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The Dogmatic and Practical Implications of Article 78 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) on Claims for Interest under International Sales Contracts.

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1. Introduction

Like almost every domestic legal system, the United Nations Convention on Contracts for the International Sale of Goods (CISG)[1] provides for a claim for interest. In terms of Article 78 CISG, a party gets the right to claim interest on a due price or any other due sum if the counterparty fails to pay it on or before the contractually stipulated time. Generally speaking, this article of the Vienna Convention provides for the general obligation of the contracting parties, both the

[1] The United Nations Convention on Contracts for the International Sale of Goods signed in Vienna on 11. April 1980 UN Doc A/ CONF 97/18 Annex 1 (1980) reprinted in United Nations Conference on Contracts for the International Sale of Goods, OR 176 UN Doc A/CONF 97/19, UN Sales No E 81 IV 3; herein cited as "CISG" and as "the Vienna Convention".

buyer and the seller, to pay interest if the purchase price or any other kind of sum becomes due. Hence, the liability for interest is not confined to arrears on the purchase price but for any outstanding sum of money.

If one approaches the question of interest in the context of the CISG, one faces a number of difficulties in the application of Article 78 CISG. Article 78 CISG does not state how to determine the interest rate and, moreover, the moment from which the interest actually becomes due. The absence of any regulations concerning these important matters entails difficult questions of interpretation and gap filling. In this context, one will have to deal with the general principles of interpretation and gap filling in the context of an internationally binding body of law provided by the general rules of international private law.

This research paper is confined to the problem of the rate of interest as the most significant problem**,** which arises from the interpretation and the gap filling of Article 78 CISG.

One may ask in this context how the legislature in Vienna could have agreed on a provision for interest, which lacks any rule for the exact determination of the interest rate and therefore gives rise to the question as to how this gap is to be filled properly. This paper therefore focuses on those provisions in the CISG dealing with the issue of gap-filling and interpretation of a legal norm.

As far as the determination of the interest rate is concerned, one will have to apply Article 7 (2) CISG since the matter of the interest rate is not expressly settled within the Convention. In terms of this article there are two possible ways to fill a gap, and specifically the gap concerning the interest rate: One might either set up a supplemental provision in "conformity with the general principle on which it is based or, in the absence of such principles, the gap has to be filled in conformity with the law applicable by virtue of the rules of private international law".

There has been widespread academic discussion about how to fill this gap in accordance with the other relevant provisions in the CISG.

The leading opinion of thought contends that the CISG is lacking any provisions concerning the interest rate consciously, so that the rate is to be determined in terms of the respective domestic law pointed to by the rules of international private law of the lex fori.[2] Within this point of view, however, certain modifications has been drawn up and alternative ways of interpretation as to the gap-filling issue. In contrast to this, another considerable opinion of thought tries

[2] See Schlechtriem/Eberstein/Bacher, Art. 78 CISG, note 21.

to refer to an internationally uniform rule for the determination of the interest rate.[3] These different dogmatic approaches will be the central theme of this paper. The second central theme of this paper is concerned with the issue of legal interpretation in the context of an international Convention. Since many of the approaches followed by courts and scholarly writings to date in respect of the interpretation and gap filling of Article 78 CISG refer directly to the legislative history of the Vienna Convention and the function of Article 78 CISG, this paper begins with a brief introduction to the basic function and to the legislative history of this article. This will be followed by a chapter on the proper determination of the interest rate as the essential part of this paper before coming to a final conclusion.

2. Function of Article 78 CISG – Ratio Legis

The main purpose of Article 78 CISG is to protect the creditor's economic interests in providing him with recompense for the fact that he was unable to use the money that he would otherwise have had, if the debtor had paid timeously.[4] On the one hand, the rules adopted in Article 78 CISG are supposed to achieve, to a certain extent, an even balance between the parties' contentious interests that normally occur in the case where one of the parties has unjustifiably delayed payment of any sum that is in arrears. In other words, as the rules adopted in Article 78 CISG provide the creditor with a claim for interest, they purport to grant appropriate recompense for each potential loss in money, which the creditor might have to face because he was unable to use the capital that should actually be freely available for him. According to international legal standards it is generally held as unjust and intolerable that one party to a sale's contract should get a non-bargained advantage in retaining a sum of money without being entitled to do so.[5] This would also conflict with the internationally accepted private law principle according to which the contractual relation between the parties is based on the idea of equivalence, i.e. based on the idea of *do ut des*. On the other hand, these rules also aim at preventing the debtor from obtaining the economic advantages out of the sum due in using it for his own monetary purposes and, furthermore, at forcing the debtor to make his payment voluntarily.[6]

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[3] Honnold, Uniform Law for International Sales, note 420.
[4] Staudinger/ Magnus, Art. 78 CISG, note 1.
[5] Enderlein/Maskow, Art. 78 CISG, note 2.1..
[6] Honnold, supra, note 420.

Article 78 CISG is located in a section on its own within the CISG and therefore is to be deemed a systematically unique provision, which is not directly connected with the provisions for damages.[7] For, in terms of Article 78 CISG the rules on interest do not prejudice any further claim for damages under Article 74 CISG. However, it has to be pointed out, that some domestic legal systems, mostly based on the common law, regard the interest issue as an integral part of damages, whereas other legal systems that are based more on the civil law tradition permit interest as a pre-judgement claim notwithstanding any other claims for damages that might come into question.[8] In respect to Article 55 CISG, only the party suing in a forum, which allows an award of pre-judgement interest under its domestic law, will, as a consequence of the discrepancy mentioned above, potentially get a judgement that offers him the choice between damages by virtue of Article 74 CISG or pre-judgement interest in terms of Article 78 CISG.[9]

Moreover, considering the systematic placement of the rules adopted in Article 78 CISG within the Vienna Convention, the provisions concerning claims for damages and the provisions concerning claims for interest are generally deemed to be independent.[10] This conclusion is supported by the UNIDROIT Principles[11], which also subject the issue of default in payment by the debtor and the issue of interest to a special regime.[12] This article can therefore be seen as an autonomous set of rules specifying the terms on the issue of interest. Generally, the rules laid down in article 78 CISG supplement the rules concerning damages as they provide the right of a party to claim interest instead of or besides claiming consequential damages as compensation.[13]

3. Legislative History of Article 78 CISG

In order to explain the reasons for the gap mentioned above and the difficulties incurred by Article 78 CISG as to its proper interpretation and application in practice, one should first review the historical background of legislation concerning the legislative genesis of Article 78 CISG (travaux preparatoires) and of the Vienna Convention as a whole.

