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**COMPARISON BETWEEN THE CENTRAL LIST AND THE VIENNA  
CONVENTION FOR THE INTERNATIONAL SALE OF GOODS –  
SPECIFIC TOPICS**

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I hereby declare that I have read and understood the regulations governing the submission of Master in Commercial Law (CML606W) dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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## INTRODUCTION

It is now well recognized that International Trade is a sphere of economic activity that needs appropriate rules and that municipal laws are 'ill-adapted' to reach its needs.<sup>1</sup> Globalization makes necessary to provide for some unification on the applicable law. As reminded by Professor Bernard Audit, the unification may take various forms. Firstly, domestic laws could be unified. The result is however difficult to achieve and at a world-wide level impossible. Secondly, choice of law rules might be unified. It means that, although international trade is still governed by domestic laws, the rules that lead to the choice of a specific municipal law are unified with the result to achieve predictability in a given case. The 1955 Hague Convention and the 1980 EEC Rome Convention are two illustrations of this kind of unification although their scope of application is limited. Nevertheless, this method entails various practical problems. To the extent that the domestic applicable law is chosen according to its degree of close relationship with the legal situation, it happens that more than one rules of conflict are applicable rendering the method complicated to use and unpredictable. Thirdly, unification may encompass the adoption by States of substantive legal rules specifically tailored for International Trade. The Vienna Convention for the International Sale of Goods ("CISG", "Vienna Convention", "Convention") is an application of this method.

The CISG is born from the failure of the Uniform Law for the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contract for the International Sale of Goods (ULFC), two Hague Conventions of 1964 drafted under the direction of the UNIDROIT and that received limited support (nine States ratified the conventions).<sup>2</sup> The Vienna Convention was drafted under the direction of UNCITRAL (United Nations Commission on the International Trade Law). In charge of the task to 'further the progressive harmonization and unification of the

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<sup>1</sup> Bernard Audit, 'The Vienna Sales Convention and the Lex Mercatoria' in rev. ed., Carbonneau ed., *Lex mercatoria and arbitration*, Juris Publishing (1998) at 173, available on <http://www.cisg.law.pace.edu/cisg/biblio/audit.html>, accessed on 2006-03-29.

<sup>2</sup> Michael Joachim Bonell, 'Introduction to the Convention' in Bianca-Bonell *Commentary on the International Sales Law*, Giuffrè: Milan (1987) [hereinafter in Bianca-Bonell *Commentary*], 1 at 1 to 4, available on <http://www.cisg.law.pace.edu/cisg/biblio/bonell-bbintro.html#i>, accessed on 2006-03-23.

law of international trade’,<sup>3</sup> the UNCITRAL requested the Secretary General to transmit to all Members of the U.N. the two Hague Conventions and to collect their opinions. Following the comments and suggestions, a Working Group was set up ‘in order to ascertain which modifications of the existing texts might render them capable of wider acceptance by countries of different legal, social and economic systems, or whether it will be necessary to elaborate a new text for the same purpose [...]’.<sup>4</sup> During its nine sessions, the Working Group made a revision of the ULIS and ULFC with the proposition of two drafts respectively in 1976 and 1977. At the eleventh session of the UNCITRAL,<sup>5</sup> both drafts were consolidated before being transmitted to the General Assembly of the United Nations which decided that an international conference of delegates should be convened to consider the Draft Convention. The United Nations Conference on Contracts for the International Sale of Goods was held in Vienna, from 10 March to 11 April 1980 and was attended by representatives of 62 States and of 8 international organisations. Two Committees were in charge to prepare, in one hand the text of the substantive provisions (Arts. 1-88) and, in the other, the final clauses (Arts. 89-101). The final texts of the Convention were then submitted to the Conference that voted in a Plenary session, article by article. Finally, ‘the Convention as a whole was submitted to a roll-call vote and was approved without dissent.’<sup>6</sup> Actually, 67 States have signed the Vienna Convention.<sup>7</sup>

As indicates its name, the CISG is aimed to deal with a limited albeit important area of international trade: the international sale of goods. The purpose of the Convention is thus to provide substantive rules and to reach uniformity in its application and interpretation (Art. 7(1) CISG). However, the drafting process was characterized by several episodes of compromises between members of the Working Group or between delegates during the Vienna Conference. It results that the Convention

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<sup>3</sup> See the General Assembly Resolution 2205 (XXI) of 17 december 1966 on the Establishment of the United Nations Commission on International Trade Law, available on <http://www.uncitral.org/uncitral/en/commission/resolutions.html>, accessed on 2006-03-24.

<sup>4</sup> UNICTRAL Report at its second session, Yearbook I (1968-1970) at 173, available on [http://www.uncitral.org/pdf/english/yearbooks/yb-1968-70-e/yb\\_1968-1970\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1968-70-e/yb_1968-1970_e.pdf), accessed on 2006-03-29.

<sup>5</sup> UNCITRAL Report at its eleventh session, Yearbook IX (1978), available on [http://www.uncitral.org/pdf/english/yearbooks/yb-1978-e/yb\\_1978\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1978-e/yb_1978_e.pdf), accessed on 2006-03-29.

<sup>6</sup> Supra footnote 2 at 5.

<sup>7</sup> See [http://www.uncitral.org/uncitral/fr/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/fr/uncitral_texts/sale_goods/1980CISG_status.html), last visited on 2006-03-29.

contains provisions with open interpretations weakening the uniformity. Consequently, it is not uncommon that the Convention is supplemented by or interpreted in the light of other instruments of international trade law such as the UNIDROIT Principles for the International Commercial Contracts (UPICC) and the Principles of European Contract Law (PECL).<sup>8</sup> As a result thereof, many comparative studies were made between the CISG and those instruments. The ‘new’ *lex mercatoria*, as an alternative source of the law of international trade might also be used to interpret the Convention. Indeed, Article 9(2) provides that trade usages are applicable to the contract or its formation unless explicitly excluded by the parties. It means that the Convention places transnational rules on the same level than party autonomy and thus, on a superior status than the Convention rules themselves.<sup>9</sup>

The *lex mercatoria* is usually characterized as ‘spontaneous’ law, a law created by standard commercial practices and arbitral decisions. An issue with the *lex mercatoria* is to find a method to get a ‘fast and easy access’ to its content.<sup>10</sup> The Transnational Law Database (TLDB) created in 2001 by the Center for Transnational Law (CENTRAL) of the University of Cologne in Germany is designed to provide the ‘hitherto “missing link” between the theory of transnational commercial law and international legal practice’<sup>11</sup> via the publication, on a website ([www.TLDB.de](http://www.TLDB.de)), of a list of Principles. The TLDB is based on the concept of ‘creeping codification’ of transnational commercial law. According to Prof. Klaus Peter Berger<sup>12</sup>, ‘[t]his concept rests on three basic premises:

- (1) First, the *lex mercatoria*, which is characterised by its openness, flexibility and informality, requires a codification technique which reflects these characteristics.
- (2) Secondly, transnational commercial law is a world-wide phenomenon and requires a codification which allows instant and easy access to its contents at any time and anywhere over the world.

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<sup>8</sup> In the Preamble of the UPICC it is provided that the Principles may be used to ‘interpret or supplement international uniform law instruments’.

<sup>9</sup> *Supra* footnote 1 at 176.

<sup>10</sup> Klaus Peter Berger, ‘Lex Mercatoria Online : the CENTRAL Transnational Law database at [www.tldb.de](http://www.tldb.de)’, *Arbitration International* (2002) Volume 18 Number 1, at 83.

<sup>11</sup> *Ibid.* at 84.

<sup>12</sup> *Ibid.* at 85.

- (3) Thirdly, the method of codification has to include recourse to the extensive case law of international arbitral tribunals and to international drafting practice as the “social engineers” of the *lex mercatoria*.<sup>13</sup>

The idea of a list of Principles is situated in a certain legal tradition. In some cases list of principles were used to support the existence of the *lex mercatoria*.<sup>14</sup> In another case, it was used to illustrate the deficiency of such principles.<sup>15</sup>

The novelty with the TLDB consists in providing an ‘open-ended’<sup>16</sup> list of Principles. In practice, the TLDB works as follows: The TLDB contains so far<sup>17</sup> 74 principles divided into chapters and sections. Each Principle contains a link that lead to scholar writings, case law of international arbitral tribunals, general principles, international conventions, standard contract forms and other sources that have contributed to the evolution of a transnational commercial legal system.<sup>18</sup> Another important feature of the TLDB list (or Central list) is that it is not limited to the area of international commercial contract but contains legal rules relevant to other area such as international company law, international private law, arbitration, expropriation.

A comparative study between the Central list and the Vienna Convention would constitute a useful basis for the interpretation of the Convention in those cases where a uniform interpretation cannot be reached. For the purpose of this topic, the study shall be limited to some specific topics of commercial contracts that are important, in particular in regard to the difficulty of interpretation they represent for the CISG. Accordingly, this dissertation is to be divided into five parts. In the first part the TLDB Principle on good faith is compared with CISG counterpart article 7(1). In the second part, the TLDB Principle on fundamental non-performance is compared with article 25 CISG on fundamental breach of contract. In the third part, the TLDB principles dealing with Force majeure and Hardship are compared with article 79 CISG on Exemption. The fourth part is focused on the specific topic of price

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<sup>13</sup> Ibid. at 85-86.

<sup>14</sup> For instance, Andreas F. Lowenfeld, ‘Lex Mercatoria: An Arbitrator's View’, *Arb.Int'l* 1990, 133 at 148, available on [www.TLDB.de](http://www.TLDB.de) – DocID: 126000.

<sup>15</sup> Michael Mustill, ‘The New Lex Mercatoria: The First Twenty-five Years’, *Arb.Int'l* 1988, 86 at 110-114., available on [www.TLDB.de](http://www.TLDB.de) – DocID: 126900.

<sup>16</sup> Supra footnote 10 at 87.

<sup>17</sup> At the date of 2006-03-27.

<sup>18</sup> Supra footnote 10 at 86.

determination and the comparison between TLDB Principle IV.5 and Arts. 14(1) and 55 CISG. The fifth and final part deals with damages and the comparison between TLDB Principle VI.1 and article 74 CISG.

## **I. DUTY OF GOOD FAITH AND FAIR DEALING (TLDB PRINCIPLE I.1) AND GOOD FAITH IN INTERNATIONAL TRADE (ART.7(1) CISG)**

Both the Vienna Convention and the Central List embody the concept of good faith and its application in international trade. However, the Convention is less ambitious. Indeed, whereas the Central List imposes a duty of good faith on the parties (A), with respect to the Convention, authorities disagree on whether to limit the scope of application of good faith to the interpretation of the Convention (B) or to extend it to the rights and duties of the contracting parties (C).

### **A. TLDB Principle: a duty imposed on the parties**

The Central List introduces the duty to act in good faith as a fundamental principle of the *lex Mercatoria* (1). It results from comparative studies that good faith is a principle common to most of the legal systems (2).

#### **1. A fundamental Principle of the *Lex Mercatoria***

TLDB Principle I.1 provides: '[t]he parties must act in accordance with the standard of good faith and fair dealing in international trade'.<sup>19</sup> The oldest arbitral award the TLDB refers to is the ICC Award 2291 of 1975 which deals with the interpretation of a clause of revision of price. In this award, the sole arbitrator stated that the conventions [or contracts] must be interpreted in good faith.<sup>20</sup>

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<sup>19</sup> [www.TLDB.de](http://www.TLDB.de)>list of Principles, Principle I.1.

<sup>20</sup> ICC Award No. 2291, (1976) *Clunet* 989 at 990 Available on [www.TLDB.de](http://www.TLDB.de) – DocID: TLDB-DocID: 202291, accessed on 2006-01-20.

The principle of good faith has been retained in previous lists of Lex Mercatoria Principles. For instances, Michael Mustill<sup>21</sup> proposed that the rule according to which ‘a contract should be performed in good faith’ forms part of the Lex Mercatoria. The same list was reproduced by Andreas Lowenfeld F.<sup>22</sup> In the same vein, Fouchard, Gaillard and Goldman<sup>23</sup> consider that the rule according to which ‘contracts must be performed in good faith’ is a principle of the lex mercatoria. Moreover, good faith in International Commercial Law is not merely a rule of the lex mercatoria; it is also considered as a general principle of that legal system. Accordingly it is said that good faith comes under the ‘essence of the Lex Mercatoria’.<sup>24</sup> Some arbitral awards raise the duty of good faith to a general or fundamental principle of the lex mercatoria: in the ICC Award No 5721<sup>25</sup> good faith is referred as a ‘general notion’. In the ICC Award No 5953<sup>26</sup>, it was considered that among the principles of the lex mercatoria, the most general one is the principle of good faith. It means that the Principle of good faith within the Lex Mercatoria helps the arbitrators to find out other rules. Indeed, Filali Osman held that in the absence of auxiliary rules of the parties’ will, International Commercial arbitrators progressively took from the fundamental principle of good faith the material allowing them to measure the behaviour of the parties and to pronounce more and more coherent and uniform rules.<sup>27</sup>

Within the TLDB List itself, the Principle of Good faith plays a determinant role. Indeed, the Principle forms part of the first chapter on the general provisions and it is the first Principle of the Central List. Thus, the concept of good faith is reflected in many other Principles of the List. For instance, Principle I.2 provides: ‘[t]he parties

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<sup>21</sup> Supra footnote 15 at 111.

<sup>22</sup> Supra footnote 14, at 148.

<sup>23</sup> Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* [hereinafter ‘Fouchard, Gaillard, Goldman’], The Hague 1999, at 814 and 828, available on [www.TLDB.de](http://www.TLDB.de) – DocID: 130600, accessed on 2006-03-29.

<sup>24</sup> ‘De l’essence de la lex mercatoria’, quotation from Berthold Goldman in ‘La Lex Mercatoria dans les contrats et l’arbitrage internationaux : réalité et perspectives’ 1979 *JDI* 475 and mentioned by Pierre Mayer, ‘Le Principe de Bonne Foi devant les Arbitres du Commerce International’, in *Festschrift Pierre Lalive*, Basel/Frankfurt 1993, at 543, also available on [www.TLDB.de](http://www.TLDB.de) – DocID : 115700, accessed on 2006-03-29.

<sup>25</sup> ICC Award No. 5721 (1990) *Clunet*, 1019 at 1023, available on [www.TLDB.de](http://www.TLDB.de) – DocID: 205721 (Abstract), accessed on 2006-03-29.

<sup>26</sup> ICC Award No. 5953, (1990) *Clunet* 1056 at 1060, available on [www.TLDB.de](http://www.TLDB.de) – DocID: 205953 (Abstract), accessed on 2006-03-29.

