The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles

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The United Nations Convention on Contracts for the International Sale of Goods (hereinafter Convention or CISG)[1] aims to promote international trade by removing legal barriers in international trade.[2] The Convention is the culmination of more than five decades of international efforts to unify the sales law of international trade,[3] and many of its provisions reflect the difficult negotiations and compromises the drafters had to make.

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1. Final Act of the United Nations Conference on Contracts for the International Sale of Goods, Apr. 10, 1980, U.N. Doc. A/CONF.97/18 (1980), *reprinted in* S. TREATY DOC. NO. 98-9, (1983) and 19 I.L.M. 668 [hereinafter CISG].

2. CISG, supra note 1, preamble.

3. There is extensive literature on the drafting and negotiating history of the Convention. *See generally* CESARE M. BIANCA & MICHAEL J. BONNELL, COMMENTARY OF THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION (1987); JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES (1989) [hereinafter HONNOLD, DOCUMENTARY HISTORY]; JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES (2d ed. 1991) [hereinafter HONNOLD, UNIFORM LAW]; Gyula Eörosi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L. 333 (1983); Note, *Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods*, 97 HARV. L. REV. 1984 (1984); Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265 (1984); *see also* UNILEX, A COMPREHENSIVE AND "INTELLIGENT" DATA BASE ON THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG), Transnational Juris Publications, Inc., Irvington, N.Y. [hereinafter UNILEX].

The integrity of the Convention and its role as an international body of law to be respected and widely followed depends on how its various provisions are interpreted by the judiciary in a given country.[4]

To promote uniformity of interpretation, Article 7 of the Convention itself undertakes the formidable task of guiding judges. This article is arguably the single most important provision in ensuring the future success of the Convention.

The general scheme of Article 7 is that the judge should give an "international" rather than a "domestic" interpretation to the Convention. Article 7(1) requires that the judge, when interpreting any provisions of the Convention, should not, at least initially, look to any national (domestic) law. Rather, the judge should focus on the overall objectives of the Convention, namely, to bring uniformity and to promote the observance of good faith in international trade. While Article 7(1) describes the goals of interpretation, Article 7(2) sets out the protocol to achieve these goals. Article 7(2) requires that the text of the Convention itself should be the primary source of interpretation. If the text does not expressly address an issue, the next step is to consult the "general principles on which the Convention is based." Only if the answer cannot be found either in the text or in the general principles of the Convention is the judge free to consult domestic law as determined by private international law rules.

Part I presents a brief discussion of "international interpretation" under Article 7(1). This discussion suggests that a European model of international interpretation, as developed by the European Court of Justice, may guide the judiciary in interpreting the Convention. It also argues that international interpretation can be achieved by focusing on the general principles and objectives of the Convention. Part II identifies several general principles contained within the Convention. It argues that the courts should, consistent with the Article 7(2) methodology, look to these general principles in resolving specific issues. Part II also analyzes some of the recent international cases and arbitral awards interpreting the Convention in terms of their observance

4. Unlike some international agreements and conventions, such as the Brussels Convention on Recognition and Enforcement of Judgments, the CISG does not vest interpretational authority with any international tribunal. There also is not an editorial board that can regularly meet and amend the Convention, as is the case with the Uniform Commercial Code in the United States. Thus, it is crucial that the judge understand his or her role in the interpretation of the Convention and the lack of any effective short-term "corrective" mechanisms at the international level.

of Article 7 requirements in resolving various issues, such as interest rate determination and mode of payment.

This article then undertakes further analysis based on general principles to address the role of "good faith" and "validity" in the Convention. Part III demonstrates that the general principles underlying many provisions of the Convention collectively impose an obligation of good faith on the parties. This is a more expansive role than the limited interpretive function envisioned by some scholars. In contrast, Part IV suggests that the general principles of the Convention indicate that the validity exception should be interpreted narrowly to allow the Convention to have the widest possible application in international trade. Part IV further argues that some issues relating to validity of contract formation such as the issue raised by a missing price term should be resolved by resorting to the application of many general principles discussed in this article, rather than declaring the contract "invalid." Such an approach based on general principles will meet the requirements of Article 7 and fulfill the objectives of uniformity and certainty in international trade.

I. THE "INTERNATIONAL" INTERPRETATION

> "1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."[5]

"To read the words of the Convention with regard for their 'international character' requires that they be projected against an international background."[6] Reading the Convention in light of domestic legal principles would violate the Article 7(1) requirement of having regard to its international character.[7] The commentary by the UN Secretariat on the 1978 Draft Convention stated that "[n]ational rules on the law of sales of goods are subject to sharp divergencies in approach and concept. Thus, it is especially important to avoid differing constructions of the provisions of this Convention by national courts, each dependent upon the concepts used in the legal system of the country of the forum."[8]

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5. CISG, *supra* note 1, art. 7.
6. HONNOLD, UNIFORM LAW, *supra* note 3, § 88(2).
7. *Id.*
8. *Commentary on the Draft Convention on Contracts for the International Sale of Goods*, Prepared by the Secretariat, U.N. Doc. A/CONF.97/5 (1979), *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 407.

"The key issue to uniformity . . . is the degree to which [the courts] will be guided by foreign decisions."[9] The judge is obliged to consider interpretations of the Convention from other jurisdictions.[10] However, it is important to recognize that giving an international interpretation does not mean merely choosing a domestic interpretation from another country.[11] Even if the domestic law is the same in the countries of the parties, the interpretation as provided by that law may not be the international interpretation. Nor does choosing the majority rule of the existing domestic opinions of the world necessarily amount to an international interpretation. An arbitrator stated that the Convention was silent on the issue of novation and that the issue can be resolved by looking to the appropriate domestic law.[12] Because the law in all three nations (those of the parties and the place where dispute arose) was similar with respect to the issue of novation, the arbitrator applied the "common standard."[13] This approach equates the international interpretation with the majority rule among the domestic interpretations of the world and takes a narrow view of the international scope of the Convention. It fails to recognize that the Convention is not limited to those three countries whose law was considered, but rather it applies to all contracting states. A parochial or biased interpretation is a disservice not only to the immediate parties but also to the international community at large, and such an opinion should be disregarded at the international level.[14]

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9. V. Susanne Cook, Note, *The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 50 U. PA. L. REV. 197, 198 (1988).

10. As Professor Honnold comments, "The Convention's requirement of regard for 'uniformity in its application' calls for tribunals to consider [foreign] interpretations of the Convention." HONNOLD, UNIFORM LAW, *supra* note 3, § 92(3).

11. For example, assume that a U.S. judge is resolving the issue of acceptance under the Convention between Chinese and U.S. parties. If the judge chooses the Chinese interpretation, she may merely have chosen a Chinese domestic interpretation, and not necessarily an international interpretation.

12. Arbitral Award 7331 (Yugo. v. Italy), ICC Ct. Arb. (1994), 6 ICC INT'L CT. ARB. BULL. 73 (1995), *available in* UNILEX, *supra* note 3. The dispute was between a seller from the former Yugoslavia and a buyer from Italy over the sale of cow hides. The seller delivered the goods, but the buyer paid only partial payment. The parties later renegotiated the mode of payment. The issue was whether there was a novation. The arbitration was held in Paris. The arbitrator looked to the law of Italy, the former Yugoslavia, and France to resolve the issue, because the CISG is silent on the issue of novation. *Id.*

13. *Id.*

14. "Divergent national interpretations [pose] two distinct difficulties. First, a lack of information may impose disproportionate costs on certain groups

The requirement of international interpretation places a special burden on the judiciary. The judge must not only consult other international opinions, but also realize that his or her opinion will be consulted by the judiciary from other jurisdictions for persuasive authority.[15] Thus it becomes imperative that the judge deliver a well-reasoned international interpretation.[16] Because the case law under the Convention is still at a very early stage of development, it is crucial that present decisions lay the proper foundation for future interpretations to build upon.

Many scholars agree that an international interpretation cannot be based on any domestic legal concepts.[17] There has been less than clear guidance, however, on *how* to achieve the international interpretation. The primary reason is that very few domestic courts ever need to consider foreign interpretations in their daily business. But the concept of giving an international interpretation or an independent meaning is not new to some judges, especially to the judiciary in the European Union.[18] As a result, the European model may offer some guidance to domestic courts on how to apply an international inter-

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of traders. Second, a lack of any amendment mechanism may leave any divergencies uncorrected, thus undermining the Convention's relevance." Timothy N. Tuggey, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?*, 21 TEX. INT'L L.J. 540, 555 (1986).

15. One commentator states:

> Article 7 envisions deliberation in which courts will treat the decisions of other national courts as significant to their own interpretation of the Convention. This provision requires courts to pursue uniformity in the interpretation of the Convention despite th[e] fact that once ratified, the Convention becomes a part of the domestic law of each member state.

Amy H. Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 NW. J. INT'L L. & BUS. 574, 601 (1988) (citation omitted).

16. For the criticism that some foreign decisions are short on analysis and thus are of limited help to other jurisdictions, see Paul Amato, *Recent Developments: CISG, U.N. Convention on Contracts for the International Sale of Goods - The Open Price Term and the Uniform Application: An Early Interpretation by the Hungarian Courts*, 13 J.L. & COM. 1, 25-28 (1993).

17. *See* HONNOLD, UNIFORM LAW, *supra* note 3, §103.2.

18. The European Union today consists of fifteen Member States: Germany, France, Belgium, the Netherlands, Luxembourg, United Kingdom, Austria, Italy, Spain, Greece, Denmark, Sweden, Ireland, Finland, and Portugal. All members of the European Union are Contracting States to the Brussels Convention. There are some additional countries, however, that are Contracting States to the Brussels Convention, but are not Member States of the European Union. *See generally* RALPH H. FOLSOM, EUROPEAN COMMUNITY BUSINESS LAW: A GUIDE TO LAW AND PRACTICE, HANDBOOK (1995).

pretation to legal concepts embedded firmly in many domestic legal systems.

A. THE EUROPEAN MODEL OF INTERNATIONAL INTERPRETATION: THE BRUSSELS CONVENTION ON RECOGNITION AND ENFORCEMENT OF JUDGMENTS

The European Court of Justice (ECJ)[19] has been interpreting the Brussels Convention on Recognition and Enforcement of Judgments[20] for almost two decades and has given many of its

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19. The ECJ is a supranational court created under Article 4 of the Treaty of the European Economic Community. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958) [hereinafter EEC Treaty]. The ECJ has thirteen justices and has broad jurisdiction. Its judgment is binding on all the Member States of Europe. *See generally id.* arts. 164-88 (assigning jurisdiction and powers for the ECJ); FOLSOM, *supra* note 18, § 2.10.

20. European Communities Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32, *reprinted in* 8 I.L.M. 229 [hereinafter Brussels Convention]. Some excellent reviews on this subject include Robert C. Reuland, *The Recognition of Judgments in the European Community: The Twenty-fifth Anniversary of the Brussels Convention*, 14 MICH. J. INT'L L. 559 (1993); Arthur Taylor von Mehren, *Recognition and Enforcement of Sister-State Judgments: Reflections on General Theory and Current Practice in the European Economic Community and the United States*, 81 COLUM. L. REV. 1044 (1981); C.G.J. Morse, *International Shoe v. Brussels and Lugano: Principles and Pitfalls in the Law of Personal Jurisdiction*, 28 U.C. DAVIS L. REV. 999 (1995).

The Brussels Convention is a unique body of procedural law that governs the jurisdiction, recognition, and enforcement of judgments in the Community and ensures free movement of judgments throughout the Community. The original six members of the European Community — Belgium, West Germany, France, Italy, Luxembourg, and the Netherlands — originally signed the Brussels Convention. As the EC enlarged, new members also joined the Convention. In 1988, the Community signed an agreement with the Member States of the European Free Trade Association (EFTA), known as the Lugano Convention. The Lugano Convention mirrors the Brussels Convention; it is essentially identical for the purposes of this article and will not be discussed further. Similarly, the San Sebastian Convention, which came into force when Spain and Portugal joined the Community, will not be discussed in this article.

The Brussels Convention has been described as the European equivalent of the United States Full Faith and Credit Clause. Lee S. Bartlett, *Full Faith and Credit Comes to the Common Market: An Analysis of the Provisions of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 24 INT'L & COMP. L.Q. 44 (1975). The Brussels Convention is not Community law by its origin. However, negotiations were undertaken pursuant to article 220 of the EEC Treaty, which provided that "Member States shall . . . engage in negotiations with each other with a view to ensuring for the benefit of their nationals . . . the simplification of the formalities governing the reciprocal recognition and execution of judicial decisions and of arbitral awards." EEC Treaty, *supra* note 20, art. 220; *see also* Reuland, *supra*, at 560-65 (discussing the history of the Brussels Convention).

terms an independent "Community"[21] or international meaning that is not based on the meaning given in a Contracting State. The ECJ declared as early as 1971, that "the Brussels Convention must be interpreted having regard both to its principles and objectives and to its relationship with [Article 220 of the Treaty of Rome]."[22] The objectives are simplification, uniformity, and fairness in recognition and enforcement of judgments in all the Contracting States.[23] Accordingly, in *Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol,*[24] the ECJ held that neither the rendering court's nor the enforcing court's interpretation of the phrase "civil and commercial matters" should govern, but rather that an independent Community definition be given.[25] The Court ruled that "reference must not be made to the law of one of the States concerned but, first, to the *objectives and scheme* of the Convention and, secondly, to the *general principles* which stem from the corpus of the national legal systems."[26]

To ensure uniform interpretation of the Brussels Convention, the EEC Member States signed a Protocol in 1971 conferring jurisdiction on the European Court of Justice. Bartlett, *supra*, at 59. Article 173 of the EEC Treaty allows any national court to refer to the European Court of Justice an interpretational question and such interpretation is binding on all the courts of the European Union. EEC Treaty, *supra* note 19, art. 177.