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[7] Honsell/Magnus, Art. 78 CISG, note 10.
[8] Schlechtriem, Internationales UN Kaufrecht, note 317.
[9] Idem.
[10] Schlechtriem, supra, note 317.
[11] Principles of an Uniform International Contract Law set up by the International Institute of the Unification of the Private Law (UNIDROIT).
[12] Compare UNIDROIT Principles 1994, Comment 1 to Art. 7.4.9..
[13] Schlechtriem/Eberstein/Bacher, Art. 78 CISG, note 1.

Looking back at the legislative history of Article 78 CISG one may find useful hints pointing to the genuine traces of the different basic ideas in terms of a proper interpretation and satisfactory application of this article of the Vienna Convention. The idea of a globally applicable sales law for internationally operating merchants was born out of the upcoming need for legal unification in an area where business dealings in many cases transcends national boundaries. Before the Vienna Convention took effect as the first international legal framework which was approved by its member states, there had been several domestic trade and sales laws that had been confined to one territory and therefore their provisions were applicable only nationally and had quite often remained unknown to foreign traders.

The genesis of the provisions on interest contained in Article 78 CISG started long before the United Nations Diplomatic Conference, by which the CISG had been drafted and finally signed in Vienna on the 11. of April 1980, had taken place. Nevertheless, the final draft of Article 78 CISG has to be seen as a culmination of a development relating to the recent international legal discussion. This discussion was conducted in terms of the global unification of the law that, directly or according to the conflict of laws rules, had been governing the area of the international business dealings and especially the sale of goods taking place beyond national boundaries. In the recent decades, trade in general and the sale of goods in particular had become more and more global. Thus, as a compelling consequence, it appeared to be quite necessary to commonly adjust the existing sales laws with the aim of creating an international legal system that could govern the legal and especially contractual relationships of globally operating and trading merchants autonomously. In 1966 the United Nations therefore launched the United Nations Commission on International Trade Law (UNCITRAL)[14] that had been basically charged with establishing an internationally accepted and applicable sales law in order to accomplish the legal unification of international sales of goods and to effectively facilitate the global trade in general. UNCITRAL then set up certain working groups, which were given the task to produce suitable drafts for a uniform body of law governing the international sale of goods.

3.1. Previous Provisions and Drafts relating to Article 78 CISG

[14] United Nations Commission on International Trade Law, founded on the proposal of Hungary by the resolution Nr. 2205 (XXI) on the 17th of December 1966 as a permanent gremium.

Two conventions on international sales contracts preceded the CISG, namely the Uniform Law on the International Sale of Goods and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULIS and ULF)[15], ultimately drafted and signed by the United Nations Diplomatic Conference at the Hague in July 1964. ULIS contained provisions on interest in Article 83, which may be seen as the basis on which Article 78 CISG was modelled. Article 83 ULIS, however, contained express rules for the precise determination of the interest rate. In further contrast to Article 78 CISG, the rules of Article 83 ULIS were logically seen as part of the section dealing with damages and were, therefore, not given an autonomous nature. According to the rules of Article 83 ULIS the interest rate was to be determined with reference to the discount interest rate of the country where the creditor had its place of business. This provided a definite and legally certain approach on the question of the determination of the rate of interest.

Besides The Hague Conventions of 1964, there were three subsequent draft provisions on a uniform law for the international sale of goods that need to be mentioned: Article 58 of the 1976 Geneva Draft, Article 55 (1) of the 1977 Vienna Draft and the correspondingly worded Article 69 (1) of the 1978 New York Draft.[16] In this regard, Article 58 of the Geneva Draft for the Uniform Law on the International Sale of Goods was almost similar to the corresponding provision of Article 83 ULIS. The two latter drafts provided only for interest effecting so far as the seller was obliged to pay back the purchase price. Ultimately, the aforementioned drafts culminated in the currently operating Article 78 CISG, agreed on at the Vienna UN Conference in 1980. These prior drafts failed since they appeared to be less practicable for lawyers than the provisions in the CISG Treaty, which could provide the international business community and its lawyers with much more flexible and easily accessible rules.[17]

3.2. The Final Legislation of Article 78 CISG in Vienna

It must be clearly stated that the rules finally adopted in Article 78 CISG are the result of a compromise in the last phase of the Vienna United Nations Diplomatic Conference, which drafted and ultimately signed the Vienna Convention in 1980.

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[15] Uniform Law on the International Sale of Goods and the Uniform Law on the Formation of Contracts for the International Sale of Goods, both signed at the UN Hague Diplomatic Conference on the 1st of July 1964, reprinted in (1972) UNTS 107 and in (1972) 834 UNTS 169.

[16] Staudinger/Magnus, Art. 78, note 3.

[17] Audit, The Vienna Sales Convention and Lex Mercatoria, 2.

Due to considerably different opinions concerning the question of interest, a consensus seemed impossible at first.[18] These basically different and even contradictory approaches to the issue of interest were a reflection of different economic, political, cultural and even religious views and ideas of the Contracting States.[19] The economic and political differences resulted from the former order of the cold war era, when the world was divided into two major blocs, the western free-market and the eastern socialist bloc. The socialist countries followed an economic and political system, which was thoroughly distinct from the idea of democracy and free markets pursued by the western countries. Instead of leaving the determination of interest rates to the market, the socialist states determined the rates of interest by their administration competent for economic affairs.

In respect of the religiously motivated reservations to the final draft of this part of the Vienna Convention, there were some delegates from Islamic states who, in the first stages of the drafting process, had been rejecting a provision that would contain a claim for interest, since a sizeable group of the Islamic religions` believers regarded the claim for interest as basically amoral or even as an religious offence.[20] Other delegations that pertained mainly to the Anglo-American legal sphere, moreover, deemed a rule on interest as fairly unnecessary because, due to their legal view, a loss in money could in any case be compensated for in damages.[21]

On top of that, there were further differences of view on the possibility of proper attempts to draft sufficiently detailed rules on the issue of interest. There arose a dispute between the former socialist and the western free-market countries as to whether the interest rate should be determined on the interest level of the creditor's or the debtor's country.[22] At that time, the interest rates in the west, which used to be determined only by the market, were much higher than those in the eastern bloc countries, which, in contrast, used to be determined by the government according to public law. The western countries therefore argued in favour of the creditor's country as the decisive place, which, of course, would have meant that the debtors from western countries would have had to pay relatively low interest to eastern creditors. Conversely, debtors from eastern bloc countries would have had to pay relatively high rates of interest to their western

[18] Honnold, Documentary History of the Uniform Law for International Sales, 401,744 f.
[19] Schlechtriem/ Eberstein/ Bacher, Art. 78, note 2.
[20] Bianca/ Bonell/ Nicholas, Art. 78 CISG, note 1.
[21] Schlechtriem, supra, note 317.
[22] Enderlein/Maskow, Art. 78 CISG, note 1..

creditors. This example clearly shows to what extent the negotiations at the UN Conference were conducted under the influence and pressure of the various countries` divergent economic interests.

