above, some courts have expressly referred to Article 7(2) CISG but concluding

that there is no uniform principle stated in the Convention regarding the amount of interest; and therefore resorted to the applicable law by virtue of rules of conflicts of law. Nevertheless, these courts are of the opinion that the issue of interest rates is governed by the Convention in the first place and, hence, a gap "*praeter legem*" exists. Other courts, however, consider the issue of interest rates to be a matter which should be, in the first place, calculated according to the domestic law. In so doing, they apply the forum´s rule of private international law to determine the law applicable in absence of the CISG without reference to Article 7(2). Thus, these decisions seem to treat the question at hand as a matter not governed by the Convention at all, i.e., as a gap *intra legem*.

However, it is not always clear whether most decisions treat the issue as a gap "*intra legem*" or a gap "*praeter legem*". Nevertheless, it is noted: "In either case, if one has found that the appropriate interest rate should be determined by private international law rules, one must further choose a specific connecting factor, i.e., decide whether the issue of interest rates should follow the general law applicable to the sales contract or if a specific choice of law rule applies. This, however, is a question that may be only solved by national law since it concerns the non-uniform rules of the forum s private international law."[157]

This is confirmed by the case law. From some CISG decisions´ point of view, this question at hand might not have great relevance. In either case, the ultimate recourse is frequently made to the applicable domestic law by virtue of rules of conflict of law. In this context, however, no special connecting points seem to have developed for the entitlement to interest.[158]

8.2.2 *Recourse to the law otherwise applicable by virtue of private international law*

The primary method which courts and literature use to arrive at an applicable law focuses on the law hypothetically applying to the contract in question if the CISG did not exist.[159]

As demonstrated by the case law, lots of courts held that the rate of interest be determined by the law governing the contract in the absence of CISG. For instance, in [16 December 1991 *Pretore della giurisdizione* [District Court] Locarno], it is held that "the interest rate to be applied is the rate prescribed by the law which would be applicable if the Vienna Convention were not applied."[160] In [6 October 1995 Amtsgericht Kehl 3 C 925/93], absent an express provision in CISG, the Court held that the interest rate was to be determined in accordance with the law otherwise applicable to the contract. In determining this the Court had first to establish whether there was a valid choice of law clause in the contract.[161] Similarly, in [12 February 1996 *Tribunale d'appello* [Appellate Court] Lugano], the court held:

> "The CISG is silent on the issue of default interest, which results in the application of the law that would otherwise apply absent the Convention (Weber, *id.*). In the present case, since the parties did not choose the applicable law, the connection criterion must be applied, which leads to the application of the law of the seller (article 117, cpv. lit a LDIP), that is, the Italian law."[162]

As to the law otherwise governing the contract in the absence of the CISG, it is above all determined by the parties with a valid choice of law clause agreed in the contract; and where they did not choose the applicable law, however, the connection criterion must be applied. In other words, as indicated in many cases, it is a question that may be only solved by virtue of rules of the forum´s private international law, which usually leads to the application of relevant domestic substantive law.

For instance, in [26 September 1990 *Landgericht* [District Court] Hamburg], the court ruled that "because the actually owed interest rate has not expressly been regulated within the CISG (v. Caemmerer/Schlechtriem/Enderlein, loc. cit., Art. 78, Note 2), so that the interest rate has to be determined in accordance with the relevant national law, being applicable pursuant to the general principles of conflicts of laws (see Art. 7(2) Alt. 2 CISG; v. Caemmerer/Schlechtriem/Enderlein, Art. 78, Note 3; Bianca/Bonell, loc. cit., Art. 78, Note 2.1)."[163] Similarly, in [24 April 1997 *Oberlandesgericht* [Appellate Court] Düsseldorf], the Court ruled:

> "The UN Sales Convention, however, does not regulate the amount of the interest rate. It depends on the relevant national law which is to be determined according to the general conflict-of-laws rules (cf. OLG Düsseldorf (Senat) NJW RR 1994, 506, 507; OLG Frankfurt/Main NJW 1994, 1013, 1014; von Caemmerer/ Schlechtriem/Eberstein/Bacher, loc. Cit., Art. 78 CISG, No. 21 with further citations; Herber/Czerwenka, loc. cit., Art. 78 CISG, No. 6)."[164]

In some decisions, it is deemed as an approach in conformity with the "prevailing opinion" or even so-called "unanimous opinion" as such. For instance, in [5 April 1995 *Landgericht* [District Court] Landshut], the court observed:

> "[...] The rate of interest is not regulated by Art. 84 CISG. Also, in Art. 78 CISG no mention is made of the rate of interest. According to *the prevailing opinion*, the rate of interest within the scope of Art. 78 CISG is governed by the applicable national law, which is determined by the rules of private international law. This notion is also applicable to Art. 84 CISG."[165]

Furthermore, it is held in [5 November 1997 *Oberlandesgericht* [Appellate Court] Hamm]:

> "The CISG does not fix the applicable interest rate. According to *unanimous opinion* and the case law of this Court (*cf.* IPRax [IPRax = *Praxis des internationalen Privat- und Verfahrensrecht* [German legal periodical] 1996, 197], the interest rate is to be settled in conformity with the law applicable by virtue of the rules of private international law. [...]"[166]

Similarly, in a Switzerland case [21 October 1999 *Kantonsgericht* [District Court] Zug], it is also stated:

> "It is a *uniform opinion* that the interest rate is governed by the law of the country which the

rules of conflict of laws refer to as law of the contract (Magnus, in: Honsell, op. cit., at n.5, 9 and 12 on Art. 78 CISG)."[167]

8.2.3 *Summary*

Overwhelmingly, the vast majority of national courts and tribunals, especially those of Germany and Switzerland, have determined the amount of interest by reference to the law otherwise governing, by virtue of rules of conflict law of the forum, the contract in the absence of the CISG. There may be no sound basis, as long as this issue has not been settled either by the Convention or parties' agreement, to call, as some German and Swiss courts did, a "unanimous opinion" or "uniform opinion" on how to calculate interest under the Convention. Nonetheless, an established or prevailing opinion exists. Following such a prevailing opinion, the interest rate is determined by the applicable national law.

German courts until now have almost always determined the amount of interest by reference to the national law applicable according to the rules of conflict of laws.[168] To date, 33 of the 73 cases collected and published on the UNILEX Database, where interest rate is determined by the domestic law governing the contract in the absence of the CISG, are decided before German courts.[169] In this respect, it is noted: "According to German private international law, the applicable law is initially determined by choice of the parties. If there is neither express nor implied choice, the applicable law is ascertained according to the law of the country with which the contract is most closely connected. Such connections primarily are found in the country of residence or place of business of the party carrying the characteristic obligation, this being, in the case of a sale, the seller. The question of rate of interest is considered to be part of the contract itself, thus it must be settled according to the same law as that of the contract itself."[170]

Another country, from which we have a great number of the decisions determining the amount of interest by reference to the national law applicable by virtue of the rules of conflict of law, is Switzerland. Up until now, 25 cases of the 73 cases collected and published on the UNILEX Database following this approach are decided in Switzerland.[171] In this respect, it is noted in [20 December 1994 *Tribunal Cantonal* [Appellate Court]]: according to art. 117 LPIL [LPIL = Swiss Federal Law on Private International Law], in case of a failure to choose the governing law, the contract is governed by the law of the State to which the contract is mostly related (art. 117(1) LPIL); the contract is deemed to be related to the State in which the party which has to fulfill the principal obligation under the contract has its place of residence, or – if the contract forms part of professional or commercial activities – its place of business (art. 117(2) LPIL); in contracts for the transfer of property, the duty of the owner is crucial for the determination of the governing law (art. 117(3) LPIL). According to art. 118 LPIL, sales of goods are governed by the Convention on the Law Applicable to International Sales of Goods, adopted in The Hague on 15 June 1955. Rules of conflict of laws stated in that Convention are applicable even if the law governing the contract is the law of a non-Contracting State. Art. 3(1) of the 1955 Hague Convention states that sales of goods are governed by the law of the State where the seller has its place of residence at the moment of the receipt of the offer, unless otherwise agreed by the parties.[172]

As evidenced by the decisions made by the vast majority of national courts and tribunals, there is a strong tendency, at least among German and Swiss courts, to fix the applicable law according to the private international law of the court.[173] This results in, on the other hand, different outcomes based on different regulations in non-unified private international law.[174] Needless to say, the CISG was adopted by the relevant countries precisely to prevent the application of national law.[175] Thus, by applying national law to fill the interest rate gap, national courts and arbitral tribunals may contravene the intent of the Convention and further promote discontinuity.[176] Nevertheless, it is believed: "While this might be considered deplorable, in no respect are these differences a violation of the principle of uniformity in application of the Convention. The lack of uniformity actually conforms to the standards of the Convention. Uniformity in the outcome of the case would obviously be preferable. This deficiency in the Convention must be accepted. This is preferable to rewriting the Convention without benefit of a new conference and a renewed Convention."[177]

In all events, in the vast majority of cases, the rate of interest is fixed according to the national law applicable by virtue of private international law of the court.[178] Despite some initial doubts as to which domestic law should be applied, currently there seems to be a tendency to apply the law which would be applicable to the sales contract if it were not subject to the Vienna Sales Convention.[179] However, while the question is open for further discussion, it would be shown below that there indeed are other justifications for deviating from the prevailing opinion. Up until recently, there have been arbitral awards and court decisions from more than one jurisdiction *not* applying this approach.[180]

8.3 Determined by Domestic Law of the Interest-creditor

8.3.1 *Overview*

As indicated above, some courts applied the domestic law of a specific country by virtue of the rules of private international law of the forum. On the other hand, as to be demonstrated in this section, others applied the domestic law of the creditor without it being necessarily the law made applicable by the rules of private international law.

Some courts and tribunals have held that the issue of interest rates is governed by the law of the interest-creditor's place of business. This approach is similar to the one claiming that interest is a form of damages.[181] In respect of this approach, the ruling made by the court in [7 May 1993 *Richteramt* [District Court] Laufen] deserves significant attention:[182]

> "[...] Following Schlechtriem/Eberstein (Art. 78, para. 3), the law determined by the conflict of laws provisions shall be applicable, whereas following a dissenting and significant opinion, the rate of interest should be determined by the law of the interest-creditor (*cf.* the references in Schlechtriem/Eberstein, Art. 78, para. 9). However, *this controversy is only of significance when the seller is in arrears with his obligation to pay the price, e.g., with the liability for damages for defective goods under Art. 74 CISG et seq.; here, applying the conflict of laws provisions, the rate of interest is determined by the statute of the seller, whereas the*

> *rate of interest is determined by the statute of the buyer when applying the law of the interest-creditor.* In cases where, as brought forward by the [seller], the buyer is in arrears with his obligation to pay the price, which should be the majority of all cases, the rate of interest is – under both approaches – to be determined by the law of the seller, which in the case at issue is Finnish law. [...]"

Another point bearing significance is submitted by *Thiele* in commentating on a German case:

> "Moreover, the courts reference to the creditor s place of business sometimes may be misleading. In an action for recovery of the purchase price, the German Landgericht Stuttgart, for example, stated that the determination of the appropriate interest rate should be governed by the law of the *creditor s* place of business. At the same time, however, the court made a reference to Article 28(2) Einführungsgesetz zum Bürgerlichen Gesetzbuch [EGBGB]. As a part of German private international law, this provision determines which law is applicable to contracts in general. Absent a contractual agreement, Article 28(2) EGBGB requires the application of the *seller s* place of business. *Since in actions for the purchase price the law of the creditor s and the seller s place of business are identical, it is not always clear whether courts that purport to apply the law of the creditor s place of business, do not actually apply the law applicable to the contract in general.*"[183]

8.3.2 *General recourse to the law of the creditor's place of business*

Despite this approach in question is only of significance when the *seller* is in arrears with his obligation to pay damages or refund the paid price. It is clear that the courts have occasionally applied the law of the creditor.

For instance, in [16 September 1991 *Landtgericht* [District Court] Frankfurt], the court held that the rate was the statutory rate of the seller's place of business:

> "The level of the interest rate has not been set forth in Art. 78 CISG. Consequently, the relevant obligor is to pay the interest rate which is due and payable pursuant to the relevant national substantive law of the creditor (see LG Stuttgart, op. cit., p. 985 providing further literature references; Asam/Kindler, Indemnification of any interest and/or money devaluation damages under the CISG, RIW 1989, p. 842; Eberstein, in: Schlechtriem, Art. 78 No. 11 CISG)."[184]

In [1992 *International Court of Arbitration*, Case 7197], as CISG does not expressly specify the rate of interest payable, the court referred to Austrian law as the law of the creditor's place of business.[185] In [24 January 1994 *Kammergericht* [Appellate Court] Berlin], the Court also granted the assignee the right to interest, at the interest rate of the creditor's country, Italy (Art. 78 CISG).[186] In [9 December 1994 *Bezirksgericht* [District Court] Arbon], the Court held that interest was payable on the sums due to the claimant. As CISG does not determine the interest rate (Art. 78 CISG), the Court stated that it was to be determined in accordance with the domestic law of the creditor's country (Austria).[187]

Most often, the law of the creditor's country is that of the seller's place of business. Thus, in [24 March 1992 *Fovárosi Bíróság* [Metropolitan Court]], the seller was awarded the purchase price plus interest at the rate fixed by the law of the country of the seller (creditor).[188] In [21 October 1994 *Amtsgericht* [Lower Court] Riedlingen], the Court held that the seller was entitled to interest (Art. 78 CISG). Since CISG does not determine the rate of interest, the Court stated that the rate was to be determined in accordance with the domestic law applicable in the seller's country.[189] Similarly, in [25 October 1994 *Landgericht* [District Court] Darmstadt], the court stated that the rate was to be determined in accordance with the domestic law applicable in the seller's country (Argentina).[190]

On the other hand, in case of the refunding of the paid price under CISG Art. 84, the interest-creditor is the buyer while the seller is the interest-debtor. Therefore, in [15 April 1994 Arbitration award 1/1993], the Tribunal, following the creditor-approach, decided in favor of the buyer [interest-creditor] and ordered the seller to refund the price paid for the goods and to pay interest on this sum at the rate established by the law of the buyer's country.[191] In this respect, it is to be noted that in [08 February 1995 *Oberlandesgericht München*], the Court determined that according to Art. 84 CISG the buyer (interest-creditor) was also entitled to interest on the sum to be refunded. The Court, however, in interpreting Art. 84 CISG, applied the statutory interest rate of the (interest-debtor) seller's place of business (Germany).[192] Also, in [5 February 1997 *Handelsgericht* [Commercial Court] Zürich], the court awarded the buyer the restitution of the advance payment plus interest (Art. 78 CISG). However, as to the applicable rate of interest, the court applied the interest rate of the *sellers' place of business*, reasoning that this is the place in which the sellers usually invest their money.[193] Indeed, the latter two courts followed a debtor-approach, which is to be given more details *infra.* 8.4.