<sup>27</sup> Filali Osman *les Principes Généraux de la Lex Mercatoria*, under the collection thèses-bibliothèque de droit privé, Vol. 224 Paris, LGDJ, 1992 at 19, available on [www.TLDB.de](http://www.TLDB.de) – DocID : 106300, (only citations) accessed on 2006-03-29.

always have to act according to what is reasonable in view of the particular nature of their transaction and the circumstances involved, in particular the economic interests and expectations of the parties.’<sup>28</sup> In the Chapter on contractual obligations, Principle IV.5.8 provides: ‘[e]ach party is under a good faith obligation to notify the other party of any problems that occur in the performance of the contract and to cooperate with the other party when such co-operation can reasonably be expected for the performance of that party's obligations.’<sup>29</sup>

The Principle I.1 does not give a definition of good faith and does not provide to which extent good faith must be used by arbitrators, whether for the performance of the contract only, or also for its formation and its interpretation. The positions taken by some authorities do not provide certainty either: in the ICC Award N° 3131<sup>30</sup> it was held that the principle of good faith must be applied to the formation and performance of the contract. In the ICC Award N° 5953<sup>31</sup>, it was held that good faith must apply to the negotiation of contracts, their interpretation as their performance. In Mustill's list of *lex mercatoria* principles<sup>32</sup>, good faith governs merely the performance of the contract.

In fact, an overview of some legal systems would demonstrate that the principle of good faith, although not applied to the same extent, is a principle common to most of them. In adopting a broad wording, Principle I.1 leaves itself open to new development on that matter.

## 2. A principle common to most legal systems

For the purposes of this subtitle, the analysis would be limited to English, American and German laws as the most representative legal systems. It shall be pointed out it would be out of the scope of the topic to make an extensive analysis of the concept of good faith in each of those legal systems.

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<sup>28</sup> [www.TLDB.de](http://www.TLDB.de) Principle I.2, accessed on 2006-03-29.

<sup>29</sup> [www.TLDB.De](http://www.TLDB.De) Principle IV.5.8, accessed on 2006-03-29.

<sup>30</sup> ICC Award 3131 (1983) *Rev. d. Arb.*, 525 at 530, available on [www.TLDB.de](http://www.TLDB.de) – DocID 203131 (Abstract), accessed on 2006-03-29.

<sup>31</sup> *Supra* footnote 26.

<sup>32</sup> *Supra* footnote 15 at 111.

a) English law

Traditionally, in English law there was no general doctrine<sup>33</sup> of good faith.<sup>34</sup> Probably, that strict view comes from the opinion according to which the adoption of good faith would lead the Courts to adopt unpredictable decisions in the exercise of the inherent discretion beyond the use of such a concept. Thus, and for instance, English Courts were particularly reluctant to recognize the principle of good faith in pre-contractual negotiations.<sup>35</sup> This solution was conformed with the nineteenth century's philosophy of individualism. Consequently, English Courts used to work on a more detailed level of the legal rules<sup>36</sup>, having recourse to 'piecemeal solutions'.<sup>37</sup> Moreover, it was held there was no need for a general principle of good faith. Nevertheless, some English authors are of the opinion that a principle of good faith does exist in English Law<sup>38</sup>. The debate between English practitioners on the existence of a good faith principle seems to be linked with the historical issue of its application. However, one could be confident to say, that today, English Law does have a concept of good faith 'albeit a limited and fragmented one'.<sup>39</sup>

b) American Law

United States, as a common law country, used to have the same solution as in England. Nevertheless, American law has adopted the concept of good faith for decades, since the publication of the Uniform Commercial Code (UCC).<sup>40</sup> UCC section 1-203 provides a general obligation of good faith: 'every contract or duty within this Act imposes an obligation of good faith in its performance or

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<sup>33</sup> As defined in the Black's law dictionary 7th edition : 'A principle especially a legal principle that is widely adhered to'.

<sup>34</sup> John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, Pace University Essay (February 2001), footnote 229, available at <http://www.cisg.law.pace.edu/cisg/biblio/felemegas.html>, accessed on 2006-03-29.

<sup>35</sup> Ibid at footnote 233.

<sup>36</sup> Ibid at footnote 230.

<sup>37</sup> Reinhard Zimmermann and Simon Whittaker *Good Faith in European Contract Law*, Cambridge University Press 2000, at 47, also available on [www.TLDB.de](http://www.TLDB.de) – DocID: 132600 (citations only), accessed on 2006-03-29.

<sup>38</sup> For instance, J.F. O'Connor, *Good Faith in English Law*, Adershot 1991, also available on [www.TLDB.de](http://www.TLDB.de) – DocID:106100 (citations only), accessed on 2006-03-29.

<sup>39</sup> Supra footnote 34 between footnote 246 and 247.

<sup>40</sup> Supra footnote at footnote 259.

enforcement'. At least fifty other sections of the code mention good faith.<sup>41</sup> Also, Section 205 of the Restatement provides that 'every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement'. Clearly, those two provisions limit the application of the principle of good faith to the performance of the contract.

The UCC provides a definition of good faith in its section 1-201: 'good faith means honesty in fact in the conduct or transaction concerned'. J. Felemegas,<sup>42</sup> demonstrates that despite a statutory definition of good faith, a theoretical debate upon good faith in performance divides three scholars: Professor Farnsworth considers that the duty of good faith within the Code can serve as a source of implied terms in a contract. Professor Summers considers that good faith does not have a 'general positive meaning' and that it should function as an 'excluder'. Finally, Professor Burton alleges that good faith plays the function of limiting the discretion of one party in the performance of the contract at the expense of the reasonable expectation of the other party. Opposed to this theoretical debate, a more practical debate concerning good faith is whether 'honesty' is introducing a subjective or an objective criterion,<sup>43</sup> the last one requiring a standard of reasonableness.

### c) German Law

The German Civil Code (BGB) came into force in 1900 and provides for the observance of 'good faith and fair dealing' ('Treu und Glauben mit Rücksicht auf die Verkehrssitte'). The principle transcends the whole code, from general provisions (articles 157 and 242 BGB) to more specific applications.<sup>44</sup> Moreover, there is no definition of the concept. According to one commentator,<sup>45</sup> it is an open norm rather than a legal rule with specific requirements. In the same vein and as enumerated by J. Felemegas<sup>46</sup>, the four functions of good faith in German law are: to create a general principle because it is an impossible task to draft a code dealing with all imaginable

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<sup>41</sup> E. Allan Farnsworth, 'Duties of good faith and fair dealing under the Unidroit Principles, relevant international conventions, and national laws' 1995 *Tul.J.Int.Comp.L* 47 at 52, also available on [www.TLDB.de](http://www.TLDB.de) – DocID: 122100, accessed on 2006-03-29.

<sup>42</sup> Supra footnote 34, between footnotes 262 and 276.

<sup>43</sup> Supra footnote 34, between footnotes 277 and 278.

<sup>44</sup> Supra footnote 37 at 30 ; supra footnote 34.

<sup>45</sup> Supra note 37 at 30.

<sup>46</sup> Supra footnote 34 between footnotes 286 and 289.

situations; to carry the function of filling gaps or interpreting uncertain provisions within the code; to create obligations in order to complete the duties and obligations in the contract; to create a right of an adjustment of the contract after a change of circumstances.

The flexibility of the TLDB Principle on good faith is justified in regard to the current trend that might be observed in different legal systems. Indeed, an overview of the German, English and American laws is enough to understand that despite the differences in its application, good faith is a principle shared by those legal systems. In that sense the vagueness of the TLDB Principle I.1 might be considered as a consensus. Moreover, the position of the principle within the Central List is the manifestation of the importance that good faith is able to take in International Commercial Law.

Since the observance of good faith in contractual relationship is ‘common stock of most legal systems’<sup>47</sup>, a similar provision should have been included in the Vienna Convention. However and at that time, a consensus was not reached to impose such a duty to the parties of a contract of sale. Thus, whereas some commentators consider that the principle of good faith should only apply to the interpretation of the Convention, others are of the opinion to extent its application to the rights and duties of the contracting parties.

### **B. Good faith limited to the interpretation of the Vienna Convention**

Article 7(1) CISG provides: ‘[i]n the interpretation of this Convention, regard is to be had to its international character and the need to promote uniformity in its application and *the observance of good faith in international trade*’ [emphasis added]. This ‘peculiar provision’<sup>48</sup> on good faith is the result of a compromise. Even though it does not expressly provide for a duty of good faith imposed on the parties, few are

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<sup>47</sup> Pierre Schlechtriem, ‘Good Faith In German Law and In International Uniform Laws’, Centro di studi e ricerche di diritto comparato e straniero (Research and studies center of foreign and comparative law), Conference held in Rome (February) 1997, citations available on [www.TLDB.de](http://www.TLDB.de) – DocID: 107700, accessed on 2006-03-30, full text available on <http://soi.cnr.it/~crdcs/crdcs/frames24.htm>, accessed on 2006-03-30.

<sup>48</sup> Michael Joachim Bonell, in Bianca-Bonell *Commentary*, 65 at 83 paragraph 2-4, available on <http://www.cisg.law.pace.edu/cisg/biblio/bonell-bb7.html>, last visited on 2006-03-30.

the decisions that limit the concept of good faith to the interpretation of the Convention.

### 1. Good faith within the Vienna Convention: the result of compromise

Various qualifications have been given to that compromise: a 'hard won',<sup>49</sup> an 'awkward',<sup>50</sup> a 'statesmanlike',<sup>51</sup> a 'strange',<sup>52</sup> an 'uneasy',<sup>53</sup> compromise. Those comments show, not only that the delegates could not impose their point of view on that matter but, also, the difficulty one would face in order to reach an uniform interpretation on that provision.

The concept of good faith has been first introduced in 1977 in a proposal made by the Hungarian representative during the eighth session of the Working Group on charge of the revision of the uniform law on the formation of contract for the international sale of goods. Good faith was to be applied to the formation of contract and thus imposing a duty to the parties.<sup>54</sup> Although the proposal was supported by the majority of the representatives since the principle of good faith was already embodied in many national laws, a strong opposition existed against the adoption of such a provision. Its opponents alleged, among others, that the wording was too vague and that it would have jeopardized a uniform interpretation.<sup>55</sup> After deliberation, the sentence was adopted and became article 5 of the Draft Convention

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<sup>49</sup> Ibid.

<sup>50</sup> Supra footnote 41 at 55 footnote 52, quotation from Thomas E. Carbonneau & Marc S. Firestone, 'Transnational Law making: Assessing the Impact of the Vienna Convention and the Viability of National Adjudication', (1986) 1 *EMORY J. INTL'DISP. RESOL.* 51, 74.

<sup>51</sup> Supra footnote 41 at 55 footnote 54, quotation from E. Allan Farnsworth 'Problems of Unification of Sales Law from the Standpoint of the Common Law Countries', in 7 *Digest of Commercial Laws of the World* (Dobbs Ferry: Oceana, March 1980). The wording was probably used in an ironically way.

<sup>52</sup> Alejandro M Garro, 'Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods', (1989) 23 *International Lawyer*, available on <http://www.cisg.law.pace.edu/cisg/biblio/garro1.html> accessed on 2006-03-30, at footnote 109: quotation from Gyula Eörsi, 'A Proposal for the 1980 Vienna Convention on Contracts for the International Sale of Goods' (1983) 31 *Am. J. Comp. L.* 333, 346. ('The result was strange but gained for the principle of good faith a foothold in an international convention for unification of law. It is hoped that this meager result represents a modest start.')

<sup>53</sup> Ibid at footnote 108, quotation from M.J. Bonell, *Methodology in Applying Uniform Law for International Sales Under the U.N. Convention* (Wien 1980), in Italian National Reports to the XII International Congress of Comparative Law 43, 62 (1986).

<sup>54</sup> Supra footnote 5 page 65.

<sup>55</sup> Supra footnote 5, page 66.

on the Formation of Contracts for the International Sales of Good. The provision was the subject of lengthy discussion during the eleventh session of the Commission in 1978. According to the Report,<sup>56</sup> there was a wide support for the deletion of the article 5. Indeed, the opponents alleged that a Convention should not embody a ‘moral exhortation’, that national Courts would be too much influenced by their own legal system when applying good faith in individual cases, that the draft did not contain the consequences of a failure to observe the good faith leaving that matter to the national laws, with the result of not reaching uniformity of the sanctions. On the other hand, there was also a wide support for its retention. The representatives in favour of article 5 retorted that the principle of good faith was universally recognized, that good faith had played a very important role in developing rules regulating commercial activities, that good faith was well recognized in international law and that leaving to the national laws how to sanction a violation of good faith was preferable in order to afford flexibility.

Among the proposals to reach a compromise, the one which purported to embody the concept of good faith within the provision relating to the interpretation and application of the Convention received more support as a ‘realistic compromise’.<sup>57</sup> When the draft Convention on the Formation of contract was merged with the draft Convention on the International Sale of goods, article 13 of that latter became article 6, which provided: ‘[i]n the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity and the observance of good faith in international trade’. The wording used does not make clear whether or not the observance of good faith was also directed to the parties to an international sales transaction. During the Vienna Conference, some amendments to article 6 of the 1978 Draft were made, the most important one being the introduction of a second paragraph dealing with the problem of gaps in the Convention. The debate on good faith was re-introduced by an amendment proposal of the Italian delegate to delete good faith from article 6 and to transfer it to article 7 [Art. 8 CISG]: ‘In the formation [interpretation] and performance of a contract of sale the parties shall observe the principles of good faith

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<sup>56</sup> Supra footnote 5, page 35.

<sup>57</sup> Supra footnote 5, page 36.

and international co-operation'.<sup>58</sup> A reference to international co-operation was added in order that only the aspects of good faith which are internationally acceptable would have to apply.<sup>59</sup> In opposition to this proposal, the United Kingdom's proposal, although admitting the interest for parties to act in good faith, considered that the principle had an uncertain meaning and its inclusion within the CISG would be inappropriate.<sup>60</sup> E. Allan Farnsworth from the U.S. delegate also preferred the wording of the Draft.<sup>61</sup> Finally, it was decided at the Plenary Conference to maintain the scope of application of the good faith principle within the limits of article 6 of the Draft which became article 7 CISG.

E. Allan Farnsworth, proposes three possible interpretations of article 7(1) CISG<sup>62</sup>: (1) The Convention can be literally interpreted so that the question whether Art. 7(1) imposes a duty of good faith is not 'expressly settle[d]'<sup>63</sup> and, such a duty cannot be deduced from the principles on which the Convention is based (Art. 7(2) CISG). (2) A literal interpretation does not settle the question but a duty of good faith can be extracted from the principles on which the Convention is based. (3) Article 7(1) CISG might be interpreted so as to impose a duty of good faith to the parties of an international sale of goods. The commentator prefers the first type of interpretation because it would be in line with the legislative history of the provision and the true nature of the compromise.