The dispute on the issue of interest arose in respect to the UNCITRAL Working Group's Draft Convention of 1976 that was based on the rules vesting in the former Article 83 of ULIS according to which the creditor was entitled to claim interest based either on the official discount rate in the creditor's country plus 1 % or on the rate for unsecured short-term credits. In the end this draft article was taken out of the Draft Convention mainly for two reasons: On the one hand, it was technically deficient in regard to certain states that did not have and still do not have implemented official discount rates. On the other hand, as mentioned above, in some Islamic states, it was and still is not allowed to charge interest. [23] At that stage, it seemed therefore almost impossible to accomplish any compromise on this very controversial issue. Under sizeable pressure of governments and internationally operating non-governmental organisations, the United Nations Diplomatic Conference then set up an ad hoc working group charged with the drafting of a compromise provision in this area. The Conference Plenary, however, failed to approve the working group's resultant draft, so that a second ad hoc working group had to be set up for the same purpose. This group finally succeeded in finding a compromise draft that was acceptable and finally approved by the Plenary of the Vienna Conference in 1980. This draft, ultimately enacted as the current Article 78 CISG, is confined to the institution of a general right to claim interest on sums in arrears. At first sight, this provision seems to be rather unsatisfactory because of its lack of clarity and precision, but it must be acknowledged that this legal norm, as many other provisions of the Vienna Convention, has to be seen as the result of a compromise. The lack of any provision concerning the calculation of the rate of interest hence requires interpretation and gap filling of Article 78 CISG. In the interpretation one will have to bear in mind that this gap was left consciously.[24]

It should be mentioned that, in terms of the underlying principle of freedom of contract, it is always open to the parties to include a provision in their sales contract dealing with the issue of interest on arrears sums in order to bypass the difficulties associated with Article 78 CISG.

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[23] Honnold, supra, note 420.
[24] Schlechtriem, supra, note 46.

4. Proper Determination of the Interest Rate in Terms of Article 78 CISG

If the parties have not stipulated any provision for the precise determination of the interest rate in their sales contract, the problem of the rate of interest will inevitably occur in the case of a dispute concerning interest. Article 78 CISG provides generally for interest on sums in arrears as follows: *"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*."

As can be clearly seen it remains silent on the issue of the applicable interest rate.

In respect to its lack of clarity and precision this article has to be regarded as a bare torso. Due to its open and vague nature Article 78 CISG is quite open to different interpretations, which may cause considerable problems in regard to its proper application by the decision makers (judges or arbitrators).

Furthermore, one can see that in almost each case where the CISG governs the matter in practice, the lawyers and the courts will have to deal with the issue of interest in terms of Article 78 CISG, except if contractually provided for. [25] The reason for this lies in the fact, that in most of these cases the claimant or plaintiff will claim the payment of the due purchase price plus interest or he will sue for damages plus interest. Therefore, the rules of Art. 78 CISG are often directly involved and the question of interest becomes very crucial.

As many cases concerning international business transactions, which are finally brought to court or an arbitral tribunal, simply deal with disputes concerning delay in or ultimately omission of payment by the defendant, the question of pre-judgement interest will almost always have to be taken into account by the aggrieved party. Therefore, the discussion has to focus on the question how to find reasonable and practicable ways to fill the gap that the fairly vague rules adopted in Article 78 CISG still contain.

As far as one seeks to interpret a legal norm of the Vienna Convention, one will first have to pay attention to the rules set forth in Article 7 (1) CISG.

According to the first paragraph of this general provision "*in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade*".

[25] Schlechtriem, supra, note 318.

The content of this paragraph must be viewed as a general guideline for any interpretation of the Conventions` provisions bearing a gap to be filled, not least because Article 7 (1) CISG has to be respected as the strong will of the Conventions` legislators to uphold a uniform application of the CISG.[26]

If any approach to the interpretation of the Convention did not comply with the requirement of a uniform application, the Convention would fail its initial goal to promote uniformity in the application of the international sales law.

Approaching the interpretation of the requirements of a specific provision of the Convention one must, first of all, to put aside all the domestic legal interpretation techniques as well as the domestic laws terminology and meanings. The rules of Article 78 CISG, moreover, demand an entire interpretation against the backdrop of the existing international background, since it necessarily needs a consistent interpretation by courts and arbitral tribunals all over the world. A thoroughly independent exegesis can be achieved in looking for accessible interpretation practices of other contracting states (states that have acceded to the Vienna Convention) through an already existing body of international case law like UNILEX, CLOUT, Pace Law or CISG online. Nevertheless, it has already turned out that the CISG is still in real jeopardy of being indirectly interpreted close to national views by courts and arbitral tribunals, which are inevitably prone to their own lex fori. [27]

The danger of inconsistency may therefore cause considerable uncertainty for business people seeking to use the Vienna Convention in practice. Nonetheless, the problem of uncertainty in this matter will in most cases simply be solved by contractual agreement.

It has to be examined whether the rate can in fact be determined in terms of Article 7 (2) CISG as the calculation of the interest rate is not specified by Article 78 CISG.[28] In terms of Article 7 (2) CISG the question arises whether this gap is to be filled in an autonomous manner or according to the national law chosen by the international private law of the lex fori. Basically, Article 7 (2) CISG reveals a general principle dealing with the due interpretation, application and supplementation of the Vienna Convention, according to which the provisions are

[26] Bernstein/Lookofski, 21.
[27] Witz, Art. 78 CISG, note 13.
[28] Neumayer/Ming, Art. 78 CISG, note 2..

generally to be “interpreted in an autonomous manner” without reliance to any national law.[29]

According to the principle laid down in Article 7 (2) sentence 1 CISG, every interpretation and gap filling of the Convention shall promote its uniform application, whereas the last sentence of this paragraph provides for the application of international private law only in the exceptional case where the gap cannot be filled in accordance with the Convention’s general principles.

Before approaching this question, however, one will have to examine whether the sales contract itself provides for potential claims for interest and especially for the determination of the interest rate. Due to the difficulties arising in the application of the CISG provision on interest, merchants who seek to conclude a sales contract with a foreign party often tackle these problems directly by their sales contract in including the issue of interest that may arise, if one party fails to pay the purchase price or any other sum in arrears.[30] Since Article 6 CISG expressly provides the parties with the autonomy to contract out of or modify most of the Vienna Convention’s provisions, it seems to be quite sensible to take specific precautions to facilitate possible claims for interest. This, of course, requires certain skills on the side of the legal adviser who is responsible for the conclusion of a contract that includes detailed agreements on the issue of interest.

However, where the sales contract does not contain a provision that specifies the preconditions of the claim for interest and especially the calculation of the interest rate, the amount of interest has to be determined according to a subsidiary applicable law or other substitute rules.