21. The term "Community" refers to what is now known as the European Union.

22. Case 12/76, Industrie Tessili Italiana Como v. Dunlop AG, 1976 E.C.R. 1473, 1484, [1977] 1 C.M.L.R. 26, 51 (1977). Article 220 of the EEC Treaty provides: "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: . . . the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards." EEC Treaty, *supra* note 20, art. 220.

23. Brussels Convention, *supra* note 20, pmbl.

24. Case 29/76, Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol, 1976 E.C.R. 1541, [1977] 1 C.M.L.R. 88, 102 (1977).

25. *Id.*

26. *Id.* at 1552, 1 C.L.M.R. at 101 (emphases added); *see also* Case 814/79, The Netherlands State v. Rüffer, 1980 E.C.R. 3807, [1981] 3 C.M.L.R 293 (1981). The Netherlands' government sued the German owner of a wrecked vessel for costs of recovering the wreckage from a public waterway. *Id.* at 3818. The German owner refused to pay, claiming that the Dutch court did not have jurisdiction, that the Dutch government performed an essentially public service, and that the matter was outside the scope of the Convention. The Court ruled that the agency involved in the removal of the defendant's wrecked vessel was acting as a public authority under the applicable treaty. The granting of such authority to the agency is in keeping with the general principles which stem from the corpus of the national legal systems of the Member States. *Id.* at 3819, [1981] 3 C.L.M.R. at 313-14. Accordingly, the agency's acts are acts of

While the ECJ in *Eurocontrol* did not elaborate on the general principles of the Brussels Convention, those principles can be recognized from the text. For example, Article 2 of the Brussels Convention provides the basic rule that "persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State." This provision reflects the general principle of fundamental fairness to the defendant.[27] But, Article 5(1) makes an exception in cases of matters relating to a contract[28] and allows the defendant to be sued in a place other than its domicile. The Court in *Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aanemers Vereniging*,[29] gave an independent meaning to the term "matters relating to a contract" to include relations between a trade association and its members.[30] The Court stated that the membership of an association creates between the members close links of the same kind as those which are created between the parties to a contract.[31] Because of such close links, "it should be possible for all the difficulties which may arise on the occasion of the performance of the contract to be brought before the same court."[32] Thus, the Court gave primacy to the general principle of judicial efficiency over the Article 2 principle of fairness to the defendant by granting an independent meaning to a key provision of the Brussels Convention. Such an independent meaning ensures "equality and uniformity of the rights and obligations arising out of the [Brus-

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exercising public authority and thus are not within the scope of Article 1 of the Convention. *Id.*

27. Article 6 of the Brussels Convention is the counter-provision addressing fairness to the plaintiffs. It provides that in a case with multiple defendants, all of them may be sued in a jurisdiction in which any of them is domiciled. Brussels Convention, *supra* note 20, art. 6(1).

28. Article 5(1) of the Brussels Convention provides: "A defendant domiciled in a Contracting State may be sued in another Contracting State . . . in contract matters, before the courts of the place where the contract was or is to be performed." *Id.* art. 5(1).

29. Case 34/82, Martin Peters Bauunternehmung GmbH v. Zuid Nederlanse Aanemers Vereniging, 1983 E.C.R. 987, 1002, [1984] 2 C.M.L.R. 605 (1984).

30. *Id.* A Dutch trade association sued one of its member companies, a German company, for the sums owed under the association's internal rules. The issue was whether the matter was related to a contract. If so, then under the Brussels Convention the Dutch courts will have jurisdiction, because the place of performance is the Netherlands where the trade association has its seat. *Id.* at 1001.

31. *Id.*

32. *Id.*

sels] Convention for the Contracting States and the persons concerned."[33]

On the other hand, even an exclusive jurisdiction based on property should not prevail if it does not serve the objectives of the Convention. For example, Article 16(1) provides that the courts where immovable property is situated shall have *exclusive* jurisdiction in cases involving *in rem* rights or tenancies in such immovable property, regardless of the domicile of the defendant.[34] This exclusive jurisdiction is clearly meant to facilitate judgment by the judiciary most intimately familiar with the applicable property law.[35] In *Hacker v. Euro-Relais GmbH*, the tenancy agreement in dispute involved a German traveler and a German travel agency that arranged for the traveler to rent a cottage in the Netherlands for a short term.[36] The defendant also agreed to provide a number of services to the plaintiff. The ECJ held that the term "tenancy" should be construed *narrowly* ("must not be given a wider interpretation than is required by [its] objective") and that it cannot include providing additional services.[37] Interpreting the term more broadly than the facts required (in this case to include an agreement where none of the parties is the owner of the leased property) would deprive the parties of the domestic forum, because they would be brought before a Dutch court.[38] The Court implied that exceptions to the Convention's basic rule of choice of forum to the parties should not be granted lightly.

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33. *Id.*

34. "The following courts shall have exclusive jurisdiction, regardless of domicile: . . . in matters involving rights *in rem* in real property or concerning the leasing of real property: . . . the courts of the Contracting State in which the real property is located." Brussels Convention, *supra* note 20, art. 16(1).

35. See Case 241/83, Rösler v. Rottwinkel 1985 E.C.R. 99, 126, [1985] 1 C.L.M.R. 809 (1985), explaining that the logic behind Article 16(1) was that since leases are so closely related to the law of real property, courts in the jurisdiction where the property in question is located will be most competent to decide lease disputes. See also, Case 158/87, Scherrens v. Maenhout, 1988 E.C.R. 3791, 3804, [1990] 2 CEC (CCH) 8, 16 (1990), in which the court, relying on *Rösler's* statement of the reasoning behind article 16(1), decided that in a dispute over leased land situated partly in Belgium and partly in the Netherlands, both the Belgian and Dutch courts had exclusive jurisdiction over the property located within their respective borders.

36. Case C-280/90, Hacker v. Euro-Relais GmbH, 1992 E.C.R. I-1111, I-1124, [1994] 1 CEC (CCH) 102, 114 (1994).

37. *Id.* at I-1132, [1994] 1 CEC (CCH), at 116.

38. *Id.*

The ECJ interpreted many other concepts of the Brussels Convention consistently with the ruling in *Eurocontrol*.[39] This remarkably heightened awareness and consistency displayed by the ECJ is probably the reason for the success of the Brussels Convention in Europe. The Court correctly focused on the objectives and principles of the Brussels Convention and interpreted its terms either narrowly or broadly, for the sole purpose of effectuating those objectives and principles. When there is tension between two principles, as in the case of Article 16(1) exclusive jurisdiction and the basic jurisdiction of Article 2, the Court again resolved the issue by focusing on the objectives of the Brussels Convention.

By analogy,[40] the Article 7(2) approach to interpretation of CISG also requires that the general principles of the Convention guide its proper interpretation.

> Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles,

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39. Case 21/76, Bier v. Mines de Potasse D'Alsace, 1976 E.C.R. 1735, [1977] 1 C.M.L.R. 284 (1977) (construing Article 5(3)'s reference to "the place where the injury occurred"); Case 189/87, Kalfelis v. HEMA 1988 E.C.R. 5565, [1990] 2 CEC (CCH) 22 (1990) (construing reference to "tort or quasi-torts," Article 5(3)); Case 150/77 Bertrand v. Ott, 1978 E.C.R. 1431, [1978] 3 C.M.L.R. 499 (1978) (construing "installment contracts for the purchase of personal property or . . . installment loans to finance the purchase of such property," Article 13); Case 33/78, Somafer v. Saar-Ferngas, 1978 E.C.R. 2183, [1979] 1 C.M.L.R. 490 (1979) and Case 139/80 Blanckaert & Willems v. Trost, 1981 E.C.R. 819, [1982] 2 C.M.L.R. 1 (both construing "operation of a branch, agency, or other establishment," Article 5(5)).

In Case C-214/89, Powell Duffryn plc v. Petereit, 1992 E.C.R. I-1745, [1994] 1 CEC (CCH) 293 (1994) a German court requested that the ECJ interpret Article 17 of the Brussels Convention. Article 17 confers exclusive jurisdiction to the court of a Contracting State if one or more parties is domiciled in a Contracting State and all have agreed to that effect. The Court found that the relationship between a company and its shareholders is a "close link" which justifies treating them as parties to a contract, and therefore Article 17 makes enforceable their agreement to bring disputes before a specified court. *Id.* at I-1774, [1994] 1 CEC (CCH) at 315. It warned that "[a]ny other interpretation of art. 17 of the Brussels Convention would lead to a multiplication of the heads of jurisdiction for disputes arising from the same legal and factual relationship between the company and its shareholders and would run counter to the principle of legal certainty." *Id.* at I-1775, [1994] 1 CEC (CCH) at 315.

40. It can be argued that, because the Brussels Convention is a procedural body of law and that the CISG is a body of substantive law, the Brussels Convention cannot be a suitable model to follow, but this is merely arguing form over substance. The essence of the model is to identify the principles and objectives of the Convention and adopt an interpretation that best serves those principles and objectives.

in conformity with the law applicable by virtue of the rules of private international law.[41]

Because the general principles of the Convention represent the "common ground" on which the international delegates understood each other and agreed to join together in formulating the Convention, interpretations based on the general principles are least likely to be labeled as domestic or parochial and are most likely to represent the spirit of international cooperation and understanding behind the Convention. The success of the European model shows that such an approach based on general principles is not only feasible but also should be practiced in the arena of international trade.

The approach based on general principles serves the objectives of the Convention more fully because sometimes the text may have failed to express clearly the objectives of the Convention. For example, the role of good faith as expressed in Article 7(1) does not seem to convey its intended role as being strictly limited to the interpretation only.[42] Similarly, the legislative history is often inconclusive and offers limited guidance in answering specific issues.[43] In these cases, the general principles offer a more reliable indication of the objectives of the Convention. Given that the CISG does not have any provision for a centralized interpreting authority, it becomes imperative that the judiciary has a thorough understanding of the general principles of the Convention.

II. THE GENERAL PRINCIPLES ON WHICH THE CONVENTION IS BASED

Article 7(2) of CISG requires courts to consult the general principles of the Convention before they apply domestic law. The Convention, however, does not explicitly state what those general principles are.[44] Some members objected to the general principles approach because "it is difficult or impossible to iden-

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41. CISG, *supra* note 1, art. 7.

42. *See infra* notes 146-47 and accompanying text.

43. For example, on the issue of determining interest rates, the Convention's legislative history shows that the delegates could not agree on any formula. Inconclusive debates such as this offer little guidance to a judge facing ambiguous provisions. *See infra* notes 85-128 and accompanying text (discussing interest rates).

44. The concept of relying on the general principles of the Convention caused some debate among the members of the Working Group at their first session in 1970. *Report of the Working Group on the International Sale of Goods*, 1st Sess., ¶¶ 56-72, U.N. Doc. A/CN.9/35 (1970) [hereinafter Working Group I], *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 19-21.

tify those general principles."[45] Supporters of retention of the reference to general principles argued that one of the sources for these principles would be the generalizations that could be made from the various specific provisions of the text;[46] another source would be the "course of evolution of the Law."[47] The purpose is to provide the judge with some guidance rather than "to leave the matter in complete uncertainty," which could result in judges being "free to apply national law whenever a question [was] not expressly settled by the Uniform Law."[48] Otherwise, it would be "an *invitation* to disregard [the Convention] for those who would wish to avoid its application."[49]

While the Convention does not list the general principles on which it is based, it is possible to discern a number of those principles from the text of the Convention and from its legislative history.[50] In identifying those general principles, it should be kept in mind that the Convention's overall objective is to promote international trade by removing legal barriers that arise from different social, economic, and legal systems of the world.[51] The general principles provision can have the narrow effect of "guarding against the use of local (and divergent) legal concepts in construing the specific provisions" or the broader effect of "authorizing tribunals to create new rules not directly based on the [textual] provisions."[52] As in many commentaries in the past,[53]

45. *Id.* ¶ 57, *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 20.

46. "The general principles . . . are the general ideas which inspired the Uniform Law." *Id.*

47. *Report of the Working Group on the International Sale of Goods*, 2d Sess., ¶ 132, U.N. Doc. A/CN.9/52 (1970), *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 68.

48. *Id.*

49. Working Group 1, *supra* note 44, ¶ 69, *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 21 (emphasis added).

50. In debates over the drafting of the Convention, some delegates pointed out that the general principles of ULIS (the Uniform Law on the International Sale of Goods, which preceded the CISG) are apparent in the provisions of ULIS and its legislative history. *Id.* ¶ 59, *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 21.

51. The Convention states:

> Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States, [and] being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.

CISG, *supra* note 1, pmbl.

52. *Id.*

the present purpose in identifying and extracting many of the general principles is to help produce at least the narrow effect of preventing interpretations of the Convention based on domestic law. The broader effect of creating a *jus commune*[54] can take place on these foundations in the distant future.