8.3.3 *Statutory rate vs. bank lending rate of interest*

Among those decisions following the creditor-approach, there are some referring to the statutory rate of interest in accordance with the domestic law of the creditor's State. For instance, in [24 April 1990 *Amtsgericht* [Lower Court] Oldenburg], the court held that the seller was entitled to interest accruing from the date when payment was due (Arts. 59 and 78 CISG) at the statutory rate of interest in force in the seller's country (Italy).[194] Similarly, in [18 January 1994 *Oberlandesgericht* [Appellate Court] Frankfurt], the court granted the seller the right to payment of the balance of the price as well as interest at the rate of 10% (statutory rate of the country of the creditor-seller).[195]

On the other hand, some other decisions have referred to bank lending rate, average or actual, of interest in accordance with the domestic law of the creditor's State. Several courts have awarded interest at the average bank lending rate of creditor's State. For instance, in [3 April 1990 *Landgericht* [District Court] Aachen], the court awarded interest at a rate of 12% for the period of delayed payment as the average bank lending rate at seller's place of business (Arts. 61 (1)(b), 74 and 78 CISG).[196] In [8 November 1995 *Rechtbank van Koophandel* [District Court] Hasselt], as CISG does not determine the interest rate, the Court applied the average bank

lending rate in the creditor's country (the seller's), because the creditor would have received interest on the sums due in that country had the debtor paid on time.[197] Similarly, in [9 October 1996 *Rechtbank van Koophandel* [District Court] Hasselt], the Court applied the average bank lending rate in the creditor's country (the seller's), because the creditor would have received interest on the sums due in that country had the debtor paid on time.[198]

In respect of the bank lending rate awarded, it is to be noted that some Russian courts have calculated interest, according to Article 395 of the Civil Code of the Russian Federation in conjunction with CISG Art. 78, at the actual credit rate of interest offered by banking institutions at the place of location of the creditor. For instance, in [28 March 1997 Arbitration award 38/1996], the court held: "[...] Since the interest rate is not set forth in the Convention and since it cannot be determined in conformity with general principles pursuant to Article 7(2) CISG, the provisions of the Russian laws shall apply. Under Article 395 of the Civil Code of the Russian Federation, in case of delay of performance of money obligations, annual interest shall be recovered in the amount of the bank discount interest rate at the place of creditor's location. The [seller]'s claim of 12% annual interest does not exceed the interest rate used for short-term hard currency loans in Russia."[199] In another case decided in Russia [22 October 1998 Arbitration award 196/1997], it is similarly held: "[...] The interest, though not specified in the CISG, is to be calculated in conformity with subsidiary applicable law, that is the Russian Federation Civil Code Article 395, which provides that the interest for the use by the [buyer] of the unlawfully kept money is to be calculated on the basis of the bank interest rate at the [seller]'s place of business. The Tribunal, thus, admits the Certificate of 21 November 1997, issued by the Cypriot Central Bank, presented by the [seller], which certifies that on the day of bringing the action before the Tribunal the interest rate amounted to 8%. The [buyer] did not contest this certificate."[200]

Also, in [27 July 1999 Arbitration award 302/1996], it is ruled: "The Tribunal granted the claim of the [buyer] to recover annual interest on the granted sum of lost profit at the LIBOR rate plus 2% per annum, on the basis of Article 78 CISG and Article 395 of the Russian Federation Civil Code that refers to the rate of bank loan at the place of creditor. The Tribunal found that the mentioned rate of interest accorded to the rate which prevailed in Switzerland (place of [buyer]'s (interest-creditor's) company) respectively. The Tribunal has also taken into account that [seller] raised no objections regarding the issue of rate of interest."[201] In [10 February 2000 Arbitration Award No. 340/1999], the tribunal stated: "[...] Considering that the CISG does not provide the rate of interest, the amount of interest should be calculated in accordance with the rules of subsidiary applicable Russian law. Under Article 395(1) of the Russian Federation Civil Code, the amount of interest for failure to perform a monetary obligation is calculated according to the actual credit rate of interest offered by banking institutions at the place of location of the creditor. From the calculation provided by [seller], it follows that he had calculated the interest in the amount of 22% per annum based on the reports of three banks. The Tribunal has granted the seller's claim as to recovery of the interest in the mentioned amount on the sums granted by the Tribunal in favor of the [seller] for the relevant periods of time."[202]

8.3.4 *Summary*

Some courts and tribunals have held that the issue of interest rates is governed by the law of the interest-creditor´s place of business, which finally refers to statutory rate or (commercially average or actual) bank lending rate. Data available on the UNILEX Database indicates that the creditor-approach is the secondly prevailing opinion in determining the rate, with 28 cases of the 148 cases involving CISG interest issue following this approach.[203] Yet in reality, sometimes the creditor-approach is not an application of the law of the creditor.[204] Some decisions listed above are clearly based on private international law which frequently leads to the law of the creditor's state.

Most possibly, it seems that national courts prefer to, in the absence of a rate fixed by agreement or referred otherwise in the domestic law, statutory rate. However, to the extent the creditor-approach is followed, it seems commercially persuasive to say that an average commercial interest rate should prevail over the statutory interest rate. *Thiele* makes pertinent remarks when generally examining the two rates as follows:[205]

> "Finally, this paper suggests that an average commercial interest rate should prevail over the statutory interest rate. First of all, statutory interest rates make no difference between home and foreign currency and, thus, may not reflect on a foreign currency´s inflation rate. Secondly, whereas statutory interest rates usually stay in force for a longer period of time, commercial interest rates are altered on a regular basis and, therefore, usually reflect the inflation rate. They are, thus, better suited to properly compensate the creditor. Usually, however, there are two different interest rates for borrowing and depositing money. Therefore, the question may be raised which of the two commercial rates should apply. In this context it is important to recall once again that the general principle underlying Article 78 is to compensate the creditor for its loss. Therefore, if the creditor was forced to borrow money from a bank, the prevailing commercial borrowing rate should apply. If, however, the creditor did not have to borrow money, it is nevertheless entitled to the interest it lost by not being able to invest the money owed to it. This interest is best reflected by the prevailing commercial deposit or savings rate."

8.4 Determined by Domestic Law of the Interest-debtor

This approach is similar to the one claiming that interest is meant to restitute benefits.[206] It is said in this respect: "A general principle which can be taken from CISG is that the law at the place of business of the debtor of interest should be applied. This is because it is the debtor who has the use of the money while he is in arrears to the seller. It has been suggested that the purpose of Article 78 is to deny the debtor these unjustified advantages. However, there is strong opposition to this approach. Its detractors argue that the purpose of CISG is not taking advantages from the debtor but allowing the creditor to recover his costs by demonstrating damages."[207]

While it is open for further discussion whether the purpose of Article 78 is intended to prevent undue enrichment on the debtor´s part, or on the other hand, to protect the creditor and

indemnify him or her for the loss incurring from the debtor´s withholding of the sum in dispute; there occasionally have been decisions referring to domestic law of debtor's State.[208] For instance, the two cases reviewed above ([08 February 1995 *Oberlandesgericht München*], [5 February 1997 *Handelsgericht* [Commercial Court] Zürich]) which involve the refunding obligation under CISG Art. 84 in effect follow the debtor-approach.[209] In [11 March 1996 *Tribunal Cantonal* [Appellate Court] Vaud [01 93 1061]], the court stated in pertinent part: "The only disputable obligation in the present case is that of the buyer which is established in Switzerland. It is appropriate to refer to the rate applied in the place of establishment of the debtor (Neumayer / Ming, op. cit., p. 514). [...]"[210] In [11 March 1996 *Tribunal Cantonal* [Appellate Court] Vaud [01 93 0661]], the court similarly held that the rate was to be determined in accordance with the domestic law of the buyer's country (Switzerland) as the obligation of the buyer was the only disputed performance in the case at hand.[211]

Also, in a case where a Belgian buyer and a French seller were involved [16 December 1996 *Rechtbank van koophandel* [District Court Kortrijk]], the Court awarded the seller payment of the price as well as interest under Art. 78 CISG. As CISG does not specify the rate of interest payable, the Court, considering the circumstances of the case, decided to award interest at the Belgian (debtor's) statutory rate.[212] And in [21 March 2003 *Landgericht Berlin*], the court, after mentioning that the question is controversial, decided to apply the statutory rate of the debtor's country (Germany):

> "The claim for payment of default interest ensues from Art. 78 CISG in connection with Sec. 288 BGB [BGB = *Bürgerliches Gesetzbuch* [German Civil Code]]. Art. 78 CISG does not state anything concerning the actual interest rate owed by the defaulting party. Opinions are widely divergent on this question, which interest rate shall be applicable. Under any circumstances, it is arguable to apply the law of the State in which the debtor has his place of permanent residence, domicile or establishment (von Caemmerer/Schlechtriem, Art. 78, Note 32)"[213]

However, in another case, this debtor-approach was criticized to be an isolated deviating opinion. In [18 January 1994 *Oberlandesgericht* [Appellate Court] Frankfurt], it is held as:[214]

> "[...] According to the *isolated deviating opinion* by Stoll (Festschrift für Ferid, 1988, 495, 509f.; similar: von Caemmerer-Leser, Article 84, Rn. 13 on the obligation to pay interest under CISG Article 84(1)), the legal rate [of interest] has to be determined by the domestic sales law of the debtor. Whether or not Stoll's opinion has to be followed did not have to be decided in the [previous] ruling of this court rendered on June 13, 1991, because in that case the [seller] at the very beginning limited her interest claim to 5%, a rate that is justified both under German and under French Law. In this case, however, the court has to decide according to the *prevailing legal opinion*. Since the amount of interest intentionally is not prescribed in the Convention, the answer can only be taken from the rules of international private law. Absent any point of reference, no principle can be derived from the Convention such as saying that the domicile of the debtor would be decisive, because the duty to pay interest was aimed at preventing the withholding of money from being

> advantageous to the debtor (Stoll as referred to above [Festschrift für Ferid, *supra*]) who still has the possibility to use or invest the funds as compared to payment. Furthermore, this argument is not persuasive, since it is not guaranteed that the domestic legal rate [of interest] fully compensates for (see § 352 HGB) the advantage of non-payment and any other calculation of interest would erase the dividing line [between interest and] damages. The practical disadvantage of eventually being obliged to investigate foreign law to calculate the interest has to be accepted because of the partial incompleteness of the Convention arising from unsettled disputes during the negotiation process (Herber/Czerwenka, Article 78, Rn. 1). Besides, disadvantage can be diminished by the availability of adequate charts (Piltz, § 5, Rn. 415)."

While the question is open for further discussion, it should be remembered that as different payment obligations may become due under any contract, this approach, which relates, to the payment in question rather than the underlying contract, appears preferable. Nevertheless, as the creditor-approach does, it also takes a decidedly one-sided approach to solving the problem, which is unlikely to attract a large following.[215]

8.5 Determined by Domestic Law of Other Places

It is to be noted that both the creditor-approach and the debtor-approach discussed above relate to a specific place. There are also other places which may operate as a connection point in calculating interest under Article 78 CISG.

One such approach is found in the only 2 of the 178 cases collected by the UNILEX Database, where the applicable rate was determined by domestic law of place of payment.[216] In [9 August 1995 *Arrondissementsrechtbank* [District Court] Almelo], the Court stated that the rate was to be determined according to the law of the country where the price was to be paid (in this case German law as the law of the country where the seller had its place of business) (Art. 57(1)(a) CISG).[217] In [1992 *International Court of Arbitration*, Case 7153], the Court also held that the interest rate was to be determined in accordance with the law governing in the place of payment. The court stated:[218]

> "Moreover, the rate of said interest is not provided for in the Convention, which is why we need to turn to the national law designated by the rule on conflict of laws. (Cf. Eberstein, in: v. Caemmerer/Schlechtriem, Commentary on the Uniform Law of Sales of the United Nations – CISG – 1990, Article 78, end of line 3.) In this case, the court of arbitration believed the applicable law to be Czech law, i.e., the law applicable at the place of payment.
>
> "It is true that the contract does not contain any provision as to the place of payment. In the absence of such a provision, Article 57(1) of the Convention nevertheless applies. The latter stipulates that the buyer is required to pay the price at the seller's place of business or, if the payment is to be made against the handing over of the goods, where said handing over takes place. [...]"

Another approach referring to a specific place is found in [1994 *International Court of Arbitration*, Case 7331], where the arbitral tribunal held that the seller was entitled to receive interest at the rate according to the law of the country in which the damage resulting from the delayed payment was suffered: in this case, the seller's country. The tribunal ruled:[219]

> "Regarding the precise rate of interest to be applied, there is no single internationally accepted rate of interest. This is reflected in the Vienna Convention, which only generally provides that parties are entitled to interest without specifying any particular rate of interest. It is, however, acknowledged in international law that where the parties are silent as to choice of law with respect to the payment of interest, the law of the State applies in which the damage resulting from the delayed payment is suffered. It is furthermore acknowledged in international law that such damage is suffered at the place of the creditor and in the creditor's market [citing ICC arbitration cases 2375 of 1975 and 5460 of 1987]. Therefore, this Tribunal shall apply the rate of interest effective for commercial matter in the country of the creditor, the [seller]."

However, differing interest rates in the relevant places (creditor's or debtor's place of business, place of payment or the place in which the damage resulting from the delayed payment is suffered) remain a problem. They might give rise to unjust enrichment or its opposite when one party has its place of business in a country with high inflation, even though the parties to a contract tend to avoid this by agreeing on a "hard" currency.[220] This concern seems to be well remedied by the following approach.

8.6 Determined by Law of Payment Currency

8.6.1 *Overview*

Other courts and legal scholars have suggested to refer to the law of the currency in which payment of the purchase price has to be made. It follows from the fact that interest rates are usually linked to the rate of inflation; and the "strong" currency is subject to much less inflation than the "weak" currency. In respect of this approach, *Thiele* makes the following remarks:[221]

> "However, even if one proceeds from the assumption that a creditor-focused approach is appropriate, one should take into account that interest rates are usually linked to the rate of inflation. Therefore, if the creditor is located in a country with a 'weak' currency, the interest rate in this country for the country´s currency usually is high. If the creditor is located in a country with a 'strong' currency, the interest rate in that country for that country´s currency is low. Accordingly, if the sum in question is to be paid in the creditor´s currency, the creditor´s law should apply because its interest rates compensate the creditor best for the delay of payment. If, however, the creditor is located in a country with a 'weak' currency and the payment currency is 'strong', the creditor is not harmed as much by the delay of payment as it would be when the payment currency was 'weak', especially when the creditor did not have to replace the sum in question by borrowing additional funds. This consequence results from the fact that the 'strong' currency is subject to much less inflation

than the 'weak' currency. To award the creditor in addition to the lesser inflation rate the high interest rate of its country for that country´s currency may result in overcompensation and, thus, may lead to unjust results. Accordingly, this paper suggests that in determining an appropriate interest rate under Article 78, one also should take the payment currency into account."

8.6.2 *Deemed as a commercially reasonable solution*

Indeed, some decisions have clearly referred, as a commercially reasonable solution, to the law of payment currency. An interesting particular is to be noted: 9 of the 10 cases collected by the UNILEX Database where it refers to interest rate currently used with respect to currency of account, were decided before arbitral tribunals.[222]

In particular, there are several ICC decisions following this approach. For instance, in [1992 *International Court of Arbitration, Case 7585*], where the contract price had to be paid in a currency other than that of the seller's place of business (German Marks), as to interest the sole arbitrator expressly rejected the view according to which the applicable rate should be the rate in force in the State whose law is the law governing the contract or the rate in force at the place of business of the creditor. In his opinion, the rate of interest is linked to a precise currency. The sole arbitrator stated as follows:[223]

"The question of the rate of interest is not solved in the Convention. The Diplomatic conference did not agree on this issue (See Official Records I p. 138; II p. 223-226, p. 388-392, 415-419, 429-430).

"Several solutions are conceivable:

- the rate in force in the state whose law is applicable;
- the rate in force in the place of business of the creditor;
- the rate in force in the place of procedure.

"The arbitrator shares another view. In his opinion the rate of interest is linked to a precise currency. It would be rather illogical to base interest for the delayed payment of a price agreed in strong currency on the legal rate in force at a place of business located in a country which has a high inflation figure and consequently, a high rate of interest.

"The same reasoning would lead to the exclusion of the law applicable to the contract, the lex fori, or that of the place of payment.

"In the present case, the parties agreed that the price had to be paid in German Marks. The first and the second down payments had been paid in DM. The same currency was used for the payment of the bank guarantee issued by Seller.

> "Clearly, the financial aspects of the sale are linked with the German Mark. The applicable rate of interest is therefore the German one. [...]"

This approach was followed in another ICC case [1993 *International Court of Arbitration, Case 6653*]. In this case at hand, the court finally held that as CISG does not determine the rate of interest, the applicable rate was to be the one currently used in international trade with respect to Eurodollars, the currency in which payment had to be made. The court stated there:

> "But then the Convention does not regulate the method of determination of the percentage of interest. The Arbitral Tribunal finds that in matters of international commerce, the percentage that must be retained is the one that corresponds to the use which the creditor could have made of the sum to be reimbursed. Consequently, it appears logical to retain a percentage currently applied between merchants and that conforms with the currency in which the settlement was made and in which the payment must be made. This solution, which is in the eyes of the Arbitral Tribunal *the most logical one from the economic point of view*, leads to retaining the percentage that operators of international commerce apply to settlements made in Eurodollar, i.e., the one-year percentage of LIBOR (London Inter-Bank Offered Rate), published every day in the Wall Street Journal."[224]

However, it is to be noted in [6 April 1995 *Cour d'appel* [Appellate Court] Paris], which involved an appeal against the above award of the Arbitral Tribunal of the ICC Case 6653/1993, the Appellate Court reversed that part of the arbitral award requiring the seller to pay interest at the LIBOR rate, on the grounds that the Convention is silent on the way in which the rate of interest is be determined, and that the decision to apply the LIBOR rate had been taken by the arbitrators without the parties being given the possibility to make their defense on that point, whereas the international trade usage invoked by the buyer does not provide rules to determine the applicable rate.[225] Nevertheless, the Appellate Court did not reverse the part of the arbitral award because of its fault in applying the law of the currency in calculating the interest.