Various approaches have been proposed based on different dogmatic standpoints, purporting to properly tackle the gap of Article 78 CISG.[31] All these approaches has been subject to intense criticism and discussion among scholars and decision makers ever since the promulgation of the CISG.[32]

In the first instance, one can point out two different conceivable dogmatic approaches to solve the question of the correct determination of the interest rate.[33]

On the one hand, one could approach this question by making reference to the conflict of laws rule of the lex fori and one would, accordingly, be referred

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[29] Ferrari, *Ga.J.Int. & Comp.L. 1994*, 201.

[30] Honnold, supra, note 422.
Enderlein/Maskow, Art. 78 CISG, note 2.2..

[31] Details are displayed in Schlechtriem/Eberstein/Bacher, Art. 78 CISG, note 22 f.

[32] Schlechtriem, supra, note 318.

[33] See Schlechtriem/Eberstein/Bacher, Art. 78 CISG, note 21.

directly to a certain domestic legal system. In this case the interest rate would be determined pursuant to that domestic legal system.

On the other hand, one could try to evolve a uniform set of rules applicable in all cases concerned with claims for interest based on an international sale contract and determined by the scope of the CISG.

In this context, one will have to apply the general principles of interpretation and gap filling concerning an international convention. As far as the question of interpretation and gap filling of Article 78 CISG is concerned, one may generally assume a so-called *internal gap* as to the rate of interest, which is to be filled according to the general principles contained by the Convention itself pursuant to Article 7 (2) sentence 1 CISG. [34] A precondition for such an approach would be that the drafters of the Convention did unintentionally neglect to create an exhaustive provision on a certain issue.

In contrast to that, one may assume a so-called *external gap*, which is to be filled according to international private law of the forum pursuant to Article 7 (2) sentence 2 CISG.[35] Such a gap is as to its subject-matter not comprised by the ambit of the CISG and can thus only be filled by the respective domestic law, which is applicable as the subsidiary law. Especially, where the drafters of the Convention have consciously left a gap because they were not able to agree upon a certain issue, one is faced with such an external gap, which then requires the application of domestic law.[36]

4.1. The Concept of a Uniform Legal Norm Providing for Interest

In contrast to the leading opinion that assumes that the rate of interest should be calculated on the basis of domestic law, other dogmatic approaches have been formulated in favour of a uniform provision applicable to disputes concerning problems of interest under the auspices of the CISG.[37]

These views supporting a uniform approach, argue that the fact that a compromise on the issue of the interest rate could not be found at the Vienna Conference, does not necessarily indicate that a uniform approach is precluded.[38] Article 78 CISG

[34] Schlechtriem, supra, note 33.
[35] Idem.
[36] Idem.
[37] Honnold, supra, note 420. Neumayer, *RIW 1994*, 106.
[38] See Schlechtriem/Eberstein/Bacher, Art. 78 CISG, note 22.

does not necessarily imply the application of domestic law in respect of the determination of the interest rate.[39]

According to this view one is supposed to take recourse to the general principles of the Convention in terms of Article 7 (2) sentence 1 CISG in order to uphold uniformity in the calculation of the amount of interest and the interest rate. Regarding the regulations of Article 7 CISG as a whole one must take into account that their prime purpose is to promote uniformity in the Convention's application. Furthermore, it has to be pointed out that the CISG provides for a claim for interest as a general point of departure. That could mean that the CISG already contains the basic principles concerning the issue of interest while only failing to provide for one aspect: the determination of the rate of interest.

It is further mentioned in favour of the uniform approach, that arbitration tribunals are often inclined to determine the interest rate without any reference to choice of law rules and the domestic law normally applicable.[40] This merely practical argument is not very convincing, since it simply refers to a matter of fact.

One also has to bear in mind that, as a consequence of the fact that the Contracting States have consciously left a gap concerning the rate of interest, it has to be classified as an external gap, which is to be filled according to the subsidiary domestic law (Article 7 (2) sentence 2 CISG).[41]

Thus, there are no convincing reasons supporting an autonomous gap filling approach because one is not dealing with an internal gap, which would have to be filled according to the general principles of the Convention pursuant to Article 7 (2) sentence 1 CISG.[42]

4.1.1. Application of a Special Connecting Factor Leading to the Seller's Place of Business

A considerable sub-opinion of thought within the uniform law approach follows the idea of a special connecting factor which points to the usual interest rates like the commercial bank lending rates or similar costs of credit at the seller's place of business.[43]

According to this view both the law and the bank rates of the seller's country will in most cases be the law or the usual bank rates of the creditor's place of business

[39] Idem.
[40] See Behr, *The Journal of Law and Commerce 1998*, 266.
[41] Schlechtriem, supra, note 46.
[42] Frigge, Art.7 (2) CISG, 79.
[43] Awards of the Bundeskammer der gewerblichen Wirtschaft in Österreich, Award -4366 and Award -4318 of the 15th of June 1994, *RIW 1995*, 591. Discussed by Schlechtriem, *RIW 1995*, 592.

since the seller is not exclusively, but typically the creditor.[44] Accordingly, it is typically the seller who claims payment of the purchase price owed by the buyer. Therefore, as far as the seller's place of business is concerned, one generally has to deal with the creditor's place of business. This reasoning is, however, to a certain extent suspect if one takes into account the case where the buyer claims refunding of the purchase price. In this special case the buyer would be the genuine creditor claiming the refund of the purchase price he has paid before. It remains to be seen how this approach will deal with this contradiction.

In the decision of the *Bundeskammer der gewerblichen Wirtschaft Oesterreich* the arbitral tribunal held that the calculation of the rate of interest is to be determined not by the conflict of law rules of the forum, but rather by an autonomous uniform rule which is based on a particular connecting factor leading to the commercial bank lending rates for prime borrowers of the seller's country. Such an approach has already been supported by scholarly writings and arbitral tribunals appointed in the context of an international commercial arbitration.[45]

In respect to that approach, the question arises whether the rate of interest is to be decided indirectly through the application of international private law, i.e. the conflict of law rules of the lex fori, or whether it is to be decided in an autonomous manner with reference to general principles pursuant to article 7 (2) sentence 1 CISG. However, the above mentioned arbitral decision does not seem to refer to an autonomous regulation based on general principles in terms of Article 7 (2) sentence 1 CISG. In this context the rate of interest was merely calculated pursuant to the costs of credit or the usual bank rates of the seller's, respectively the creditor's country instead of being determined by operation of the applicable domestic law. Although this decision refers to a connecting factor not leading to any law of the seller's, respectively the creditor's country, it sets up a basic rule that fills the gap of Article 78 CISG in determining a special manner to calculate the amount of the interest rate. It thus appears to be a special conflict of law rule being of an autonomous nature in contrast to the general conflict of law rules.[46] Therefore, this approach corresponds with the mechanisms of the conflict of law rules in that it seeks to set up a uniform provision to govern the issue of interest. However, the criteria for the special connecting factor leading to the usual rates and costs of credit in the creditor's or the debtor's country follow the