An important general principle that has been explicitly stated in the Convention itself is the parties' freedom of contract.[55] "[V]irtually all of the provisions [Articles 1-88 of the Convention] yield to the contract made by the seller and buyer; in short, the heart of the Sales Convention is the contract of sale."[56] The general principle of timely communication among the parties whenever that communication is important to the affected party is pervasive among the many provisions of the Convention.[57] For example, Article 18(1) states that silence is not

53. *See generally* HONNOLD, UNIFORM LAW, *supra* note 3, §§ 99-101, 101 n.39, 150, 177.

54. *Jus commune* means "[i]n the Civil law, common right; the common and natural rule of right." BLACK'S LAW DICTIONARY 859 (6th ed. 1990). This contrasts with *jus singulare*, "a peculiar or individual rule . . . established for some special reason." *Id.* at 862-63.

55. "The parties may exclude the application of this Convention or, . . . derogate or vary the effect of any of its provisions." CISG, *supra* note 1, art. 6.

56. HONNOLD, UNIFORM LAW, *supra* note 3, § 103.

57. *See* CISG, *supra* note 1, arts. 18(1) (stating "silence or inactivity does not in itself amount to acceptance."); 18(2) ("An acceptance is not effective if the indication of assent does not reach the offeror within the [appropriate time]"); 19(2) (requiring the offeror to communicate his objections to the offeree who accepts with terms that are additional or different but not materially so); 21(2) (providing late acceptance is binding unless the offeror informs the offeree otherwise "without delay"); 26 (stating "a declaration of avoidance of the contract is effective only if made by notice to the other party."); 32(3) (requiring seller to provide insurance information to buyer if buyer so requests); 39 (stating "the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller . . . within a reasonable time"); 43 (providing buyer loses the right to rely on seller's warranties as provided in Articles 41 or 42, if he does not give notice to the seller within a reasonable time after becoming aware of the third party's claims to the goods); 46 (requiring buyer to give notice to the seller if the buyer wants substitute goods or the repair of the goods already delivered); 47(2) (prohibiting buyer from resorting to any remedy for the breach of contract during the time period reserved for performance of the contract unless he receives a notice of the seller's impending non-performance); 48(2) (stating "if the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller."); 68 (placing the risk of loss on the seller if the seller knew that the goods have been lost or destroyed already and does not notify the buyer); 71(3) (requiring that in anticipatory breach situations, the party suspending performance must notify the other party of his suspension); 72(2) (providing that a party intending to declare the

communication of an acceptance. Article 26 provides that a party cannot avoid the contract unless a declaration of avoidance of contract is communicated to the other party. A buyer's right to demand that the product conform to the contract is lost under Article 39 if the buyer does not notify the seller in a reasonable time. Article 72(2) requires a party to give reasonable notice if it wants to declare the contract avoided. The Convention requires these important messages to be communicated promptly so that the affected party can take the necessary measures to protect its interests. Not only must the communication be timely, but it also must disclose relevant information to avoid any surprises.[58]

An important aspect of international trade is that, in practice, the parties heavily rely on reasonable conduct by the other party. Many provisions of the Convention are aimed at protecting such reasonable reliance of the parties.[59] Article 16(2)(b) is

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contract avoided must give reasonable notice to the other party); 79(4) (requiring a party that fails to perform to give notice of the impediments to its performance to avoid being held liable to the other party for its non-performance); 88(1) (stating that to the extent possible, the party preserving the goods must notify the other party of his intention to sell them).

58. *See e.g., id.* arts. 1(2) (stating "the fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract."); 2(a) (stating the "Convention does not apply to sales of goods bought for personal, family, or household use, unless the seller, at any time before or at the conclusion of the contract, *neither knew nor ought to have known* that the goods were bought for any such use.") (emphasis added).

59. *See id.* arts. 9(1) (stating "any practices which [the parties] have established between themselves" must be honored); 10(a) (providing that when defining a party's place of business, regard is to be had "to the circumstances known to or contemplated by the parties"); 14(2) (explaining that a proposal is merely an invitation to make offers, "unless the contrary is clearly indicated by the person making the proposal"); 16(2)(b) (stating an offer is irrevocable "if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer"); 27 (providing that it is reasonable to rely on appropriate methods of communication); 29(2) (precluding a party from asserting that a written agreement cannot be modified orally if his conduct induced the other party to rely on an oral modification); 35(2)(b) (providing that the warranty of fitness for a particular purpose should apply unless the buyer did not rely on seller's skill and judgment); 48(2) (stating that a seller who relies on buyer's "acquiescence" to imperfect perfomance is protected, and the buyer may not "resort to any remedy which is inconsistent with performance by the seller"); 49(2) (protecting the seller by requiring that the buyer act within a reasonable time to declare the contract avoided); 63 (preventing the seller from resorting to any remedy during the time period in which he gives the buyer additional time to perform); 79(4) (allowing one party to collect damages if the other party fails to perform and does not give timely notice); 80 (stating "[a]

a prime example, as it makes an offer irrevocable when the offeree acts in reasonable reliance.[60] Article 8 expressly encourages and sets forth the standards to be used in interpreting the parties' conduct and binds the parties to any such usages, including any subsequent conduct that promotes reliance by the other party.[61] Thus the Convention actively encourages the parties to communicate, contract and thus distribute the risks as they see fit. The overarching principle of contractual freedom under Article 6 allows maximum flexibility for the parties.

Once the parties reach an agreement, however, the distribution of risk is, for the most part, fixed. This general principle of freezing the distribution of risk can be recognized from the expression "at the of conclusion of the contract" present in many provisions of the Convention.[62] The Convention itself provides an exception to this general principle in Article 29(1), which allows a contract to be modified or terminated without any further consideration. But, such modification or termination is subject to the agreement of the parties, which agreement takes into account the general principles of communication and respect for protection of each other's interests. The general principles of

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party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission").

60. *See* CISG, *supra* note 1, art. 16(2)(b).

61. *See id.* art. 8.

62. *See id.* arts. 10(a) (providing that the parties' place of business are determined at conclusion of the contract); 31(b), (c) (fixing the place of delivery as the place where the parties knew the goods were at the time of conclusion of the contract or the seller's place of business); 42(1) (stating that liability for selling goods which are subject to industrial property rights depends on the seller's knowledge at the time of conclusion of the contract); 42(2) (providing that the seller is not liable for any infringement of industrial property rights if the buyer knew of a third-party claim at the time of the conclusion of the contract); 55 (providing that an open price term is to be determined by the price generally charged for similar goods at the time of the conclusion of the contract); 68 (placing the risk of loss of goods sold in transit on the buyer from the time of the conclusion of the contract, but on the seller if the seller knew, at that point, that the goods had been lost or damaged, but did not tell the buyer of such loss or damage); 73(2) (providing that the buyer in an installment sale may declare the contract void with respect to past and future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract); 74 (stating that consequential damages are not recoverable if those damages are not foreseeable at the time of the conclusion of the contract); 79(1) (stating that a party is not liable for failure to perform any of his obligations if the failure was due to an "impediment beyond his control" and such impediment was unforeseeable at the time of the conclusion of the contract).

good faith and reasonable behavior are also evident from the text of the Convention.[63]

The general principle of protecting restitution,[64] reliance,[65] and expectation[66] interests of the aggrieved party is evident from the text of the Convention. The duty to mitigate the damages or losses is another general principle.[67] One court extracted the general principle that the burden of proof with respect to lack of conformity of goods is on the buyer.[68] Similarly, one court stated that Article 57(1)(a) represents the general principle that obligation to pay is to be performed at the place of business of the creditor.[69]

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63. *See infra* notes 146-57 (discussing good faith as a general principle).

64. CISG, *supra* note 1, arts. 81(2) (allowing restitution for partial performance); 82 (stating buyer can only avoid a contract as long as it is possible for him to make restitution); 84 (requiring seller to account for benefits received when restitution is due).

65. *Id.* arts. 85, 86(1), 88(3) (providing that a party that preserves goods is entitled to reasonable expenses).

66. Many provisions directly or indirectly support this principle. *See, e.g., id.* arts. 45(2) (stating "the buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies"); 47(2), 48(1) (providing that the buyer is not deprived of any right to claim damages for delay in performance or for allowing the seller to cure after the delivery date); *see also id.* arts. 61(2), 63(2), 65(1) (listing analagous provisions for the seller); 79(5), 81(1) (preserving either party's right to claim other damages or rights); 78 (providing for interest on any sum "that is in arrears" from the other party, "without prejudice to any claim for damages recoverable under article 74").

67. *See, e.g., id.* arts. 77 (stating that the seller "must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit"); 85, 86(1) (setting out the duty to preserve goods); 88(2) (setting out the duty to take reasonable measures to sell the rapidly deteriorating goods).

68. Case HG930138 U/H93, (Italy v. Switz.), Handelsgericht Zürich (Sept. 9, 1993) (unpublished), *available in* UNILEX, *supra* note 3. The court held that the general scheme of the Articles 38 and 39 reflects the general principle of burden of proof with respect to lack of conformity of goods delivered. *Id. But see* Arbitral Award 6653 (Fr. V. Syria), ICC Ct. Arb. (Feb. 7, 1993), *reprinted in* A.H. KRITZER, 2 GUIDE TO PRACTICAL APPLICATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, (supp. 2 1994), *available in* UNILEX, *supra* note 3. The court stated that even though "Articles 35 and 36 provide for a unified notion of non-conformity, unlike the French domestic law which distinguishes between non-conformity and defects," the question of burden of proving non-conformity is not addressed in the CISG and should be resolved according to the French law. *Id.*

69. Case 17 U 73/93 (F.R.G. v. U.S.), Oberlandesgericht Düsseldorf (July 2, 1993) RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 845 (1993), *translated in* A.H. KRITZER, 2 GUIDE TO PRACTICAL APPLICATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (supp. 9 1994), *available in* UNILEX, *supra* note 3.

The ultimate unifying general principle of the Convention is probably the principle of preservation of the contract.[70] The various gap-filling provisions of the Convention, including Article 7, are all geared to accomplish this objective.[71] The notice requirements of the Convention supplement these provisions in effectively preserving the contract.[72]

While many general principles of the Convention can be extracted from the text alone, several courts have stated, without engaging in much analysis, that there are no general principles addressing a specific issue.[73] At least one commentator has argued that Article 7(2) "admits the possibility that there actually are [no] general principles underlying the Convention, or at least that the principles are not comprehensive."[74] Both of these readings take an unjustifiably narrow view of the nature and role of the Convention. The Convention was drafted in an atmosphere of compromise to find a reasonably workable solution and is not meant to be an exhaustive codification of international commercial behavior. Such codification would have been unrealistic and would make the Convention too inflexible to adapt to changing circumstances of international trade.

It has been suggested that one should exercise restraint in extracting the general principles. Professor Honnold recommends that such findings of general principles should be limited to situations where the general principles are "moored to premises that underlie specific provisions of the Convention."[75] He

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70. *See* HONNOLD, UNIFORM LAW, *supra* note 3, § 101(c) n.39.

71. CISG, *supra* note 1, arts. 8(3) (stating "due consideration is to be given to all relevant circumstances of the case, including . . . any subsequent conduct of the parties"); 9(2) (providing that the parties are impliedly bound to any usage they ought to have known); 11 (providing that there is no need for a written contract; its existence can be proved by any means); 14 (1) (stating an offer "is sufficiently definite if it indicates the goods . . . quantity and the price"); 18(3) (allowing acceptance by performance); 21(2) (providing that an acceptance is effective if dispatched in time but gets to the offeror late); 23 (stating "[a] contract is concluded at the moment when an acceptance of an offer becomes effective"); 25 (stating that a breach is not fundamental if it was not reasonably foreseeable); 26 (requiring notice to avoid the contract); 29(1) (stating "a contract may be modified or terminated by the mere agreement of the parties"); 31-34 (listing gap-filling provisions as to the delivery of the goods or transfer of documents); 47(1), 48 (listing provisions to permit the buyer to allow the seller more time to perform); 55, 57, 58 (listing gap-filling provisions that fix the price, place of payment, and time of payment, respectively); 63(1) (allowing seller to fix additional reasonable time for the buyer to perform).

72. *See supra* notes 57-58 and accompanying text.

73. *See infra notes* 85-128 and accompanying text.

74. Kastely, *supra* note 16, at 606.

75. HONNOLD, UNIFORM LAW, *supra* note 3, § 102.

further suggests that finding general principles to solve a specific problem is valid only when the lack of a specific provision to govern the issue is due to deliberate rejection by the delegates to the Convention or due to the Convention's "failure to anticipate and resolve [the] issue."[76] If the Convention failed to anticipate and thus provide for a specific solution to an issue, an analogical extension from the existing provisions to the new situation is then appropriate.[77]

Thus, any *issue* that has not been expressly *excluded* by the Convention,[78] and which can be resolved by applying the general principles of the Convention, should be solved accordingly. In reaching a solution, the legislative history controls only to the extent of identifying a general principle, determining that the issue was not impliedly excluded from the Convention, or ascertaining whether the issue was anticipated.[79] This formulation is preferable because it provides "a generous response to the invitation of Article 7(2) to develop the Convention through the 'general principles on which it is based.'"[80] A faithful application of Article 7 requires this approach. Such faithful application is required of judges in applying the Convention because, by voting for Article 7(2), the delegates agreed to deny reference to domestic law except as a last resort for the sake of any "uniformity" the domestic law may bring.[81]

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76. *Id.* "The language of Article 7(2) reflects the decision to narrow the scope of ULIS 17 . . . which authorized tribunals to find (or create) general principles to settle every problem that is not governed expressly by the Convention." *Id.*

77. *Id.*

78. Various alternatives discussed at the Convention included assigning the interest rate at the seller's place or at the buyer's place or the higher of either place. The "prevailing" rate could be either the statutory rate or the commercial short term discount rate. Some delegates favored adding a penalty of one per cent to whatever the rate to be agreed upon. Other suggestions were to tie the rate to the currency of payment or base it on international markets. The issue remained unresolved throughout the Convention and the final text emerged without any solution.