Also, in [December 1996 *International Court of Arbitration, Case 8769*], the sole arbitrator decided to apply an interest rate that he deemed commercially reasonable, i.e., the interest rate of the currency in which damages had to be paid (Austrian schillings), and in support of his finding he referred with no further explanation to Art. 7.4.9 (2) of the UNIDROIT Principles: "Claimant is entitled to interest on the sums awarded pursuant to Art. 78 of the Vienna Convention. Art. 78 Vienna Convention does not specify a particular interest rate. The sole Arbitrator considers it appropriate to apply a commercially reasonable interest rate (see Art. 7.4.9. subs. 2 Unidroit Principles). The interest rate claimed is commercially reasonab[l]e for the award currency; Austrian schillings."[226] And in [September 1997 *International Court of Arbitration, Case 8962*], since the [seller] was entitled to payment in German currency [*Deutsch Mark*], the Arbitrator held that the [seller] was entitled to interest using the market rate for Deutsch Mark on the date of default.[227]

Similarly, in [September 1998 *International Court of Arbitration, Case 8908*], the court held:

> "The Vienna Convention lays down a general rule, in Article 78, that the liability for payment of a sum is subject to interest for late payment, but it does not lay down the criteria for calculating this interest. International case law presents a wide range of possibilities in this respect, but amongst the criteria adopted in various judgments, the more appropriate appears to be that of the rates generally applied in international trade for the contractual currency [...]. In concrete terms, since the contractual currency is the dollar and the parties are European, the applicable rate is the 3-month LIBOR on the dollar, increased by one percentage point, with effect from the due date not respected up until full payment has been made."[228]

Also, several domestic courts or tribunals have followed this approach. For instance, in a Hungary case [17 November 1995 Budapest Arbitration award Vb 94124], after noting that CISG does not specify the interest rate, the Court held that it would be improper to determine it according to the law otherwise applicable to the contract (Hungarian law, as agreed upon by the parties), in particular taking into account the different inflation figures in the two countries involved (Hungary and Austria). Since payment was to be made in Austrian Shillings, the Court disregarded the provisions of the Hungarian Civil Code fixing the interest rate at 20 % and granted interest at 5 % in accordance with the law of the State in whose currency payment was to be made.[229]

In a Belgium case [25 April 2001 *Rechtbank van Koophandel* [District Court] Veurne], the court held that "this interest rate is determined according to the law of the currency of payment (*cf.* H. Van Houtte, 'Het Weens Koopverdrag in het Belgish recht', T.B.H., 1998, p. 344 e.v., inz. No. 33, pp. 352-353)".[230] And in a Switzerland case [5 November 2002 *Handelsgericht* [Commercial Court] des Kantons Aargau], it is held:

> "[...] The doctrine convincingly postulates that to determine the relevant national law, it is the connection to the currency that is decisive for the primary claim. (Schlechtriem/Bacher, id., note 33 to Art. 78 CISG). Decisive in this connection is the rule of the amount of the interest on arrears that is reached by the concerned system of laws (Bacher, id., note 34 to Art. 78 CISG)."[231]

8.6.3 *Summary*

In any case, the approach referring to the law of payment currency seems to be based on that it would be improper to determine the interest rate according to the law of a State other than that of the currency of payment, in particular when this other State has a weak currency and a high inflation figure. And therefore some courts follow this approach as a commercially reasonable solution; it is even deemed sometimes *the most logical one from the economic point of view*.

The solution substantially corresponds to the one provided for in Art. 7.4.9 (2) of the UNIDROIT Principles, though this provision was not always expressly referred to by some courts. Indeed, as to be further demonstrated in next section, there still exist some other decisions establishing the interest rate in conformity to private international law according to

Art. 7(2) CISG, and deeming the applied rate to be reasonable preferably taking into consideration the State of the currency.

In respect of this approach, it is also noted: "This solution can no longer lead to satisfactory solutions for a large amount of contracts, however, once the European currency union takes effect. The same is true for contracts already made specifying ECU as currency. In such instances, the currency no longer leads to the law of a single state, whose legal interest rate might then be applied."[232]

8.7 Unidentifiable Law under Compositive Deliberations

8.7.1 *Leave open creditor-focused or debtor-focused*

There may exist some cases where the rate determined by the law of the creditor´s State and that determined by the law of the debtor´s State are identical. In such cases, some decisions leave open the question of whether to apply the statutory rate of the country of the interest-creditor or of the country of the interest-debtor.

For instance, in [13 June 1991 *Oberlandesgericht* [Appellate Court] Frankfurt], the court referred to German private international law rules to ascertain the applicable law for the determination of the interest rate. The court left open whether the interest rate was the statutory rate in France (place of business of the seller/creditor) or that in Germany (place of residence of the buyer/debtor) as the rates of interest in both countries were the same (5%).[233]

8.7.2 *Leave open focusing on a special connection or the law otherwise applicable*

In some other cases, it may also happen both the creditor-approach and the approach by virtue of private international law lead to the application of the law of the same country.

For instance, in a case involving an Italian seller and a buyer of Italian nationality but with place of business in Germany [13 April 2000 *Amtsgericht* [Lower Court] Duisburg], the buyer was ordered to pay the price plus interest, at the rate determined by Italian domestic law (without having to decide whether this happened by virtue of a special connecting factor, that is the creditor's place of business, or by virtue of the law otherwise applicable to the contract).[234] It is held pertinently:

> "Both approaches [the creditor-approach and the approach by virtue of private international law] lead to the application of Italian national law, as the [seller] has his place of business in Italy and the rules of German private international law (Art. 28(2) EGBGB) lead to the application of Italian law."[235]

In this respect, it is said:

> "Since in actions for the purchase price the law of the creditor´s and the seller´s place of business are identical, it is not always clear whether courts that purport to apply the law of

the creditor´s place of business, do not actually apply the law applicable to the contract in general."[236]

8.7.3 *Preferably taking into consideration the State of the currency*

In those cases where which law was applied is not indicated, some decisions bear particular significance. In such decisions, the interest rate is determined in conformity to private international law according to Art. 7(2) CISG, and deemed to be commercially reasonable preferably taking into consideration the State of the currency. In respect of this approach, the details were given in [5 December 1995 Budapest Arbitration award Vb 94131]:[237]

"CISG Art. 78 is silent on the amount of interest rate (see Loewe, p. 95). It is accepted as a problem that it is neither logical nor fair to apply rules of one State on a sum that is expressed in the currency of another State if the currency of one of the States is stable or the influence of inflation is minor and the currency of the other State continuously diminishes in value. In Austria, the inflation rate in 1994 and 1995 was on the average 3%, in Hungary 20%. Commenting on an award of the Court of International Arbitration of the Austrian Federal Economic Chamber in Vienna, Schlechtriem, in Recht der Internationalen Wirtschaft 1995 pp. 593/94, proposed three ways of establishing the interest rate:

(1) via the application of the lex contractus;
(2) via the autonomous establishment of the interest rate by the Court or Arbitration Tribunal through comparison of criteria for different bank rates;
(3) in conformity to private international law according to Art. 7(2) CISG, preferably taking into consideration the State of the currency.

"*Schlechtriem* advocates the last solution; the arbitrator agrees. Therefore, the interest rate is to be established according to Austrian law; according to § 352 para.1 of the Commercial Code, the rate is 5% for bilateral commercial activities. [...]"

Similar ruling is also found in several other cases. For instance, in [31 August 1989 *Landgericht* [District Court] Stuttgart], the court held that the rate was to be determined in accordance with the domestic law of the seller's country, as the country in which the seller is affected by the delayed payment, all the more so as payment was to be made in the currency of the seller's country. The court stated:

"The CISG does not fix the rate of interest. This is a controversial subject. It is advisable to fall back on the national law of the creditor because the consequences of the debtor's nonfulfillment of his payment obligation take effect there and payment was due in Italian currency. Therefore, the debtor must carry the risk of paying the monetary debt in the foreign currency according to the rate of interest there. (References: Stoll in Schlechtriem, Einheitliches Kaufrecht und nationales Obligationenrecht, 1987, §§ 279/280, 291; Schlechtriem Einheitliches UN-Kaufrecht, 1981, §§ 93/94)."[238]

Similarly, in [30 December 1993 *Arrondissementsrechtbank* [District Court] Arnhem], the Court held that it was reasonable to apply German law in order to determine the rate of interest since the price was to be paid in German currency and the law applicable to the contract in the absence of CISG was German law.[239] In [October 1996 *International Court of Arbitration*, Case 8740], as the interest rate of 9 percent per annum was not disputed by either party and determined to be reasonable by the Tribunal based on the currency in question, this rate was accepted by the Tribunal.[240] In [1997 *International Court of Arbitration*, Case 8611], the sole arbitrator applied the German statutory interest rate, observing that German law was the law otherwise applicable to the contract and at the same time the law of the country in whose currency payment was to be made. This arbitrator stated:

> "[...] Because Art. 78 CISG does not, for obvious reasons, define the interest rate, the law applicable to this matter, in certain circumstances the monetary law, comes into force. Both are part of German law which, in Art. 352 of the Commercial Code concerning trade transactions, fixes the interest rate at 5%."[241]

This approach is further supported in two recent cases. In [10 October 2001 *Oberlandesgericht* [Appellate Court] Rostock], since Art. 78 CISG does not determine the interest rate, the Court held that German domestic law was applicable, either as the law otherwise governing the contract, or as the law of the currency of the purchase price.[242] And in [25 September 2002 *Oberlandesgericht* [Appellate Court] Rostock], the Court granted the seller interest (Art. 78 CISG) at the rate determined by German law, either because it was the law otherwise applicable to the contract, or because it was the law of the State in which currency the price had to be paid. It is stated:

> "[...] Since Art. 78 CISG does not provide for an interest rate, the rate needs to be determined by the national law which finds supplementary application or by the interest level of the country in whose currency the price is to be paid (cf. v.Caemmerer/Schlechtriem/Bacher, *op. cit.*, Art. 78 n. 27, 33); either way, this leads to the application of German law in the present case."[243]

8.7.4 *Summary*

Thus, there often exist cases where different approaches discussed above lead to an identical rate or the application of the law of the same country. Especially, in some decisions, the interest rate is determined in conformity to private international law, and deemed to be commercially reasonable preferably taking into consideration the State of the currency. In any case, the rules of conflict law, which often finally lead to the application of the substantive law (referring to statutory rate or commercial bank lending rate) of a specific country, undoubtedly play a predominant role. However, generally, courts rarely state the reasons they apply the law they choose to apply.

Nevertheless, on the grounds that the recourse to domestic law would lead to results contrary

to those promoted by the Convention, several decisions have sought a solution aiming at uniformity, one of the general principles on which the Convention is based. As is to be discussed below.

8.8 Approaches Aiming at Uniformity

8.8.1 *Recourse to general principles underlying CISG: full compensation*

Several decisions have sought a solution on the basis of general principles on which the Convention is based. However, the Convention does not provide a list of these principles, nor does it indicate where any are to be found.

In this respect it is noted:

> "In search of a uniform solution to the issue in question, some authors have suggested that one of the general principles of the Convention is the principle of full compensation. Therefore, these authors argue, an interest rate should be chosen that fully compensates the aggrieved party. Consequently, these authors propose to calculate the interest under Article 78 by means of the aggrieved party´s actual credit costs."[244]

However, except for the only case [29 December 1999 *Tribunale* [District Court] Pavia],[245] never was express reference made to Article 7(1) and its call for uniformity in any of the decisions reviewed.

At least two arbitral courts have applied what seem to be general CISG principles. Of the few arbitral court decisions applying general principles, only the Austrian arbitral court tries to explain why its approach is "preferable" to the private international law approach. In [15 June 1994 Vienna Arbitration award SCH-4366], the court stated in pertinent part:[246]

> "One of the general legal principles underlying the CISG is the requirement of 'full compensation' of the loss caused (cf. Art. 74 of the CISG). It follows that, in the event of failure to pay a monetary debt, the creditor, who as a business person must be expected to resort to bank credit as a result of the delay in payment, should therefore be entitled to interest at the rate commonly practiced in its country with respect to the currency of payment, i.e. the currency of the creditor's country or any other foreign currency agreed upon by the parties (cf. Art. 7.4.9 of the Principles of International Commercial Contracts prepared by the International Institute for the Unification of Private Law (UNIDROIT), on which see M.J. BONELL, An International Restatement of Contract Law. The UNIDROIT Principles of International Commercial Contracts, Transnational Juris Publications, Irvington - N.Y., 1994, 114-115). The information received from the leading Austrian banks is that the average 'prime borrowing rates' for US dollars and DM in Austria in the period in question were 4.5% and 8%, respectively. The interest due from the [buyer] should be calculated at those rates."

In [15 June 1994 Vienna Arbitration award SCH-4318], the court followed the same

reasoning:[247]

> "[...] One of the general principles underlying the CISG is that of 'full compensation' of the loss caused (cf. Art. 74 of the CISG). It follows that, in the event of failure by the debtor to pay a monetary debt, the creditor, who as a business person must be expected to resort to bank credit as a result of the delay in payment, should therefore be entitled to interest at the rate commonly practised in its country with respect to the currency of payment, i.e. the currency agreed upon by the parties (cf. Art. 7.4.9 of the Principles of International Commercial Contracts prepared by the International Institute of the Unification of Private Law (UNIDROIT), on which see M.J. BONELL, An International Restatement of Contract Law. The UNIDROIT Principles of International Commercial Contracts, Transnational Juris Publications, Irvington - N.Y., 1994, 114-115). The information received from the Deutsche Bundesbank is that the average 'prime borrowing rate' for US dollars in Germany in the period in question was 6.25%. The interest due from the [seller] should be calculated at that rate."