[44] Enderlein/Maskow, Art. 78 CISG, note 2.1..
[45] Enderlein/Maskow, Art. 78 CISG, note 2.1..
[46] Schlechtriem, *supra*, 593. Witz, Art. 78 CISG, note 7.

same patterns as the conflict of law rules and could therefore also be deemed as part of the international private law approach.[47]

The reasons given for the application of the costs of credit at the creditor's country in this decision are of particular interest. The tribunal stated that the issue of interest is quite similar to the issue of damages. Although Article 78 CISG was of an independent nature (see above under II.) the purpose of Article 78 CISG appeared to be close to that of Article 74 CISG as the general provision for damages. The decision furthermore pointed out that the principle of full compensation in terms of Article 74 CSIG pertains to one of the basic principles of the CISG and that according to that principle, in the case of a default in payment by the debtor, the creditor is entitled to claim payment of interest determined in terms of his own national law or costs of credit at his place of business.[48]

Moreover, one has to bear in mind that, if the applicable law is established in terms of the conflict of law rules, the provisions for the interest rate of that law would decide the issue.[49] Therefore, it has to be considered that, if the conflict of law rule of the lex fori leads to a national legal system, which prohibits any payment of interest, the creditor's disadvantage arising from this kind of situation would hardly comply with the principle contained by Article 78 CISG according to which the creditor should get full recompense in all cases. This argument, however, hardly appears to be conclusive because one will have to consider that in the case of a statutory prohibition of interest the decision maker will probably find a rule with a comparable function or a law which provides for comparable compensation.[50] Only if no law at all for the determination of the interest rate can be found, may one refer to a prime rate set by the central bank or the lending rates of the dominant private banks.[51] According to the approach discussed in this paragraph, this would be the bank lending rates of the creditor's country.

The provisions adopted in Article 78 CISG have to be treated as clearly distinct from the provisions for damages because a claim for interest is of a different nature than a claim for damages.[52] The claimant generally has the choice between full compensation in terms of Article 74 CISG and a claim for interest in

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[47] Idem.
[48] Awards of the Bundeskammer der gewerblichen Wirtschaft in Österreich, Award -4366 and Award -4318 of the 15th of June 1994, *supra*, 592.
[49] Schlechtriem/Eberstein/Bacher, Art. 78 CISG, note 31.
[50] See Herber/Czerwenka, Art. 78 CISG, note 7.
[51] See Staudinger/Magnus, Art. 78 CISG, note 17.
[52] Witz, Art. 78 CISG, note 7. Enderlein/Maskow, Art. 78 CISG, note 2.2..

terms of Article 78 CISG.[53] Although Article 74 CISG is based on the principle of full compensation on which the grounds for a claim for interest can be asserted as well, this principle cannot be taken into account in regard to the provisions adopted by Article 78 CISG, since this article is not part of the provisions dealing with claims for damages.[54]

There is no actual need to treat the provisions on interest as being a kind of provisions for damages because the creditor can recover his costs incurred by his possible refinance efforts and any other additional losses in reliance to Art. 74 CISG, provided the preconditions of a claim for damages are satisfied.[55]

For the determination of the interest rate the decision mentioned above does not make any reference to the law of the creditor's place of business, but instead considers the rate of interest as set out by the bank lending rates of the creditor's country applicable to the merits. On that issue it makes reference to the provisions contained in Article 7.4.9. of the UNIDROIT Principles which it considers as a proper guideline. Pursuant to Article 7.4.9. of this non-binding body of law the bank lending rate of the currency of payment determines the amount of interest to be paid. This will often be the bank lending rate of the creditor's country.

Regarding the history of the Convention's final adoption, the tribunal's decision is in line with the former approach of the Western industrialized countries that also suggested considering the cost of credit at the creditor's place of business as decisive and therefore followed the UNIDROIT Principles that directly point to the costs of credit and not to a special law regulating the issue of interest (see also above III. 2.). Nonetheless, this solution was rejected by the Diplomatic Conference in Vienna and should therefore not be adopted by means of interpretation.[56]

Generally speaking, as a further argument in favour of the approach relating to a special connecting factor leading to the creditor's country, one may point out that the debtor should have to bear the risk relating to the obligation to pay a sum of interest determined by a foreign rate of interest, since he is the one who owes a sum of money in a foreign currency and it is his default in payment that affects the creditor. Hence, the question is ultimately related to the creditor's place of

[53] Piltz, NJW 2000, 558.
[54] Rossmeier, *RIW 2000,* 413.
[55] Schlechtriem, *RIW 1995*, 594. See also Schlechtriem/Eberstein/Bacher, Art. 78 CISG, note 34.
[56] Enderlein/Maskow, Art. 78 CISG, note 2.2..

business.[57] This relation has to be taken into consideration since the creditor, in the case of the debtor's default in payment, will often be forced to get a bank loan himself in his own country in order to reassure the further financing of his entire business.

These arguments seem to be convincing at first glance. However, this approach entails a rejection of the international private law, not least those of the European Union. The application of any interest rate pertaining to the creditor's country is in conflict with the provisions of Article 10(1)(c) of the Rome Convention[58] in terms of which the conflict of law rules of the forum are to be applied in the case of a dispute arising from a breach of contract.[59] Bearing in mind the promulgation of a convention for Europe in the area of international private law, the approach applying a special connecting factor leading to the creditor's country would hardly be justifiable, as such an incompatible result should basically be avoided.[60]

One will have to consider that the concept of a special connecting factor leading to the credit costs at the seller's (creditor's) place of business does not take into account the inability of the Vienna Conference to reach an agreement upon any regulation of the rate of interest under Article 78 CISG (see above III.).[61]

Thus, there are no convincing grounds for the justification of a gap filling approach in terms of Article 7 (2) sentence 1 CISG purporting to find a special connecting factor or other uniform rule applying to the question of interest.[62] As long as no provisions for the rate of interest has been adopted, Article 78 CISG requires the application of the conflict of law rules of the lex fori leading to domestic law; otherwise the different countries could be inclined to interpret their own ideas and approaches to the problem of interest into the Convention.