79. Article 7(2) provides that "[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based" CISG, *supra* note 1, art. 7(2); *see generally infra* notes 85-128 and accompanying text.

80. *See, e.g.,* CISG, *supra* note 1, arts. 2-5.

81. The legislative material "may be indecisive but it can reveal the objective of a provision and thereby help in coping with novel situations where the statutory text is unclear." John Honnold, *The Sales Convention in Action-Uniform International Words: Uniform Application?,* 8 J.L. & COM. 207, 209 (1988).

Without this safety net of general principles,[82] the rules of interpretation become simple: apply the domestic law whenever the Convention has not expressly provided for the resolution of an issue. Such a simple solution would severely undercut the effectiveness of the Convention because many issues of practical importance to international trade have not been expressly resolved by the Convention, even though they were discussed. A prime example is the payment of prejudgment interest, where the Convention has discussed but has not expressly provided for a method of determining the interest rate. As the following discussion illustrates, this contentious issue can be resolved by focusing on the objective and general principles of the Convention.

A. RATE OF INTEREST PAYMENTS

Some of the thorny issues that confront judges are those that have been specifically debated at the Convention but could not be agreed upon. A specific example is the issue of interest payments. The Convention expressly provides in Article 78 that interest is due on payments in arrears. As the legislative history nevertheless shows, the delegates could not agree on the rate of interest or the time for accrual of the interest payment.[83] Should a court deciding these issues consider the matter as having been deliberately rejected at the Convention and resort to the appropriate domestic law? The answer should be no because the *issue* of interest payment is not excluded from the Convention (matter governed by the Convention), but rather the mechanics of accomplishing it is not expressly settled. Accordingly, Article 7(2) requires resort to general principles in resolving the issue.[84]

Interest payment is considered to be part of the damages in some countries, whereas it is completely excluded in other countries.[85] The Convention expressly provides in Article 78 that the

82. HONNOLD, UNIFORM LAW, *supra* note 3, § 102.

83. The delegates "wished to free judges from having to look to national law for [solving interpretational questions and gaps], an avenue that would lead to disunity." Working Group 1, *supra* note 44, ¶ 59, *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 20.

84. The importance of the general principles in the success of the Convention cannot be overstated. One needs to recognize that the text of the Convention is incapable of adapting to various fact patterns that may emerge in the future and may threaten the success of the Convention. The concept of general principles is a flexible concept that can address the future needs of the Convention.

85. Even though the Convention clearly provides for interest in an Article separate from the description of general damages, some courts still consider the

creditor is to be paid interest on any payments in arrears.[86] The Convention, however, is silent on the rate of interest that should be calculated. Consequently, as indicated by the growing case law, Article 78 has become the focus of substantial controversy under the Convention.[87] The controversy has its origins in the legislative history of the CISG itself.[88]

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interest to be part of the damages. *See, e.g.*, Arbitral Award 7531 (Aus. V. P.R.C.), ICC Ct. Arb. (1994), 6 ICC INT'L CT. ARB. BULL. 67 (1995), *available in* UNILEX, *supra* note 3 (explaining that interest is an element of damages under Article 74). In some Moslem countries it is forbidden to charge interest. *See Deliberations of the First Committee of the Convention on Contracts for International Sale of Goods*, 34th mtg., ¶ 10, U.N. Doc. A/CONF.97/C.1/SR.34 (1980) [hereinafter U.N. Meeting 34], *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 647; Franco Ferrari, *Uniform Application and Interest Rates Under The 1980 Vienna Sales Convention*, 24 GA. J. INT'L & COMP. L. 467, 478 n.63 (1995).

86. "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." CISG, *supra* note 1, art. 78.

87. Approximately more than 70% of the cases compiled by UNILEX discuss the issue of interest rate. UNILEX, *supra* note 3. "More than any other provision in the Convention, article 78 was affected by the diverse traditions of its drafters. Interest is treated differently in countries with different economic systems—the distinction is greatest between capitalist and socialist countries—and is barred by religious rules existing in some countries." Jeffrey S. Sutton, *Measuring Damages Under the United Nations Convention on the International Sale of Goods*, 50 OHIO ST. L.J. 737, 749 (1989) (citation omitted).

88. The origins of Article 78 can be traced at least to Article 83 of ULIS, which provided that the seller shall be allowed an interest rate equal to the official discount rate in his place of business plus 1 per cent. *Report of the Working Group on the International Sale of Goods*, 5th Sess., ¶ 166, U.N. Doc. A/CN.9/87 (1984), *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 190; Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, with Annex, Uniform Law on the International Sale of Goods, 1972, 834 U.N.T.S. 109 (entered into force Aug. 18, 1972), *reprinted in* 13 AM. J. COMP. L. 453 (1964). This provision was then amended to state that the seller is entitled to a rate of interest that is no lower than the rate charged for unsecured short-term commercial loans in seller's place of business. *Report of the Working Group on the International Sale of Goods*, 6th Sess., ¶ 115, U.N. Doc. A/CN.9/100 (1975), *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 253. The objective was to prevent buyers from holding off on payments if the statutory interest rate is lower than what the seller actually pays. *Id.*

Additional proposals included first, tying the interest rate to that prevailing at the buyer's place of business, and second, outright deletion of the provision, on the grounds that some countries disallow any charging of interest. *Report of Committee of the Whole I Relating to the Draft Convention on the International Sale of Goods*, ¶¶ 492-500, U.N. Doc. A/32/17, Annex I (1977), *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 353. But later, a Swedish representative pointed out that interest on arrears was acceptable even in countries that prohibited charging interest outright. *Deliberations of the First Committee of the Convention on Contracts for International Sale of Goods*, 29th mtg., ¶ 5, U.N. Doc. A/CONF.97/C.1/SR.29 (1980) [hereinafter U.N.

Some commentators argue that, because the interest rate is not fixed by the Convention, it is outside the scope of the Convention and thus it should be determined by the appropriate domestic law.[89] This interpretation results from a misunderstanding of the overall scheme of the Convention, as well as the express provisions of Article 7(2) and the general principles on which the Convention is based. The Convention provides in Article 7(2) that matters governed by the Convention but which are not expressly settled in it should be settled in conformity with the general principles on which it is based. It is beyond dispute that payment of interest is a matter governed by the Convention: the principle is codified in Article 78. But the matter of how the rate should be determined is not expressly settled in the Convention. The determination of interest rate seems to be an ideal example for the application of Article 7(2) methodology.

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

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Meeting 29], *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 610. Some delegations also preferred that a clear statement be adopted in the Convention rather than leaving the issue to the national laws. *Id.* ¶¶ 1-43, *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 609-13. The U.S. delegation commented that since the purpose of the provision was to compensate the plaintiff and he would more likely have lost the use of his money in his own place of business, the interest rate should be the rate prevailing in his place of business. *Id.* ¶ 30, *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 612. The Indian delegation suggested that the rate should be the higher of the rates at the buyer's and seller's place of business, and that it be due from the date payment should have been made and tied to the currency in which the payment is due. *Id.* ¶ 18, *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 611. The East German delegation argued that the interest rate should be that prevailing in the international markets. U.N. Meeting 34, *supra* note 85, ¶ 6, *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 637. At some point the Article even was split into two parts. *Draft Articles of the Convention Submitted to the Plenary Conference by the First Committee of the Draft Convention on Contracts for the International Sale of Goods*, pt. III, ch. V, sec. II, art. 73 *bis*, U.N. Doc. A/CONF.97/11/Add. 1 and 2 (1980), *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 722. But later, at the 11th plenary meeting, the Article was adopted in its present form. *Report of the First Committee to the Plenary Conference*, 11th plen. mtg., ¶ 4, U.N. Doc. A/CONF.97/SR.11 (1980), *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 761.

89. *See generally* Ferrari, *supra* note 85, at 475-76 (citing many authorities that argue that the rate of interest is to be determined by applicable domestic law); *see also* Eva Diederichsen, *Commentary to Journal of Law & Commerce Case I: Oberlandesgericht, Frankfurt am Main*, 14 J.L. & COM. 177, 180-81 (1995) (arguing that the common German practice of relying on domestic law to determine the interest rate is "the only possibility in practice").

bargain.[90] 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.[91] While in some countries interest is not considered part of damages,[92] 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."[93] 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.[94]

If the mandate of Article 7(2) is followed, it also becomes apparent that the various formulations of calculating the interest rate may be unnecessary. By focusing on the full-compensation objective of the Convention, the inquiry should be which interest rate will fully compensate the aggrieved party. It has been argued that the aggrieved party should be awarded interest payments at the rate based on the aggrieved party's credit costs.[95] Such a solution is "best suited to international trade where it is not the practice for the business person to leave their money idle."[96]

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90. "The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies." CISG, *supra* note 1, art. 61(2). Also, even if interest is not defined as part of damages, Article 78 specifically provides for interest "without prejudice to any claim for damages recoverable under article 74." *Id.* art. 78.

91. Some commentators criticize this view for the reason that it leads to blurring the line between damages and interests, which article 78 was intended to draw. Ferrari, *supra* note 85, at 476 n.55. But the issue of whether the interest is part of the damages or separate from the damages is irrelevant, because the Convention expressly provides that the interest should be awarded regardless of how it is classified. CISG, *supra* note 1, art. 78.

92. *See* U.N. Meeting 34, *supra* note 85, ¶ 9, *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 637 (remarks of Mr. Klingsporn, Delegate from Feceral Republic of Germany).

93. CISG, *supra* note 1, art. 78.

94. In one European case construing the CISG, "the arbitrator found that full compensation is one of the general principles underlying CISG." Arbitral Award SCH-4366, (Aus. v. F.R.G.), Internationales Schiedsgericht der Bundeskammer der Gewerblichen Wirtschaft (June 15, 1994) (abstract), RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 590-91 (1995), *available in* UNILEX, *supra* note 3.

95. U.N. Meeting 29, *supra* note 88, ¶ 30, *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 612 (remarks of Mr. Farnsworth, Delegate from the United States).

96. Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORDHAM L. REV. 281, 312

This solution, however, has been criticized as reintroducing through interpretation an approach that was suggested by Western nations and rejected at the diplomatic conference.[97] The concern is that through this approach "[o]ther countries would then be inclined to interpret into the Convention their own rejected proposals."[98] Further analysis reveals that such criticism is invalid. The issue is not whose law or view prevails ultimately, but rather which interpretation promotes international trade by bringing uniformity and certainty to the legal rules. The express purpose for the delegates at the Convention was not to debate who had the better law, but rather how best to accommodate national and international interests, without undermining domestic sovereignty and legal order. In the process, many nations made "sacrifices" so that a workable solution could be found.[99] If an interpretation promises to bring certainty to international trade, such interpretation should be encouraged and followed, even if such interpretation was not adopted at the Convention. This approach is not only appropriate but particularly essential in the case of CISG, where there is no editorial body to amend the Convention periodically to discard principles that no longer serve the goals of the Convention. Thus, it is entirely inappropriate to look only to national laws to determine the applicable interest rate.

It has been argued that the sole purpose of requiring interest payments is to prevent the debtor from taking advantage of the funds withheld.[100] The Convention addresses the issue of unjust enrichment separately under Article 84. Article 84(1) requires the seller to pay interest when the seller has to refund

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(1994) (quoting PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT) 1994), art.7.4.10 cmt.). The comment to Article 7.4.10 of the UNIDROIT Principles supports the general principle of full compensation and interest payment measured to fulfill the objective of that general principle. *Id.*

97. Ferrari, *supra* note 85, at 478 n.64.

98. *Id.* (quoting FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS 313 (1992)).

99. For example, the United States sacrificed the principle of the statute of frauds (U.C.C. § 2-201) by ratifying the Convention without a statute of frauds. *See* CISG, *supra* note 1, art. 11. Similarly, the Islamic nations that prohibit charging any interest seem to have yielded to the Convention by agreeing to be bound by Article 78 that expressly awards interest payment. *See id.* art 78.

100. Case 5 U 261/90 (Fr. v. F.R.G.), Oberlandesgericht Frankfurt am Main, (June 13, 1991), RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 591 (1991), *available in* UNILEX, *supra* note 3, *translated in* 14 J.L. &. COM. 229 (1995).

the purchase price or any down payment.[101] An analysis of the the interplay between the general principle of preventing unjust enrichment and the earlier-stated general principle of full compensation suggests that the principle of preventing unjust enrichment has a limited role in the Convention. For example, imagine two scenarios. In both cases the interest rates at buyer's place and seller's place are ten percent and five percent, respectively. In the first scenario, the buyer breaches and does not pay. What should the seller get by way of interest rate? Should he be compensated for his actual loss, which is five percent at his place of business, in which case he is fully compensated, or should he get buyer's unjust enrichment of ten percent rate. If he gets the ten percent rate, the buyer's unjust enrichment is taken away, but the seller is certainly being overcompensated and arguably is being unjustly enriched.