## 2. An illustration

Unilex affords only one illustration<sup>64</sup> of an interpretation strictly literal of article 7(1) CISG: confronted to a distributorship agreement, the Arbitral Tribunal had to settle a dispute between a German seller and a Spanish buyer. The buyer wanted to make use of the principle of good faith as interpreted by German Courts according to which the

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<sup>58</sup> See the summary of the proceedings at the Vienna Conference <http://www.cisg.law.pace.edu/cisg/1stcommittee/summaries7.html#b>, accessed on 2006-03-30.

<sup>59</sup> Summary Records of the 5th meeting of the First Committee, available at <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting5.html>, point 40, last visited on 2006-01-23.

<sup>60</sup> Supra, point 47.

<sup>61</sup> Supra, point 50.

<sup>62</sup> Supra note 24 at 56.

<sup>63</sup> Supra.

<sup>64</sup> ICC arbitral award, W. v. R., Paris, , 23.01.1997 at [www.unilex.info](http://www.unilex.info) - Case, [Abstract] number: 8611/HV/JK, accessed on 2006-03-30.

producer of defected technical equipment has to provide spare parts. The Arbitral Tribunal held that good faith as mentioned in the Vienna Convention is ‘*only*’ applicable to the interpretation of the Convention and is not to be referred to as a source of the parties’ rights and duties as concerns the performance of the contract.

The lack of cases illustrating a literal interpretation of article 7(1) is an evidence that the principle of good faith is not merely used for the interpretation of the Convention. Indeed, since the adoption of the Convention, many commentators was giving to the principle of good faith a more ambitious role.

### **C. Good faith, an obligation on the contracting parties**

It seems that, despite the absence of a general requirement of good faith and the location of the concept in a provision relating to the interpretation of the Convention, some delegates were still satisfied of the result achieved by the article 7(1) CISG and could see from the beginning the important role that the concept of good faith could play.<sup>65</sup>

In general, three ways are suggested by scholars in order to interpret the Vienna Convention so the parties to a contract of sale have an obligation to act in good faith, namely: (1) article 7(1) CISG provides a general requirement to act in good faith; (2) that good faith is a general principle on which the Convention is based; (3) that good faith is a general principle of the *lex mercatoria* and UNIDROIT.<sup>66</sup>

#### **1. A general duty of good faith**

Indeed, the Vienna Convention deals with the rights and duties of the parties to a contract of sales of goods. Thus, the good faith principle contained in article 7(1) cannot be used for the interpretation of the Convention without any impact on the

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<sup>65</sup> Gyula Eörsi, comments on ‘General provisions’ in Galston & Smit ed *International Sales : The United Nations Convention on Contracts for the International Sale of Goods* [hereinafter ‘Galston & Smit’], Matthew Bender (1984), Ch. 2, page 2-7, available on <http://www.cisg.law.pace.edu/cisg/biblio/eorsi1.html> , accessed on 2006-03-30.

<sup>66</sup> Troy Keily, ‘Good Faith & the Vienna Convention on Contracts for the International Sale of Goods (CISG)’, (1999) 3 *VJ* 1, 15 at 22-23, available at [www.TLDB.de](http://www.TLDB.de) – DocID: 131400, last visited on 2005.11.08.

parties to such a contract<sup>67</sup>: ‘interpreting the Convention in the light of good faith amounts to subjecting the rights and duties of the parties to that standard’.<sup>68</sup> A French decision<sup>69</sup> gives a good illustration of this proposal. In the case at hand, the Court of Appeal of Paris made use of the principle of good faith to evaluate the damages. In substance, it was held that, although the buyer was clearly in breach of its obligation (article 25 CISG), it started proceedings before the French Courts. Such a conduct was considered contrary to the principle of good faith laid down in article 7(1) CISG.

Alleging that article 7(1) CISG provides for the contracting parties to act in good faith leads to two major problems. First, in order to promote uniformity in the application of the Convention, national Courts should not be tempted to refer to the standard of their legal system. Indeed, the reference to good faith ‘in international trade’ purports to avoid such a result.<sup>70</sup> M. J. Bonell gives some indications of what good faith in international trade could mean: It might mean such national standards to the extent they are ‘commonly accepted at a comparative level’.<sup>71</sup> Also, the distinction generally found in domestic laws between consumer transaction and contracts of commercial nature might also be of some help.<sup>72</sup> Finally, the reference to the Preamble of the Vienna Convention might provide a better indication.<sup>73</sup> Second, if there is a general duty for the parties to conduct themselves in good faith, according to article 6 CISG, they would be able to exclude that duty. This result would impair part of the objective that article 7(1) tries to aim. In an Arbitral Award, it was held that by the intentional insertion of different terms in the letter of credit than what was agreed on, the buyers behaved in violation with the principle of good faith as provided by Art. 7(1) CISG; principle that cannot be limited or excluded by

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<sup>67</sup> Arthur Hartkamp, ‘The UNIDROIT Principles for International Commercial Contracts and the United Nations Convention on Contracts for the International Sale of Goods’, in Boele-Woelki/ Grosheide/ Hondius/ Steenhoff (eds.), *Comparability and Evaluation: essays on comparative law, private international law and international commercial arbitration* (Dorrecht, Boston, London, T.M.C. Asser Institute/Nijhoff Publishers 1994), 85 at 87, also available on [www.TLDB.de](http://www.TLDB.de) – DocID: 113000; M.J. Bonell, supra footnote 48 at 84.

<sup>68</sup> A. Hartkamp, Ibid.

<sup>69</sup> Cour d’Appel de Paris, SARL Bri Production “Bonaventure” v. Société Pan African Export, 22.02.1995, available on [www.unilex.info](http://www.unilex.info) – Fulltext.

<sup>70</sup> M.J. Bonell, supra footnote 48, at 86.

<sup>71</sup> Ibid.

<sup>72</sup> Supra footnote 48 at 86.

<sup>73</sup> Supra footnote 48 at 88.

the parties and that has to be understood in the way it is recognized in international trade.<sup>74</sup>

## 2. Good faith as a general principle of the Vienna Convention

The Vienna Convention contains a gap filling provision (Article 7(2)) according to which '[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 (...)'. Moreover, not only the Convention expressly refers to good faith in its article 7(1) but it also contains so many provisions referring to reasonable conduct that it is said that good faith is one of its general principles.<sup>75</sup> For instance, lot of articles refer to a 'reasonable time' (Arts. 25, 39(1), 43(1), 46(2) (3), 47(1) etc.). In the Secretariat's Commentary on the Draft<sup>76</sup> – closest counterpart to an official commentary – it is referred to some articles as a particular application of the principle of good faith: article 14(2)(b) [draft counterpart of CISG article 16(2)(b)] on the non-revocability of an offer where it was reasonable for the offeree to rely upon the offer being held open and the offeree acted in reliance on the offer; article 19(2) [draft counterpart of CISG article 21(2)] on the status of a late acceptance which was sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time; article 27(2) [draft counterpart of CISG 29(2)] in relation to the preclusion of a party from relying on a provision in a contract that modification or abrogation [termination] of the contract must be in writing; articles 35 and 44 [draft counterpart of CISG articles 37 and 38] on the rights of a seller to remedy non-conformities in the goods; article 38 [draft counterpart of CISG article 40] which precludes the seller from relying on the fact that notice of non-conformity has not been given by the buyer in accordance with articles 36 and 37 [draft counterpart of CISG articles 38 and 39] if the lack of conformity relates to facts of which the seller knew or could not have been unaware and which he did not disclose to the buyer; articles 45(2), 60(2) and 67 [draft

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<sup>74</sup> COMPROMEX (Comision para la Proteccion del Comercio Exterior de Mexico), case number M/115/97, Dulces Luisi, S.A. de C.V. v. Seoul International Co. Ltd. Seoulia Confectionery Co., 30.11.1998, [www.unilex.info](http://www.unilex.info) (Full text) at paragraph 10 after the word 'Considerandos'.

<sup>75</sup> Troy Keily, supra footnote 66 at 28 to 32 ; A. Hartkamp, supra footnote 67 at 87; M.J Bonell, supra footnote 48 at 85.

<sup>76</sup> Secretariat Commentary on article 7 available on <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-07.html>, accessed on 2006-03-30.

counterpart of CISG articles 49(2), 64(2) and 82] on the loss of the right to declare the contract avoided; articles 74 and 77 [draft counterpart of CISG articles 85 to 88] which impose on the parties obligations to take steps to preserve the goods.

National Courts have made an extensive use of this method of interpretation. Indeed, without any specific reference to article 7(2) CISG, it was held that the parties had to conduct themselves according to the principle of good faith which is a general principle on which CISG is based. Such principle ‘not only influence[s] the entire regulation of the international sale but also supplies an essential standard for the interpretation of the rules set forth in the CISG’.<sup>77</sup> In that case, the Tribunal concluded that it would have been contrary to the principle of good faith to file a claim in court just few days after the expiry of the deadline for the payment of price, without having demanded the buyer adequate explanations for the delay or having conceded him a period to cure. To give another illustration, a Court referred to Article 7(1) and the need to promote good faith in international trade for the interpretation of the Convention:

‘Although this does not open up the interpretation of the Convention to every single equitable consideration, it does, however, pave the way for the construction of established and fixed principles of the national legal systems of the Contracting States, created as concrete ideals of the principle of good faith.’ ‘For example, the prohibition of *venire contra factum proprium* can apply for the interpretation of the provisions of the Convention. As a consequence thereof, a party who definitively refuses to perform the contract, or – as here – denies the very existence of contractual duties, cannot successfully rely on the argument that a declaration of avoidance of contract was not made by the opposing party’.<sup>78</sup>

### 3. Good faith as a general principle outside the Convention

Although article 7(2) CISG only refers to those principles on which the Convention is based, one author<sup>79</sup> considers that, as an exception, recourse should be possible to general principles ‘which are internationally co-ordinated and [that] actually find general acceptance’. The advantage of such interpretation results in the possibility to

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<sup>77</sup> Tribunale di Padova, case number 40552, 25.02.2004, available on <http://cisgw3.law.pace.edu/cases/040225i3.html>, at the heading ‘substantive issues’, accessed on 2006-03-30.

<sup>78</sup> Court of Appeals (Oberlandesgericht) München, 15.09.2004, [7 U 2959/04], available on <http://cisgw3.law.pace.edu/cases/040915g2.html>, accessed on 2006-03-30.

<sup>79</sup> Supra footnote 66 at footnote 91: Ulrich Magnus, ‘General Principle of UN-Sales Law’.

take into account new developments of the concept of good faith. Indeed, during the drafting of the Convention, there was much disagreement between common law and civil law countries on the approach to take for good faith. However, fundamental changes have happened in the law of some common law countries and as article 7(2) CISG stands, such development may not be taken into account. For instance, Australia is more prepared to recognize an obligation of good faith upon the parties.<sup>80</sup> The same author makes the proposal to utilize the UNIDROIT Principles (in particular Principle 1.7(1)) as additional general principles of the CISG.

### **Conclusion**

Through its openness, TLDB Principle I.1 on good faith is aimed to play a more important role than the counterpart provision within the CISG. The *lex mercatoria* principle purports to be the result of a certain level of consensus whereas the article 7(1) CISG is obviously the result of a compromise. Consequently, under the Vienna Convention and because of divergent interpretations of scholars, a uniform interpretation of article 7(1) is jeopardised. However, despite the differences between both provisions and depending the way how the Convention is interpreted, similar result of the *lex mercatoria* principle can be achieved by the Convention. Accordingly, the TLDB Principle I.1 constitutes a useful basis for the interpretation of the article 7(1) CISG.

## **II. TERMINATION FOR FUNDAMENTAL NON-PERFORMANCE (PRINCIPLE VI.1) AND FUNDAMENTAL BREACH OF CONTRACT (ART. 25 CISG)**

TLDB Principle VI.1 provides: '[i]f a party's failure to perform its obligation amounts to a fundamental non-performance, the other party may terminate the contract. Both parties may then claim restitution, in re or in money, of whatever they have supplied to the other party. The *exceptio non adimpleti contractus* rule applies'.<sup>81</sup> The Vienna Convention counterpart article provides: '[a] breach of

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<sup>80</sup> See Farnworth, *supra* note 41 at 52 and 53; Troy Keily *supra* footnote 66 at 38.

<sup>81</sup> [www.TLDB.de](http://www.TLDB.de)> List of Principles, Principle VI.1.

contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result'. In appearance, the Vienna Convention lays down a clearer rule than the TLDB Principle does. In reality both provisions are vague and recourse to the UNIDROIT Principles or the Principles of European Contract Law (PECL) might be useful. Firstly we shall deal with the Central List Principle and, secondly with the Vienna Convention provision.

### **A. The TLDB Principle**

Since the Central List does not lay down a definition of the fundamental non-performance principle, reference to the UNIDROIT Principles or PECL might constitute a help in the interpretation of the Lex Mercatoria Principle.

#### **1. Absence of definition**

TLDB Principle VI.1 is located in the Chapter VI of the List entitled 'non-performance'. It means that the scope of application of the rule is limited to the non-performance of the contract.

Like Mustill's list<sup>82</sup>, the Central List does not aim to give a definition of fundamental non-performance. It just mentions the Principle is part of that legal system. Indeed, Mustill considers that '[o]ne party is entitled to treat itself as discharged from its obligations if the other has committed a breach, but only if the breach is substantial'.<sup>83</sup> He based himself on the ICC arbitral award 2583 of 1976<sup>84</sup> in which it was considered that, to abandon a contract, one or several serious ('grave') failure to the essential obligations of the contractor justify the avoidance of the project. Also, Fouchard, Gaillard, Goldman consider that '[t]ermination of the contract for failure, to perform or lack of proper performance, which is closely related to the withholding

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<sup>82</sup> Supra footnote 15.

<sup>83</sup> Ibid.