It is to be noted that the above seeming recourse to so-called general principle of "full compensation" indeed finally focuses on the law of payment currency, which substantially corresponds to the one provided for in Art. 7.4.9(2) of the UNIDROIT Principles. However, some authorities have criticized the theory of applying the general principle of "full compensation" from Article 74's damages provision within the context of interest since it confuses the distinct difference between interest and damages in the Convention. Nevertheless, the issue of whether or not interest is or is not part of damages would seem to be immaterial since the Convention explicitly states that a party is entitled to interest *without prejudice to any claim for damages*.[248]

8.8.2 *Recourse to UNIDROIT Principles or PECL*

In [1995 *International Court of Arbitration*, Case 8128], the Arbitral Tribunal applied the average bank short term lending rate to prime borrowers, being the solution adopted either by Art. 7.4.9 of the UNIDROIT Principles and by Art. 9:508 (*EX* Art. 4.507) of the PECL. The Arbitral Tribunal considered that such rules were applicable as they must be considered general principles on which CISG is based (Art. 7(2) CISG). In the case at hand, the London Inter Bank Offered Rate (LIBOR) plus 2% required by the buyer corresponded to the bank short term lending rate to enterprises. The buyer was therefore awarded interest at the required rate.[249]

This decision suggests that the interest gap should be answered by the general principles on which the CISG is based, as Article 7(2) stipulates. However, the principles from which the Tribunal derived its solution do not come from the text of the Convention. The Tribunal instead, referred to UNIDROIT Principle Article 7.4.9 and Article 9:508 (*EX* Art. 4.507) of the PECL as the general principles on which the CISG is based in setting the interest rate in accordance with the two principles at the average bank short-term lending rate. Such an approach, however, creates possible distortions in the application of the Convention by

resorting to the UNIDROIT Principles or the PECL as a component of the general principles referenced in Article 7(2) CISG. Thus, care should be taken when the Principles are embraced as general principles on which the CISG is based. Careful examination of UNIDROIT Principle 7.4.9 and PECL Art. 9:508, however shows that the wording of the texts remedies most concerns that were voiced at the Vienna Conference.[250]

8.8.3 *Recourse to international usages*

It is said that:

> "[B]efore one has recourse to a uniform conflict of laws rule, one should first decide whether any 'substantive' general principles may provide guidance as to the law applicable to interest rates under Article 78. One of those substantive general principles may be inferred from Article 9 CISG. Absent any special agreement as to usage, Article 9(2) states that a sales contract under CISG is subject to a 'usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned'. Therefore, if such a kind of usage applicable to the parties´ contract provides a specific interest rate, this usage should be used to supplement Article 78."[251]

Again, in the private international law context, it is said that usage prevails based on Article 9 of CISG, and that only in case of lack of established practices should applicable law be fixed according to private international law.[252] Indeed, some court decisions have invoked Article 9 of the Convention in order to solve the issue of the applicable rates of interest and determined the amount of interest payable according to the relevant trade usages. For instance, in [23 October 1991 *Juzgado Nacional de Primera Instancia en lo Comercial* [National Commercial Court of First Instance]], in order to ascertain whether the buyer was obliged to pay interest, the Court expressly referred to the international trade usages on the basis of Art. 9 CISG. In this respect the Court held that payment of interest, "at an internationally known and used rate such as the Prime Rate", constitutes "an accepted usage in international trade, even when it is not expressly agreed between the parties", then granting the seller recognizance for its credit for interest "at the Prime Rate ... as required by the creditor", without specifying which Prime Rate it was, and applying a rate of 10 %. In the same decision, the Court also entitled another US seller, on the same grounds, to recover interest at the Prime Rate plus a spread of 2%, as provided in the contract.[253]

In another Argentina case [6 October 1994 *Juzgado Nacional de Primera Instancia en lo Comercial* [National Commercial Court of First Instance]], with respect to interest accruing on the credit deriving from the performance of the second sales contract, the Court determined interest at the rate of 12%, as a rate generally recognized in international trade. In the Court reasoning, since CISG does not determine the interest rate, reference should be made to international trade usages "which are assigned by CISG itself a hierarchical position higher than the very same CISG provisions (Art. 9 CISG)".[254]

8.8.4 *Recourse to independent LIBOR*

There are also other authors prefer the general principles approach by relying on the London Inter-bank Offered Rate (LIBOR), sometimes even classifying it as a "usage" under Article 9(2) CISG. However, it is strongly said that the LIBOR, applying a totally independent approach, does not conform to CISG or to private international law. This is a far from acceptable approach, because it precludes worldwide application in small everyday business transactions.[255] In this respect, *Thiele* makes the following remarks:[256]

> "The general application of an interest rate that is used in specific international trade transactions, such as the LIBOR, is more problematic, however. As stated above, gaps in the Convention may be filled 'in conformity with the general principles on which it is based'. There is no indication, however, that the Convention was based on the external interest rates of the LIBOR. Furthermore, the LIBOR may not be introduced to the Convention by classifying it as a 'usage' under Article 9(2) CISG either. As stated above, 'usage' under Article 9(2) CISG requires that the usage is regularly observed by parties to contracts of the type involved *in the particular trade concerned*. The LIBOR, however, is the rate at which banks in the London market offer dollar deposits to each other. Whether parties to regular international sales transactions have reason to know of the LIBOR is therefore doubtful. To extend the application of the LIBOR to all international sales transactions, thus, would stretch the meaning of 'usage' under Article 9(2). Although the application of the LIBOR would have the advantage of guaranteeing uniformity to the issue in question, this solution, therefore, is not compatible with Article 7 CISG because there is no 'general principle' to this effect."

It is recalled that in [6 April 1995 *Cour d'appel* [Appellate Court] Paris], which involved an appeal against the award of the Arbitral Tribunal of the ICC Case 6653/1993, the appellate Court reversed that part of the arbitral award requiring the seller to pay interest at the LIBOR rate, on the grounds that the Convention is silent on the way in which the rate of interest is be determined, and that the decision to apply the LIBOR rate had been taken by the arbitrators without the parties being given the possibility to make their defense on that point, whereas the international trade usage invoked by the buyer does not provide rules to determine the applicable rate.[257]

Nevertheless, several cases reviewed above have clearly calculated the interest by referring to LIBOR.[258] Also, in [25 March 1998 Arbitration award 491/1997], the court stated in part: "Taking into account the fact that the annual rate of 5% which the [seller] claims does not exceed the LIBOR rate usually applicable in international trade relations, the Tribunal found it possible to grant the [seller]'s claim."[259]

8.9 Parties' Disposition

8.9.1 *Rate contractually agreed prevails*

Based on the principle of autonomy, the rate of interest agreed upon by the parties should be

applied. Undoubtedly, the lack of a specific interest rate under the CISG is to be compensated above all by agreement between the parties. A contract clause that clearly spells out the rate or the method for calculating the rate of interest should eliminate much of the uncertainty.

In [21 December 1992 *Zivilgericht* [Civil Court] Basel], the Court awarded the rate of interest to which the parties had contractually agreed upon, and stated pertinently:[260]

> "[...] The rate of interest is not provided for in the CISG. The CISG refers to the national law which the previously considered conflict of laws provisions refer to (cf. 2.). Under Para 352 of the Austrian Commercial Code, the rate of interest laid down amounts to 5%. However, *this rate of interest only applies if no rate of interest was agreed between the parties* (cf. Straube, Commentary to the Commercial Code, N 1 ff. to para. 352). The general terms and conditions of trade of the [seller] which are printed on the back of the carbon copies of the letters of confirmation of 24 February 1989 submitted by the [buyer] to the court (in English with a reference to the 'German Translation' on the 'preceding page') provide, in Number 4.6, for a rate of interest which exceeds the bank rate of the Austrian National Bank by at least 3.5% (Annex 4 to defendant's plea). According to the prevailing legal theory in Austria, the general terms and conditions of trade are also valid if reference is first made to these in a confirmation (cf. Code of Commercial Law, edited by Fritz Schoenherr and Gunter Nitsche, Vienna 1981, page 288, E. 1b). The defendant does not in general contend that the General Terms and Conditions of Trade of the [seller] had not become contractual content.
>
> That the bank rate of the Austrian National Bank 1989 was 5.5% or more according to the General Terms and Conditions of Trade of the [seller] can, given the interest situation in Austria, be regarded as established. Therefore, it is to be established that the 9% interest claimed by the [seller] was agreed upon. Thus the interest claim of the [seller] can also be awarded in full."

Similarly, in [6 October 1994 *Juzgado Nacional de Primera Instancia en lo Comercial* [National Commercial Court of First Instance]], with respect to interest accruing on the credit deriving from the performance of the first sales contract, the Court gave recognizance to the credit for interest at the rate of 24%, that is corresponding to the rate agreed upon by the parties. The Court held this on the ground that CISG, as envisaged by its Art. 6, *grants the parties with the widest possibility of determining the contents of their contract*.[261]

However, an interest rate fixed in standard terms is more problematic and deserves stricter scrutiny. For instance, while in [10 December 1997 Vienna Arbitration award S 2/97], the seller was further awarded interest on the sums due as damages (Arts. 78 and 74 CISG) at the rate fixed by the seller's standard terms;[262] in another case the fixed rate is not awarded. In [28 October 1999 *Oberlandesgericht* [Appellate Court] Braunschweig], it is held:[263]

> "This Court reverses the appealed decision only with respect to the damages resulting from a delay in payment. The [seller] may not rely on the interest clause contained in Section 7 of

his standard terms. This section of his standard terms determines delay damages as an abstract lump-sum without giving due consideration to the actual nature of the damages (*cf.* § 11 no. 5(b) AGBG). Following §§ 9 and 24 AGBG, such a varying clause is also forbidden in business transactions. The CISG does not diverge from these provisions. The decision of the domestic German law to regard such a clause as invalid comes in under Art. 4(a) CISG, Art. 31(1) EGBGB. Because the [seller] does not submit a concrete basis for determining the interest rate, the [buyer's] duty to pay interest is based on CISG Article 78, whereas the interest rate is to be determined by the law applicable by virtue of the rules of private international law, that is § 352 HGB (*cf.* Ensthaler/Achiles, after § 382, Art. 78 n.3). Consequently, the DM 3,887.40 interest determined by the Court of First Instance is to be replaced by only DM 2,556.10.

"The interest on the [seller's] entire claim again is based on CISG Art. 78, while the interest rate is determined by § 352 of the German Commercial Code (HGB). Following the above reasoning, the decision on interest also needs to be adjusted so that the [seller] receives an interest rate no higher than 5% per annum. [...]"

8.9.2 *Undisputed rate is usually awarded*

The second consequence following parties' disposition is that an undisputed rate is usually awarded. For instance, in [October 1996 *International Court of Arbitration*, Case 8740], as the interest rate of 9 percent per annum was not disputed by either party and determined to be reasonable by the Tribunal based on the currency in question, this rate was accepted by the Tribunal.[264]

Similarly, in [3 July 1997 *Bezirksgericht* [District Court] St. Gallen], the court awarded the seller the price indicated on the corrected invoice plus interest (Art. 78 CISG). With respect to the interest rate, although the court pointed out the two leading theories on the determination of the interest rate under CISG (interest rate to be determined according to the domestic law governing the contract in the absence of CISG or according to the domestic law of the debtor's place), it awarded the Swiss rate of interest, as that was the rate requested by the seller in the judicial complaint to which the buyer did not raise an objection during the court proceeding.[265]

Also, in [30 July 2001 *Landgericht* [District Court] Braunschweig], it is held: "Under Art. 78 CISG, [buyer] is entitled to interest. The rate of interest was not contested by [seller]."[266] In [11 April 2002 *Amtsgericht* [Lower Court] Viechtach], it is similarly held: "Since the [buyer] did not dispute the interest rate submitted by the [seller], the Court grants the requested rate of 12%."[267]

8.9.3 *Lower rate requested is certainly awarded*

In some cases, despite a statutory rate would have been applied by virtue of private international law, the court awards an inferior rate asked in the legal request of the entitled party.

For instance, in [16 December 1991 *Pretore della giurisdizione* [District Court] Locarno], the court held that the rate of interest be determined by the law governing the contract in the absence of CISG (in the case at hand, French law as the law of the seller's place of business). The relevant rate amounted to 9.5% but since the seller asked only for 6% interest rate, the court awarded the latter rate, "since this rate is inferior to the rate prescribed by law".[268] Similarly, in [20 December 1994 *Tribunal Cantonal* [Appellate Court]], the Court awarded the interest rate expressly referred to in seller's claim which was 2% lower than the Italian statutory rate, and stated:[269]

> "In the present case, application of those rules of conflict of laws leads to the application of Italian law. This conclusion is also the result of the application of art. 117 LPIL; the principal obligation under the present contract (delivery of blocks of stone) is the [seller's] responsibility, whose place of business is in Italy. According to art. 1284 of the Civil Code of Italy, the rate of default interest is 10%, unless a higher rate is fixed by the parties. The [seller] in the present case claims the default interest at the rate of 8%. Therefore, it is possible to award a higher rate of default interest only if the Court rules *ultra petita*."

Also, in [21 January 1997 *Rechtbank van Koophandel* [District Court] Hasselt], the Court held that the rate had to be determined in accordance with that provided for in the seller's standard terms if lower than the one required by the domestic law otherwise applicable to the contract.[270] In [28 October 1997 *Tribunal Cantonal* [Appellate Court] Valais], with regard to the interest rate, the Court considered this to be a matter governed but not expressly settled by CISG (Art. 7(2) CISG) and applied the statutory rate of the State whose law would have been the governing law of the contract in the absence of CISG (Italy). However, the Court awarded interest at the rate expressly referred to in the seller's counterclaim (5%) which was lower than the Italian statutory rate (10%).[271]

In any case, following the principle of parties' disposition, the lower (than the applicable statutory or commercial bank lending rate by virtue of private international law) interest claimed is to be granted according to the legal request of the entitled party.[272] Whereas, on the other hand, the higher interest claimed by the entitled party would not be awarded unless relevant proof is submitted sufficiently. It is an issue deserving a further discussion below.

8.9.4 *Higher rate needs to be proved*

As indicated previously the creditor is generally entitled to interest *without prejudice to any further damages recoverable*. Quite a significant number of the cases reviewed (*supra.* 3.4) had to decide the question of interest under the heading of damages. It is also noted that the practical problem of claiming interest by way of damages seems to be limited to the proof.[273] And the burden of proving a further damage deriving from the late payment falls on the claimant. In this regard, it is often held that the burden of proof is a matter governed but not expressly settled in CISG, to be solved applying the general principle underlying the Convention; and the claimant must prove its cause of action.[274]

In some decisions, evidence of the discount rate in plaintiff's country was not held to be sufficient evidence of damages. For instance, in [16 September 1991 *Landtgericht* [District Court] Frankfurt], the court held that the rate was the statutory rate of the seller's place of business. Further, as there was no evidence of any other damage suffered by the seller, no other damages were awarded. The court stated:

> "The [seller] does not have the right to claim any further interest under Art. 74 CISG. The [seller] has not provided evidence for his disputed assertion that he borrows money continuously at an interest rate of 15% *per annum*. It is hereby irrelevant that the [seller] demonstrated that the discount interest rate was 12.5%, respectively 13.5% in Italy. Furthermore, any agreement to a higher interest rate than what is legally owed would require a document complying with the written form (Art. 1284 Par. 3 Cc). In this case, however, the [buyer] has not provided such a document."[275]

Also, in [18 January 1994 *Oberlandesgericht* [Appellate Court] Frankfurt], the seller was not awarded the higher interest rate of 13,5% as further damages, since it had not given evidence of making recourse to bank loans. It is held:

> "The [seller's] claim for default interest at an amount of 13.5% could not be awarded. CISG, Article 78 does not bar a claim for damages under CISG, Article 74 to recover additional loss resulting from finance charges (Herber/Czerwenka,[30] Article 78, Rn. 8). However, the [seller] has no shown evidence of any further loss caused by using credit (as to the burden of proof: von Caemmerer-Stoll,[31] Article 74, Rn. 41). The submitted certificates issued by the Banca d'Italia only refer to the discount [rate] fluctuations."[276]

Similarly, in [24 April 1997 *Oberlandesgericht* [Appellate Court] Düsseldorf], the appellate Court held that the seller had not proved it had taken out on at its place of business a bank loan in Italian Lire at a 16,5% rate of interest. It therefore awarded the statutory rate of 10% according to Italian law as the law otherwise applicable to the contract. The court stated there:

> "The [seller], however, is not entitled to a further interest claim in form of the damage claim according to Art. 74 CISG. Apart from all the other requirements, such a damage claim is to be ruled out as the [seller] did not put forward and prove to utilize a bank credit amounting to the claim for which the [seller] demands interest exceeding the statutory interest rate. The certificate from Bank N.A. which was submitted by the [seller] at first instance, merely gives information on the demanded credit rates. However, the certificate does not contain any information whatsoever as to whether the [buyer] actually makes use of a credit exceeding the principal claim."[277]

However, it is to be noted that in another case [8 March 1995 *Amtsgericht* [Lower Court] Wangen], the seller was not entitled to the higher interest rate of 16,5% as further damages, since the court considered that the seller should have applied for obtaining a bank loan at the average market rate.[278] And in [25 January 1996 *Landgericht* [District Court] München], a higher

interest rate as further damages (Art. 74 CISG) was not granted since the seller was not able to prove a causal connection between its recourse to bank loans and the buyer's non payment.[279] In any case, the detailed analysis made by the court in [6 April 2000 *Landgericht* [District Court] München]:[280]

> "The rate of interest on the sum in arrears comes to 5% p.a. (Art. 78 CISG, Art. 1284 Cc). A claim for compensation of interest for drawn credit would require that the [seller] conduct his business with an ongoing bank credit which exceeds the sum claimed during the time the payment was in arrears. Furthermore - and this is decisive - the credit has to be repaid by all of the payments received by the [seller] unless such payments must be used immediately for the interest owed on the credit. It is only in such a case that a loss in the meaning of Art. 74 CISG, which exceeds the legal damage for delay, exists. The [seller] did not submit any facts demonstrating such a loss.
>
> "[Seller] could only claim for payment of an overdraft interest rate if he had established to conduct his business while permanently using an overdraft facility. Further, this overdraft had to extend his claim within these proceedings while [buyer] was in default. And most importantly, this overdraft would have had to be repaid with all incoming cash flow under his trade receivables, unless those cash flows were appropriated to redeem any accrued interest. Only if that were the case, might one establish a claim for compensation of damages beyond the statutory default interest rate pursuant to Art. 74 CISG. [Seller] has not, however, demonstrated any facts as to the aforementioned ingredients to establish such a claim beyond the statutory default interest rate."