In the second scenario, the seller defaults and does not return the price or down payment. If the aim is to prevent unjust enrichment, seller needs to pay only five percent interest (which is the prevailing rate at seller's place of business). If the objective is full compensation of the aggrieved party, the seller needs to pay a ten percent interest rate, which works out to be a type of penalty to the seller. However, there is no unjust enrichment to the buyer. Thus, in one case full compensation of the aggrieved party (seller) may lead to unjust enrichment of the breaching party (buyer) with no penalty to either party. In another case, it may lead to a penalty to the breaching party (seller, by not refunding the buyer's money) and no unjust enrichment to either party.

To continue the analysis, assume the converse position that preventing unjust enrichment, rather than full compensation, is the goal to be pursued. Assume the same two scenarios as to interest rates that are described above. When the seller breaches and withholds the buyer's payment, the seller is required to pay five percent interest, but the buyer is not fully compensated. Because the seller's payment is limited to his actual unjust enrichment, there is no penalty to the seller. More interestingly however, when the buyer breaches, preventing un-

101. "If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid." CISG, *supra* note 1, art. 84(1). Article 84(1)'s insistence that the interest payment should be made from the date on which the price was paid, rather than from the time of notice to the seller or some other later time, clearly shows that the seller should not be unjustly enriched. While Article 84(1) focuses on the seller, Article 84(2) focuses on the disgorgement of the buyer's unjust enrichment. *Id.* art. 84(2).

just enrichment requires that the buyer pay a ten percent interest rate. While there is no penalty to the buyer, this leads to a curious result of conferring unjust enrichment on the seller because he is compensated at a ten percent interest rate while his loss is only at five percent. Thus the goal of preventing unjust enrichment eliminates the penalty to the breaching party, but leaves the aggrieved party either under- or overcompensated.

A judge faced with these two scenarios is in a difficult position. Accordingly, further analysis of the underlying general principles should be undertaken. The broader and primary goal of the Convention is to compensate the aggrieved party fully. Once this goal is accomplished, if there is still unjust enrichment on the part of the breacher, such unjust enrichment should be disgorged depending on the facts. Assume that the seller withheld the refund money to the buyer due to some circumstances beyond his control (but not a *force majeure* situation), as in the case of a governmental exchange control. In contrast, if the seller was simply "riding" the high interest rate in his country, the seller stands to gain even if he fully compensates the buyer at the lower interest rate in buyer's country. By applying the broader general principle of good faith and reasonable behavior, the seller in the second instance should be made to disgorge all the interest gain because, even though such behavior may be economically efficient to both parties, the seller may not be acting in good faith. This analysis not only satisfies the operative general principles of full compensation and unjust enrichment, but also promotes good faith and reasonable behavior between the parties in international trade, thereby fulfilling the mandates of Article 7. Thus, the formulation based on the breaching party's gain by withholding payment should be rejected. Consequently, the prevailing interest rate in the breaching party's country should be irrelevant. Similarly, the interest rate of a third country where the payment was supposed to have taken place should also be irrelevant, unless the plaintiff can demonstrate that such interest rate somehow would have been material to him.[102]

A review of the recent international case law indicates that many tribunals have missed the mark and have contributed to inconsistent results. A German tribunal rejected outright the approach based on general principles and argued that even

102. In other words, the plaintiff may demonstrate that it was his business practice to deposit the funds he receives from sale in a country with a higher interest rate, whichever country that might happen to be.

when CISG was still only in the preparatory stages the delegates could not agree on a uniform solution.[103] 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.[104] By following domestic law, the interest rates being paid lacked uniformity. For example, in *Delchi Carrier S.p.A. v. Rotorex Corp*,[105] the United States district court stated that because Article 78 of CISG does not specify the interest rate, the rate should be fixed in its "discretion" and granted the rate of the United States Treasury Bill. One court determined that the interest rate is the *average* bank lending rate at the creditor's place of business.[106] Another variation was that the rate awarded was an international trade rate known as LIBOR (London International Bank Offered Rate) that is commonly used with Eurodollars, the currency in which payment was to be made.[107] While this approach may have the virtue of creating uniformity in its application, it may fail to fulfill the Convention's general principle of full compensation.[108]

These cases also illustrate another issue in interest rate calculations, namely, the role of a statutory rate and the burden of proof. Because the payment of interest is stated as a positive obligation on the part of the debtor, it may be a fair presumption that the creditor is owed at least the statutory interest rate or

103. Case 41 O 111/95 (Italy v. F.R.G.) Landgericht Aachen (July 20, 1995) (abstract) (unpublished), *available in* UNILEX, *supra* note 3.

> The Court rejected the opinion according to which the interest rate, in order to achieve a uniform international regulation, shall be determined in accordance with the general principles on which CISG is based: as a matter of fact even when CISG was still only in the preparatory stage it had not been possible to reach a uniform solution to this problem.

Id.

104. Courts often remark that "the general principles do not settle the matter." *E.g.*, Arbitral Award 7565 (Neth. v. U.S.), ICC Ct. Arb. (1994), 6 ICC CT. ARB. BULL. 64, *available in* UNILEX, *supra* note 3.

105. Delchi Carrier S.p.A. v. Rotorex Corp., No. 88-CV-1078, 1994 U.S. Dist. LEXIS 12820, at *16 (N.D.N.Y Sept. 7, 1994) (mem. and order).

106. Case 41 O 198/89, (Italy v. F.R.G.) Landgericht Aachen (Apr. 3, 1990) RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 491 (1990), *available in* UNILEX, *supra* note 3.

107. Arbitral Award 6653, *supra* note 68.

108. It should be remembered, however, that had the currency of payment not been Eurodollars, this approach might not be desirable. Such an approach of tying the interest rate to an international index may be inapplicable to the plaintiff's actual loss. This solution was rejected by the delegates. HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 759 (remarks of Mr. Dabin, Belgium).

the commercial lending rate, whichever is lower. If the creditor incurred higher costs, he has the burden of proving the actual loss. When a contract between a German seller and an Egyptian buyer was avoided, the seller was required to return the buyer's money.[109] Private international law rules led to the application of German law and the interest rate awarded was the German statutory rate of four percent.[110] The plaintiff, however, asked for 13%, even though the facts were unclear whether thirteen percent was the prevailing rate in Egypt, statutory or otherwise, or whether the rate reflected the buyer's otherwise provable loss.[111] Assuming that the Egyptian creditor could not meet his burden of proving his actual losses, the court's denial of the thirteen percent rate is correct. But even in that case, granting the German statutory rate is incorrect because it does not focus on the creditor's loss.

In case there is no actual loss, the creditor could still prove his future probable losses by showing his habitual investment practices. A German court ordered the seller to pay a thirteen percent interest rate when the statutory rate was only five percent, because the statutory rate did not reflect the rate that a business would get on its loans.[112] Even awarding actual loss, if it is higher than what the plaintiff could have received under its regular course of business, it is subject to the plaintiff's duty under Article 77 to mitigate.[113] This sensible approach was reflected in the opinion when the court denied the plaintiff's claim for sixteeen and a half percent interest rate, which was higher than he should have paid.[114] In another case the court awarded twelve percent interest when the statutory rate was five per-

109. Case 20 U 76/94 (Egypt v. F.R.G.) Oberlandsgericht Celle, (May 24, 1995) (abstract) (unpublished), *available in* UNILEX, *supra* note 3.

110. *Id.*

111. "Der Kläger hat beantragt, die Beklagte zu verurteilen, an ihn 70.000 DM nebst 13% Zinsen seit dem 13.02. 1993 zu zahlen." *Id.* (textual meaning as translated by the author).

112. Case 5 O 543/88 (Italy v. F.R.G.), Landgericht Hamburg (Sept. 26, 1990), *reprinted in* PRAXIS DES INTERNATIONALES PRIVAT- UND VERFAHRENSRECHTS (IPRax) 400 (1991), *available in* UNILEX, *supra* note 3.

113. The Convention states:

> A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

CISG, *supra* note 1, art. 77.

114. Case 2 C 600/94 (Italy v. F.R.G.), Amtsgericht Wangen (Mar. 8, 1995) (abstract) (unpublished), *available in* UNILEX, *supra* note 3.

cent.[115] These rules, while supported by the general principles of full compensation and fair dealing, also represent a fair allocation of the burden of proof and a fair distribution of risk for the debtor for his delay in payment. In addition, these rules take into account the realities of the market place.

Many courts seem to have determined the interest rates by simply following domestic rules, or in some cases, without indicating any clear rationale. For example, a German court of appeal in Munich awarded the statutory interest rate of Sweden (the creditor's place of business), which was *higher* than the discount rate of the Swedish Central Bank.[116] Similarly, a Swiss court awarded a Swiss buyer the Italian statutory interest rate when the buyer avoided the contract for the Italian seller's failure to perform.[117] The court should have focused on the buyer's loss, which was in Switzerland, and ordered payment of interest at the Swiss rate. The facts did not indicate that the seller was acting in bad faith, thus requiring disgorgement of the higher interest he earned in Italy.[118]

In yet another case, an arbitrator granted an interest rate based on the currency in which the contract price was to be paid.[119] The Italian seller demanded the high inflationary Italian rate of interest when the contract price was to be paid in German marks. The arbitrator denied the demand, stating that when the contract price is to be paid in strong currency, it would be "illogical" to base the interest rate according to the seller's place of business which has a high interest rate.[120] This is a sensible decision. The seller was expecting payment in German

115. Arbitral Award 7197 (Aus. v. Bulg.), ICC Ct. Arb. (1993), *reprinted in* J. DU DROIT INT'L, 1028-37 (1993), *available in* UNILEX, *supra* note 3.

116. Case 7 U 4419/93 (Swed. v. F.R.G.), Oberlandesgericht München (Mar. 2, 1994), *reprinted in* RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 595-97 (1994), *available in* UNILEX, *supra* note 3. The dispute was between a Swedish seller and a German buyer for the sale of coal. As discussed *supra*, the determination of interest rate as per the seller's "loss" in Sweden is appropriate. But the award of the statutory rate, which is higher than the bank discount rate, is questionable. It is simply not reasonable for the seller to have borrowed at the higher statutory rate when the bank offers a lower rate. In this case, the awarding of higher interest rate shows a failure on the court's part to recognize the general principle of the Convention and has violated the Article 7 mandates of good faith in interpretation. *Id.*

117. Case 77/89, Foliopack AG v. Daniplast S.P.A., Pretura di Parma-Fidenza (Nov. 24, 1989) (unpublished), *available in* UNILEX, *supra* note 3.

118. *See supra* notes 100-102 and accompanying text (discussing payment of interest as a means of preventing unjust enrichment).

119. Arbitral Award 7585 (Italy v. Fin.), ICC Ct. Arb. (1992), 6 ICC INT'L CT. ARB. BULL. 60 (Nov. 1995), *available in* UNILEX, *supra* note 3.

120. *Id.*

marks and, absent evidence to show that he would have converted the payment into Italian lira immediately upon receipt (in which case he would have lost the high interest rate but would have also suffered high inflation), it would have been simply unfair to pay at the Italian rate.

While many courts have misunderstood or have misapplied the Article 7 mandates, a few courts have recognized the general principle of full compensation and applied it properly.[121] In Arbitral Award SCH-4318, the arbitrator stated that merchants resort to bank credit when payment from the other party is delayed. Thus the party (the buyer in this case) should be compensated for the interest rate in his place of business with respect to the currency of payment, which was agreed upon as U.S. dollars. The arbitrator also noted that the UNIDROIT Principles of International Commercial Contracts suggest the same solution.[122] This reasoning was also followed in another arbitral award from Austria.[123]

Disagreement also exists as to whether interest payments are mandatory, even in *force majeure* situations. It has been suggested that because interest payment is a general obligation, if the seller is able to claim payment after the *force majeure* situation has been overcome (as in the case of a temporary ban in the buyer's country on payment in foreign currency), he can claim interest on it.[124] The counter-argument is that because interest is part of damages, the payment of interest should be exempted in *force majeure* situations.[125] Because the Convention makes the payment of interest a separate obligation, the argument based on the premise that interest is part of damages should be rejected. On the other hand, because interest payment is a general obligation, the argument that interest can be claimed even under *force majeure* situations should also be re-

121. *See generally* Arbitral Award SCH-4318 (F.R.G. v Aus.), Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Wien (June 15, 1994), *reprinted in* RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 591-92 (1994), *available in* UNILEX, *supra* note 3.

122. *Id.*

123. Arbitral Award SCH-4366 (Aus. v. F.R.G.), Internationales Schiedsgericht der Bundeskammer der Gewerblichen Wirtschaft, Wien (June 15, 1994), *reprinted in* RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 590-91 (1994), *available in* UNILEX, *supra* note 3.

124. Ferrari, *supra* note 85, at 475 n.46 (quoting Barry Nicholas, *Article 78: Interest*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 568, 571 (C.M. Bianca & Michael J. Bonell eds., 1987)).

125. *Id.* (citing F.J.A. VAN DER VELDEN, HET WEENSE KOOPVEDRAG 1980 EN ZIJU RECHTSMIDDELEN 405 (1988)).

jected. This argument misinterprets the relationship between Articles 78 and 79. Article 79(1) exempts a party from *any* of his obligations, including the obligation under Article 78, in cases of *force majeure*. Thus, after the temporary ban ends, the buyer is only liable to pay interest from the date the ban ends, i.e., from the date the obligation to pay resumes.