<sup>84</sup> ICC Award No 2583, 1977 *Clunet*, at 950 et seq. available on [www.TLDB.de](http://www.TLDB.de) – DocID: 202583 (Abstract), accessed on 2006-03-30.

of performance, is also considered by some arbitrators to be a general principle of law'.<sup>85</sup>

The absence of definition of 'fundamental non-performance' is obviously the result of a policy to keep an open principle in order to be able to adapt itself to new developments in relation to this issue. Nevertheless, such attitude lacks of some practicability. Indeed, in the absence of any guideline, the legal practitioners would have recourse to the arbitral awards to which the website refers to. However, those arbitral awards do not give a clear picture either. For instance, it was considered that a party to a sub-contract was entitled to abandon, without notice, the construction site after the failure from the other party to comply with an agreement about the revision of price.<sup>86</sup> Indeed, in the case at hand, that other party (the Respondent) undertook an unconditional obligation to determine the increase of the contract price and to pay that price. Since the sub-contract is independent from the contract between the Respondent and the employer, the position of the employer in relation to the principle of an increase of the contract price was considered irrelevant. Also, in the ICC Arbitral Award N° 8365 of 1996 it was held that a party could avoid the contract only if the breach of its co-contractant is 'substantial'.<sup>87</sup> Defining fundamental by substantial results to be a tautology and in itself is not conclusive. In another case<sup>88</sup>, the Arbitral Tribunal considered that regard has to be had on the intention of the parties to ascertain whether or not the non-performance is fundamental.

Those few illustrations lead to the impossibility to determine a definition of fundamental non-performance. On the other hand, some arbitral awards<sup>89</sup> when applying the *lex mercatoria* apply or refer to the UNIDROIT Principles<sup>90</sup> which contain provisions dealing with the right to terminate a contract in case of

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<sup>85</sup> Supra footnote 23 at 831.

<sup>86</sup> ICC Award No 4761, 1987 *Clunet*, 1012 available on [www.TLDB.de](http://www.TLDB.de) - DocID: 204761 (Abstract), accessed on 2006-03-30.

<sup>87</sup> ICC Award No. 8365, 1997 *Clunet*, 1078 at 1080, available on [www.TLDB.de](http://www.TLDB.de) – DocID: 208365, accessed on 2006-03-30.

<sup>88</sup> ICC Award No. 1795, 1999 *YCA*, 196 at 200, available on [www.TLDB.de](http://www.TLDB.de) TLDB-DocID: 201795 (Abstract), accessed on 2006-03-30.

<sup>89</sup> Ibid; also ICC Arbitral Award 9797, 2000 *ASA Bull.*, 514, available on [www.TLDB.de](http://www.TLDB.de) – DocID 209797 (Abstract), accessed on 2006-03-30.

<sup>90</sup> The Preamble states that the UNIDROIT Principles 'may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like. They may be applied when the parties have not chosen any law to govern their contract.'

fundamental non-performance.<sup>91</sup> Thus, their use might afford a better illustration of the principle of fundamental non-performance

## **2. Possible recourse to the UNIDROIT Principles or to the PECL to supplement the TLDB List**

The UNIDROIT Principles are not the only codification to which one can refer. The Principles of European Contract Law contain provisions very similar to those of UNIDROIT. Moreover, both instruments are mentioned in the Central List website.<sup>92</sup>

UNIDROIT Principle 7.3.1 and PECL article 8:103 provide a real guideline and official commentaries on the right to terminate a contract. Principle 7.3.1(2) provides that ‘[i]n determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether (a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result; (b) strict compliance with the obligation which has not been performed is of essence under the contract; (c) the non-performance is intentional or reckless; (d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance; (e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated’.

Article 7.3.1(2)(a) refers also to the substantiality of the non-performance and thus makes a tautology as well. The comments of Hossam El-Saghir on the PECL article 8:103<sup>93</sup> might be used in order to explain that provision. The commentator considers that the provision is focus on the gravity of the consequence of the non-performance. The gravity must be determined in accordance with the intention or the expectation of the parties to the contract. It seems that such a result is in line with the solution

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<sup>91</sup> UNIDROIT Principle 7.3.1, [www.unilex.info](http://www.unilex.info).

<sup>92</sup> Under the heading ‘Principles, Restatements, Model laws’.

<sup>93</sup> Hossam El-Saghir in the Editorial Remarks, Guide to article 25 [CISG], comparison with Principles of European Contract Law, July 2000, available on <http://www.cisg.law.pace.edu/cisg/text/peclcomp25.html#er>, accessed on 2006-03-30.

reached in the ICC Award No. 1795.<sup>94</sup> The others paragraphs of the UNIDROIT article give complementary indications. Article 7.3.1(2)(b) provides that if strict performance of the contract is essential for one of the parties, a breach of that contract will be fundamental. It is not the gravity of the consequences of the non-performance but rather the strictness of the obligation that is the decisive factor.<sup>95</sup> In the ICC Arbitral Award n° 4761<sup>96</sup> the breach by the defendant of its obligation to revise the price was determinant for the claimant which relied on that promise for its own performance. One can say that the border between strict compliance and gravity of consequences of the breach is not easy to determine in practice. In both cases, the aggrieved party loses interest in the performance of the contract justifying its cancellation. The Central List does not provide illustration of a fault as a relevant factor for the determination of a fundamental non-performance. Nevertheless, nothing in the TLDB Principle would prevent an Arbitral Tribunal to refer to the UNIDROIT Principle 7.3.1(2)(c). A similar outcome could be reached with respect to the (d) and (e) of the article.

As demonstrated, a fundamental non-performance can result from various situations. The vagueness of the TLDB Principle affords flexibility. Probably a definition of fundamental non-performance would not have been satisfactory.

## **B. The Article 25 of the Vienna Convention**

Compared with the TLDB Principle VI.1, fundamental breach within the Vienna Convention plays a more important role. Indeed, article 25 is the cornerstone of the system of remedy provided by the Convention. It affects the remedial provisions of the buyer and seller (Arts. 49(1)(a), 51(2), 64(1)(a), 72(1), 73(1) and (2)); the delivery of substitute goods (Art. 46(2)) as well as the passing of risk (Art. 70).<sup>97</sup> For

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<sup>94</sup> Supra footnote 88.

<sup>95</sup> Supra footnote 93.

<sup>96</sup> Supra footnote 86.

<sup>97</sup> Michael Will, 'Article 25', in Bianca-Bonell *Commentary on the International Sale Law*, (Giuffrè: Milan 1987) at 205, available on <http://www.cisg.law.pace.edu/cisg/biblio/will-bb25.html>, accessed on 2006-03-30; also Chengwei Liu, 'The concept of Fundamental Breach: Perspectives from the CISG, UNIDROIT Principles and PECL and case law' [2nd edition: Case annotated update (May 2005)], under the heading 'In General', available on <http://www.cisg.law.pace.edu/cisg/biblio/liu8.html>, accessed on 2006-03-30.

this reason, it was necessary to define the concept of fundamental breach.<sup>98</sup> Having regard to the position of the concept within the Convention, it seems uneasy to analyse article 25 without a cross-reference to the other provisions mentioned above. However it is not the purpose of this topic. This part will be focused on the component elements of the definition. To the extent the definition incorporates vague words, the UNIDROIT Principles and the PECL might be useful tools for the interpretation of article 25 CISG.

To be qualified fundamental, a breach has to constitute a foreseeable detriment. Each of these elements are to be analysed in the light of the interpretation given by scholars, the UNIDROIT Principles and PECL and the case law.

### 1. The broad term detriment

The originality of the definition is in the use of the word ‘detriment’. According to the statement of Chengwen Liu, ‘it is a fresh legal concept’.<sup>99</sup> The term is not defined in the Convention. It has been introduced in the Draft of the Convention for the International Sale of Goods at the article 9 which became article 23 of the 1978 Draft Convention: ‘A breach committed by one of the parties is fundamental if it results in substantial detriment to the other party unless the party in breach did not foresee and had no reason to foresee such result’.<sup>100</sup>

#### a) Opinions of some scholars

According to the Secretariat Commentary<sup>101</sup>, the ‘substantial detriment’ is the ‘basic criterion’ of the definition which, thus, looks to the ‘harm’ caused to the aggrieved party. Nevertheless, the wording of the actual article 25 CISG is different from the Draft. Indeed, instead of ‘substantial detriment’, it contains: ‘detriment (...) as

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<sup>98</sup> Uncitral Yearbook VII (1976) at 101, available on [http://www.uncitral.org/pdf/english/yearbooks/yb-1976-e/yb\\_1976\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1976-e/yb_1976_e.pdf), accessed on 2006-03-30.

<sup>99</sup> Supra footnote 97, at the heading ‘gravity of the consequence of non-performance’.

<sup>100</sup> Supra footnote 98.

<sup>101</sup> Ibid. ; same comments given by the Secretariat Commentary on article 23 of 1978 Draft, available on <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-25.html>, accessed on 2006-03-30.

substantially to deprive'. Accordingly, some commentators<sup>102</sup> consider that the commentary should not apply to the interpretation of detriment. They believe that the meaning of the term should be tied to the expectation of the injured party i.e, whether or not it has still an interest in the performance of the contract. Thus, instead of having regard to the nature of the term detriment, it is on the degree or function that one should focus on. From M<sup>a</sup> del Pilar Perales Viscasillas' point of view, if the buyer can still resell non conforming goods, even at a lower price, or make use of those goods, it is not a fundamental breach of contract because the buyer found an interest in the performance of the contract. The difference in the profit can be remedied by the allowance of damages.<sup>103</sup>

Another commentator<sup>104</sup> considers that 'detriment' merely fills the function of filtering out certain cases when a fundamental breach has occurred but not caused injury.

In the opinion of Jacob. S. Ziegel<sup>105</sup>, the Draft Convention article 23 really provided for a fundamental breach whereas the current version provides for 'quasi-fundamental' breach, in that sense it is a stricter principle. Thus it is not enough for the detriment to be substantial or material but, it has to go to the 'roots' of the contract.

b) Recourse to UNIDROIT Principle and PECL to interpret article 25 CISG

Article 25 CISG is similar to article 7.3.1(2)(a) of UNIDROIT and article 8:103(b) of PECL. Among the 'subtle' differences<sup>106</sup> that exist between them, under the Convention the detriment is a precondition whereas it is not under the UNIDROIT

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<sup>102</sup> Hossam El-Saghir, supra footnote 93 under the heading 'substantial detriment' and Chengwen Liu, supra footnote 97 under the heading 'Gravity of the Consequences of Non-performance'.

<sup>103</sup> M<sup>a</sup> del Pilar Perales Viscasillas in 'El Contrato de Compraventa Internacional de Mercancias (Convencion de Vienna 1980)', 2001, Chapter VI, under the heading 'Circunstancias en que se puede declarar resuelto el contrato. Incumplimiento esencial', available on <http://www.cisg.law.pace.edu/cisg/biblio/perales1.html>, accessed on 2006-03-30.

<sup>104</sup> Michael Will, supra footnote 97 at 211-212.

<sup>105</sup> Jacob S. Ziegel 'The Remedial Provisions in the Vienna Sales Convention : Some Common Law Perspectives', in 'Galston & Smit', Ch. 9, at 9-15 9-16, available on <http://www.cisg.law.pace.edu/cisg/biblio/ziegel6.html>, accessed on 2006-03-30.

<sup>106</sup> Hossam El-Saghir, supra footnote 93.

Principles and PECL. Like articles 7.3.1(2)(b) of UNIDROIT and 8:103(a) of PECL, under article 25 CISG the terms of the contract vehicle the expectation of the parties.<sup>107</sup> Thus, if it is expressly provided delivery or payment for the 15<sup>th</sup> of February for instance, the minor deviation might lead to the avoidance of contract. According again to Hossam El-Saghir<sup>108</sup> and Robert Koch<sup>109</sup>, the Convention is not interested by the intentional or reckless non-performance. Fault is not a prerequisite for a breach to be fundamental.

### c) Case law

Despite all the decisions dealing with the article 25 CISG, it seems that only in one of them<sup>110</sup> an effort has been made to elaborate a guideline. It follows from the decision that: (1) the breach must affect the substance of the contract, i.e., the principal obligations like the goods or the price and, must deprive the economic goal of the parties. (2) If it affects the complementary obligations, it must have some effects to the performance of the principal obligations. (3) What matters are the consequences of the breach on the aggrieved party and not the gravity of the breach. (4) It does not matter whether or not the detriment is reparable or not. (5) It is not necessary for the aggrieved party to suffer a monetary loss. The solution given might be considered restrictive. Indeed, in a German decision<sup>111</sup>, it was held that a secondary obligation can, ‘without any further’, be fundamental.

The evaluation of the fundamental breach differs in accordance with the type of non-performance and the circumstances of the case. Indeed, it has been held that a non-delivery or a late delivery does not in itself constitute a fundamental breach of contract since it would render useless the provisions of article 49(1) (a) and (b).<sup>112</sup>

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<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Robert Koch, ‘Commentary on Whether the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Article 25 CISG’, available on <http://www.cisg.law.pace.edu/cisg/biblio/koch1.html#rkiv>, accessed on 2006-03-30.

<sup>110</sup> Schweizerisches Bundesgericht, 15.09.2000, Switzerland, case number 4C.105/2000 available on [www.unilex.info](http://www.unilex.info) (Full text), accessed on 2006-03-30.

<sup>111</sup> Appellate Court, Frankfurt, 17.09.1991, case number 5 U 164/90, available on <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/910917g1.html>, accessed on 2006-03-30.

<sup>112</sup> Court of Appeal (Oberlandesgericht) Munich, 01.07.2002, available on <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020701g1.html>, accessed on 2006-03-30.

Regarding the lack of conformity of the goods, a French decision<sup>113</sup> considered that the seller committed a breach justifying avoidance of the contract, because the defects concerned a third of the total number of the goods and made their use dangerous. Indeed, those goods were to be distributed in a chain of supermarkets. In that case, it could be said that the security in the use of the goods was a relevant criterion. Without going so far, an American Court<sup>114</sup> held that the lower cooling capacity of compressors to be used in a line of room air conditioners and their high energy consumption constituted a fundamental breach from the seller's part because they are 'important determinant of the productive value' of the goods. It should also be pointed out that, in the circumstances of the case, the buyer relied on a sample. In a case dealing with non-payment of the price, an Australian Court considered that the failure to issue a letter of credit amounted to a fundamental breach because, in the particular circumstances of the case, it was demonstrated that the buyer did not have the intention to perform its obligation. Indeed, the goods were scrap steel and between the conclusion of the contract and the date of payment, those goods were subject to a fall in price. Thus, the buyer had an interest in the renegotiations of the contract.<sup>115</sup>

## 2. The foreseeability

The main discussion about that criterion deals with the point in time to which one has to measure the foreseeability of the breaching party.

At the 13<sup>th</sup> meeting during the Vienna Conference, Mr. Felthman from the English delegate proposed an amendment to article 23 of the Draft in order to include the date of the conclusion of the contract as the relevant point in time of measurement.<sup>116</sup> Finally this proposal was withdrawn when other delegates considered that the article had to keep its flexibility since informations provided after the conclusion of a contract had to be taken into account. Thus, the decision is left to the discretion of

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<sup>113</sup> Cour d'Appel de Paris, 04.06.2004, case number 2002/18702, available on [www.unilex.info](http://www.unilex.info), accessed on 2006-03-30.