Only in the exceptional case where a claim of interest is prohibited in the applicable law's country, does it seem to be reasonable to determine the rate of interest according to comparable costs of credit within that country.[63] If it turns out to be impossible to find such comparable costs of credit, one view prefers the application of the usual rate of interest of that country.[64] However, it appears to be both reasonable and favourable to deny any claim for interest where no

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[57] Decision of the Landgericht Stuttgart of the 31st of August 1989, *RIW 1989*, 985.
[58] The Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on the 19th of June 1980 (80/934/EEC).
[59] Kindler, *IPRax 1996*, 21.
[60] Idem.
[61] Schlechtriem, supra, note 318.
[62] Schlechtriem/Eberstein/Bacher, Art. 78 CISG, note 26.
[63] Staudinger/Magnus, Art. 78 CISG, note 17. Honsell/Magnus, Art. 78 CISG, note 15.
[64] Schlechtriem/Eberstein/Bacher, Art. 78 CISG, note 31.

comparison can be found.[65] In this rare case of a lack of comparable costs of interest, the claimant may take recourse to a claim for damages pursuant to Article 74 CISG.[66]

Furthermore, one will have to recognise that the gap of Article 78 CISG is to be filled in terms of Article 7 (2) sentence 2 CISG instead of the first sentence. There is no reason for a uniform rule based on general principles of the CISG, since the Convention does not contain such a principle as to the rate of interest.[67]

4.1.2. Application of a Special Connecting Factor Leading to the Debtor's Place of Business

Another sub-opinion of thought suggests the debtor's place of business as a criterion for a special connecting factor and therefore prefers the application of the bank lending rates or similar costs of credit of the debtor's country.[68] This view constitutes the exact opposite of the view discussed in the previous paragraph.

According to this view, the costs of credit of the debtor's country should decide the question of interest, since it is the debtor who generally obtains the benefits of the money he keeps in his pocket without being entitled to do so and, hence, the enrichment takes place at the debtor's place of business.[69] This reasoning is just as unconvincing as the reasoning used for the connecting factor leading to the creditor's place of business. This approach would also contravene the historical fact that no consensus as to the interest rate could be reached by the Contracting States. The argument that Article 78 CISG purports to prevent the debtor from indulging in delaying tactics is not convincing, because that aim can also be reached through the creditor's right to claim damages.[70]

It is also said that the CISG does not contain such a principle as the CISG intends to prevent the debtor from benefiting from the money he withholds from the creditor.[71] As to this approach, it can be argued that there is no reason why the debtor's place of business should specifically be relevant for the determination of the interest rate. Hence, the argument that Article 78 CISG aims at compelling the debtor to pay the money punctually does not necessarily support this view.

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[65] See Herber/Czerwenka, Art. 78 CISG, note 7.
[66] Rossmeier, *supra*, 415. Achilles, Art. 78 CISG, note 5.
[67] Frigge, supra, 79. See also Schlechtriem, supra, note 318.
[68] Neumayer/Ming, Art. 78 CISG, note 2..
[69] Idem.
[70] Compare to Honnold, Uniform Law for International Sales, note 420.
[71] Decision of the Landgericht Hamburg of the 26th of September 1990, *IPRax 1991*, 403.

The same reservations referred to above in paragraph 4.1.1. speak against this approach as well.

4.1.3. Application of an International Rate of Interest (LIBOR)[72]

Within the uniform approach some commentators refer to LIBOR as a uniform rule determining the interest rate.[73] The LIBOR international interest rate constitutes a reference figure according to which the international banks conclude transactions on the money market in London. This approach has to be seen against one of the basic disputes of the Vienna Conference as to which one of the existing rates in the various countries would be apt for a consensus on this issue.

This approach aims at generally supporting uniformity in the application of Article 78 CISG. In order to achieve this aim, it takes recourse to an international rate. However, it has to be mentioned in this context, that the LIBOR rate is related to a currency and therefore dependent on the relevant inflation rate for that currency. The problem is that the figures of the interest rate depend on the currency and thus on the currency's inflation rate. A result rendering a uniform rule dependent on local circumstances of that kind, should however be avoided.[74] Nonetheless, taking into account that it is quite desirable to effect a uniform application of the Convention, in order to grant a high degree of legal certainty, it appears to be reasonable to rely on an international uniform rate like the LIBOR rate to resolve the issue.

Bearing in mind the legislative history of the Convention, one can observe that the Contracting States differed most on how to calculate the rate of interest. The discussions on that issue revealed that an agreement on the question whether the interest level of the creditor's or of the debtor's country should be applicable was impossible.[75] It may seem more likely that the Contracting States could have agreed to one single international interest level, but in fact they did not. Therefore, as has already been pointed out above, the Convention's general principles in terms of Article 7 (2) sentence 1 CISG do not support the use of such an international rate of interest for the determination of the rate of interest.[76]

Furthermore, the fact that the delegates at the Vienna Conference have consciously left a gap as to the rate of interest does not support such an approach.

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[72] London Interbank Offered Rate.
[73] ICC Award No. 6653/1993, *Journal du Droit International 1993*, 1046.
[74] Enderlein/Maskow, Art. 78 CISG, note 2.2..
[75] See Enderlein/Maskow, Art. 78 CISG, note 1..
[76] Frigge, supra, 79.

Therefore, there are no convincing grounds on which this approach could be supported.

4.1.4. Application of the Usual Rate at the Place of Performance

Another opinion of thought within the uniform approach resorts to the place where the contractual obligation is to be performed as a criterion for the determination of the interest rate. According to this approach the usual rate of interest of the place of performance shall be used for the determination of the interest rate in terms of Article 78 CISG.[77] The prime rate for borrowers in the country where the main contractual performance takes place is regarded as the usual rate of interest in terms of this approach.[78] To that extent, this approach partly matches Article 7.4.9. of the UNIDROIT Principles which relates to the currency of payment as well as to the place of performance. The place of performance can be seen as a special connecting factor since the money in arrears is presumably used at the place of performance.[79]

This approach also tries to create a uniform rule applicable to the question of interest. Nonetheless, such an approach would not comply with the requirements set up by Article 7 (2) sentence 2 CISG in terms of which the gap of Article 78 is to be filled with reference to domestic law instead of a uniform set of rules in this regard.