Another argument is that Article 78 is not enforceable if any clause containing interest payments is invalid under domestic law.[126] This argument is not convincing because it does not recognize the special status of the text of the Convention. The language of the Convention reflects the binding compromise the national delegates made on behalf of those nations that have ratified the Convention. Thus, if an issue is specifically addressed by the *text* of the Convention, it overrules domestic law.[127] The issue of interest payment was specifically addressed, debated, and resolved in the Convention. The text of the Convention stands for the proposition that the domestic law is overruled on that issue, unless the objecting nation made a reservation to derogate from the Convention. Therefore, it becomes unnecessary to consult domestic law on the validity of the issue. In the same vein, it is incorrect for an American party to argue that an oral contract is not valid if the goods exceed $500 in value, as provided by the UCC. When the United States ratified the Convention, it agreed to subordinate its domestic law to the Convention on that provision. Thus, arguments based on the validity exception of Article 4(a) misunderstand the provision, nullify the express provisions of the Convention, and apply domestic law inappropriately.[128]

B. POINT OF ACCRUAL

Another issue that is producing divergent results in the courts is the time from which to award interest. The general principle of full compensation requires that the plaintiff be paid interest from the date that payment should have been made. Many courts seem to have followed this approach.[129] However,

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126. *Id.* at 478 n.63.

127. It is recognized, however, that the Convention has provided, at least in case of Article 28 on specific performance, that it is only available if the domestic law provides the remedy.

128. *See infra* notes 179-202 and accompanying text (discussing validity issues).

129. See the following cases for the rule that interest accrues from the date payment was due. *Available in* UNILEX, *supra* note 3 (translations are by the author):

by ignoring the general principle and relying instead on domestic law, some tribunals produce variations on the time for accrual. When a buyer sued for a refund of the purchase price, one court held that the interest should accrue from the date of avoidance of the contract, not from the date the buyer paid the purchase price to the seller.[130] In another case the court measured the interest rate from the date of giving notice to the defendant of a possible claim.[131] Yet another court ruled that interest should be awarded from the time when the aggrieved seller would "normally have resold" the goods after the buyer's breach.[132] Still another variation was that interest should accrue from a date that is determined by "a usage widely known

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Case 3 C 75/94 (Italy v. F.R.G.), Amtsgericht Nordhorn (June 14, 1994) (unpublished) ("Der Zinsanspruch ist gemäß Artikel 78 CISG gerechtfertigt. Nach dieser Vorschrift sind Zinsen ab Fälligkeit zu zahlen." (interest is due from the date of failure to pay)); Case 156 (Fr. v. Spain), Cour d'Appel de Grenoble Chambre Commerciale (Mar. 29, 1995) (unpublished) ("[T]he duty to pay interest for the delay in payment is not conditional on a formal request by the seller."). *Compare* Arbitral Award 7331/1994, *supra* note 12 (such notice being a prerequisite to claim interest from the date of notice). Case 920159 (Italy v. Neth.), Gruppo IMAR S.p.A. v. Protech Horst, Arrondissementsrechtsbank Roemond, (May 6, 1993) (abstract) (unpublished) (interest accrues from the date when payment was due); Arbitral Award 6653, *supra* note 68 ("In accordance with Arts. 78 and 84 CISG the buyer was awarded interest on the price to be refunded, accruing from the date of payment"); Case 1 C 216/92 (Italy v. F.R.G.), Amtsgericht Zweibrücken (Oct. 14, 1992) (unpublished) (no formal notice required for the interest to accrue); Case 15/91 (Fr. v. Switz.), Pretura di Locarno-Campagna (Dec. 16, 1991), *published in* Revue suisse de droit international et de droit europ, en (RSDIE) 663 (1993) (no formal notice required for accrual of interest from the date payment due); Case 20 U 76/94, *supra* note 109 ("Der Zinsanspruch des Klägers ergibt sich aus Art. 84 Abs. 1 CISG, wonach der Verkäufer, wenn er den Kaufpreis zurückzuzahlen hat, außerdem von Tag der Zahlung an auf den Betrag Zinsen zahlen muß." (The interest is due from the date of payment)).

130. Case 77/89, *supra* note 117.

131. *See* Arbitral Award 7331, *supra* note 12. If no notice is given, then the accrual point is from the time of arbitration. "It is also generally acknowledged that interest does not begin to accrue until proper notice of the claim has been given." *Id.*

132. Arbitral Award 7565, *supra* note 104. "Interest shall be computed from January 1, 1992, on the assumption that the cargo would normally have been resold to Claimant's customers by the end of December 1991." *Id.* The Claimant asked for the accrual date starting August 14, 1991, presumably the date the buyer defaulted. *Id.* This is a poor application of Article 7, which mandates uniformity in interpretation. How could one know when the cargo "would *normally* have been resold" in international trade? Why is it necessary to resort to such an empirical rule when the general principles of the Convention clearly establish that the seller be fully compensated for all losses and it is the practical experience of any business person that she would incur interest payments for money she had to borrow from the date of borrowing?

and regularly observed in international trade."[133] The abstract did not define usage, and did not specify what time frame was used in that particular case. By referring to international trade usage, the court seemingly pointed to a general principle of the Convention, rather than to a domestic law.[134]

The method discussed thus far for measuring the time for accrual of interest assumes that the seller has made a conforming delivery. If there is no conforming delivery, obviously the seller cannot be entitled to accrual of interest from the date of delivery. This fairness was recognized when one court awarded interest from the date the seller cured the defects in the goods.[135] This is an appropriate decision because it properly balanced the principle of fairness to the seller against the principle of fairness to the buyer.

C. THE CURRENCY FOR PAYMENT

The Convention is silent on the currency in which the price is to be paid. This problem does not usually arise, because if the price is agreed upon by the parties, they will have negotiated the price with reference to a certain currency. The problem does arise, however, when the price term is left open and the court fills the gap using Article 55. The delegates at the Diplomatic Conference deliberated on the issue of currency and voted against a proposal to fix a specific currency for payment.[136] The general rule based on trade usage seems to be that the currency

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133. Case 7 (Arg. v. U.S.), Elastar Sacifia v. Bettcher Industries Inc., Jugzado Nacional de Primera Instancia en lo Comercial (May 20, 1991) (abstract) (unpublished) (citing CISG, art. 9(2)), *available in* UNILEX, *supra* note 3.

134. *Id.* However, the court did indeed resort to a domestic law without searching for any general principles when it stated that Ohio law should be used as per the Argentinian rules of private international law. *Id.*

135. Case RG 93/4879, Marques Roque Joachim v. La Sarl Holding Manin Riviere, Cour d'Appel de Grenoble Chambre Commerciale (Apr. 26, 1995) (unpublished), *available in* UNILEX, *supra* note 3.

136. The proposal was introduced by the Spanish delegation and provided that the seller could require the buyer to pay the price in the buyer's currency, even if the buyer's domestic exchange controls prevented him from paying in another currency. HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 583. "The problems connected with the currency of payment were related to those concerning the validity of the contract, which, under article 4*(a)* of the draft Convention, were excluded from its sphere of application." *Id.* at 584 (Remarks of Mr. Krispis, Greece).

will be that of the place of payment (the seller's place of business, under Article 57(1)(a)).[137]

If the seller's place of business changes (either because the seller moved or because he assigned the contract to another from a different country) and the currency of the seller's new place is a hard currency, should the buyer pay in that hard currency? The answer should be no, because a change of seller's place of business is not a risk that the buyer contemplated (unless there was an agreement to the contrary) upon entering the contract. In fact, the Convention explicitly states that a rise in costs associated with the seller's change of place of business should not be borne by the buyer.[138] This result also flows from recognition of the general principle that the distribution of risk is fixed "at the conclusion of the contract."[139]

D. PLACE OF PAYMENT

The Convention provides that the buyer is required to pay at the seller's place of business unless a specific place of payment is agreed upon.[140] If payment is due against handing over the goods or the documents, the payment is due at the place where such handing over takes place.[141] If the buyer defaults, the discussion above on fixing of interest rate[142] indicates that the seller can sue for interest at the rate prevailing in the seller's place of business. But if the place of exchange is *a third country* and the buyer defaults, to what interest rate should the seller be entitled?

An Austrian seller and a Croatian buyer agreed that the payment was to be made against handing over the goods in Prague, in the Czech Republic,[143] and no choice of law was

137. Case 2 U 7418/92 (Italy v. F.R.G.), Kammergericht Berlin (Jan. 24, 1994) RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 683 (1994), *available in* UNILEX, *supra* note 3; *see also* Case 2 U 1230/91 (Fr. v. F.R.G.), Oberlandesgericht Koblenz, (Sept. 17, 1993) RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 934-38 (1993), *available in* UNILEX, *supra* note 3.

138. "The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract." CISG, *supra* note 1, art. 57(2).

139. *See supra* note 62 and accompanying text (discussing the general principle of the Convention that the distribution of risk should be determined at the conclusion of the contract).

140. CISG, *supra* note 1, art. 57(1)(a).

141. *Id.* art. 57(1)(b).

142. *See supra* notes 85-128 and accompanying text (discussing interest rates).

143. Case 7153 (Aus. v. Yugo.), ICC Ct. Arb. (1992), *translated by* Vivian Curran, 14 J.L. & COM. 217 (1995).

agreed upon in the contract. When the buyer failed to pay, the seller sued for the price and the interest payment at the rate prevailing in *Prague,* because interest rates were higher in Prague than in Austria. The court ruled that, under the rules of private international law, Prague was the place of performance and thus its interest rate controlled.

Under the general principle of full compensation, the seller should have been awarded the credit costs suffered as a result of the buyer's default. The seller's costs in the usual case are the costs in the seller's own country, unless the seller typically borrows money in Prague for business needs or deposits money in Prague to earn interest. Thus, unless the seller could have demonstrated that the interest rate in Prague was material to its business, the Prague interest rate should not have been allowed. If the payment were to be made in Czech currency, the interest rate arguably should be tied to that currency.[144] The facts were not clear as to currency in this case.[145]

Applying the Czech interest rate was also incorrect because, by expressly providing in Article 57(1)(b) for choosing a third country as the place of performance, the Convention requires that it be the controlling law. When the parties chose Prague as the place of performance, it was not derogating from the Convention under Article 6, but following the Convention. Neither Czech law nor the law of the parties should control, but rather the Convention should control. Under the general principles of the Convention, the seller's full compensation should have been the guiding principle. Thus, unless the seller could demonstrate that the Czech interest rate would have been applicable to its business, the seller should not have been allowed to claim that rate.

III. THE ROLE AND NATURE OF "GOOD FAITH"

A. "GOOD FAITH" AS A GENERAL PRINCIPLE

The Convention states that in its interpretation, "regard is to be had to . . . the need to promote uniformity in its application and the observance of good faith in international trade."[146] The drafting history of the Convention reveals that the delegates

144. *See supra* notes 119-20 and accompanying text (discussing interest rates).

145. Even if the interest rate is tied to a particular currency, the interest rate still would be not be the rate in Prague, because the interest rate should be based on the currency in the seller's place of business.

146. CISG, *supra* note 1, art. 7(1).

were divided on the role of good faith in the Convention.[147] Beyond concerns about what "good faith" is, the exact role of good faith in the Convention is unclear. A plain reading of Article 7(1) suggests that in interpreting the Convention, "regard is to be had to . . . the observance of good faith in international trade."[148] This reading requires the judge to look for good faith behavior and interpret the Convention so that the party who has deviated from good faith behavior should not be looked upon favorably. Another reading is that in interpreting the Convention, "regard is to be had . . . to the *need to* promote . . . the observance of good faith in international trade."[149] Under this reading, the judge should interpret the Convention with an emphasis on promoting good faith in international trade, so that the holding will not necessarily be limited to the instant facts of the case.

The distinction between the two readings may be largely academic because, under either reading, the essential focus is on the behavior of the parties. The legislative history, however, shows that many delegates objected to the imposition of "good faith" as a general obligation on the parties in the performance of the contract along the lines of Uniform Commercial Code §1-203.[150] Many authorities agree that "the Convention rejects good faith as a general requirement and uses good faith solely as a principle for interpreting the provisions of the Convention."[151] The legislative history suggests that the "good faith" requirement should apply only in interpretation of the Convention: the

147. Some delegates objected to the inclusion of good faith because it simply represented a moral exhortation which should not be elevated to the status of a legal obligation without explicit details on how to apply the principle in a given situation. HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 369. Another objection was that it was unnecessary to include the provision in the Convention because the principle of good faith was implicit in all national laws. *Id.* In addition, delegates objected that the Convention does not specify the sanctions for failing to comply with the good faith principle and that in imposing any sanctions the domestic law will be used with the resulting inconsistency. *Id.*

In support of having the good faith provision in the Convention, it was argued that there is little harm in having such a provision because the principle is "universally recognized." *Id.* The consequences of violation need not be spelled out in the Convention, but rather can be developed in a flexible manner on a case by case basis. *Id.*

148. CISG, *supra* note 1, art. 7(1).

149. *Id.* (emphasis added).

150. *See generally* HONNOLD, UNIFORM LAW, *supra* note 3, § 95; Peter Winship, *Commentary on Professor Kastely's Rhetorical Analysis*, 8 NW. J. INT'L L. & BUS. 623, 630-33 (1988).

151. Professor Honnold at one point states that the "good faith" provision of Article 7(1) bears only on the interpretation of provisions of the Convention. HONNOLD, UNIFORM LAW, *supra* note 3, § 65 n.4.

obligation of "good faith" is directed primarily to the judges who ultimately pass on the Convention, and not to the parties.