<sup>114</sup> U.S Court of Appeal, 2<sup>nd</sup> circuit, Rotorex Corp v. delchi Carrier S.p.A, 06.12.1995, available on [www.unilex.info](http://www.unilex.info), accessed on 2006-03-30.

<sup>115</sup> Supreme Court of Queensland (Australia), Downs Investments Pty Ltd v Perjawa Steel SDN BHD, Civil Jurisdiction No. 10680 of 1996, 17.11.2000, [www.unilex.info](http://www.unilex.info) (Full Text), available on 2006-04-01.

<sup>116</sup> See <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting13.html>, accessed on 2006-03-30.

the Court, with that risk of course not to achieve uniformity. One commentator<sup>117</sup> pointed out the discrepancies between the official versions of the Convention. Indeed, on one hand the English version is using the present tense ('what he is entitled to expect under the contract'), and could probably lead the judge to place itself at the time when the breach is committed. Obviously, the result would favour the aggrieved party. On the other hand, the use of the past tense in the French, Spanish and Russian version would lead the Court to take the date of the formation of the contract as the point in time.

Scholars are also divided on the interpretation to give to the English version of the Convention. John O. Honnold<sup>118</sup> considers that the point in time should not be the conclusion of the contract. According to the example he gives, if before shipment of the goods the buyer asks the seller to use a specific package because the goods are to be resold and the seller refuses, the buyer would be allowed to avoid the contract. Thus all information received by one of the parties before their respective performance had to be taken into account. On the contrary, Peter Schlechtriem<sup>119</sup> is of the opinion that since article 25 CISG is focused on the interest of the aggrieved party as fixed by the terms of the contract, the relevant point in time should be the date of the conclusion of the contract. For Joseph S. Ziegel<sup>120</sup>, the solution to that issue may come from a cross reference with article 74 CISG which provides for the calculation of damages. This article refers to the date of the conclusion of the contract as the relevant point in time to measure the amount of damages. Accordingly, he estimates it would be 'anomalous' not to take the same time of measurement to interpret article 25 CISG.

### Conclusion

The TLDB Principle VI.3 aims to be flexible. Accordingly, it is on purpose that it does not contain a definition of fundamental non-performance. Any attempts of

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<sup>117</sup> Robert Koch, *supra* footnote 109, at title II.

<sup>118</sup> John O. Honnold in *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd edition, (Kluwer Law International 1999) at 208, available on <http://www.cisg.law.pace.edu/cisg/biblio/toc.html>, accessed on 2006-03-30.

<sup>119</sup> Peter Schlechtriem in *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods*, Published by Manz, Vienna, 1986 at 60, available on <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html#a37>, accessed on 2006-03-30.

<sup>120</sup> *Supra* footnote 105 at 9-19 9-20.

definition would have been unsatisfactory because the substantiality of a breach may come from various situations and regard to the particular circumstances of the case are relevant. On the contrary, under the Vienna Convention a definition of fundamental breach was said to be necessary. However, the broad terms of the definition is undermining the uniformity in the interpretation of the Convention. Nevertheless one should notice that Arbitral Tribunals and National Courts are very pragmatical when determining a fundamental breach under Central List or the Convention. The result thereof is that, in practice and without the recourse to the UPICC or PECL, the TLDB Principle affords little help for the interpretation of article 25 CISG.

### **III. FORCE MAJEURE (PRINCIPLE VI.3) AND HARDSHIP (PRINCIPLE VII.1) v. EXEMPTION (ART. 79 CISG)**

Probably one of the most interesting provision within the Vienna Convention is the article 79 on Exemption. Indeed, whereas traditionally excuses for non performance are dealt within two principles namely force majeure and hardship, like the Central List does, the Vienna Convention has adopted a 'neutral' position.

Article 79 CISG on exemption is a peculiar provision. The use of the term 'Exemptions' translates the intention not to refer to any national legal system such as the French concepts of Force Majeure and *imprévision* or the English concepts of impossibility, impracticability and Frustration, or the German concept of *Wegfall der Geschäftsgrundlage* and its various applications<sup>121</sup>. On the contrary, the TLDB List provides a rule (Principle VI.3) dealing specifically with the Force Majeure and another one (Principle VIII.1) on hardship. Each TLDB Principle would be compared with the article 79 CISG. One may notice that the Principle on Force majeure makes a reference to 'acts of God', 'force majeure'<sup>122</sup> and 'höhere Gewalt'.<sup>123</sup> It means that

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<sup>121</sup> David R. Rivkin, 'Lex Mercatoria and Force majeure', in: Gaillard (ed.), *Transnational Rules in International Commercial Arbitration* (ICC Publ Nr. 480,4), Paris 1993, at 161 et seq., available on [www.TLDB.de](http://www.TLDB.de) – DocID 116100, accessed on 2006-03-30.

<sup>122</sup> Articles 1147 and 1148 of the French civil code.

<sup>123</sup> that concept comes from an interpretation by the German Court of Section 275 of the BGB entitled "nicht zu vertretende Unmöglichkeit" (impossibility due to an event for which the obligor is not responsible).

the TLDB Principle covers those domestic doctrines. However it would be wrong to state they are identical.<sup>124</sup> The same is true about the Hardship Principle which refers to the doctrines of ‘Wegfall der Geschäftsgrundlage’, ‘*clausula rebus sic stantibus*’, ‘frustration of purpose’.

### **A. Comparison between the TLDB Principle on Force Majeure with the article 79 CISG on Exemption**

Article 79 CISG contains five paragraphs. The first and the last one deal with the definition of the exemption and its legal effects. The three other paragraphs deal with particular situations such as the exemption for failure by a third party (Art.79(2)), temporary exemptions (Art.79(3)) and the duty of notification of the impediment (Art.79(4)). The TLDB Principle on Force majeure provides also a definition with its legal effect on the parties. Every paragraphs of the CISG article are to be compared with the Central List provision.

#### **1. Elements of the definition of Exemption (Art.79(1) CISG) and of Force Majeure (Principle VI.3)**

The Central List website refers to article 79(1) CISG. Indeed, that article and the TLDB Principle share many similarities: under CISG, three elements must be proved by the non-performing party in order to be exempted: (a) failure is due to an ‘impediment’ (b) ‘beyond his control’; (c) at the conclusion of the contract that party ‘could not reasonably be expected to have taken the impediment into account’ and the party could not reasonably be expected ‘to have avoided or overcome that impediment or its consequences’. The TLDB Principle also contains those elements but with slight differences: an ‘impediment (...) beyond the *reasonable* control [emphasis added], that could not have reasonably been *foreseen* (...) at the time of the conclusion of the contract’ [emphasis added], and ‘neither the impediment nor its consequences could have been avoided or overcome by the non-performing party’.

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<sup>124</sup> Official Comments of the UNIDROIT on the Principle of Force majeure (article 7.1.1) available on <http://www.cisg.law.pace.edu/cisg/principles/uni79.html>, accessed on 2006-03-30.

a) An impediment

Both instruments use the word ‘impediment’. Neither the Principle nor the CISG provide a definition of the term, although the TLDB Principle gives a non-exhaustive list of examples.

1) *The CISG*

The vagueness of the CISG provision has led to the formulation of criticisms and different interpretations by commentators. In particular, it is uncertain whether or not the non-conformity in goods is a failure that can be subject to an exemption. Some commentators from a Common Law background led by Professor Nicholas consider that defects in goods should never be exempted.<sup>125</sup> Indeed and having regard to the legislative history of the provision, impediment is similar to ‘obstacle’, a term which had been abandoned in favour of ‘circumstance’ during the drafting process on the Uniform Law for the International Sales. That latter term was chosen so that defects in goods could be a failure comprised in the exemption.<sup>126</sup> The similarity in meaning between impediment and obstacle may lead to the conclusion that only events that bar performance (late delivery for example) might be exempted.<sup>127</sup> In the opinion of Barry Nicholas, it is clear that the intention behind the choice of that term was to prevent the seller not to be liable for defective performance even though they were complying with the other requirements of the definition. John Honnold adds that such interpretation is supported by the wording of article 79(4) CISG which provides for an obligation of notification when a party fails to perform. According to him, such a requirement is ‘absurd’ in case of delivery of hidden defect.<sup>128</sup> From another point of view, Joseph Lookofsky considers that those commentators might have been influenced by their own domestic conceptions and considers that the legislative history of the provision affords little certainty.<sup>129</sup> Moreover, few commentators<sup>130</sup>

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<sup>125</sup> Barry Nicholas ‘Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods’, in ‘Galston & Smit’, Ch. 5, 5-1 at 5-11, available on <http://www.cisg.law.pace.edu/cisg/biblio/nicholas1.html>, accessed on 2006-03-30 ; John Honnold supra footnote 117, at 478.

<sup>126</sup> John Honnold, *Ibid.*

<sup>127</sup> Barry Nicholas, supra footnote 125 at 5-11.

<sup>128</sup> John Honnold, supra footnote 118 at 478.

<sup>129</sup> Joseph Lookofsky, ‘The 1980 United Nations Convention on Contracts for the International Sale of Goods’, in J. Herbots editor / R. Blanpain general editor *International Encyclopaedia of Laws*, -

consider that the non-conformity of the goods is an event that could be exempted: the wording of article 79(1) CISG suggests also this solution since the event can concern ‘any of [the non performing party’s] obligations’ and article 35 CISG provides for the duty of the seller to deliver conforming goods. At least one decision clearly indicates that defects in goods may be exempted: in the particular circumstances of the case, it was proven that the defects came from the failure of the seller’s supplier and that the seller did not act in bad faith.<sup>131</sup>

## 2) *The Central List*

The term ‘impediment’ within the TLDB Principle VI.3 is not linked to any legislative history. Its meaning might seem clearer within the context of the Principle than impediment within the Convention. Indeed, although there is no definition, the Principle lists numerous events that can be qualified as impediment.

Although the provision is not only concerned with the international sale of goods, it might be interesting to verify if, under the Central List Principle, an impediment might exempt a defect in goods. The broad term ‘non-performance’ might correctly be interpreted so as to include defect in goods. With respect to the case law available on the TLDB website, none of the arbitral awards to which I had access give an illustration of the Force majeure applicable to defective goods. Only one arbitral award implicitly mentions the possibility.<sup>132</sup>

The debate on exemption for non-conformity is also closely linked to the external character of the impediment. It could thus be argued that, to the extent that the quality of the goods delivered forms part of the sphere of activity of the seller,

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*Contracts*, Suppl. 29, (The Hague Kluwer Law International December 2000) at 161, available on <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky.html>, accessed on 2006-03-30.

<sup>130</sup> Professor Nicholas, supra footnote 124 refers to Professor Huber and to Professor Schelchtriem (footnotes 22 and 23). With respect to the latter, see Peter Schlechtriem supra footnote 118 at 102, in which he considers that impediment should not mean an ‘occurrence that absolutely bars performance’; see also Denis Tallon, ‘Article 79’ in ‘Bianca-Bonell Commentary’ 572 at 576, available on <http://www.cisg.law.pace.edu/cisg/biblio/tallon-bb79.html>, accessed on 2006-03-30.

<sup>131</sup> Tribunal de Commerce de Besançon (France), case n° 97 009265, 19.01.1998 available on [www.unilex.info](http://www.unilex.info), accessed on 2006-03-30.

<sup>132</sup> ICC Award No. 3880 1985 YCA, 44 and seq., available on [www.TLDB.de](http://www.TLDB.de) – DocID: 203880, (Abstract) accessed on 2006-03-30, in which the seller alleged the force majeure because his late and non-conforming performance was due to the failure of its supplier. The Arbitral Tribunal implicitly admitted that the failure of a third person could have constituted an excuse to its non-performance.

defects in goods would never be exempted. The French decision mentioned above<sup>133</sup> would not contradict that statement because, in that case, the defects in the goods came from the supplier. On the other hand, a German decision<sup>134</sup> left this question open because in the particular circumstances of the case the defects in the goods were ‘in any event’ not considered outside the seller’s control.

b) Beyond the non performing party’s control

The requirement deals with the external character of the impediment. The TLDB Principle provides that the impediment must be beyond the ‘reasonable’ control of the non-performing party whereas the Vienna Convention does not include a standard of reasonableness in the exercise of control. The legal consequences of this difference are not obvious and, finally, would depend on the particular circumstances of the case.

1) *The Vienna Convention*

With respect to the Convention, it shall be pointed out that neither the UNIDROIT Principle 7.1.7 nor PECL article 8:108 mention the reasonableness of the control and that, according to the commentary on the article 8:108 of PECL<sup>135</sup>, beyond the non-performing party’s control would mean outside its sphere of activity. Cases applying the Vienna Convention afford different solutions: in 1998 the High Court of Arbitration of the Russian Federation<sup>136</sup> held that the buyer could not raise, as a defence, that the payment was stolen from the foreign bank because it was not an impediment beyond its control. This seemingly strict solution might be put into perspective with an arbitral award from the Bulgarian Chamber of Commerce and Industry<sup>137</sup> that states that a strike might in itself constitute an exemption although in the circumstances of the case it was not (however it is not clear whether the strike involved the seller’s own workforce).

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<sup>133</sup> Supra footnote 130.

<sup>134</sup> Bundesgerichtshof [Federal Supreme Court], 24 March 1999, case number VIII ZR 121/98, available on <http://cisgw3.law.pace.edu/cases/990324g1.html>, accessed on 2006-03-30.

<sup>135</sup> Guide to article 79, comparison between CISG and PECL and comments on article 8:108 PECL, available on <http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html>, accessed on 2006-03-30.

<sup>136</sup> High Court of Arbitration of the Russian Federation, 16.02.1998, [www.unilex.info](http://www.unilex.info) (Abstract), accessed on 2006-03-30.

<sup>137</sup> case number 56/1995, 24.04.1996, [www.unilex.info](http://www.unilex.info) (Abstract), accessed on 2006-03-30.

## 2) *The Central List*

The TLDB Principle, contains a non exhaustive list of impediments that carry a high level of externality, such as war, acts of terrorism, fire, storm, cyclone; earthquake.... The list provides also that a 'strike' might be a lawful impediment. With respect to that event, some Commercial Terms<sup>138</sup> expressly or implicitly state that even a strike organized by the workforce of the party seeking relief may constitute a cause of Force majeure, whereas some others<sup>139</sup> exclude that possibility. The addition of the word 'reasonable' within the TLDB Principle might be considered as an evidence that strike within one of the parties' premise may constitute a impediment beyond its control. A cross-reference to the TLDB Principle I.2 (Standard of reasonableness) would be also useful. In any case, the issue would have to be resolved according to the particular circumstances of the case.