Indeed, the reason most often given for not awarding further damages is that plaintiffs either were unable or unwilling to prove such damages arising from reliance on bank credit at a higher interest rates. It is often held that the claiming party was not entitled to the higher interest rate as further damages, since it has not provided sufficient evidence that it suffered losses higher than the legal interest rate by making recourse to bank loans.[281]

On the other hand, once relevant proof has been submitted sufficiently, higher rate is awarded. For instance, in [1 September 1994 *Kantonsgericht* [District Court] Zug], the Court applied the law otherwise applicable to the contract (in the case at hand, German law) and, as the seller had given evidence of having had recourse to bank loans, granted the higher interest rate of 12%.[282] In [21 September 1995 *Handelsgericht* [Commercial Court] Zürich], although Austrian statutory interest rate amounted to 5%, the Court held that the seller was entitled to the higher interest rate of 9,75% as further damages (Arts. 78 and 74 CISG). In this respect, the Court observed that the seller had only to prove the recourse to bank loans since it can be assumed that companies normally resort to external sources of credit to finance their activities.[283] Also, in [5 December 1995 *Handelsgericht* [Commercial Court] St. Gallen], the seller was awarded a higher interest rate as further damages since it provided a bank certificate proving that it had paid interest on bank loans during a specific time period.[284]

Similarly, in [5 March 1996 *Landgericht* [District Court] Düsseldorf], the seller was finally

awarded the purchase price and interest according to Art. 78 CISG at the rate of 16,5%, as it had proved it had recourse at its place of business to a bank loan in Italian Lire at this rate of interest.[285] In [25 June 1996 *Amtsgericht* [Lower Court] Bottrop], the seller was also granted a higher interest rate of 16,5% as further damages as it had proved a causal connection between its recourse to bank loans and the buyer's late payment.[286] In [10 July 1996 *Handelsgericht* [Commercial Court] Zürich], the seller was also a higher interest rate as further damages according to Art. 74 CISG, at the rate it was actually charged for a bank loan obtained after the buyer's refusal to pay the purchase price.[287]

Thus, there also exist decisions where the claiming parties were also awarded a higher interest rate as further damages pursuant to Arts. 78 and 74 CISG, since they provided sufficient evidence of recourse to bank loans. As indicated in [12 November 1996 *Amtsgericht* [Lower Court] Koblenz], "Article 78 does not exclude the possibility to demand reimbursement under Art. 74 CISG for losses suffered through a bank credit at a higher rate than the statutory interest rate."[288] In this regard, the pertinent ruling in [12 December 2002 *Kantonsgericht* [District Court] Zug] deserves significance:

> "[...] A higher interest is only owed if the creditor proves that he was in fact - due to the debtor's delay - obliged to pay interest on debts at this rate, or that he lost this amount in interest on investments (*cf.* Baumbach/Hopt, Handelsgesetzbuch, 29th ed., Munich 1995, § 352 HGB n. 5).[...]"[289]

8.10 Concluding Remarks

Regarding the precise rate of interest to be applied, there is no single internationally accepted rate of interest. This is reflected in the Convention, which only generally provides that parties are entitled to interest without specifying any particular rate of interest.

In the Vienna Convention, nothing is said either in Article 74 (damages) nor in Articles 78, 84 (interests) about the rates nor the modus of calculation of interests where interests are due to a party in case of breach of contract by another party. Art. 78 of the Vienna Convention, which lays down a general rule that the liability for payment of a sum is subject to interest for late payment, is the result of compromise which the Contracting States reached after long discussions. However, it was not possible to reach an agreement on the interest rate. As a consequence of the partial incompleteness of the Convention arising from unsettled disputes during the negotiation process, one of the most complex problems facing judges and arbitrators in adjudicating international commercial disputes falling under the CISG is which rate of interest to apply in fixing judgments and awards.

As demonstrated above, there is a considerable number of decisions dealing with the issue of determining the appropriate interest rate under Article 78 CISG. However, only few of these decisions engage in a thorough discussion of the problem in question. Moreover, international case law presents a wide range of possibilities in this respect. Attitudes of those who have ruled on interest under the CISG generally fall in either of two camps: rate of interest should be set

in accordance with applicable domestic law; or rate of interest should be set aiming at uniformity, among other things, in accordance with general principles on which the Convention is based. So far, none of the proposed uniform law approaches could find widespread acceptance. Because of the problems and inconsistencies associated with them, this is unlikely to change in the near future.[290]

But amongst the criteria adopted in various judgments, there is a strong tendency, at least among German and Swiss courts, to fix the applicable law according to the private international law of the court. However, up until recently, there have been arbitral awards and court decisions from more than one jurisdiction *not* applying this approach. It is apparent that if there is any uniformity in the application of national law as the interest rate gap filler, it is that there is uniform incongruity.[291] Therefore, calling one approach "unanimous" is at least incorrect, if not willfully misleading. Any method, that is, except the one apparently favored by national courts the world over: By resorting to national law of conflicts, the question of interest enters a maze of different legislations, viewpoints and currencies.[292]

As indicated by the above review of the recent international case law, many tribunals have contributed to inconsistent results. Undoubtedly, it should be noted that CISG obviously is far from perfect and must be developed by courts and scholars. But again, we should not replace CISG with what we consider better law. For it is fear of such a development that leads parties to avoid contracting under CISG and may induce countries not to adopt the Convention.[293] Accordingly, parties to international sales contracts can only be urged to include provisions specifying the situations calling for interest and determining a specific interest rate in their contract, which is clearly available under Article 6 of CISG.

In any case, as long as this issue has not been settled either by statute or court decisions, parties to international sales transactions should avoid uncertainty by negotiating appropriate contractual interest rate provisions and procedures to trigger the accrual of interest.[294]

MAIN ABBREVIATIONS

CISG/Convention = United Nations Convention on Contracts for the International Sale of Goods
PECL/European Principles = Principles of European Contract Law
UPICC/UNIDROIT Principles = UNIDROIT Principles of International Commercial Contracts

FOOTNOTES

1. *See Gotanda, John Y.* in "Awarding Interest in International Arbitration", 90 *AJIL* (1996); pp. 41-42. Available online at <http://tldb.uni-koeln.de/TLDB.html>; TLDB Document ID: 123400.
2. *See Alan F. Zoccolillo, Jr.* in "Determination of the Interest Rate under the 1980 United Nations Convention on Contracts for the International Sale of Goods: General Principles vs. National Law": 1 *Vindobona Journal of International Commercial Law and Arbitration* (1997); pp. 3-43. Available online at <http://www.cisg.law.pace.edu/cisg/biblio/zoccolillo.html>.
3. *Ibid.*
4. *See* Library of Congress v. Shaw, 478 U.S. 310, 315 n.2 (1986). (citing *Gotanda*, *supra.* fn. 1 at n. 13.)
5. *Supra.* fn. 2.
6. *See Dan B. Dobbs*, *Handbook on the Law of Remedies* § 3.5, at 164 (1973). (citing *Zoccolillo, supra.* fn. 2 at n. 5.)
7. *See McCollaugh*, 11 Iran-U.S. *Cl. Trib. Rep.* at 29; Illinois Central R.R Case, 3 *Ann. Dig.* 257 (U.S: Mex.Gen. Claims Comm'n 1922), reprinted in part in 5 Hackworth, DIGEST §539, at 735. (citing *Gotanda*, *supra.* fn. 1 at n. 12.)
8. *See Spalding v. Mason*, 161 U.S. 375, 396 (1896) (quoting *Curtis v. Innerarity*, 47 U.S. (6 How.) 146, 154 (1848))
9. *Supra.* fn. 2. *Zoccolillo* believes with this regard: "In certain disputed international transactions, involving parties from countries with high interest rates, the interest awarded to a debtor can substantially add to an award or even exceed the original amount sought. Thus, unless there is an equitable calculation of interest, the damages sought in an international proceeding could reflect only a fraction of a total debt a party in default may encounter." (*Ibid.*)
10. *See Volker Behr* in "The Sales Convention in Europe: From Problems in Drafting to Problems in Practice": 17 *Journal of Law and Commerce* (1998); p. 266. Available online at <http://www.cisg.law.pace.edu/cisg/biblio/behr.html>.
11. *Ibid.*, p. 268
12. *See Jelena Vilus* in "Provisions Common to the Obligations of the Seller and the Buyer": *Petar Sarcevic* & *Paul Volken* eds., *International Sale of Goods: Dubrovnik Lectures*, Oceana (1986); Ch. 7, p. 252. Available online at <http://www.cisg.law.pace.edu/cisg/biblio/vilus.html>.
13. *See Peter Schlechtriem* in "Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods", Manz (1986); p. 99. Available online at <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem-78.html>.
14. *See André Corterier* in "A New Approach to Solving the Problem of the Interest Rate Under Article 78 CISG": 5 *International Trade and Business Law Annual* (2000); p. 34. Available

online at <http://www.cisg.law.pace.edu/cisg/biblio/corterier.html>. In this respect, *Enderlein & Maskow* observe as follows: The regulation of interest has caused considerable difficulties, both in preparing and holding the diplomatic conference. Those difficulties are reflected in the modesty of the results. In ULIS there was a rule for interest in arrears in the event of payment in arrears of the price which provided for one per cent above the official discount rate in the creditor's country (Article 83). No agreement could be achieved in preparing the draft CISG, however, so that the interest is mentioned only in what is now Article 84, paragraph 1, hence interest on the price to be paid back (Nicholas/BB, 568). The subject was taken up repeatedly at the diplomatic conference. Religiously motivated prohibition or restriction of interest in Islamic countries played a role in the debates, but by no means a decisive one (O.R., 416 fol). The main contentious issue was rather how the interest rate should be calculated. Given the considerable movement in the money market, there were only few delegations which, like that of the FRG, were in favour of a fixed interest rate, as a minimum (O.R., 416). But flexible interest rates were only possible through reference to an existing interest level. Insofar the discussion revolved around the question of whether the interest level in the creditor's country or the one in the debtor's country should be decisive. At the time of the diplomatic conference there were serious differences between the Western industrialized countries, where the amount of interest is formed in the market (naturally influenced by political measures) and had at that time reached considerable amounts, and most of the at that time called socialist countries where the interest was fixed by law and relatively low. It was against this background that the Western industrialized countries aimed towards interest to be set according to the level of the creditor's country. This would have meant that debtors from those countries would have had to pay low interest to creditors from Eastern countries, but by contrast, debtors from the latter countries high interest. It was pointed out in favour of this variant that the creditor would have to procure financing in replacement in his country. The Eastern countries, and also many developing countries, opted for the reverse solution pointing to the fact that they would have to procure the means needed in their commercial relations with Western partners in high-interest countries (c. in regard to the overall subject O.R., 223 fol; 388 fol, 415 fol, 429 fol). These differences of opinion caused by the differing interests could not be overcome even by compromise proposals (O.R., 138). Furthermore, in light of the divergent methods used in forming interest in the countries involved, difficulties of a substantive and legal, technical kind become apparent in concretely determining the level of interest by reference. It was impossible, in the end, to come to a basic rule. (*Infra.* fn. 41, pp. 310-311.)

15. *See Jacob S. Ziegel* in "Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods". Available online at <http://www.cisg.law.pace.edu/cisg/text/ziegel78.html>.
16. *See* Judgment by HG Zürich [HG = Handelsgericht = Commercial Court], Switzerland 10 February 1999; No.: HG 970238.1. English translation by *Ruth M. Janal*. Available online at <http://cisgw3.law.pace.edu/cases/990210s1.html>.
17. *See Jeffrey S. Sutton* in "Measuring Damages Under the United Nations Convention on the International Sale of Goods": 50 *Ohio State Law Journal* (1989); pp. 737-752. Available online at <http://www.cisg.law.pace.edu/cisg/biblio/sutton.html>.

18. *Supra.* fn. 12, p. 253.
19. *See* The Iranian Revolutions and the Islamic Republic 11 (*Nikki R. Keddre & Eric Hooglund*, eds., 1986). (citing *infra.* fn. 19, at n. 204.)
20. *See T.S. Twibell* in "Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) under Shari'a Law: Will Article 78 of the CISG Be Enforced When the Forum Is an Islamic State?": 9 *International Legal Perspectives* (1997); p. 71. Available online at <http://www.cisg.law.pace.edu/cisg/biblio/twibell.html>.
21. *See* editorial remarks by *Albert H. Kritzer* on ICC Arbitration Case No. 7531 of 1994. Available online at <http://cisgw3.law.pace.edu/cases/947531i1.html>.
22. *Supra.* fn. 1, p. 42. *Gotanda* observes there: The practice of awarding interest as an element of damages is well established among the countries in Europe. Countries in North and South America generally authorize the awarding of interest to compensate a party for the loss of the use of money. Like their European and North and South American counterparts, Asian countries, such as China, India, Japan and the Republic of Korea, generally allow interest to be paid when a debtor defaults on a money payment. Several countries do not allow interest as part of an arbitral award. Most of these countries are in the Middle East and Africa, and have legal systems based on *Shari'a* (Islamic law). The *Shari'a* is based on the teachings of the Koran, Islam's holy book, which expressly prohibits the taking of interest, or *riba*. Some Islamic countries, such as Egypt, have moved away from *Shari'a* toward more Western-style legal systems. In these countries, either the payment of interest is expressly permitted in certain circumstances or a similar fee is allowed as a "service" or as "administrative" costs. Other countries, such as Iran, have adopted fundamentalist Islamic law, which strictly adheres to the *Shari'a* principles, including the prohibition against the taking of interest. Even in Iran, however, there is a limited exception to this prohibition. (*Ibid.*, pp. 42-50)
23. *Supra.* fn. 11.
24. *See Phanesh Koneru* in "The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles": 6 *Minnesota Journal of Global Trade* (1997); pp. 105-152. Available online at <http://www.cisg.law.pace.edu/cisg/biblio/koneru.html>.
25. *See* Judgment by LG Stuttgart [LG = Landgericht = District Court], Germany 31 August 1989; No.: 3 KfH O 97/89. English translation by *Jutta Surovic*. Available online at <http://cisgw3.law.pace.edu/cases/890831g1.html>.
26. *See* Judgment in ICC Arbitration Case No. 9333 of October 1998. English translation by *Kirsten Stadtländer*. Available online at <http://cisgw3.law.pace.edu/cases/989333i1.html>.
27. *See* Judgment in ICC Arbitration Case No. 7331 of 1994. Cited in editorial remarks by *Albert H. Kritzer*. Available online at <http://cisgw3.law.pace.edu/cases/947331i1.html>.
28. *See* Comment and Notes to the PECL: Art. 9:508; Comment B. Available online at <http://www.cisg.law.pace.edu/cisg/text/peclcomp78.html>.
29. *See Lauterpacht, Hersch, Private Law Sources and Analogies of International Law*, New York, Toronto (1927); p. 145. TLDB Document ID: 104200.
30. *See* Comment 1 on UPICC Art. 7.4.9. Available online at <http://www.cisg.law.pace.edu/cisg/principles/uni78.html>.
31. *Supra.* fn. 11; see also *supra.* fn. 1.