On the other hand, a general-principles analysis of the various provisions of the Convention makes it clear that "good faith" is so pervasive a concept that it must be a general principle of the Convention. Many provisions of the Convention represent "good faith" through its variants, such as "reasonableness" or "fair dealing."[152] In reality, it has been acknowledged that "[t]he principle of good faith is, however, broader than these examples and applies to all aspects of the interpretation and application of the provisions of this Convention."[153] The drafters of the Convention seem to have achieved indirectly the objective of imposing "good faith" on the conduct of the parties by purporting to require "good faith" in interpretation only. Even though the drafting history impressively supports Professor Winship's argument to the contrary, the pervasive presence of good faith as an obligation on the parties dictates that such an obligation indeed must exist. If good faith in international trade were to be promoted by a liberal application of the provisions of the Convention, how else can a judge promote "good faith" in trade other than by requiring the parties to behave in good faith? Stated differently, good faith cannot exist in a vacuum and does not remain in practice as a rule unless the actors are required to participate.[154] Thus, it seems that "good faith" performs dual roles in the Convention: one directed to the parties and the other directed to the judiciary. The former role arises from the textual provision and the general principles of the Convention, and the latter role comes from the legislative history of the Convention.

152. The following list of provisions referring to reasonableness has been adapted from Professor Honnold's work and is further expanded. *See generally* HONNOLD, UNIFORM LAW, *supra* note 3, arts. 16 (b) (reasonable reliance); 18(2), 33(c), 39(1), 43(1), 46(2), 46(3), 47(1), 48(2), 49(2), 63(1), 64(2)(b), 65(1), 65(2), 73(2), 75, 79(4), (reasonable time); 34, 37, 86(2) (unreasonable inconvenience or expense); 88(1) (unreasonable delay); 76(2) (reasonable substitute); 75 (reasonable manner); 79(1) (reasonable expectations); 85 (reasonable steps); 88(2) (reasonable measures to sell); 72 (reasonable time for notice); 35(2)(b) (unreasonable reliance); 38(3) (reasonable opportunity for examination); 88(2) (unreasonable expense); 8(2), 25 (reasonable person); 48(1) (unreasonable delay, inconvenience or expense); 44 (reasonable excuse); 72(2), 88(1) (reasonable notice); 77, 86(1) (reasonable steps in the circumstances); 85, 86(1), 87, 88(2), 88(3) (reasonable expenses).

153. HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 408.

154. Winship, *supra* note 150, at 630-33. Professor Winship later seemed to agree in reconciliation that the "question of how 'good faith' relates to the Convention is more complex than [he] originally suggested." *Id.* at 633.

"Good faith" in international case law seems to be an issue that is discussed infrequently. One court, however, expressly recognized the nature and the attending disagreement among the authorities on the role of good faith in the Convention.[155] The court held that despite the disagreement, the principle of estoppel or the prohibition of *venire contra factum proprium*, represents a special application of the general principle of good faith and without doubt is seen as one of the general principles on which the Convention is based.[156] The role of good faith in international trade is evolving and moving towards an international concept.[157]

B. LIQUIDATED DAMAGES

The subject of liquidated damages is not explicitly covered in the Convention,[158] although there was considerable support for the idea that the Uniform Law should regulate liquidated damages clauses.[159] The Committee felt that such regulation is particularly desirable because the rules on liquidated damages vary widely, and it would be a practical contribution to international trade to bring uniformity in their application.[160] The Committee again could not agree on proper language that would avoid the technical problems associated with the proposed

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155. *See* Arbitral Award SCH-4318, *supra* note 121. An Austrian seller and a German buyer contracted for the purchase of rolled metal sheets. The materials, upon delivery, were sold to merchants down the chain of trade. The ultimate buyer refused to pay by alleging defects in quality. The Austrian seller refused to pay damages claiming that the notice was not timely. The court ruled that the Austrian seller was prevented from raising the defense of untimely notice because the seller, through its conduct, led the buyer to believe that the seller would not raise that defense. The court found that the seller continued to ask the buyer for information on the status of the complaints and pursued negotiations seemingly to reach a settlement agreement. The court cited to some scholarly commentary and argued that the seller was estopped from denying such conduct which induced reliance in the buyer. *Id.*

156. *Id.*

157. "The kind of reasonableness [being discussed] seems to . . . have much in common with the notions of good faith which are regarded in many of the civil law systems of Europe and in all States in the United States as necessarily implied in many kinds of contract." Renard Constructions (ME) PTY LTD v. Minister for Public Works (Mar. 12, 1992), *reprinted in* 26 NEW S. WALES L. REP. 234 (1992), *available in* UNILEX, *supra* note 3.

158. A provision on liquidated damages was considered at the 1977 UNCITRAL review of the Working Group "Sales" draft. HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 354.

159. *Id.*

160. *Id.*

draft.[161] As a result, the basic principle underlying the liquidated damages provision was not rejected in the Convention. Accordingly, a liquidated damages clause agreed upon by the parties should be given full effect under the Article 6 principle of contractual freedom to derogate from the Convention.

At least two courts misunderstood the provision and misinterpreted it, casting doubt not only on the future of liquidated damages clauses under the Convention, but also on the court's ability and willingness to comply with the Article 7 mandates of international interpretation of the Convention. When an Austrian seller and a Bulgarian buyer entered into a contract for the sale of goods, they specifically agreed to limit their damages to a certain percentage of the contract price, regardless of who failed to perform.[162] After noting that the CISG did not expressly address liquidated damages, an arbitration court applied Austrian domestic law to determine if the liquidation clause was valid.[163] The court held that the seller should recover all damages suffered, in spite of the specific agreement to limit the damages by a penalty clause. The parties seemed to have been commercially sophisticated and their agreement should have been respected.[164] The court ignored the Article 6 provision that the parties may derogate from or vary the effect of any of the provisions of the Convention. There was no inquiry needed to determine the validity of the liquidated damages clause.[165] The only inquiry should have been whether the parties were behaving in

161. The Committee decided to postpone dealing with the issue because of limited time and because the scope of liquidated damages could be greater than the Convention itself. *Id.* The Committee decided that it might be appropriate to cover the issue under another instrument. *Id.*

162. Arbitral Award 7197, *supra* note 115. The contract between an Austrian seller and a Bulgarian buyer had a "penalty clause" for a certain percentage of the price in case of non-performance by either party. *Id.* Even though the court did not label the clause as a liquidated damages clause, it probably was a liquidated damages clause. *Id.* The facts indicated that the clause limited damages to either party to a certain percentage of the price in case of non-performance by either party. *Id.*

163. The translated abstract as provided in UNILEX refers to the liquidated damages as "penalty clause." *Id.* This nomenclature may confuse lawyers trained in the United States, because "liquidated damages" are void as penalty. *See* Uniform Commercial Code § 2-718(1).

164. The issue of whether commercial sophistication should matter in international transactions has been addressed in literature, but is beyond the scope of this article. *See generally* Kastely, *supra* note 15, at 607-20.

165. *See infra* notes 179-89 and accompanying text (discussing the validity issue).

good faith as provided under Article 7(1). Thus, this ruling seems to be unwarranted.[166]

Should the result be different if the buyer agreed to pay a "compensation fee" that amounts to thirty percent of the contract price even in a *force majeure* situation?[167] One arbitrator held that even though there was a "construction difficulty" of the term "compensation fee" and that the phrase is "not usual in legal vocabulary," the wording of the clause was not "precise enough" to be construed as a liquidation clause which would foreclose any claim for other damages.[168] The arbitrator focused on the condition that the buyer agreed to pay the "compensation fee" even in the condition of *force majeure* situations and interpreted to mean that the fee was "money payable in consideration of the termination of the contract independently of any damages suffered by Seller."[169] The seller was awarded storage costs under Article 77 ("mitigation" costs), seller's costs in modifying the equipment for a substitute buyer, the lost profit resulting from the substitute sale (Article 74 damages), the "compensation fee" of thirty percent of the contract price, and interest on all the amounts due.[170]

Given the ambiguity of the provision, the arbitrator had to choose between granting or denying the thirty percent "compensation fee." Even though the Convention does not address the "compensation fee" issue, the issue could have been analyzed under the general principles of the Convention, namely, the principles of freedom of contract, fair dealing and good faith observance, and full compensation.[171] The seller was fully compensated with all the damages under Articles 74, 75, 77 and 78. Even though the principle of contractual freedom requires that the fee provision should be respected, it is nonetheless subject to the principles of good faith and fair dealing. Both parties were merchants and were presumably dealing at arm's length. But

166. This criticism is only valid if the facts as supplied in the UNILEX abstract are complete and there were no other facts that altered the complexion of the case or that the court looked at in making this determination.

167. Arbitral Award 7585, *supra* note 119.

168. *Id.*

169. *Id.* "The mere fact that the compensation fee has to be paid in such a situation evidences that it has a nature different from damages in compensation of a loss." *Id.*

170. *See supra* notes 119-20 and accompanying text (discussing the award of interest rate in this case).

171. *See supra* notes 90-94 and accompanying text (discussing full compensation); note 150 and accompanying text (discussing fair dealing); notes 55-56 and accompanying text (discussing freedom of contract).

the seller's provision required that in case of *seller's* breach, the buyer would get only his down payment back, with no interest.[172] The seller seemed to have made a substitute sale in a short time but only for approximately fifty percent of the contract price, which raises the question of whether the sale was done "in a reasonable manner and within a reasonable time" under the Convention.[173] Moreover, the seller asked for the higher interest rate of Italy, whereas the contract money was to be paid in German marks.[174] These facts raise an issue of unfair dealing.

This case would have been an ideal opportunity for the court to interpret the contract and the Convention under the Article 7 mandate of promoting observance of good faith in international trade. Most likely the seller drafted the contract, and the seller should have borne the consequences of any resulting ambiguity. The court should have ruled that, after the plaintiff is fully compensated, claims for additional sums must meet the test of good faith. Or conversely, it is reasonable to assume that a high (thirty percent) "compensation fee" indicates the nature of the risk the buyer assumed in case he defaulted and that was all the seller is entitled to recover.[175] Thus the court's ruling casts doubt on the ability of courts to interpret liquidated damages clauses in a manner that promotes observance of good faith in international trade.[176]

When a contract has been validly avoided, both parties are required to make restitution concurrently.[177] When the buyer

172. Article XX of the contract provided that "[i]f the agreement is terminated by fault of the supplier before the goods have been delivered, the purchaser will be returned any sum he has previously transferred to the supplier as down payment, without interest." Arbitral Award 7585, *supra* note 119. The parties deviated from the Convention's provision that requires that buyer should get interest paid on his down payment upon refund.

173. CISG, *supra* note 1, art. 75.

174. *See supra* notes 119-20 (explaining that the arbitrator rejected this demand and awarded the German interest rate, which was less than the high inflationary rate of Italy).

175. It is doubtful whether the buyer would have wanted to assume the risk of paying approximately 80% of the contract price (50% as the contract market differential plus a 30% "compensation fee"), the interest payment, equipment conversion costs incurred to facilitate the substitute sale, and storage costs and then not get the machine.

176. There is no issue of fraud suggested here, but rather unequal bargaining positions. It should be noted that Professor Honnold suggests that the "good faith" provision of the Article 7(1) is not meant to provide a general remedy for fraud, because the "good faith" provision only applies to the interpretation of the Convention. HONNOLD, UNIFORM LAW, *supra* note 3, § 65 n.7.

177. CISG, *supra* note 1, art. 81(2).

in another case placed the goods at the seller's disposal, the seller failed to take delivery and refused to refund the price.[178] The court stated that this matter is not expressly covered by the CISG and that Article 31, which deals with the delivery of the goods by the seller, is not applicable by analogy. After stating that it could find no applicable general principles of the Convention, the court applied domestic law. Instead, the court should have imposed on the seller an obligation of good faith and an obligation to mitigate his losses. The court should have stayed within the Convention rather than referring to domestic law.

IV. THE VALIDITY ISSUE: HOW BIG IS THE BLACK HOLE?

A. CONSTRUCTION DIFFICULTIES

The Convention, in Article 4(a), states that it is not concerned with the validity of the contract or of any of its provisions. However, the Convention does not define the term "validity." The "validity" exception has been described as "a potential 'black hole' [that removes] the issues from the Convention's universe."[179] It was recognized long ago that the term "validity" has at least two connotations: the formation aspect referring to whether the contract has met all of the requirements for formation and the enforcement aspects referring to such issues as whether the contract has an illegal objective or was accomplished through fraud.[180] Unfortunately, the Convention does not specify which of these two types of validity it addresses.