- c) The non-performing party could not reasonably be expected to have taken the impediment into account at the conclusion of the contract that party or to have avoided or overcome that impediment or its consequences

Article 79(1) CISG, like the TLDB Principle VI.3, measures the foreseeability of the impediment at the time of the conclusion of the contract and both make a reference to the standard or reasonableness. Two issues shall keep our attention. Firstly, whether or not an impediment can exist before the conclusion of the contract. Secondly, some comments on the concept of reasonableness should be made.

### 1) *Time to measure the impediment*

If the impediment was foreseeable at the time of the conclusion of the contract, it means that the non-performing party took the risk or that it was in fault in not having foreseen it.<sup>140</sup>

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<sup>138</sup> ICC, Force Majeure Term, edition 1985 and 2003, available on [www.TLDB.de](http://www.TLDB.de) – DocID: 700650 and 700700, (Abstracts), accessed on 2006-03-30.

<sup>139</sup> For instance, the Unido model form of semi-turnkey contract for the construction of a fertilizer plant available on [www.TLDB.de](http://www.TLDB.de) – DocID: 700800

<sup>140</sup> Supra footnote 134.

- The Vienna Convention

A debate arose in the interpretation of the CISG provision on the issue whether or not the impediment may exist before the conclusion of the contract. According to the Secretariat Commentary, this situation falls into the scope of article 65 which became article 79 CISG. Thus, and as illustrated, if the contract deals with the sale of goods transported by a ship that sank at the time of the conclusion of the contract, the seller would not be exempted if he had knowledge of the destruction of the goods or if he could reasonably have expected their destruction.<sup>141</sup> This solution might be justified by the legislative history of the provision. Indeed, according to the commentary of a previous draft of the Convention<sup>142</sup>, the impediment had to occur after the conclusion of the contract. The actual version which provides ‘at the conclusion of the contract’ should be interpreted as taking into account an impediment that existed before the conclusion of the contract. Nevertheless, Denis Tallon disagrees with this statement and considers that the Secretariat made an affirmation ‘without justifying its position’<sup>143</sup> and that such impediment falls outside the scope of article 79 CISG. According to him, an impediment that exists before the conclusion of the contract and that renders the performance impossible – like the destruction of the goods transported by a ship that sank – makes the contract invalid by application of the doctrine of mistake. Since the Vienna Convention does not deal with the validity of the contract (Art. 4 CISG), it is a matter of the applicable domestic law. However, because the author bases himself on the position held under French law, such interpretation would probably undermine the uniformity that the Convention aims to reach.

- The Central List

The TLDB Principle does not contain any official commentary that would help the reader in finding out whether or not impediment that existed before the conclusion of the contract could excuse a non-performance. Nevertheless, the doctrine of mistake is

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<sup>141</sup> Secretariat Commentary available on <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-79.html>, accessed on 2006-03-30.

<sup>142</sup> UNCITRAL yearbook VII of 1976 supra footnote 98 at 130.

<sup>143</sup> Supra footnote 130 at 577.

expressly provided by the Central List in the Principle IV.6.3.<sup>144</sup> So, one can conclude that Principle VI.3 provides for the occurrence of an impediment after the conclusion of the contract. On the other hand, the Principle dealing with Hardship expressly provides the event to occur after the conclusion of the contract. If a similar result was intended for the Principle on force majeure it would have been expressly provided. Moreover because of the broad wording, a restrictive interpretation should not be retained and one should consider that an impediment may exist before the conclusion of the contract.

## 2) *The standard of reasonableness*

One might conclude that the standard of reasonableness to which the Convention and the Central List make reference serve the same purpose. Indeed, on that matter again both instruments contain a similar wording. In relation to the Convention, that part of the official version is identical to the Draft so that the Secretariat Commentary is helpful. It is alleged that to an extent or another it is always possible for a party to avoid or overcome an impediment or its consequences. Thus the purpose to include the concept of reasonableness is to prevent that the attempts to avoid or overcome are not made at the expenses of an unrealistic cost.<sup>145</sup> A similar solution would be also applicable to the Central List Principle and in conformity with TLDB Principle I.2.

## 2. Failure by a third party

The Vienna Convention expressly provides for the exemption of a party's failure when due to the failure of a third party (Art.79(2) CISG) whereas the TLDB Principle does not.

### a) The Vienna Convention

According to the Convention, a party is exempted for failure by a third party when the third party was engaged 'to perform the whole or part of the contract' and when

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<sup>144</sup> [www.TLDB.de](http://www.TLDB.de)> Principle IV.6.3: the mistake is measured 'at the moment the contract was concluded'.

<sup>145</sup> Secretariat Commentary, supra footnote 141.

both of them comply with the requirements of the first paragraph. Thus, Paragraph 2 increases the obstacles for the defaulting party to be exempted. It results from the legislative history and some comments given by scholars that it should be given to article 79(2) a narrow scope. For instance it should not be interpreted so as to include a supplier. A revised text on ULIS approved by the Working Group<sup>146</sup> demonstrates that at some point the word ‘sub-contractor’ was chosen instead of ‘third person’ in the final version. It seems that the change in formulation came from the divergent interpretations that the former term have in some legal systems.<sup>147</sup> Nevertheless, it was still intended not to apply the second paragraph to a supplier.<sup>148</sup> Apparently, authors agree to consider that article 79(2) CISG should be given a restrictive meaning. Denis Tallon holds that there must be an ‘organic link’ between it and the main contract.<sup>149</sup> Accordingly, a supplier would not be considered as a third party.<sup>150</sup> Nevertheless, the distinction between sub-contractor and supplier might not be easy to determine. It would explain the opinion of Professor Schlechtriem that in exceptional cases, a supplier would also exempt the seller when the latter could neither ‘choose nor control his auxiliary suppliers and it was not possible to procure, produce or repair the goods in any other manner’.<sup>151</sup> In any case, the defaulting party would not be exempted for the failure by the sub-contractor if it does not comply with the requirements sets up by article 79(2).<sup>152</sup>

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<sup>146</sup> Yearbook of 1974, volume V, (A/C9./87) at 58, available on [http://www.uncitral.org/pdf/english/yearbooks/yb-1974-e/yb\\_1974\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1974-e/yb_1974_e.pdf), accessed on 2006-03-30.

<sup>147</sup> Barry Nicholas, supra footnote 125 at 5-22.

<sup>148</sup> Secretariat Commentary, supra footnote 141.

<sup>149</sup> Denis Tallon, supra footnote 130 at 585.

<sup>150</sup> ICC Court of Arbitration Basel, case number 8128, 1995, available on [www.unilex.info](http://www.unilex.info) (Abstract), accessed on 2006-03-31: the non-delivery by the supplier is part of the seller’s risk. Also Chengwen Liu ‘Force Majeure Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law’ (2nd edition: Case annotated update (April 2005) available on <http://www.cisg.law.pace.edu/cisg/biblio/liu6.html#>, accessed on 2006-03-31, see commentary in the light of the German decision Bundesgerichtshof [Federal Supreme Court] supra footnote 133. In particular the statement from the Court that from the buyer point of view there was no difference whether the seller produced the goods itself or whether the seller obtained them from a supplier.

<sup>151</sup> Peter Schlechtriem, supra footnote 119 at 104.

<sup>152</sup> Amtsgericht Alsfeld (Germany), case number 31 C 534/94, 12.05.1995, available on [www.unilex.info](http://www.unilex.info) (Abstract), accessed on 2006-03-31: ‘the buyer who has engaged a third person for payment bears the risk that the seller does not receive the payment, when the requirements for exemption from liability set forth in Art. 79 CISG are not met, as in the case at hand.’

c) The Central List

The Central List Principle does not contain a similar paragraph and, in relation to this issue, the TLDB does not refer to article 79(2). Also, among the illustrations of impediment – and except from the ‘interference by any third party state or states’ – failure by a third party is not mentioned. From another point of view, it might be said that the wording of the Principle is broad enough so as to include a similar situation than the Convention does. In that case, the non-performing party would have to prove that the failure by a third party (whether a sub-contractor or a supplier) complies with the requirement of the definition but it would not have to prove that the third party complies also with those requirements. Thus it would mean that it is easier for a party to invoke the failure of a third party under the Central List than under the Convention.<sup>153</sup>

### 3. Temporary impediment

a) The Vienna Convention

Article 79(3) CISG provides for the duration of the exemption. The provision was also subject to lengthy debate. Without entering into the details, it shall be pointed out that the paragraph was amended during the Vienna Conference. Indeed, the Draft counterpart provision stated that the exemption ‘has only effect for the period during which the impediment exists’. The Secretariat concluded thus that the provision provided only for temporary exemption.<sup>154</sup> During the 27<sup>th</sup> meeting of the first committee at the Vienna Conference, the delegate from Norway made a proposal to amend paragraph 3 considering that an undesirable outcome would result from the wording used in the Draft in cases when the impediment ceases after a long period of time and the performance of the contract would become too burdensome, ‘unrealistic’.<sup>155</sup> An alternative proposal was to delete the word ‘only’ between ‘has

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<sup>153</sup> ICC Award No. 3880, supra footnote 132: ‘that it is inaccurate to maintain as a general rule that the default of a supplier can never in any circumstances constitute an element in force majeure for a seller of goods. But in this case, B has not proved that its supplier's defaults are of the unforeseeable and irresistible nature required to constitute force majeure’.

<sup>154</sup> Secretariat Commentary, supra footnote 141.

<sup>155</sup> Summary Records of 27th meeting of the First Committee, available on <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting27.html>, accessed on 2006-03-31.

effect’ and ‘for the period’ with that underlying idea that it would provide a permanent relief. The first solution was rejected because some delegates considered that it would lead to the adoption of the doctrine of Frustration, *imprévision*, or hardship to which they were reluctant. So, as a compromise, the second solution was adopted and the word ‘only’ deleted. As a consequence, different interpretations of paragraph (3) are possible: In his commentary, Denis Tallon still mentions the rule with the word ‘only’ and considers that the exemption lasts during the length of the impediment. However, he considers that Paragraph (5) provides for the same result that a permanent remedy because if the over-due performance leads to a fundamental breach of contract, the contract may be avoided.<sup>156</sup> On the contrary, Barry Nicholas considers that the intention behind the amendment was to leave open the possibility that the exemption might continue even after the period during which the exemption existed<sup>157</sup>. The paragraph therefore might be read as follows: ‘The exemption has effect for the period during which the impediment exists and may have permanent effect if after the impediment has ceased to exist the circumstances have so radically changed that it would be manifestly unreasonable to hold the non-performing party liable.’ Nevertheless, the same author regrets that a Court would not reach such a solution without the assistance of the legislative history.

#### b) The Central List

When applying the TLDB Principle, the solution seems evident: it provides only a temporary relief. Indeed, the rule provides that the non-performing party is not liable if the impediment is temporary.<sup>158</sup> Moreover the Central List contains a Principle that deals specifically with the change of circumstances.

### **4. Duty of notification**

The obligation is provided in Article 79(4) CISG. It is an important duty because if the non-performing party fails to notify the other party of the impediment and its

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<sup>156</sup> Denis Tallon, *supra* footnote 130 at 591.

<sup>157</sup> Barry Nicholas, *supra* footnote 125 at 5-18.

<sup>158</sup> See also the ICC Award No. 7539, 1996 *Clunet*, 1030 at 1031 available on [www.TLDB.de](http://www.TLDB.de) – DocID: 207539 (Abstract), accessed on 2006-03-31: ‘the force majeure event merely constitutes a temporary obstacle (...) the performance of his obligation is suspended until the force majeure event ceases to exist.’

consequences within a reasonable period of time, it may be liable for damages.<sup>159</sup> On the contrary, the TLDB Principle VI.3 does not contain such an obligation. Nevertheless such a duty is expressly provided in Principle IV.5.8 ‘Duty to cooperate/ Duty to notify’ and it states that ‘[e]ach party is under a good faith obligation to notify the other party of any problems that occur in the performance of the contract and to cooperate with the other party when such cooperation can reasonably be expected for the performance of that party's obligations.’ Thus, the non-performing party would act in bad faith if it does not notify the other party of the occurrence of an impediment and would be probably liable to pay damages.<sup>160</sup>

### 5. Legal effect of the excuse or exemption

Article 79(5) provides that ‘either party [may exercise] any right other than to claim damages under [the] Convention’. TLDB Principle VI.3 makes a distinction between temporary non-performance under which a non-performing party is not liable for damages and a period of non-performance unreasonable and that amounts to a fundamental non-performance under which the other party may claim damages and terminates the contract.

There are two main differences between the Vienna Convention and the Central List. On one hand, under the Convention, an exempted party is never liable for damages whereas under the Central List it might be liable in cases where the non-performance becomes unreasonable. On the other hand, the Convention provides a wider range of remedies (reduction of price, specific performance, avoidance of contract) available to the injured party than under the Central List (damages and termination of contract). Some commentators<sup>161</sup> of the Vienna Convention warned about the absurdity to allow a party to ask for specific performance even though the performance is impossible. Indeed, if the seller is compelled to perform although performance is impossible, the result would be more onerous than to pay damages.<sup>162</sup>

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<sup>159</sup> See the Secretariat Commentary *supra* footnote 141.

<sup>160</sup> See also the ICC Award No.2478, 1978 *YCA*, at 223. available on [www.TLDB.de](http://www.TLDB.de) – DocID: 202478 (Abstract), accessed on 2006-03-31: In that case the cancellation of an export licence constituted an event of Force majeure but the defaulting party had to pay damages because it did not comply with its duty to inform the other party without delay.

<sup>161</sup> Denis Tallon, *supra* footnote 130 at 588 and John Honnold, *supra* footnote 118 at 494.

<sup>162</sup> John Honnold, *Ibid.*

However it seems not to be the intention of the Vienna Convention. Indeed, the Secretariat's Commentary provides an illustration of the exercise of the specific performance. In substance, if the seller was to deliver unique goods that were later on destroyed, specific performance would not be a remedy available to the buyer. On the other hand, if the seller has to deliver generic goods, the buyer would be able to request specific performance and the seller to deliver substitute goods.

The main similarities between the Convention and the Central List are that in both cases the non-performing party is exempted of damages, at least for temporary impediment, and that termination of the contract is a remedy available to the injured party as soon as a fundamental breach (art. 25 CISG) or a fundamental non-performance (TLDB Principle VI) is determined.