4.2. The Concept of the Application of Domestic Law - the International Private Law Approach

If the parties did not agree on a specific provision dealing with interest or on a choice of law clause clarifying the issue of interest in their sales contract, most academic views as well as the judicial views throughout the world seem to prefer the application of domestic law as the subsidiary law of the sales contract.[80] According to this approach the amount of interest under Article 78 CISG has to be calculated according to the domestic law pointed to by the rules and instruments of international private law.[81]

The courts and arbitral tribunals concerned with the question of interest under the auspices of the CISG mostly determine the interest rate according to the domestic

[77] See Schlechtriem/Eberstein/Bacher, Art. 78 CISG, note 23.
[78] Koeniger, Die Bestimmung der gesetzlichen Zinshoehe nach dem deutschen Internationalen Privatrecht, 23.
[79] Idem.
[80] See Schlechtriem/Eberstein/Bacher, Art. 78 CISG, note 21. Honsell/Magnus, Art. 78 CISG, note 12. Karollus, UN-Kaufrecht, 227. Enderlein/Maskow, Art. 78 CISG, note 2.2. Bianca/Bonell/Nicholas, Art. 78 CISG, note 2.1. Decision of the Oberlandesgericht Frankfurt a.M. of the 13th of June 1991, 5 U 261/90, *RIW 1991,* 591. Decision of the Oberlandesgericht Rostock of the 27th of July 1995, 1 U 247/94, *IPRax 2000,* 230.
[81] Idem.

law applicable according to the conflict of law rules of their forum.[82] However, choice of law rules differ from jurisdiction to jurisdiction and the courts therefore do not always apply a uniform approach as to the question of how to determine the applicable domestic law in cases concerned with the problem of interest.[83] Nevertheless, for people involved in an international commercial dispute, it can be quite important to know which national legal system will govern the issue of interest because the interest rates of the different contracting states may differ in levels and may furthermore be subject to fundamental changes.[84]

Within the dominant opinion of thought, according to which the interest rate is to be determined with reference to the rules of international private law pointing to a specific national legal system, different sub-opinions have been developed.[85] Within the domestic law approach reflecting the majority of court decisions and scholarly writings unity has been reached only in that it refers to the rules of national law in order to determine the rate of interest, whereas different approaches as set out below have been developed as to the method of a proper determination of the ultimately applicable national law.[86]

4.2.1. The Law Applicable to the Sales Contract

For the determination of the interest rate it seems that the majority of the courts simply refer to the rules of international private law and apply the conflict of law rules of the lex fori, which point to the applicable national law.[87]

The majority of the court decisions applying this approach as well as the majority of scholars consider the law governing the sales contract pursuant to the rules of international private law of the forum, if there was no CISG, also being applicable to the determination of the rate of interest.[88] Eventually, this view relates to the case where the parties could not agree on or did not even consider a choice of law provision as to the interest rate in their sales contract. In that case, in the absence of the CISG's application, the law governing the sales contract in terms of the conflict of law rules of the forum is applicable to the rate of interest.

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[82] See Schlechtriem/Eberstein/Bacher, Art. 78 CISG, note 21. ICC Award No 7153/1992, *Journal du droit international 1992*, 1007. Decision of the Oberlandesgericht Frankfurt a.M. of the 13th of June 1991, 5 U 261/90. Decision of the Oberlandesgericht Rostock of the 27th of July 1995, 1 U 247/94, *IPRax 2000,* 230. Decision of the Kantonsgericht Nidwalden of the 8th of December 1997, *SZIER 1998,* 81.
[83] Herber/Czerwenka, Art. 78 CISG, note 6.
[84] Schlechtriem/Eberstein/Bacher, Art. 78 CISG, note 33.
[85] Witz, Art. 78 CISG, note 6.
[86] See Schlechtriem/Eberstein/Bacher, Art. 78 CISG, note 27.
[87] See Piltz, Internationales Kaufrecht, note 412.
[88] See Behr, *Journal of Law and Commerce 1998*, 298.

According to the European International Private Law (Art. 10 (1) (c) of the Rome Convention) and, for instance, according to the German conflict of law rules (Art. 28 EGBGB which corresponds with the European law) the law which governs an international sales contract is usually the law of the seller's place of business. Practically this will in most cases lead to an application of the law of the creditor in respect of the issue of interest. Finally, in regard to the rate of interest to be paid in circumstances where this question is not regulated by the CISG the rate is to be determined in terms of the national law applicable pursuant to the conflict of law rules of the forum.[89]

Moreover, it has to be underlined that the application of domestic law, pointed to by the conflict of law rules of the lex fori, is confined to the scale of the interest rate and does therefore not comprise general questions and requirements of interest.[90] In other words, the domestic law is only meant to determine the rate of interest.

In spite of the fact that the rules of international private law often contain the danger of producing different results, using the private international law approach has a certain convincing logic as it usually leads to results, which are susceptible to legal review. However, the court decisions and arbitral decisions applying the conflict of law rules of the lex fori are quite often silent on the actual reason why they have referred to this approach. On that, they tend to not indicate whether they apply the conflict of law rules because the question of the interest is not regulated by the CISG or because the private international law of the forum is, in the absence of general principles, supplementary applicable in terms of Article 7 (2) sentence 2 CISG.[91] This question is, however, practically irrelevant, since both reasons lead to the application of the forum's national law and its conflict of law rules. Some decisions make direct reference to Article 7 (2) sentence 2 CISG according to which the lex fori decides on the interest rate.[92]

The international law approach is mainly justified on the ground that the CISG intentionally neglected to regulate the issue of the interest rate, since the Contracting States were not able to agree on this issue (see 2 above).[93]

In terms of this approach the CISG indicates the application of the subsidiary international private law of the forum by not expressly providing for the rate of

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[89] Philip, *IPRax 2000*, 209.
[90] Staudinger/Magnus, Art. 78 CISG, note 14.
[91] Lucowicz, Divergenzen in der Rechtsprechung zum CISG, 130.
[92] Award of the Chamber of Commerce Hamburg of the 21st of March 1996, *RIW 1996*, 771.
[93] Witz, Art. 78 CISG, note 6 and 1. Herber/Czerwenka, Art. 78 CISG, note 6.

interest.[94] This argument particularly corresponds with the rules of Article 7 (2) sentence 2 CISG, which according to their wording, provide for the "law applicable by virtue of the rules of private international law".

Furthermore, this approach properly takes into account that Article 78 CISG contains a so-called external gap consciously left by the drafters of the Convention, which is to be filled in terms of Article 7 (2) sentence 2 CISG.

In this regard, one will, of course, have to accept a high degree of unpredictability as to the applicable domestic law inevitably entailed by the application of the conflict of law rules of the forum.[95] Parties entering into a sales contract may have to deal with a foreign legal system, of which it may not have sufficient knowledge.[96]

4.2.2. Application of the Law of the Creditor's or the Debtor's Country

Another conceivable approach considers the criteria of the creditor's place of busines [97] or of the debtor's place of business[98] as a special connecting factor. This approach can be classified as a real international private law approach, as it points to a certain national legal system, which is meant to determine the rate of interest (in contrast to the approach dealt with in paragraph 4.1.1. and 4.1.2.)

In favour of the connecting factor leading to the law of the debtor's country, it is argued that it is eventually the debtor who benefits from using the money in arrears.[99] In addition to that, it is argued that the debtor should have to bear the risk of being obliged to pay interest according to the foreign law of the creditor's country.[100] The arguments made in favour of the creditor's place of business as a special connecting factor match those already mentioned in regard to the uniform approach. One of the main arguments in this regard was that it is the debtor who should bear the risk relating to the obligation to pay an amount of interest determined by a foreign interest rate.