32. *See* UNICITRAL case digest 3. Available online at <http://www.cisg.law.pace.edu/cisg/text/anno-art-78.html>.
33. *Supra.* fn. 10, pp. 283-284.
34. *See Joseph Lookofsky* in "Understanding the CISG in Scandinavia", (1996); p. 82. (citing *Schneider, infra.* fn. 45 at n. 73.)
35. *Supra.* fn. 24.
36. *See* Judgment in ICC Arbitration Case No. 7585 of 1992. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=134&step=FullText>.
37. *See* Judgment by OLG Koblenz [OLG = Oberlandesgericht = Provincial Court of Appeal], Germany 17 September 1993; No.: 2 U 1230/91. English translation by *Kirstin Statländer*. Available online at <http://cisgw3.law.pace.edu/cases/930917g1.html>.
38. *See Christian Thiele* in "Interest on Damages and Rate of Interest Under Article 78 of the U.N. Convention on Contracts for the International Sale of Goods": 2 *Vindobona Journal of International Commercial Law and Arbitration* (1998); pp. 3-35. Available online at <http://www.cisg.law.pace.edu/cisg/biblio/thiele.html>.
39. *Supra.* fn. 28.
40. *Supra.* fn. 13, pp. 99-100.
41. *See Fritz Enderlein, Dietrich Maskow, International Sales Law: United Nations Convention on Contracts for the International Sale of Goods*, Oceana Publication (1992); p. 311. Available online at <http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html>.
42. *See Dionysios P. Flambouras* in "The Doctrines of Impossibility of Performance and *clausula rebus sic stantibus* in the 1980 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law: A Comparative Analysis": 13 *Pace International Law Review* (Fall 2001); p. 282. Available online at <http://www.cisg.law.pace.edu/cisg/biblio/flambouras1.html>.
43. *Supra.* fn. 13, p. 100.
44. *Supra.* fn. 30.
45. *See Eric C. Schneider* in "Measuring Damages under the CISG", available online at <http://www.cisg.law.pace.edu/cisg/text/cross/cross-74.html>.
46. *Supra.* fn. 41, p. 315. In this respect, *Enderlein & Maskow* note that: "A claim for damages presupposes a breach of contract, as is the case in regard to the entitlement to interest when one assumes, as we do, that an excusable breach of contract is nonetheless a breach. The main difference, however, is that exemption under Article 79 is possible in respect of the obligation to pay damages. Hence, it may happen that there is an entitlement to interest and a damage exceeding interest can be proved, but there will be no right to claim damages because there is an impediment, such as restriction of the transfer of currency." (*Ibid.*)
47. *Supra.* fn. 18.
48. *Supra.* fn. 46. See <http://cisgw3.law.pace.edu/cases/900403g1.html>.
49. *Supra.* fn. 43.
50. *Ibid.*
51. *Supra.* fn. 28, Comment C.
52. *Supra.* fn. 10, p. 284.
53. *See* Case Abstract of the Judgment by HG Zürich [HG = Handelsgericht = Commercial Court], Switzerland 21 September 1995; No. HG 930476. Available online at UNILEX

Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=159&step=Abstract>.

54. *See* Case Abstract of the Judgment by Bundesgericht [= BGer = Supreme Court] , 1. Zivilabteilung, Switzerland 28 October 1998; No. 4C.179/1998/odi. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=382&step=Abstract>.
55. *See* Case Abstract of the Judgment by AG Oldenburg in Holstein [AG = Amtsgericht = Petty District Court], Germany 24 April 1990; No. 5 C 73/89. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=5&step=Abstract>.
56. *See* Judgment by Appellate Court Düsseldorf, Germany 14 January 1994; No.: 17 U 146/93. English translation by *Ruth M. Janal*, translation edited by *Camilla Baasch Andersen*. Available online at <http://cisgw3.law.pace.edu/cases/940114g1.html>.
57. *See* Case law on UNCITRAL texts (CLOUT) abstract no. 104: Case Abstract on ICC Arbitration Case No. 7197 of [1992]. Available online at <http://cisgw3.law.pace.edu/cases/927197i1.html>.
58. *See* Case Abstract of the Judgment by Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia 4 April 1998; No. 387/1995. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=377&step=Abstract>.
59. *Supra.* fn. 32, digest 4.
60. *See* Judgment by OLG Frankfurt [OLG = Oberlandesgericht = Provincial Court of Appeal], Germany 18 January 1994; No.: 5 U 15/93. English translation from 14 *Journal of Law and Commerce* 201-207 (1995). Available online at <http://cisgw3.law.pace.edu/cases/940118g1.html>.
61. *Supra.* fn. 52.
62. *Supra.* fn. 38.
63. *Supra.* fn. 30.
64. *Supra.* fn. 51.
65. *Supra.* fn. 30, Comment 3.
66. *Supra.* fn. 41.
67. *Supra.* fn. 38.
68. *Supra.* fn. 27.
69. *Supra.* fn. 41, p. 313.
70. In this respect, *Thiele* notes: "This language ["*any other sum that is in arrears*"] has been interpreted to encompass expenses that one party had on behalf of the other as well as reimbursements when the purchase price is reduced according to Article 50 CISG. Although the language of Article 78 CISG might suggest otherwise, the provision does not apply to interest payments on the refund of the purchase price if the purchase contract is avoided because this case is covered by the specific provisions of Article 84 CISG." (*Supra.* fn. 38.)
71. *Supra.* fn. 69.
72. *Supra.* fn. 38.
73. *Ibid.*
74. *See* Judgment by LG Landshut [LG = Landgericht = District Court], Germany 5 April 1995; No.: 54 O 644/94. English translation by *Dr. Peter Feuerstein*, translation edited by *Ruth M.*

Janal. Available online at <http://cisgw3.law.pace.edu/cases/950405g1.html>.

75. *See* Judgment by KG Zug [KG = Kantonsgericht = District Court], Switzerland 21 October 1999; No.: A3 1997 61. English translation by *Dr. Andrea Vincze*. Available online at <http://cisgw3.law.pace.edu/cases/991021s1.html>.
76. *See* Comment on UPICC Art. 7.4.10. Available online at <http://www.cisg.law.pace.edu/cisg/principles/uni78.html>.
77. *Supra.* fn. 28.
78. *Supra.* fn. 76.
79. *Supra.* fn. 38.
80. *Supra.* fn. 46.
81. *See* Case Abstract of the Judgment in ICC Arbitration Case No. 8502 of 1996. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=395&step=Abstract>
82. *See* Judgment in ICC Arbitration Case No. 8908 of 1998. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=401&step=FullText>.
83. *See* Judgment by District Court (Landgericht) Frankfurt am Main, Germany 16 September 1991; No.: 3/11 O 3/91. English translation by *Stefan Kuhm*. Available online at <http://cisgw3.law.pace.edu/cases/910916g1.html>.
84. *See* Judgment by Pretore della giurisdizione [District Court] di Locarno Campagna (Canton of Ticino), Switzerland 16 December 1991; No.: 15/91. English translation by *Danijela Luksic*. Available online at <http://cisgw3.law.pace.edu/cases/911216s1.html>.
85. *See* Judgment by LG Aachen [LG = Landgericht = District Court], Germany 20 July 1995; No.: 41 O 111/95. English translation by *Dr. Peter Feuerstein*, translation edited by *Ruth M. Janal*. Available online at <http://cisgw3.law.pace.edu/cases/950720g1.html>.
86. *See* Judgment by Tribunal Cantonal Vaud [Canton Appellate Court], Switzerland 11 March 1996; No.: 01 93 1061 [163/96/BA and 164/96/BA]. English translation by *Serge Lapine*, translation edited by *Chantal Niggemann*. Available online at <http://cisgw3.law.pace.edu/cases/960311s2.html>.
87. *See* Judgment by KG Schaffhausen [KG = Kantonsgericht = District Court], Switzerland 12 December 2002; No.: A3 2001 34. English translation by *Ruth M. Janal*. Available online at <http://cisgw3.law.pace.edu/cases/021212s1.html>.
88. *Supra.* fn. 38.
89. For instance, in [1994 *International Court of Arbitration*, Case 7331], the ICC Arbitral Tribunal even states: "It is also generally acknowledged that interest does not begin to accrue until proper notice of the claim has been given. In this case, there is no indication that proper notice was given before the filing of the Request for Arbitration." (*Supra.* fn. 27.) In [January 1997 *International Court of Arbitration*, Case 8786], the tribunal award the interest running from the time when the [seller] put the [buyer] on notice to fulfill its obligation until payment was made by the [buyer] in full. (*See* case digest by *Daniel J. Morse* on ICC Arbitration Case No. 8786 of January 1997. Available online at <http://cisgw3.law.pace.edu/cases/978786i1.html>.) In this respect, the court in [12 February 1998 *Bulgaria Chamber of Commerce Arbitration* award, Case 11/1996] interpreted in more details as follows:
"According to Article 78 CISG, 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. The Convention only defines the principle that the party in arrears owes interest, without determining the amount of that interest. *First, a debtor is in arrears when his liability becomes subject to execution. Second, the creditor must invite the debtor to fulfill its liability voluntarily.*

"The [seller] did not claim for interest in his complaint. He only declares that a separate suit will be brought against the [buyer] for interest calculated according to the quarterly LIBOR. There is no evidence proving that the [seller] invited the [buyer] to satisfy its debt and pay the interest upon it voluntarily. Consequently, there is no evidence proving that the [buyer] is in arrears.

"With the addition to the complaint received by the Arbitral Tribunal on 3 December 1997, the [seller] claims interest. The Arbitral Tribunal allowed this addition to the complaint with its ruling of 15 December 1997. After this act of the Arbitral Tribunal, the [buyer] is in arrears and owes the interest. The Arbitral Tribunal accepts that the [buyer] is in arrears from the *date when the lawsuit was brought* (3 December 1997), but not for the period before that date. With its addition to the complaint from 3 December 1997, the [seller] [creditor] cannot put in arrears the [buyer] [debtor] for a period preceding that date. This becomes clearer if we take into consideration the fact that according to the Convention, the amount of the interest is not defined and has to be determined by the contracting parties themselves or by other means. The innocent party *cannot be in arrears for the period before an invitation is made to voluntarily pay.*

"The Arbitrate Tribunal allows [seller]'s claim for interest only for the period after the addition to the complaint (3 December 1997), but not for the prior four years. "

90. *See* Case Abstract of the Judgment by AG Zweibrücken [AG = Amtsgericht = Petty District Court], Germany 14 October 1992; No.: 1 C 216/92. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=92&step=Abstract>.
91. *See* Judgment by KG Berlin [KG = Kammergericht = Upper Court Berlin (similar to OLG courts elsewhere in Germany)], Germany 24 January 1994; No.: 2 U 7418/92. English translation by *Ruth M. Janal*. Available online at <http://cisgw3.law.pace.edu/cases/940124g1.html>.
92. *See* Judgment by LG München [LG = Landgericht = District Court], Germany 20 March 1995; No.: 10 HKO 23750/94. English translation by *Ruth M. Janal*, translation edited by *Camilla Baasch Andersen*. Available online at <http://cisgw3.law.pace.edu/cases/950320g1.html>.
93. *See* Judgment by CA Grenoble [CA = Cour d'appel = Appeal Court], France 29 March 1995; No.: 93/2821. English translation by *Charles Sant 'Elia*. Available online at <http://cisgw3.law.pace.edu/cases/950329f1.html>.
94. *See* Judgment by CA Grenoble [CA = Cour d'appel = Appeal Court], France 26 April 1995; No.: 93/4879. English translation by *Charles Sant 'Elia*. Available online at <http://cisgw3.law.pace.edu/cases/950426f2.html>.
95. *See* Case Abstract of the Judgment by Tribunal Cantonal Vaud [Canton Appellate Court], Switzerland 11 March 1996; No.: 01 93 0661. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=320&step=Abstract>.
96. *See* Case Abstract of the Judgment by HG Zürich [HG = Handelsgericht = Commercial Court], Switzerland 30 November 1998; No.: HG 930634/O. Available online at UNILEX

Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=409&step=Abstract>.

97. *See* Judgment by LG Flensburg [LG = Landgericht = District Court], Germany 24 March 1999; No.: 2 O 291/98. English translation by *Ruth M. Janal*. Available online at <http://cisgw3.law.pace.edu/cases/990324g2.html>.
98. *See* Case Abstract of the Judgment by Rechtbank [District Court] van koophandel Hasselt, Belgium 8 November 1995; No.: A.R. 1970/95. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=265&step=Abstract>.
99. *See* Case Abstract of the Judgment by Tribunal de commerce [District Court] Namur, Belgium 15 January 2002; No.: R.G. no. 985/01. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=745&step=Abstract>.
100. *See* Case Abstract of the Judgment by CA Paris [CA = Cour d'appel = Appeal Court], France 6 April 1995; No.: Unavailable. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=200&step=Abstract>. This case involves an appeal against the award of an Arbitral Tribunal of the ICC International Court of Arbitration [1993 *International Court of Arbitration*, Case 6653, *infra.* fn. 115.].
101. *Quoted* in the Judgment in ICC Arbitration Case No. 7585 of 1992, *supra.* fn. 36.
102. *Supra.* fn. 30.
103. *Supra.* fn. 87.
104. *See* Judgment by AG Koblenz [AG = Amtsgericht = Petty District Court], Germany 12 November 1996; No.: 16 C 1056/96. English translation by *Jarno Vanto*, translation edited by *Ruth M. Janal*. Available online at <http://cisgw3.law.pace.edu/cases/961112g1.html>.
105. *Quoted* in the Judgment by Handelsgericht [Commercial Court] des Kantons Aargau, Switzerland 19 December 1997; No.: OR.97.00056. English translation by *André Corterier*. Available online at <http://cisgw3.law.pace.edu/cases/971219s1.html>.
106. *See* Judgment by OLG Düsseldorf [OLG = Oberlandesgericht = Provincial Court of Appeal], Germany 24 April 1997; No.: 6 U 87/96. English translation by *Julian Waiblinger*. Available online at <http://cisgw3.law.pace.edu/cases/970424g1.html>.
107. *Supra.* fn. 32, digest 2.
108. *Supra.* fn. 46. However, it is to be noted that since the payment in many cases is considered as effected only at a later date than that on which the debtor has caused it, a guess will have to be made as to the actual time of payment in calculating interest if the transfer of the principal claim and the interest is made simultaneously. (*Ibid.*)
109. *Supra.* fn. 24.
110. *See* Case Abstract of the Judgment by LG Verden [LG = Landgericht = District Court], Germany 8 February 1993; No.: 9 O 85/92. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=87&step=Abstract>.
111. *See* Judgment by Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft [Arbitral Tribunal - Vienna], Austria 15 June 1994; No.: SCH-4366. English translation reproduced with permission of Unilex database. Available online at <http://cisgw3.law.pace.edu/cases/940615a3.html>.
112. *See* Judgment by AG Nordhorn [AG = Amtsgericht = Petty District Court], Germany 14 June 1994; No.: 3 C 75/94. English translation by *Ruth M. Janal*. Available online at <http://cisgw3.law.pace.edu/cases/940614g1.html>.
113. *See* Case Abstract of the Judgment by Internationales Schiedsgericht der Bundeskammer

der gewerblichen Wirtschaft [Arbitral Tribunal - Vienna], Netherlands 6 May 1993; No.: 920159. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=94&step=Abstract>.

114. *Supra.* fn. 41, p. 314.

115. *See* Judgment in ICC Arbitration Case No. 6653 of 1993. Available online at <http://cisgw3.law.pace.edu/cases/936653i1.html>. *See* also the ruling in [6 April 1995 *Cour d'appel* [Appellate Court] Paris], where the present case was appealed. (*Supra.* fn. 100.)

116. *Supra.* fn. 104.

117. *Supra.* fn. 75.

118. *Supra.* fn. 76.

119. *See* Case Abstract of the Judgment by Tribunal Cantonal Valais [Canton Appellate Court], Switzerland 20 December 1994; No.: C 323/94. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=168&step=Abstract>.

120. *See* Case Abstract of the Judgment by Rechtbank [District Court] van koophandel Kortrijk, Belgium 16 December 1996; No.: A.R. 4328/93. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=340&step=Abstract>.

121. *See* Judgment by Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia 28 March 1997; No.: 38/1996. English translation by *Yelena Kalika*, translation edited by *Mykhaylo Danylko*. Available online at <http://cisgw3.law.pace.edu/cases/970328r1.html>.

122. *See* Case Abstract of the Judgment by Pretura circondariale [Court of First Instance] di Parma, sez. di Fidenza, Italy 24 November 1989; No.: 77/89. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=62&step=Abstract>.

123. *See* Case Abstract of the Judgment in ICC Arbitration Case No. 8128 of 1995. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=207&step=Abstract>.

124. *See* Judgment in ICC Arbitration Case No. 7565 of 1994. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=141&step=FullText>.

125. *See* Case Abstract of the Judgment by BG St. Gallen [BG = Bezirksgericht = District Court], Switzerland 3 July 1997; No. 3PZ 97/18. Available online at <http://www.unilex.info/case.cfm?pid=1&do=case&id=306&step=Abstract>.