## **B. Hardship (TLDB Principle VIII) and the Exemption of Art.79 CISG**

The Central List contains a specific provision that deals with the change of circumstances that renders the performance of the contract commercially unrealistic, the so-called hardship clause. As we know, the Vienna Convention does not refer to any domestic legal concept such as 'force majeure'. That explains the vagueness of the provision and the difficulty to reach a uniform interpretation. In this part (B) the concern is to determine whether or not the Vienna Convention provides an exemption to the party when its non-performance result from a change of circumstances that renders the performance too onerous.

### **1. The Central List**

The Principle expressly provides a definition of hardship and its legal consequences. The debtor can benefit from the rule if the event, whether legal, technical, political, financial or economical, occurs after the conclusion of the contract, that it could not reasonably have been taken into account at the time of the conclusion of the contract, and that it fundamentally alters the equilibrium of the contract. If a situation of hardship is determined, three legal consequences are available: (1) the aggrieved party (non-performing party) may claim the renegotiation of the contract. (2) In case of failure, both parties may apply to a Court or an Arbitral Tribunal to have the

contract adapted to the change of circumstances – provided it is possible under the applicable procedural law or, (3) terminated.

The inclusion of a hardship clause is common practice in international trade. The definition of hardship is similar to the definition contained in the ICC Hardship clause 2003<sup>163</sup> and the definition given by UNCITRAL.<sup>164</sup> Also, the re-adaptation of the contract seems to be the first remedy available for the parties.<sup>165</sup> To the extent that an international commercial contract may contain a much more complex hardship clause<sup>166</sup>, the definition in the TLDB Principle contains only the basic elements.

Finally, it shall be pointed out that the TLDB Principle on hardship has to be interpreted narrowly. Indeed, the use of the terms ‘fundamental’ and ‘excessively’ would lead to this solution. Moreover, a strict interpretation would also result from the nature of Hardship, as an exception to the general principle of *pacta sunt servanda*.<sup>167</sup>

## 2. The CISG

Whether or not the Vienna Convention provides for the revision of the contract in case of change in circumstances is a matter of interpretation. Regarding to the vague wording of article 79 CISG and the legislative history of that provision, scholars reached different conclusions.

As written previously, the term ‘impediment’ is not defined. In itself, that word may contain several meanings. Here, the issue is to ascertain whether or not economic difficulties like the rise in prices may be a ground for exemption. For Professor

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<sup>163</sup> [www.TLDB.de](http://www.TLDB.de) – DocID : 700700 (Abstract), accessed on 2006-03-31.

<sup>164</sup> UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, Exemption Clauses No. 1, 12 available on [www.TLDB.de](http://www.TLDB.de) – DocID : 790100 (Abstract), accessed on 2006-03-31.

<sup>165</sup> Supra footnotes 163 and 164.

<sup>166</sup> Georges Delaume ‘Law And Practice of Transnational Contracts’ (New York, London, Rome 1988), available on [www.TLDB.de](http://www.TLDB.de) – DocID: 101500, accessed on 2006-03-31.

<sup>167</sup> See ICC Award No. 1512, YCA 1976, at 129, available on [www.TLDB.de](http://www.TLDB.de) – DocID: 201512 (Abstract), accessed on 2006-03-31; ICC Award No. 4761, supra footnote 86 at 1015; see also TLDB Principle IV.1.2.

Schlechtriem, the change in wording from ‘circumstances’ in the ULIS to ‘impediment’ should not prevent the inclusion of economic difficulties to which he refers under the term ‘unaffordability’.<sup>168</sup>

The rejection of Norway’s main proposal during the Vienna Conference and according to which the non-performing party should be definitively exempted, even after the impediment vanished, when the commercial or economical circumstances have changed so radically for that party, is explained by the reluctance of some delegates to the extent that it would have included the doctrine of *rebus sic standibus*.<sup>169</sup> The choice to delete ‘only’ between ‘has effect’ and ‘for the period’ in paragraph 3 was to let open the possibility that an exemption might continue even after the disappearance of the impediment. Thus, for Barry Nicholas, the article 79 CISG does not provide for the frustration of purpose.<sup>170</sup> On the contrary, Professor Schlechtriem concludes that the provision allows to take into account the change in the economic situation of the non-performing party.

Domestic Courts have also adopted different positions. Whereas a French Court would be reluctant to admit that the Convention provides for a hardship situation<sup>171</sup>, a German Court would be less.<sup>172</sup>

Even though it is considered that the Vienna Convention provides for a relief in case of changes in circumstances, the remedies available are inadequate. Whereas the TLDB Principle provides for hierarchical system of remedies (first renegotiations, in case of failure, modification of the contract by the Court or the Arbitral Tribunal, in case of failure, termination of the contract) the only remedy that the Convention would provide to the non-performing party is the avoidance of contract ( Art.79(5)).

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<sup>168</sup> Supra footnote 119 at 102.

<sup>169</sup> Supra footnote 155.

<sup>170</sup> Supra footnote 125 at 5.16: ‘The American common law has the merit, by comparison with the common law of England and the Commonwealth, of keeping a clear distinction between impossibility or impracticability of performance and frustration of purpose. Article 79 provides for the former, but not for the latter’.

<sup>171</sup> Cour d'Appel de Colmar, 12.06.2001, France, available on [www.unilex.info](http://www.unilex.info), accessed on 2006-03-31. Indeed, in French Courts have always denied to readapt a contract in reason of change in circumstances (Arrêt du Canal de Craponne of March 6, 1876).

<sup>172</sup> Landgericht Aachen, case number: 43 O 136/92, 14.05.1993, available on [www.unilex.info](http://www.unilex.info) (Abstract), accessed on 2006-03-31, in which the Court held that ‘Wegfall der Geschäftsgrundlage’ was a matter exhaustively covered by the CISG.

## **Conclusion**

The Central List rules expressly on force majeure and hardship as it is in most of the legal systems. On the contrary, the Vienna Convention article 79 does not embody any domestic concept, as a pre-condition to reach an uniform interpretation. However, the flexibility of the article leads to different interpretation. The comparative study between the force majeure and hardship principles from one side and the article 79 CISG from the other and, in particular, the fact that the Convention provides for a permanent exemption, could lead to the conclusion that the Convention provides for a wider exemption than the force majeure but more restrictive than the hardship Principle.

## **IV. DETERMINATION OF PRICE: ARTICLES 14(1) AND 55 OF THE VIENNA CONVENTION AND THE TLDB PRINCIPLE IV.5**

Whether or not open price contracts are admitted is a very controversial subject within the Vienna Convention. By open price contract we shall understand a contract in which a price is not determined and that does not contain a provision for its determination. The result reached during the UNCITRAL deliberation and the Vienna Conference is another strong illustration of the bargaining process that features the CISG. The Vienna Convention contains two provisions that deal with price determination, articles 14(1) and 55. The relation between both articles is controversial to the extent that each one reaches a different outcome. On the contrary, the Central List Principle IV.5 does not afford any difficulty and clearly admits open price contract. Firstly, we should analyse the discrepancy between the two CISG articles. Secondly, we shall deal with the Central List Principle.

### **A. The Vienna Convention: the discrepancy between articles 14(5) and 55**

In order to understand the controversy that arises in the relation between articles 14(1) and 55 of CISG, it might be helpful, first, to present both articles and the debate that arose during their drafting.

## 1. The background

Each article shall be presented, with reference to the legislative history, in a separate heading.

### a) Article 14(1)

Article 14(1) is contained within Part II of the Convention on the formation of the contract. That second Part provides that a contract of sale of goods is formed by the encounter of an offer and its acceptance. Thus, it provides the requirements that a proposal has to fulfil in order to be a ‘CISG offer’. Article 14 is the first provision of Part II and aims to give a definition of an ‘offer’. More specifically, article 14(1) provides that ‘[a] proposal (...) 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’. The requirement of definitiveness is the major issue for this topic. With respect to price determination, that requirement gets its full sense in the light of the second sentence. Thus, an open price contract under the CISG cannot be a contract at all because at the beginning the offer was not a ‘CISG offer’. Only those countries, like the Scandinavian countries, that have declared not to be bound by Part II of the Convention – in accordance with article 92 – would not have to apply Art.14(1).

Article 14(1) is identical to the Draft counterpart.<sup>173</sup> At some point, it was contemplated that, even though an offer did not determine the price or did not contain a provision for its determination, but that indicated the intention to be bound, the price was that generally charged by the seller at the time of the conclusion of the contract or, in absence of such a price, the price generally charged for such goods under comparable circumstances.<sup>174</sup> At that time, the wording was not in

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<sup>173</sup> See ‘Legislative history of CISF article 14: matchup with the 1978 Draft’, available on <http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-14.html>, accessed on 2006-03-31.

<sup>174</sup> See the the Draft Convention on the formation of contract for the international sale of goods – article 4, Yearbook 1977, vol VIII at 89 available on [http://www.uncitral.org/pdf/english/yearbooks/yb-1977-e/yb\\_1977\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1977-e/yb_1977_e.pdf), accessed on 2006-03-31.

contradiction but just repeated article 36 of the 1976 Draft on the CISG.<sup>175</sup> For various reasons, countries such as Ghana, USSR and France rejected this wording and requested its deletion so that in the formation of a contract, the price had to be determined or determinable.<sup>176</sup> Other countries, although not in opposition with open price contract, were also in favour for a change in the wording. It resulted that the 1978 Draft Convention adopted the actual wording of article 14(1) as a compromise. However, during the Vienna Conference, the debate arose again. Indeed, some delegates proposed to delete the second sentence of article 12(1) [that became article 14(1) CISG] because article 51 [that became article 55 CISG] led to an opposite solution. Thus, a Contracting State that ratifies Part II and III of the Convention would conclude that a contract is not valid if the price is not determined.<sup>177</sup> Moreover, in countries like United Kingdom or United States, an open price contract is valid; and the price charged is, basically, a reasonable price.<sup>178</sup> On the other hand, many other countries were opposed to the deletion of that seconde sentence. The French delegate considered that the second sentence contained the essential elements of the definition of an offer and that the determination of price was necessary to protect the weaker party to a contract of sale, in particular in long term contract of raw materials, in which it has no control over the price.<sup>179</sup> A similar reasoning was arisen when a buyer having its place of business in a developing country sought to purchase industrialized goods from developed countries. To the extent that there is not a market price for most of those goods and that the buyer might be the weakest party, it is necessary to protect the buyer from any attempt from the seller to impose an unfavourable price. The delegate from Ghana also considered that contract could be formed only if the price was determined or determinable whereas article 51 of the Draft dealt with the specific situation that may arise in some countries where a contract is validly formed even if there is no agreement on the price.<sup>180</sup> With respect

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<sup>175</sup> Commentary on the Draft Convention on the Formation of Contract for the International Sale of Goods, Yearbook 1976 supra footnote 98 at 93.

<sup>176</sup> Supra footnote 5 at 134 (for Ghana's position), 143 (for France's position). About USSR's position, see comments on article 36 of the CISG 1976 Draft, Yearbook VIII (1977) supra footnote 174 at 132.

<sup>177</sup> Summary Record of the 8th meeting of the First Committee, paragraph 68, available on <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting8.html>, accessed on 2006-03-31.

<sup>178</sup> For instance, the Uniform Commercial Code article 2-305 provides: 'The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery (...)'

<sup>179</sup> Supra footnote 177, paragraph 82.

<sup>180</sup> Summary Records of the 11th meeting of the First Committee, paragraph 66, available on <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting11.html>, accessed on 2006-03-31.

to the USSR, the determination of the price was necessary in a planned economic system. Not only the proposal for the deletion of the second sentence was rejected but also any proposal to amend the wording of article 12(1) so to make it clearer.<sup>181</sup> Finally, the wording of article 12(1) did not change but, in counterpart, the wording of article 51 of the Draft was amended.

b) Article 55

Article 55 CISG is included into Part III of the Convention on the right and obligations of the parties. More precisely, it forms part of the Chapter III – Section I on the obligation of the buyer to pay the price and provides: ‘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 implicitly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned’.

The legislative history of the provision is, at some point and as demonstrated in (a), closely linked to the article 14 CISG. Article 51 was drafted before UNCITRAL had adopted Part II of the Draft Convention. Faced to the apparent contradiction between both articles, some delegates proposed the deletion of the second sentence of article 12(1). This proposal having been rejected, other delegates, from Ghana for example, suggested the deletion of article 51 of the Draft<sup>182</sup> in order to avoid any confusion for the Courts when applying article 12(1). Nevertheless, many other delegates, were of the opinion to keep article 51 because it was said to be necessary in some circumstances: for the sale of spare parts at a not fixed price to be used for machines purchased earlier;<sup>183</sup> if a State has not planned to ratify Part II or the parties have excluded its application;<sup>184</sup> or because the wording of article 12 was enough flexible and that both articles should be harmonized so that as many States as possible ratify

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<sup>181</sup> Some delegates considered that it was not clear whether the second sentence contained essential element of the definition or constituted an example. Thus an ad hoc working group submitted two proposals which provide a flexible formula, see supra at paragraph 47.

<sup>182</sup> Summary Records of the 24th meeting of the First Committee, paragraph 27, available on <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting24.html>, accessed on 2006-03-31.

<sup>183</sup> Ibid at paragraph 23.

<sup>184</sup> Ibid at paragraph 34.

Part II and III of the Convention.<sup>185</sup> Finally, article 51 of the Draft was kept with an amendment: instead to refer to the price charged by the seller, the actual article 55 CISG refers to the ‘price generally charged at the time of the conclusion of the contract’.

## **2. The controversies regarding to the relation between articles 14(1) and 55 CISG**

It seems evident that when the Convention was adopted, nobody could expect a uniform interpretation of both articles. Indeed, scholars are divided on whether or not to apply article 55 only in restrictive circumstances. For instance, Professors Farnsworth and Eörsi starts their analysis from an *a contrario* interpretation of article 14(1) – if no price is determined or determinable in an offer, there is no offer, without an offer there is no contract – to conclude that article 55 CISG would apply only in those cases where a State did not ratify Part II of the Vienna Convention.<sup>186</sup> The Secretariat Commentary on article 12(1) of the Draft leads also to that solution.<sup>187</sup> On the other hand, other scholars like Professors Honnold and Lookofsky and Alejandro M. Garro consider that article 55 could apply in a wider range of situations. The starting point is the wording of article 55 CISG that states that a open price contract might be valid. Thus, Professor Honnold takes the hypothesis where a contract was not formed by the exchange of an offer and its acceptance (i.e. an exchange of communication) but where a contract was signed or where the contract resulted from the conduct of the parties (Arts. 18(3) and 8(3) CISG). To the extent that the parties did intend to be bound although there is not provision on the price, nothing should prevent article 55 to be applied.<sup>188</sup> Professor Lookofsky also considers that the answer to the conflicting wording of articles 14(1) and 55 CISG shall be the intention of the parties, whether or not they intended to

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<sup>185</sup> Ibid at paragraph 32: In the view of the Mexican delegate, article 12 and 51 were complementary, ‘the former sanctioning contracts in which the price was implicitly fixed and the latter providing a means of determining the price.’