This approach seeks to set up a rule that has to be characterised as a definite international uniform conflict of law rule as it points to domestic law which is meant to determine the rate of interest. These special connecting factors are, however, also subject to the objection that the delegates at the Vienna Conference

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[94] Asam, *RIW 1989*, 945.
[95] Eiselen, Adoption of the CISG in South Africa, *http//:www.cisg.law.pace.edu.*
[96] Idem.
[97] Decision of the Landgericht Stuttgart of the 31st of August 1989, *RIW 1989*, 984.
[98] Stoll in: Schlechtriem, Einheitliches Kaufrecht und nationales Obligationenrecht, 280.
[99] See Behr, supra, 298.
[100] See Lucowicz, supra, 131.

consciously left a gap as to the rate of interest. Thus, this approach does also not take into account that the gap of Article 78 CISG is to be filled in terms of Article 7 (2) sentence 2 CISG.

4.2.3. The Currency of Payment as a Special Connecting Factor Leading to the Applicable Law

According to one eminent view, the law of the country in whose currency the money in arrears is to be paid should be applicable to the determination of the interest rate.[101]

On the one hand, this view can be classified a definite international private law rule which clearly indicates the law applicable to the issue of interest. On the other hand, this approach takes into account that the domestic interest rates are closely connected to the rate of inflation and therefore can vary considerably. Moreover the domestic interest rate purports to partly compensate a possible decline of the currency's value.[102] Thus, this approach properly takes into consideration the problem which may arise if a sum of money of a definite currency is used as the basis for the calculation of interest pursuant to another state's law and, furthermore, the stipulated currency is quite strong whereas the currency value of the other state steadily declines. This may produce unjust und unreasonable results.

This approach, therefore, does not really fit in with the international contexts the CISG typically applies to because it is usually the current exchange rate that is responsible for incidental expenses which occur in international commercial business transactions.[103] In other words, any international transfer of money is related more to the applicable currency exchange rates than to the rate of inflation of the respective currencies concerned.

Therefore, it appears to be more reasonable to apply the conflict of law rules of the lex fori, which ultimately determine the applicable domestic law.

4.3. Various Approaches Taken by Courts and Arbitral Tribunals to the problem of interest

[101] Schlechtriem/Eberstein/Bacher, Art. 78 CISG, note 29. See ICC Award No. 7585/1992, UNILEX, E.1992-32.
[102] Schlechtriem, *RIW 1995,* 594.
[103] Rossmeier, *supra,* 414.

Some decisions create the impression that the courts or arbitral tribunals applying Article 78 CISG do not tend to seek a uniform approach to the interpretation and application of the provisions for interest under the CISG.[104]

For instance, one U.S. District Court has, without any further explanation, calculated the amount of interest on the basis of the national law of the country whose court had jurisdiction.[105] In regard to that case the court applied the United States Treasury Bill Rate. This decision matches neither any of the uniform approaches nor any of the international private law approaches, which have been established by scholarly writings and the jurisdiction. In this decision the court briefly reasoned that it had the discretion to determine the interest rate, since Article 78 CISG does not provide for any rate of interest. The court did not explain how this conforms with the CISG, but apparently based its decision only on principles of equity.

A Dutch decision applied the law of the country where the purchase price was to be paid in terms of Article 57 CISG.[106] This decision seems to follow the approach according to which the law of the place of performance is applicable to the determination of the interest rate.

This diversity of approaches chosen by the courts in order to find a solution for the subject matter of the determination of the interest rate in international sales contracts, clearly demonstrates that the lack of such a provision in the CISG is a major weakness. As long as such a provision is not included, courts will continue to arbitrarily refer to national laws according to unclear criteria. Consequently the business dealings affected by this issue will have to face a high degree of uncertainty concerning the question of interest.[107]

Most of these court decisions concerning the question of interest under the CISG do not provide adequate legal reasons or guidance for future decisions.[108]

It still remains to be seen which approach will consistently prevail in the application of Article 78 CISG by courts and arbitral tribunals.

5. Conclusion

In Article 7 (1) the Vienna Convention proclaims the promotion of uniformity in its application as one of its main and basic principles: The aim of the unification

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[104] Behr, *supra*, 266.
[105] Decision of the U.S. District Court of the 9th of September 1994, UNILEX, E.1994-22.
[106] Award of the Rechtbank Almelo of the 9th of August 1995, *NIPR 1995*, Nr. 520.
[107] Bianca/Bonell/Nicholas, Art. 78 CISG, note 1.4..
[108] Lucowicz, supra, 135.

of the sales law as the core of international trade was to create legal certainty and to facilitate the trade between the nations of the world. This goal can only be achieved, if uniformity in the application of the international conventional law governing international sales contracts is assured. Uniformity, and thus certainty of the law can only be achieved through uniform interpretation and application, which require the person dealing with the convention to interpret it autonomously, which means detached from his national legal context.

Thus, uniformity of the law concerning the applicable rate of interest is fairly desirable and even necessary to promote the actual raison d'être of the Convention, namely the unification of the sales law within one internationally applicable body of law. Despite the diversity of approaches that have been put forward in order to find a universally applicable solution for the determination of the rate of interest, it still remains to be seen whether it will be possible to find a uniform Rule, which will be acceptable to all states that have acceded to the Convention.

The legislative history of the Convention reveals that the Contracting States were not able to find a suitable compromise on the issue of interest. They proposed many different criteria for the proper determination of the interest rate, which reflected many considerable differences in view of opinion presented by the delegates at the Vienna Conference. The content of Article 78 CISG reflects the contrasting interests of the different Contracting States on the issue of interest, which turned out to be unsusceptible to any further and more definite compromise.

Furthermore, the Convention's legislative history shows, that the participant states mainly argued about two criteria, namely whether the rate of interest was to be calculated according to the general costs of credit of the creditor's or the debtor's place of business. The reason for this disagreement was that the costs of credit in the western countries were much higher and volatile than in other countries of the world. Regarding this, it appears to be difficult to simply fill the gap of Article 78 CISG in setting up a connecting factor leading to the respective parties' countries, as some proponents of the uniform approach have already suggested.

One has to bear in mind that the drafters of the Convention were conscious of the gap of Article 78 CISG concerning the determination of the interest rate and that they did not fill it on purpose. In the case where an international Convention fails to provide for each possible situation of its subject-matter, there is unfortunately no uniform provision one can rely on.

To fill the gap, one will have to apply the international private law, which provides the proper instruments to find the national law to govern the transaction concerned. Otherwise, one would ignore the historical fact that the Contracting States apparently were unable to reach a compromise on the question of the interest rate and arrogate to overtake the law making process, which should be reserved for the legislature. Therefore, in order to fill the gap one should follow the majority of academic authorities, which propose the application of the conflict of law rules of the lex fori.

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Friso Garbers