126. *See* Case Abstract of the Judgment by Juzgado Nacional de Primera Instancia en lo Comercial No. 7 (Buenos Aires), Argentina 20 May 1991; No.: 50.272. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=14&step=Abstract>.

127. *See* Judgment by Juzgado Nacional de Primera Instancia en lo Comercial No. 7 (Buenos Aires), Argentina 20 May 1991; No.: 50.272. English translation by *Alejandra Truscello.* Available online at <http://cisgw3.law.pace.edu/cases/910520a1.html>.

128. *Supra.* fn. 69.

129. *Supra.* fn. 28, Note 1.

130. *See André Corterier, supra.* fn. 14.

131. In this respect, *Enderlein & Maskow* observe as follows: These cannot, because of the CISG, be countered anymore by national prohibitive rules for interest, which in many Islamic countries have been considerably relaxed in regard to the economic sector. Insofar a specific

rule of the Convention supersedes the general rule of Article 4, sub-para. (a) according to which the Convention does not cover questions of validity. The entitlement to interest in abstract terms is not limited by a ceiling so that in our view also, national restrictions in regard to the amount of interest do not prevail over farther-reaching party agreements. But these could be measured against relevant general provisions of national law which are aimed against unfair (immoral) behaviour. (*Supra.* fn. 41, p. 312.)

132.*Supra.* fn. 17.

133.*Supra.* fn. 38.

134.*See Franco Ferrari* in "Uniform Application and Interest Rates Under the 1980 Vienna Sales Convention": *Cornell Review of the Convention on Contracts for the International Sale of Goods* (1995); pp. 3-19. Available online at <http://www.cisg.law.pace.edu/cisg/biblio/1ferrari.html>.

135.*Supra.* fn. 38. In this respect, *Thiele* observes that: "In this context it is noteworthy that the drafters of the Convention were unable to reach a decision on the issue of interest rates. The reason for this disagreement was, among others, different views on the purpose of interest. Finding a uniform solution was further hindered by the fact that some Islamic laws expressly forbid the accrual of statutory interest. The final language of Article 78, therefore, apparently was a compromise in order to prevent the Convention from failing entirely. From this legislative history it may be inferred that the drafters of the Convention intentionally left the determination of an interest rate unsettled. For example, as the legislative history reveals, the German proposal to include a fixed interest rate in the Convention was expressly rejected. However, in order to determine whether the lack of an fixed interest rate in the Convention constitutes a gap *praeter legem* or a gap *intra legem*, the legislative history appears to be of not much avail. This conclusion is based on the fact that the drafters also rejected the British proposal to expressly leave the determination of an interest rate to the law made applicable by the rules of international private law. This rejection may suggest that the drafters saw the question at issue not outside the scope of the Convention but rather wanted it to be governed by Article 7(2) CISG. In any event, the legislative history appears to be unclear as to this matter." (*Ibid.*)

136.*Supra.* fn. 38.

137.*Supra.* fn. 30, Comment 2.

138.*Supra.* fn. 2.

139.*Supra.* fn. 28.

140.*Supra.* fn. 85.

141.*Supra.* fn. 38.

142.*Supra.* fn. 111.

143.According to Article 7, paragraph 2, of the Convention, the former matters have to be settled in conformity with the general principles on which the Convention is based or, in the absence of those principles, in conformity with the law applicable by virtue of the rules of private international law. However, if a matter is considered to fall outside the Convention's scope, it must be settled in conformity with the law applicable by virtue of the rules of private international law, without any recourse to the "general principles" of the Convention. (*Supra.* fn. 32, digest 6.)

144.*See* Judgment by Lugano, Cantone del Ticino, La seconda Camera civile del Tribunale

d'appello, Switzerland 15 January 1998; No. 12.97.00193. English translation by *Charles Sant 'Elia*, translation edited by *Angela Maria Romito*. Available online at <http://cisgw3.law.pace.edu/cases/980115s1.html>.

145. *See* Judgment in ICC Arbitration Case No. 9448 of July 1999. Available online at <http://www.cisg-online.ch/cisg/urteile/707.htm>.

146. *See* Judgment by Tribunale [District Court] di Pavia, Italy 29 December 1999; No. Unavailable. English translation by *Charles Sant 'Elia*, translation edited by *Angela Maria Romito*. Available online at <http://cisgw3.law.pace.edu/cases/991229i3.html>.

147. In other words, Art. 7(2) CISG "only legitimizes the last available option when uniform law proves inadequate. It is undisputed that the application of the law of conflicts needs to remain ultima ratio. This should be obvious when considering the spirit of the uniform law: It is meant to create a uniform body of rules, clear, understandable and equally applicable to everyone. This aim is not served by the law of conflicts. The spirit of the CISG therefore demands that such questions are solved within the context of the CISG." (*See André Corterier, supra.* fn. 14, pp. 35-36.)

148. *Supra.* fn. 111.

149. *Supra.* fn. 124.

150. *Supra.* fn. 119.

151. *See* Judgment by Schiedsgericht der Handelskammer [Arbitral Tribunal] Hamburg, Germany 21 March 1996; No.: Partial award of 21 March 1996. *Yearbook comm. Arb'n XXII.* Available online at <http://cisgw3.law.pace.edu/cases/960321g1.html>.

152. *See* Case Abstract of the Judgment by Tribunal Cantonal du Valais, IIe Cour civile [Canton Appellate Court], Switzerland 29 June 1998; No.: CI 97 288. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=366&step=Abstract>.

153. *See* Judgment by LG Berlin [LG = Landgericht = District Court], Germany 25 May 1999; No.: 102 O 181/98. English translation by *Christian P. Alberti, LL.M.*, translation edited by *Camilla Baasch Andersen.* Available online at <http://cisgw3.law.pace.edu/cases/990525g1.html>.

154. *Supra.* fn. 85.

155. *See* Judgment by HG Aargau [HG = Handelsgericht = Commercial Court], Switzerland 5 November 2002; No.: OR.2001.00029. English translation by *Martin F. Koehler.* Available online at <http://cisgw3.law.pace.edu/cases/021105s1.html>.

156. *See* the data (dated to November, 2003) available online at <http://www.unilex.info/article.cfm?pid=1&pos=78&iid=104#IID104>.

157. *Supra.* fn. 38.

158. *Supra.* fn. 41, p. 312.

159. *See André Corterier, supra.* fn. 14, p. 38.

160. *Supra.* fn. 84.

161. *See* Case Abstract of the Judgment by Amtsgericht Kehl, Germany 06 October 1995; No.: 3 C 925/93. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=163&step=Abstract>.

162. *See* Judgment by Cantone del Ticino, La seconda Camera civile del Tribunale d'appello [Appellate Court] [Lugano], Switzerland 12 February 1996; No.: 12.95.00300. English translation by *Francesco G. Mazzotta.* Available online at

<http://cisgw3.law.pace.edu/cases/960212s1.html>.

163. *See* Judgment by LG Hamburg [LG = Landgericht = District Court], Germany 26 September 1990; No.: 5 O 543/88. English translation by *Stefan Kuhm*, translation edited by *Camilla Baasch Andersen*. Available online at <http://cisgw3.law.pace.edu/cases/900926g1.html>.

164. *Supra*. fn. 106.

165. *Supra*. fn. 74.

166. *See* Judgment by OLG Hamm [OLG = Oberlandesgericht = Provincial Court of Appeal], Germany 5 November 1997; No.: 11 U 41/97. English translation by *Marko Maljevac*, translation edited by *Ruth M. Janal*. Available online at <http://cisgw3.law.pace.edu/cases/971105g1.html>.

167. *Supra*. fn. 75.

See Eva Diederichsen in "Commentary on Oberlandesgericht Frankfurt Am Main, 18 January 1994, 5 U 15/93": 14 Journal of Law and Commerce (1995); pp. 177-181. Available online at <http://cisgw3.law.pace.edu/cases/940118g1.html>.

See the data (dated to November, 2003) available online at <http://www.unilex.info/article.cfm?pid=1&pos=78&iid=104&cid=34#IID104>.

These 33 cases are listed as: 3 July 1992 Landgericht [District Court] Heidelberg; 22 September 1992 Oberlandesgericht [Appellate Court] Hamm; 14 October 1992 Amtsgericht [Lower Court] Zweibrücken; 8 February 1993 Landgericht [District Court] Verden; 17 September 1993 Oberlandesgericht [Appellate Court] Koblenz; 10 February 1994 Oberlandesgericht [Appellate Court] Düsseldorf [6 U 119/93]; 10 February 1994 Oberlandesgericht [Appellate Court] Düsseldorf [6 U 32/93]; 2 March 1994 Oberlandesgericht [Appellate Court] München; 14 June 1994 Amtsgericht [Lower Court] Nordhorn; 5 July 1994 Landgericht [District Court] Giessen; 25 August 1994 Landgericht [District Court] Düsseldorf; 25 October 1994 Landgericht [District Court] Darmstadt; 9 November 1994 Landgericht [District Court] Oldenburg; 8 February 1995 Oberlandesgericht [Appellate Court] Hamm; 20 March 1995 Landgericht [District Court] München; 5 April 1995 Landgericht [District Court] Landshut ; 12 May 1995 Amtsgericht [Lower Court] Alsfeld; 22 June 1995 Landgericht [District Court] Kassel; 20 July 1995 Landgericht [District Court] Aachen; 27 July 1995 Oberlandesgericht [Appellate Court] Rostock; 25 January 1996 Landgericht [District Court] München; 29 January 1996 Amtsgericht [Lower Court] Augsburg ; 28 February 1996 Landgericht [District Court] Oldenburg; 25 June 1996 Amtsgericht [Lower Court] Bottrop; 24 April 1997 Oberlandesgericht [Appellate Court] Düsseldorf; 5 November 1997 Oberlandesgericht [Appellate Court] Hamm; 28 January 1998 Oberlandesgericht [Appellate Court] München; 11 March 1998 Oberlandesgericht [Appellate Court] München; 24 March 1998 Landgericht [District Court] Berlin; 28 October 1999 Oberlandesgericht [Appellate Court] Braunschweig; 13 April 2000 Amtsgericht [Lower Court] Duisburg; 10 October 2001 Oberlandesgericht [Appellate Court] Rostock; 25 September 2002 Oberlandesgericht [Appellate Court] Rostock..

168. *Supra*. fn. 10, p. 289.

169. *See* the data (dated to November, 2003) available online at <http://www.unilex.info/article.cfm?pid=1&pos=78&iid=104&cid=43#IID104>. These 25 cases are listed as: 16 December 1991 Pretore della giurisdizione [District Court] Locarno; 21 December 1992 Zivilgericht [Civil Court] Basel; 9 September 1993 Handelsgericht [Commercial Court] Zürich; 6 December 1993 Tribunal Cantonal [Appellate Court] Vaud; 1 September 1994 Kantonsgericht [District

Court] Zug; 15 December 1994 Kantonsgericht [District Court] Zug; 20 December 1994 Tribunal Cantonal [Appellate Court] Valais; 5 December 1995 Handelsgericht [Commercial Court] St. Gallen; 12 February 1996 Tribunale d'appello [Appellate Court] Lugano; 20 May 1996 Tribunal [District Court] Glâne; 10 July 1996 Handelsgericht [Commercial Court] Zürich; 20 February 1997 Court Bezirksgericht der Saane; 26 September 1997 Handelsgericht [Commercial Court] Aargau; 28 October 1997 Tribunal Cantonal [Appellate Court] Valais; 3 December 1997 Kantonsgericht [District Court] Nidwalden; 3 December 1997 Kantonsgericht [District Court] Nidwalden; 29 June 1998 Tribunal Cantonal [Appellate Court] Valais; 30 June 1998 Tribunal Cantonal [Appellate Court] Valais; 21 September 1998 Handelsgericht [Commercial Court] Zürich; 28 October 1998 Bundesgericht [Federal Supreme Court]; 30 November 1998 Handelsgericht [Commercial Court] Zürich; 10 February 1999 Handelsgericht [Commercial Court] Zürich; 25 February 1999 Kantonsgericht [District Court] Zug; 11 June 1999 Handelsgericht [Commercial Court] des Kantons Aargau; 21 October 1999 Kantonsgericht [District Court] Zug.

170. *See* Judgment by Tribunal Cantonal Valais [Canton Appellate Court], Switzerland 20 December 1994; No.: C 323/94. English translation by *Marina Koukanova*. Available online at <http://cisgw3.law.pace.edu/cases/941220s1.html>.
171. *Supra*. fn. 10, p. 294.
172. *Supra*. fn. 10, p. 297.
173. *Supra*. fn. 159.
174. *Supra*. fn. 2.
175. *Supra*. fn. 10, pp. 297-298.
176. *Supra*. fn. 10, p. 286.
177. *Supra*. fn. 134.
178. *Supra*. fn. 173.
179. *Supra*. fn. 159.
180. *See* Judgment by RA Laufen des Kantons Berne [RA = Richteramt = District Court], Switzerland 7 May 1993; No.: Unavailable. English translation by *Tobias Koppitz*. Available online at <http://cisgw3.law.pace.edu/cases/930507s1.html>.
181. *Supra*. fn. 38.
182. *Supra*. fn. 83.
183. *See* Case Abstract on ICC Arbitration Case No. 7197 of [1992]. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=37&step=Abstract>.
184. *See* Case Abstract of the Judgment by KG Berlin [KG = Kammergericht = Upper Court Berlin (similar to OLG courts elsewhere in Germany)], Germany 24 January 1994; No.: 2 U 7418/92. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=46&step=Abstract>.
185. *See* Case Abstract of the Judgment by BG Arbon [BG = Bezirksgericht = District Court], Switzerland 9 December 1994; No.: BG 341/1994. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=172&step=Abstract>.
186. *See* Case Abstract of the Judgment by FB Budapest [FB = Fovárosi Bíróság = Metropolitan Court], Hungary 24 March 1992; No.: 12.G.41.471/1991/21. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=19&step=Abstract>.
187. *See* Case Abstract of the Judgment by AG Riedlingen [AG = Amtsgericht = Petty District

Court], Germany 21 October 1994; No.: 2 C 395/93. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=116&step=Abstract>.

188. *See* Case Abstract of the Judgment by LG Darmstadt [LG = Landgericht = District Court], Germany 25 October 1994; No.: 18 O 848/92. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=508&step=Abstract>

189. *See* Case Abstract of the Judgment by Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia 15 April 1994; No.: 1/1993. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=248&step=Abstract>.

190. *See* Case Abstract of the Judgment by OLG München [OLG = Oberlandesgericht = Provincial Court of Appeal], Germany 08 February 1995; No.: 7 U 1720/94. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=118&step=Abstract>.

191. *See* Case Abstract of the Judgment by HG Zürich [HG = Handelsgericht = Commercial Court], Switzerland 5 February 1997; No.: HG 95 0347. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=305&step=Abstract>.

192. *Supra.* fn. 55.

193. *See* Case Abstract of the Judgment by OLG Frankfurt [OLG = Oberlandesgericht = Provincial Court of Appeal], Germany 18 January 1994; No.: 5 U 15/93. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=40&step=Abstract>.

194. *See* Case Abstract of the Judgment by LG Aachen [LG = Landgericht = District Court], Germany 3 April 1990; No.: 41 O 198/89. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=24&step=Abstract>.

195. *Supra.* fn. 98.

196. *See* Case Abstract of the Judgment by Rechtbank [District Court] van koophandel Hasselt, Belgium 9 October 1996; No.: A.R. 2012/96. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=264&step=Abstract>.

197. *Supra.* fn. 121.

198. *See* Judgment by Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia 22 October 1998; No.: 196/1997. English translation by *Alexander Morari*, translation edited by *Mykhaylo Danylko*. Available online at <http://cisgw3.law.pace.edu/cases/981022r1.html>.

199. *See* Judgment by Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia 27 July 1999; No.: 302/1996. English translation by *Gilyana Bovaeva*, translation edited by *Mykhaylo Danylko*. Available online at <http://cisgw3.law.pace.edu/cases/990727r1.html>.

200. *See* Judgment by Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia 10 February 2000; No.: 340/1999. English translation by *Mykhaylo Danylko*. Available online at <http://cisgw3.law.pace.edu/cases/000210r1.html>.