Many authorities conclude that the validity exception should be construed as narrowly as possible "to allow the Convention to have the 'widest possible application consistent with

178. Case 54 O 644/94 (Switz. v. F.R.G.), Landgericht Landshut (Apr. 5, 1995) (unpublished), *available in* UNILEX, *supra* note 3. A Swiss buyer and a German seller entered into a contract for the sale of sports clothing. Due to defects in the clothing and the incorrect quantity of items delivered, the court held that the buyer validly declared the contract avoided after giving proper notice. *Id.*

179. Winship, *supra* note 150, at 636.

180. Professor Hartnell states that the question of validity giving rise to these connotations in meaning "is not new, but has yet to be fully answered." Helen E. Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods,* 18 YALE J. INT'L L. 1, 19 (1993). The question has been posed by an Italian delegate elsewhere in 1964 as following: "[W]hat [is] the meaning of the expression *le contrat n'est pas valable.* [Does] it mean: that the contract is not concluded; that the contract is not valid; [or] that the contract is valid, but it is not enforceable?" *Id.* n.73 (alterations in original) (citation omitted).

its aim as a unifier of legal rules governing the relationship between the parties to an international sale.'"[181] Professor Honnold states that it is "the substance rather than the label or characterization of the competing rule of domestic law that determines whether it is displaced by the Convention."[182] Moreover, it is critical to ask "whether the Convention addresses the situation in question; if so, the Uniform international rules should not be displaced merely because of the labels attached to various doctrines of domestic law."[183] This consideration is especially important because the "issues of validity are difficult matters which the differing national traditions made difficult to unify in the Uniform Law"[184] and thus can produce divergent results. It is possible to limit the meaning of the term "validity" to a "common core of meaning" because "[m]ost (if not all) countries will not enforce agreements on the grounds of illegality, capacity, fraud, mistake and duress."[185] Because Article 4(a) is part of the Convention and its interpretation is subject to Article 7 mandates of internationality, uniformity, and good faith, this narrow interpretation is appropriate.

Additionally, Article 4(a) should be interpreted against the backdrop of the general principle of parties' contractual freedom as stated in Article 6. If the parties are allowed to derogate, and if they do, should the subject matter of their derogation become an issue of validity to be analyzed under domestic law? A negative answer is preferable because Article 6 is not meant to be such an easy escape clause from the Convention. Both the legislative history and the purpose behind Article 6 strongly support this conclusion.[186] Otherwise, the breaching party could argue,

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181. *Id.* at 45 (citations omitted).

182. HONNOLD, UNIFORM LAW, *supra* note 3, § 65.

183. *Id.* § 240.

184. Winship, *supra* note 150, at 636 (citation omitted).

185. "[M]ost commentators agree that [the common core of the term "validity"] includes issues regarding fraud (*dol*), duress, unconscionability, legal capacity of the parties to enter into a contract, and error." Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443, 464 (Summer 1989); *see also* Winship, *supra* note 150, at 638.

186. Article 6 in its earlier drafts was amended to prevent an "implied exclusion" of the Convention. The purpose was to discourage courts from excluding the application of the Convention on "insufficient grounds." *See* HONNOLD, DOCUMENTARY HISTORY, *supra* note 3, at 61, 407. Later, the Working Group suggested that the Convention should not be displaced unless the parties specified which law would be applicable. *Id.* at 277. Such exclusion requires an express or implied agreement between the parties and cannot be imposed unilaterally by one party. *Id.* at 302. The *raison d'être* of the Convention is that it would

when it is advantageous, that the Convention should not apply each time there is a derogation under Article 6.

A case decided in Germany is illustrative. The parties agreed to derogate from the Convention and provided that the buyer could avoid the contract only following a notice demand to the seller to comply with the contract and only after fifteen working days from the date that the seller received the notice to comply.[187] The court chose to refer to domestic law because the validity of the contract clause is beyond the scope of the CISG according to Article 4(a). In its haste to refer to domestic law, the court failed to analyze an applicable provision under the Convention. This clause in the contract was not very different from the explicit provisions and the general principles underlying Article 47. Article 47(1) allows the buyer to fix an additional period of time of *reasonable length* for the seller to perform.[188] Article 47(2) prevents the buyer from resorting to any remedy prematurely, i.e., before the expiration of the time fixed under 47(1).[189] The inquiry should not have been whether such clause was "valid," but rather whether the time fixed was a reasonable time. Under the facts of the case, fifteen days appears to have been reasonable.

By embarking on the validity inquiry, the court misunderstood the role of Article 4(a) and its interaction with Article 6, as well as the general principle of good-faith communication between the parties. Article 4(a) probably is not meant to cover this situation because there is nothing illegal or fraudulent in agreeing to notification with a reasonable time of a party's intention to avoid the contract. To the contrary, by expressly agreeing in advance to notify, the parties demonstrated their intentions to follow the Convention's general principles. The court should have actively tried to resolve the issue of validity under the general principles of the Convention. Only if an answer

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apply automatically unless the parties expressly or impliedly derogated from it. *Id.* at 322.

187. Case 3 C 75/94 (Italy v. F.R.G.), Amtsgericht Nordhorn (June 14, 1994) (unpublished), *available in* UNILEX, *supra* note 3.

188. "The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations." CISG, *supra* note 1, art. 47(1).

189. The Convention provides:

> Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

CISG, *supra* note 1, art. 47(2).

could not be found, or if the issue raised is one of the issues that come under the "common core" of enforcement-related validity issues, should the court refer to domestic law. Faithful adherence to Article 7 requires this approach.

B. THE DEBATE OVER ARTICLES 14 AND 55(1)

Article 14 states that a proposal to conclude a contract is an offer if it is sufficiently definite to allow the price to be fixed, either explicitly or implicitly.[190] Thus, if the price can be determined, the proposal does not fail for indefiniteness, and a valid contract exists. Article 55 fills the gap for the price term and states that, once a valid contract has been formed, the price is the market price at the time of the conclusion of the contract.[191] Professor Farnsworth, applying the Convention language literally, argues that Article 55 applies only after the contract is validly formed.[192] Because the Convention is not concerned with the validity of the contract,[193] its validity should be determined according to the appropriate domestic law as directed by private

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190. The Convention states:

> A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.
>
> A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

CISG, *supra* note 1, art. 14(1).

191. Article 55 states:

> Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

CISG, *supra* note 1, art. 55(1).

192. Hartnell, *supra* note 180, at 69 n.276. Professor Hartnell also agrees and states that "Article 14(1) is a rare example of the Convention itself declaring that the absence of certain provisions renders a contract invalid." *Id.* at 69.

193. CISG, *supra* note 1, art. 4(a).

international law rules.[194] If such a contract is invalid under domestic law, Article 55 cannot be applied.[195]

While this argument is persuasive, it loses its strength when the interaction between Article 14 and 55(1) is considered in the international context. The Convention does not seem to consider the missing price term to be fatal to the contract. The Convention does not expressly provide a mechanism to fix a missing quantity term or a term that identifies the goods (the other two important variables under Article 14(2)), but Article 55 does provide the missing price. Thus, the view under the Convention is that a contract is valid even if it does not have an explicit price term. The price can be supplied either under Article 14 (implicit or explicit provisions for fixing the price), or under Article 8(3) (which allows for determination of the price from any subsequent conduct of the parties), or ultimately under Article 55(1) (a reasonable price).

Assume a scenario in which the parties failed to fix the price under Article 14, the buyer nevertheless received the goods, and the parties disagree on the price. The existence of the contract can be proved under Article 8 from their conduct. But is there a valid contract when the price term is missing? Under the indefiniteness argument, there is no contract, and Article 55 can not be used if domestic law determines the contract to be invalid. But the general principles of assessing the intent of the parties from conduct,[196] protection of reasonable reliance,[197] and the overarching principle of preservation of contract[198] require the

194. The Convention states:

> This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage.

CISG, *supra* note 1, art. 4.

"The overall scheme is thus that the CISG (usually) provides the rules of offer and acceptance; national law then determines whether there is a valid (binding & enforceable) contract; whereafter CISG Part III regains control if the answer is yes." Joseph M. Lookofsky, *Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules*, 39 AM. J. COMP. L. 403, 405 (1991) (footnote omitted).

195. Extensive debate exists on the interaction between Articles 14 and 55(1). *See generally* Amato, *supra* note 16; Hartnell, *supra* note 180, at 69 n.276.

196. CISG, *supra* note 1, art. 8.

197. *See supra* notes 59 and 65 and accompanying text (discussing provisions for reasonable reliance).

198. *See supra* notes 70-72 and accompanying text (discussing the principle of contract preservation).

contract to be preserved. Indeed, Article 55(1) is meant to apply precisely to this type of situation. Only an overly-technical reading, while ignoring the general scheme of the Convention, produces the result of an invalid contract under this scenario.[199] Thus, if the mandates of Article 7 are faithfully followed, the term validity under the Convention should be given a narrow interpretation limited to "common core" issues and does not cover the issue of a missing price term.[200]

International case law is mixed on the validity aspect of missing price terms. One court did not even inquire whether missing price created a validity issue.[201] The dispute was between an Italian seller and a French buyer who contracted over the sale of sweets produced by the seller. When the seller sued for the buyer's default in payment, the buyer claimed that the price was not fixed in the contract and that the price was to be determined according to Article 55. The buyer thus argued that the price should be the market price, which was less than the price when the contract was concluded. The court held that the buyer had taken delivery of the goods without contesting the price indicated by the seller. Under Article 8(2) and 8(3), such conduct should be interpreted as acceptance of the price. One lower court in Hungary determined that the quality, quantity, and price of the goods were all impliedly fixed by practices which the parties had established between themselves over a period of time.[202]

The Hungarian Supreme Court, in *Pratt & Whitney v. Malev, The Hungarian Airlines*,[203] ruled that if the price can not

199. "[I]n a codified set of rules such as the Convention, every effort should be made to construe seemingly incompatible provisions in order to make sense out of them." Garro, *supra* note 185, at 464.

200. *See supra* note 185 and accompanying text (discussing the core of validity issues).

201. Case 213 (Italy v. F.R.G.), Entreprise Alain VEYRON v. Soci,t, E. AMBROSIO, Cour d'Appel de Grenoble Chambre Commerciale (Apr. 26, 1995) (abstract) (unpublished), *available in* UNILEX, *supra* note 3.

202. Case AZ 12.G.41.471/1991 (F.R.G. v. Hung.), Metropolitan Court of Budapest (Mar. 24, 1992) (abstract) (unpublished), *available in* UNILEX, *supra* note 3. The court found that the contract did not fail for indefiniteness because the German seller repeatedly delivered the same type of goods and the Hungarian buyer paid the price after each such delivery. *Id.* Thus, Article 9(1) of the CISG was applicable to determine the "validity" of the contract for Article 14(1) purposes.

203. Case Gf. I. 31 349/1992/9 (U.S. v. Hung.), United Technologies International, Pratt & Whitney v. MALEV Hungarian Airlines, The Supreme Court of the Rep1ublic of Hungary (Sept. 25, 1992) (unpublished), *available in* UNILEX, *supra* note 3, *translated in* 13 J.L. & COM. 31 (1993).

be determined from the contract, the contract is void. Pratt & Whitney, a U.S. aircraft engine manufacturer, and the Hungarian Airlines (Malev) had entered into an agreement for Malev to purchase certain aircraft engines to be chosen in the future. The price had been agreed upon for two engines, but it was not fixed for one other engine. Malev argued that there was no price agreed upon for the third engine and that the contract failed for indefiniteness under Article 14(1). The *Malev* court reasoned that "price is an essential term" of the contract and ruled that the contract failed when the price could not be determined from the contract. The Court stated that there was no "ready market" for aircraft engines and that the price could not be fixed by using Article 55.

The *Malev* Court was short on analysis and failed to pay attention to the Convention on many fronts. The Court hastily referred to domestic law by failing to interpret the term "validity" under the Convention. In the process the Court ignored the interrelationship between Article 55 and Article 14. The Court purported to be willing to apply Article 55, but paid it only lip service when the Court stated that there was no ready market for aircraft engines and that the price could not be determined. Even though an aircraft engine is not a common commodity, there could have been an acceptable method to fix the price: for example, by an independent appraiser familiar with the aircraft engine industry. The Court did not take into account the parties' intent under Article 8 in the formation of the contract. The parties' behavior, under an objective standard of either Article 8(2) or 8(3), revealed that the parties considered themselves to have a binding agreement. Finally, the Court missed the general principle of protecting the reasonable reliance of the aggrieved party.[204] The facts in *Malev* seem to indicate that Pratt & Whitney reasonably believed that a binding contract was formed. The *Malev* decision suggests that not only Malev, but also the Court failed to observe "good faith" under the Convention. The *Malev* decision should have questionable authority in the international jurisprudence of the Convention.

V. CONCLUSION

The international delegates to the Vienna Convention negotiated and compromised to the best of their abilities with one

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204. *See supra* note 59 and accompanying text (discussing general principles and the specific textual provisions supporting the general principle of protection of reasonable reliance).

major objective: to bring uniformity and certainty to the international trade regime. The regime they envisioned is based on an international interpretation which is free from any domestic ties so that the international trader can rely on it without having to be concerned with parochial biases and idiosyncrasies stemming from the trading partner's domestic legal system. While global trade truly has become an international phenomenon, the legal system that is supposed to assist such trade has not kept pace. Many courts today still interpret the Convention without any regard or consideration for its international character. They resort to domestic law without hesitation. The Article 7 requirement of good faith can be met only if the judiciary pays attention to decisions from other jurisdictions, as well as to the general principles and fundamental objectives of the Convention.

This article demonstrates that reference to the general principles of the Convention will greatly reduce the need to resort to domestic law in resolving many issues that may arise in international trade. It proposes that courts follow this international approach by extracting general principles from the Convention. While the Convention does not explicitly impose an obligation of good faith on the parties, many of the Convention's general principles operate collectively to create such an obligation. Requiring good faith as a general principle promotes trust and confidence in the Convention as an international body of trade law. The general principles approach also permits a narrow interpretation of the concept of validity, reducing reference to domestic law on issues that the Convention should govern. Interpretations based on general principles thus more fully effectuate the goals of the Convention.