201. *See* the data (dated to November, 2003) available online at <http://www.unilex.info/article.cfm?pid=1&pos=78&iid=100#IID100>; <http://www.unilex.info/article.cfm?pid=1&pos=78&iid=101#IID101>;

<http://www.unilex.info/article.cfm?pid=1&pos=78&iid=102#IID102>. These 28 cases are listed as: **ICC** 1992 *International Court of Arbitration*, Case 7197; 1994 *International Court of Arbitration*, Case 7531; 1994 *International Court of Arbitration*, Case 7331; October 1998 *International Court of Arbitration*, Case 9333. **Germany** 31 August 1989 *Landgericht* [District Court] Stuttgart; 3 April 1990 *Landgericht* [District Court] Aachen; 24 April 1990 *Amtsgericht* [Lower Court] Oldenburg; 26 September 1990 *Landgericht* [District Court] Hamburg; 13 June 1991 *Oberlandesgericht* [Appellate Court] Frankfurt; 16 September 1991 *Landtgericht* [District Court] Frankfurt; 18 January 1994 *Oberlandesgericht* [Appellate Court] Frankfurt; 24 January 1994 *Kammergericht* [Appellate Court] Berlin; 21 October 1994 *Amtsgericht* [Lower Court] Riedlingen; 8 March 1995 *Amtsgericht* [Lower Court] Wangen; 6 October 1995 *Amtsgericht* [Lower Court] Kehl; 27 March 1996 *Landgericht* [District Court] Oldenburg; 13 April 2000 *Amtsgericht* [Lower Court] Duisburg; 14 October 2002 *Oberlandesgericht* [Appellate Court] Köln. **Hungary** 24 March 1992 *Fovárosi Bíróság* [Metropolitan Court]. **Russia** 15 April 1994 Arbitration award 1/1993; 9 September 1994 Arbitration award 375/1993. **Switzerland** 9 December 1994 *Bezirksgericht* [District Court] Arbon; 21 September 1995 *Handelsgericht* [Commercial Court] Zürich; 3 July 1997 *Bezirksgericht* [District Court] St. Gallen. **Argentina** 23 October 1991 *Juzgado Nacional de Primera Instancia en lo Comercial* [National Commercial Court of First Instance]; 6 October 1994 *Juzgado Nacional de Primera Instancia en lo Comercial* [National Commercial Court of First Instance]. **Belgium** 8 November 1995 *Rechtbank van Koophandel* [District Court] Hasselt; 9 October 1996 *Rechtbank van Koophandel* [District Court] Hasselt.

202. *Supra.* fn. 178. *See* also the discussion quoted in *supra.* fns. 182, 183.

203. *Supra.* fn. 38.

204. *Supra.* fn. 159.

205. *Supra.* fn. 10, p. 290.

206. 7 cases of the 148 cases involving CISG interest issue collected and published on the UNILEX Database follow this debtor-approach. *See* the data (dated to November, 2003) available online at <http://www.unilex.info/article.cfm?pid=1&pos=78&iid=103#IID103>. These 7 cases are listed as: **Finland** 27 March 1997 *Court of Appeal of Eastern Finland*; **Germany** 13 June 1991 *Oberlandesgericht* [Appellate Court] Frankfurt; 21 March 2003 *Landgericht Berlin*; **Switzerland** 11 March 1996 *Tribunal Cantonal* [Appellate Court] Vaud [01 93 1061]; 11 March 1996 *Tribunal Cantonal* [Appellate Court] Vaud [01 93 0661]; 5 February 1997 *Handelsgericht* [Commercial Court] Zürich; **United States** 9 September 1994 Federal District Court [Northern Dist. NY] (*Delchi Carrier v. Rotorex*).

207. *Supra.* fns. 192,193.

208. *Supra.* fn. 86.

209. *Supra.* fn. 95.

210. *Supra.* fn. 120.

211. *See* Judgment by LG Berlin [LG = Landgericht = District Court], Germany 21 March 2003; No.: Unavailable. English translation by *Stefan Kuhm*, translation edited by *Camilla Baasch Andersen.* Available online at <http://cisgw3.law.pace.edu/cases/030321g1.html>.

212. *Supra.* fn. 60.

213. *Supra.* fn. 159.

214. *See* the data (dated to November, 2003) available online at

<http://www.unilex.info/article.cfm?pid=1&pos=78&iid=105#IID105>.

215. *See* Case Abstract of the Judgment by Rb Almelo [Rb = Arrondissementsrechtbank = District Court], Netherlands 9 August 1995; No.: 4367. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=155&step=Abstract>.

216. *See* Judgment in ICC Arbitration Case No. 7153 of 1992. English translation 14 *Journal of Law and Commerce* (1995) 217-224. Available online at <http://cisgw3.law.pace.edu/cases/927153i1.html>.

217. *Supra.* fn. 27.

218. *Supra.* fn. 159.

219. *Supra.* fn. 38.

220. *See* the data (dated to November, 2003) available online at <http://www.unilex.info/article.cfm?pid=1&pos=78&iid=106#IID106>. These 9 cases are listed as: **ICC** 1992 *International Court of Arbitration*, Case 7585; 1993 *International Court of Arbitration*, Case 6653; 1995 *International Court of Arbitration*, Case 8128; December 1996 *International Court of Arbitration*, Case 8769; September 1998 *International Court of Arbitration*, Case 8908. **Austria** 15 June 1994 Vienna Arbitration award SCH-4366; 15 June 1994 Vienna Arbitration award SCH-4318. **Hungary** 17 November 1995 Budapest Arbitration award Vb 94124; 5 December 1995 Budapest Arbitration award Vb 94131.

221. *Supra.* fn. 36.

222. *Supra.* fn. 115.

223. *Supra.* fn. 100.

224. *See* Judgment in ICC Arbitration Case No. 8769 of 1996. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=397&step=FullText>.

225. *See* case digest by *Daniel J. Morse* on ICC Arbitration Case No. 8962 of January 1997. Available online at <http://cisgw3.law.pace.edu/cases/978962i1.html>.

226. *Supra.* fn. 82.

227. *See* Case Abstract of the Judgment by Arbitration Court of the Chamber of Commerce and Industry of Budapest, Hungary 17 November 1995; No.: Vb 94124. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=217&step=Abstract>.

228. *See* Judgment by Rechtbank van Koophandel [District Court] Veurne, Belgium 25 April 2001; No.: A/00/00665. English translation by *Vincent Naveaux,* translation edited by *Sieg Eiselen.* Available online at <http://cisgw3.law.pace.edu/cases/010425b1.html>.

229. *Supra.* fn. 155.

230. *See André Corterier, supra.* fn. 14, pp. 38-39.

231. *See* Case Abstract of the Judgment by OLG Frankfurt [OLG = Oberlandesgericht = Provincial Court of Appeal], Germany 13 June 1991; No.: 5 U 261/90. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=4&step=Abstract>.

232. *See* Case Abstract of the Judgment by AG Duisburg [AG = Amtsgericht = Petty Court], Germany 13 April 2000; No.: 49 C 502/00. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=715&step=Abstract>.

233. *See* Judgment by AG Duisburg [AG = Amtsgericht = Petty Court], Germany 13 April 2000; No.: 49 C 502/00. English translation by *Ruth M. Janal*, translation edited by *Camilla*

Baasch Andersen. Available online at <http://cisgw3.law.pace.edu/cases/000413g1.html>.

234. *Supra*. fn. 183.

235. *See* Judgment by Arbitration Court of the Chamber of Commerce and Industry of Budapest, Hungary 5 December 1995; No.: Vb 94131. English translation by *Marko Maljevac*, translation edited by *Dr Loukas Mistelis*. Available online at <http://cisgw3.law.pace.edu/cases/951205h1.html>.

236. *Supra*. fn. 25.

237. *See* Case Abstract of the Judgment by Rb Arnhem [Rb = Arrondissementsrechtbank = District Court], Netherlands 30 December 1993; No.: 1992/1251. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=61&step=Abstract>.

238. *See* case digest by *Daniel J. Morse* on ICC Arbitration Case No. 8740 of October 1996. Available online at <http://cisgw3.law.pace.edu/cases/968740i1.html>.

239. *See* Judgment in ICC Arbitration Case No. 8611 of 1997. English translation by *Beate Satory*. Available online at <http://cisgw3.law.pace.edu/cases/978611i1.html>.

240. *See* Case Abstract of the Judgment by OLG Rostock [OLG = Oberlandesgericht = Provincial Court of Appeal], Germany 10 October 2001; No.: 6 U 126/00. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=906&step=Abstract>.

241. *See* Judgment by OLG Rostock [OLG = Oberlandesgericht = Provincial Court of Appeal], Germany 25 September 2002; No.: 6 U 126/00. English translation by *Ruth M. Janal*, translation edited by *Veit Konrad*. Available online at <http://cisgw3.law.pace.edu/cases/020925g1.html>.

242. *Supra*. fn. 38.

243. *Supra*. fn. 146.

244. *Supra*. fn. 111.

245. *See* Judgment by Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft [Arbitral Tribunal - Vienna], Austria 15 June 1994; No.: SCH-4318. English translation reproduced with permission of Unilex database. Available at <http://cisgw3.law.pace.edu/cases/940615a4.html>.

246. *Supra*. fn. 2.

247. *Supra*. fn. 123.

248. *Supra*. fn. 2.

249. *Supra*. fn. 38.

250. *Supra*. fn. 10, p. 290.

251. *See* Case Abstract of the Judgment by Juzgado Comercial Nacional de Primera Instancia en lo Comercial No. 10, Buenos Aires, Argentina 23 October 1991; No.: Unavailable. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=184&step=Abstract>.

252. *See* Case Abstract of the Judgment by Juzgado Comercial Nacional de Primera Instancia en lo Comercial No. 10, Buenos Aires, Argentina 6 October 1994; No.: 56.179. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=178&step=Abstract>.

253. *Supra*. fn. 174.

254.*Supra.* fn. 38.
255.*Supra.* fn. 100.
256.*Supra.* fns. 201, 224, 228, 249.
257.*See* Judgment by Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia 25 March 1998; No.: 491/1996. English translation by *Serge Lapine*, translation edited by *Mykhaylo Danylko*. Available at <http://cisgw3.law.pace.edu/cases/980325r1.html>.
258.*See* Judgment by ZG Basel [ZG = Zivilgericht = Civil Court], Switzerland 21 December 1992; No.: P4 1991/238. English translation by *Yvonne P. Salmon*. Available at <http://cisgw3.law.pace.edu/cases/921221s1.html>.
259.*Supra.* fn. 254.
260.*See* Case Abstract of the Judgment by Schiedsgericht der Börse für landwirtschaftliche in Wien [Arbitral Tribunal - Vienna], Austria 10 December 1997; No.: S 2/97. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=346&step=Abstract>.
261.*See* Judgment by OLG Braunschweig [OLG = Oberlandesgericht = Provincial Court of Appeal], Germany 28 October 1999; No.: 2 U 27/99. English translation by *Jarno Vanto*, translation edited by *Ruth M. Janal*. Available at <http://cisgw3.law.pace.edu/cases/991028g1.html>.
262.*Supra.* fn. 240.
263.*Supra.* fn. 125.
264.*See* Judgment by LG Braunschweig [LG = Landgericht = District Court], Germany 30 July 2001; No.: 21 O 703/01 (028). English translation by *Dr. Andrea Vincze*. Available at <http://cisgw3.law.pace.edu/cases/010730g1.html>.
265.*See* Judgment by AG Viechtach [AG = Amtsgericht = Lower Court], Germany 11 April 2002; No.: 1 C 419/01. English translation by *Ruth M. Janal*, translation edited by *Camilla Baasch Andersen*. Available at <http://cisgw3.law.pace.edu/cases/020411g1.html>.
266.*Supra.* fn. 84.
267.*Supra.* fn. 172.
268.*See* Case Abstract of the Judgment by Rechtbank [District Court] van koophandel Hasselt, Belgium 21 January 1997; No.: A.R. 1972/96. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=262&step=Abstract>.
269.*See* Case Abstract of the Judgment by Tribunal Cantonal Valais [Canton Appellate Court], Switzerland 28 October 1997; No.: C1 97 167. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=311&step=Abstract>.
270.*Supra.* fn. 16.
271.*Supra.* fn. 52.
272.*See* Case Abstract of the Judgment by Tribunale [District Court] di Pavia, Italy 29 December 1999; No. Unavailable. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=442&step=Abstract>.
273.*Supra.* fn. 83.
274.*Supra.* fn. 60.
275.*Supra.* fn. 106.
276.*See* Case Abstract of the Judgment by AG Wangen [AG = Amtsgericht = Petty District

Court], Germany 8 March 1995; No. 2 C 600/94. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=120&step=Abstract>.

277. *See* Case Abstract of the Judgment by LG München [LG = Landgericht = District Court], Germany 25 January 1996; No. 12 HKO 2648/95. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=192&step=Abstract>.

278. *See* Judgment by LG München [LG = Landgericht = District Court], Germany 6 April 2000; No.: 12 HKO 4174/99. English translation by *Stefan Kuhm*, translation edited by *Ruth M. Janal*. Available at <http://cisgw3.law.pace.edu/cases/000406g1.html>.

279. For similar cases, see, e.g., 21 October 1994 *Amtsgericht* [Lower Court] Riedlingen; 9 November 1994 *Landgericht* [District Court] Oldenburg; 20 March 1995 *Landgericht* [District Court] München; 5 April 1995 *Landgericht* [District Court] Landshut; 12 May 1995 *Amtsgericht* [Lower Court] Alsfeld; 24 May 1995 *Oberlandesgericht* [Appellate Court] Celle; 27 March 1996 *Landgericht* [District Court] Oldenburg; 1997 *International Court of Arbitration*, Case 8611; 15 January 1998 *Tribunale d'appello* [Appellate Court] Lugano; 24 March 1999 *Landgericht* [District Court] Flensburg; 13 April 2000 *Amtsgericht* [Lower Court] Duisburg; 9 May 2000 *Landgericht* [District Court] Darmstadt; 22 August 2002 *Oberlandesgericht* [Appellate Court] Schleswig; 5 November 2002 *Handelsgericht* [Commercial Court] des Kantons Aargau; etc.

280. *See* Case Abstract of the Judgment by KG Zug [KG = Kantonsgericht = District Court], Switzerland 1 September 1994; No. A3 1993 84. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=237&step=Abstract>.

281. *Supra.* fn. 53.

282. *See* Case Abstract of the Judgment by HG St. Gallen [HG = Handelsgericht = Commercial Court], Switzerland 5 December 1995; No.: HG 45/1994. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=190&step=Abstract>.

283. *See* Case Abstract of the Judgment by LG Düsseldorf [LG = Landgericht = District Court], Germany 5 March 1996; No.: 36 O 178/95. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=246&step=Abstract>.

284. *See* Case Abstract of the Judgment by AG Bottrop [AG = Amtsgericht = Petty District Court], Germany 25 June 1996; No.: 12 C 177/96. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=289&step=Abstract>.

285. *See* Case Abstract of the Judgment by HG Zürich [HG = Handelsgericht = Commercial Court], Switzerland 10 July 1996; No.: HG 940513. Available online at UNILEX Database of <http://www.unilex.info/case.cfm?pid=1&do=case&id=381&step=Abstract>.

286. *Supra.* fn. 104.

287. *Supra.* fn. 87.

288. *See André Corterier, supra.* fn. 14, p. 39.

289. *Supra.* fn. 2.

290. *Supra.* fn. 290.

291. *Supra.* fn. 10, p. 299.

292. *Supra.* fn. 168. On the other hand, however, it is also noted: "In evaluating the wide range of approaches taken by courts and proposed by legal scholars, one basic fact becomes clearly evident: CISG is not applied in the complicated cases but in the *everyday* case. Everyday goods (tissues, clothes, shoes, socks, furniture, home appliances, live lambs, mussels) in

everyday amounts (ranging from hundreds of U.S. dollars to thousands of U.S. dollars) are bought and sold in everyday contracts by everyday businessmen, most often unaware that CISG applies. In case of controversy, those everyday cases must be handled by either the parties themselves or by everyday lawyers, in everyday courts. Interpretation of CISG must allow those businessmen and lawyers and judges to come to clear and convincing decisions. It is only the big and complex deals which generally are prepared by the skilled and experienced lawyers, or in case of controversy, handled by trained and experienced arbitrators." (*Supra.* fn. 10, p. 295.)

CASE INDEX