<sup>186</sup> E. Allan Farnsworth, ‘Formation of Contract’, in ‘Galston & Smit’, available on <http://www.cisg.law.pace.edu/cisg/biblio/farnsworth1.html>, accessed on 2006-02-03 at 3-8 and 3-9; Gyula Eörsi, ‘Article 14’ in ‘Bianca-Bonell Commentary’ at 144, available on <http://www.cisg.law.pace.edu/cisg/biblio/eorsi-bb14.html>, accessed on 2006-03-31.

<sup>187</sup> Secretariat Commentary on article 12 of the 1978 Draft [and that became article 14 CISG], available on <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-14.html>, accessed on 2006-03-31.

<sup>188</sup> John O. Honnold supra footnote 118 at 152-155.

derogate the principle of definitiveness of article 14(1) CISG in accordance with article 6 CISG.<sup>189</sup> The interpretation given by Alejandro M. Garro is rather different. He considers that the meaning of both articles might be reconciled. Indeed, article 14(1) provides that a price can be implicitly stated and article 55 provides that an open price contract is a contract with an implicit price fixed by operation of law, the price 'generally charged at the time of the conclusion of the contract'.<sup>190</sup> However those three authors understand that, in practice, a Court might be reluctant to admit open price contracts, in particular if its domestic law invalids them. Nevertheless, one could state at this stage that what matters is the international character of the Vienna Convention.

Among the first Court decisions that deal with this issue, one shall refer to the *Malev* case.<sup>191</sup> In that case which involved an American manufacturer of aircraft engines and a Hungarian airline company, the Supreme Court had to decide whether or not there was a contract of sale. According to the facts of the case, the American manufacturer made alternative offers of engines depending on the Hungarian party's selection for Boeing or Airbus aircraft. The offer was amended to include another model of engine for a Boeing aircraft. Two models of engine were proposed for each model of aircraft (PW 4056 and PW 4060 for Boeing and PW 4152 and 4156 for Airbus). Later on, the Hungarian party sent a telex to the American party stating it had selected the latter's party engines for the Boeing aircraft. Afterward, it notified the offeror it did not want to choose those engines. With respect to the determination of price, the Supreme Court held that the proposal did not comply with article 14(1) CISG because, on one hand, for the PW 4060 model no price was stated and, on the other hand, regarding to both models of engine for the Airbus aircrafts a price was stated only for the spare engines (the motor *stricto sensu*) but not for the engine systems whose prices could not be determined by application of article 55 CISG since there is not market price for such goods. The decision has been criticized because part of the solution was based on the lack of determination of price for goods that the Hungarian party finally did not accept. It means that the lack of determination of one of the products that constitutes the proposal affects the whole

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<sup>189</sup> Joseph Lookofsky, *supra* footnote 129, at 64.

<sup>190</sup> Alejandro M. Garro, *supra* footnote 52, at the subtitle 'Open-Price Terms'.

<sup>191</sup> Hungary, Supreme Court, 25 September 1992, *Pratt & Whitney v. Malev*, English version available on <http://cisgw3.law.pace.edu/cases/920925h1.html>, accessed on 2006-03-31.

proposal preventing it to be a definite offer under CISG. Moreover, according to Professor Flechtner<sup>192</sup>, the solution given ‘reward[ed] Malev’s bad faith’ and did not take into account the international character of the CISG.

It seems that the solution would have been different if there was a market price for the engines. Accordingly, in an hypothetical case<sup>193</sup> analysed by well known scholars it was considered that if the goods were agricultural machines composed of a tractor and a rake, and the offer stated the price for the tractor but not for the rake, a contract was still formed because a market price existed for the rake.

### **B. The Central List Principle IV.5: Admission of open price contracts**

The Central List contains less data on that matter than under the Principles analysed in the preceding parts. However, the wording of Principle IV.5 is clear: ‘If the contract does not contain a provision fixing the price or a method for determining it, the parties are to be treated as having agreed to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned, or, if no such price is available, to a reasonable price’. In fact, this Principle is similar to article 55 CISG to which the TLDB refers.

The above mentioned Principle is contained in Section 5 on the contractual obligations and not in a section dealing with the formation of contract. Moreover there is no Principle within the Central List which contradicts Principle IV.5. On the contrary, Principle IV.2.1 on the contractual consent is using a flexible wording. Indeed, with respect to the formation of contract, the Central List relevant provision does not seek to describe in detail how an international contract might be concluded. In particular, there is neither a definition of an ‘offer’ nor of an ‘acceptance’ but, also, there is not a reference to the communication of an offer and its acceptance in

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<sup>192</sup> Harry M. Flechtner ‘The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)’ (Abstract), (1998) 17 *Journal of Law and Commerce* 187-217, available on <http://cisgw3.law.pace.edu/cisg/wais/db/editorial/flechtner920925h1.html>, accessed on 2006-03-31.

<sup>193</sup> In an excerpt from ‘Transcript of a Workshop on the Sales Convention: Leading CISG scholars discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and much more’, (1999) 18 *Journal of Law & Commerce* 191-258, transcribed and edited by Harry M. Flechtner, available on <http://www.cisg.law.pace.edu/cisg/biblio/workshop-14,55,18.html>, accessed on 2006-03-31.

order to conclude a contract. Indeed, the relevant Principle just provides that ‘[a] valid contractual consent requires that the parties intend to be legally bound and that they have sufficiently identified the terms of the contract with respect to the parties and the subject matter’. Such a flexible wording is preferable in International Commercial Law and understandable within the Central List which does not deal only with the international sale of goods.

Finally, the wording of Principle IV.5 is wider than article 55 CISG. Indeed, the Central List Principle gives an alternative option between the price generally charged and a reasonable price whereas article 55 CISG makes only reference to the first option. Thus, if applied to the *Malev* case the wording of the Principle would have, probably, not led to the solution reached by the Hungarian Supreme Court when applying the Convention.

### **Conclusion**

Whereas the issue on price determination is one of the most controversial within the Vienna Convention, under the Central List is probably one of the easiest to understand and to apply. Despite the similarities between Principle IV.5 and article 55 CISG, a literal interpretation of the CISG would unlikely lead to the same solution than under the Central List. The *Malev*’s case is a relevant illustration. However, many scholars believe that the Vienna Convention provides also for open price contracts. Maybe, new developments on that matter and in the light of other principle such as the principle of good faith would lead to a balance.

## **V. DAMAGES : TLDB PRINCIPLES VII.1 TO VII.3.2 AND ARTICLE 74 OF THE CISG**

The TLDB and the Vienna Convention contain various provisions dealing with damages. The damages provisions within the Central list are included in chapter VII, between the chapters that deal with non-performance and hardship and, in chapter IX if one include the duty to pay interest. With respect to the CISG, the provisions dealing with damages appear in article 45(1)(b) in chapter II section III on the

remedies available to the buyer in case of breach of the seller's obligation, in article 61(1)(b) in the subsequent chapter and in the articles 74 to 78 located in the chapter V on the provisions common to the obligations of the seller and of the buyer. For the purposes of this fifth and final part, we shall focus only to the comparison between the TLDB principles VII.1 to VII.3.2 and article 74 CISG that deal with the principles of full compensation and of foreseeability of loss.

### **A. General right of damages: The principle of full compensation**

Both the Central List ( TLDB Principle VII.1) and the Vienna Convention (Art. 74) embody the principle of full compensation in case of non-performance by one of the parties to a contract.

#### **1. The Central List**

TLDB Principle VI.1 provides that '[t]he aggrieved party is entitled for damages for loss caused by the other party's non-performance of its contractual obligations.'<sup>194</sup> The purpose in allocating damages is to put the creditor in the same economical position it would have been if the contract have been performed.<sup>195</sup> The right of damages in International Law is also seen as a 'general conception of law'<sup>196</sup> or, as a manifestation of the principle of good faith.<sup>197</sup>

To be entitled for damages, the aggrieved party has to comply with three requirements: it has to prove the existence of a non-performance, a loss and a causal relation between those two.

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<sup>194</sup> [www.TLDB.de](http://www.TLDB.de)> List of Principles

<sup>195</sup> Filali Osman, *supra* footnote 27 at 179 : 'Le droit anational envisage les dommages et intérêts comme un moyen permettant de placer le créancier dans la situation économique qui lui eût procuré l'exécution du contrat'.

<sup>196</sup> Georges Ripert, 'Les règles du Droit Civil Applicables aux Rapports Internationaux (Contribution à l'Etude des Principes Généraux du Droit visés au Statut de la Cour Permanente de Justice Internationale)', 44 Rec.Cours 1933-II, at 602, [www.TLDB.de](http://www.TLDB.de) – DocID 128400, accessed on 2006-03-31.

<sup>197</sup> ICC Award N°3131, *supra* footnote 30 at 531: 'In conformity with the Principle of Good Faith which inspires the international *lex mercatoria*, the arbitral tribunal has considered whether under the circumstances of the present case, the disturbance of the contract may be attributed to the behavior of one of the party and whether this has caused a damage to the other side the reparation of which is required by equity'.

a) A non-performance

This first requirement does not entail any difficulty. It is expressly provided in Principle VII.1 entitled '[d]amages in case of non-performance'. An issue would be to know if the breach of any contractual obligation, whether principal or secondary, would justify the same remedy. According to the broad wording of the provision, nothing should prevent the allocation of damages in case of non-performance of a secondary obligation. Such a solution would be in line with the analysis made about the termination of the contract for fundamental non-performance (Part II) and according to which even non-performance of secondary obligation may lead to the termination of the contract as soon as the breach was fundamental.

It shall also be pointed out that the wording of the rule should be interpreted as to provide for a liability without fault: the aggrieved party is not entitled for damages merely because the non-performing party was in fault. That solution is in line with the UNIDROIT Principles (Article 7.4.1).<sup>198</sup>

b) A Loss

Under this heading, three specific issues are to be analysed namely the questions of damages for future losses, non-pecuniary damages and loss of profits.

TLDB Principle VII.1 does not give a definition or a list of losses that may be recoverable. However, Principles VII.3.1 and VII.3.2 give some indications. The first one provides that the loss must be 'actual' and the second one provides that loss should include also lost profits.

*1) Damages for future losses*

As seen above, Principle VII.3.1 provides that the loss must be 'actual'. 'Actual loss' are broad terms and we shall consider whether or not to interpret the term 'actual' in the light of the UNIDROIT Principles which provide for the certainty of harm.

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<sup>198</sup> See Official Comments in 'Guide to article 74' available on <http://www.cisg.law.pace.edu/cisg/principles/uni74.html>, accessed on 2006-03-31.

Indeed, Article 7.4.3 of UNIDROIT Principles provides that '[c]ompensation is due only for harm, including future harm, that is established with a reasonable degree of certainty'. Thus, in applying that article to interpret the Central List provisions on damages, future loss might be included when calculating the amount of damages, as soon as they are certain. On the other hand, the test within the UNIDROIT is translated by the added words: 'with a reasonable degree of certainty' which do not appear in the Principle VII.3.1. Thus, it might be held that the TLDB Principle is stricter than the UNIDROIT provision and one may consider that future loss might not be included when calculating the amount of damages because they cannot be ascertained at one hundred percent and thus are not 'actual'. Such interpretation seems to be more in line with the literal meaning of the word. At the end the outcome is unclear and, unfortunately, the cases available on the Central List databases are unhelpful.

### 2) *Non-pecuniary losses*

Contrary to the UNIDROIT Principle (Article 7.4.2(2)), the TLDB Principle VII.3.1 does not expressly include the non-pecuniary losses such as physical injury, death or emotional distress. Nevertheless, as soon as those losses are 'actual', nothing should prevent their inclusion.

### 3) *Lost profits*

In relation to lost profits, the Central List Principle VII.3.2 provides that '[t]he party who suffers a loss from the failure of the other party to deliver is entitled to calculate his loss based on the difference between the price in the non-executed contract and the market price at the date of default.'<sup>199</sup> The rule according to which lost profits are also to be reimbursed forms part of the general rule of full compensation and, in that sense, constitutes a 'universal consensus'.<sup>200</sup> Principle VII.3.2 provides expressly for a method to calculate the gains of which the aggrieved party was deprived: it is the difference between the price of the unexecuted contract and the market price at the

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<sup>199</sup> [www.TLDB.de](http://www.TLDB.de) > list of Principles

<sup>200</sup> John Y. Gotanda 'Recovering Lost Profits in International Disputes', (2004) 36 *GILJ* 61 at 111, available on [www.TLDB.de](http://www.TLDB.de) – DocID: 123430 (citations only), accessed on 2006-03-31.

date of the default. A problem might arise when there is no market price. The Central List does not contain an express provision in that case. Thus regard has to be had on the general rule of Principle VII.1 and arbitrators would have to choose the suitable method. Accordingly, the calculation of the damages might be based on the evaluation of the ordinary and foreseeable course of business.<sup>201</sup> Nevertheless, the aggrieved party may seek to enrich itself. The TLDB Principles forbid this possibility because it would jeopardize the goal of full compensation and would be contrary to the Principle X.1 on unjust enrichment.<sup>202</sup>

### c) Causal relation between the non-performance and the loss

The rule is contained within Principles VII.1 ('loss caused by the other party's non-performance') and VII.2 that deals with the Principle of foreseeability of loss. Indeed, the latter provision provides that the loss must be the 'likely result of [the non-performing party's] non-performance'. As it shall be seen later on when dealing with the Vienna Convention, the use of the word 'likely' is stricter than 'possible'. A probability estimation had to be done but it is not necessary for the aggrieved party to prove that the non-performance was, at a hundred percent, at the origin of the loss.

## 2. The Vienna Convention

Article 74 CISG first sentence provides '[d]amages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.' Here again, the 'basic philosophy of the action for damages is to place the injured party in the same economic position he would have been if the contract had been performed'.<sup>203</sup> Like the Central List counterpart, three requirements are to be met in order for the aggrieved party to claim damages.

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<sup>201</sup> ICC Award No. 1526, 1974 *Clunet*, at 918, available on [www.TLDB.de](http://www.TLDB.de) – DocID: 201526 (Abstract), accessed on 2006-03-31.

<sup>202</sup> [www.TLDB.de](http://www.TLDB.de) > Principle X.1: 'If a party is unjustifiably enriched at the expense of another, that party has to pay a sum of money equal to the value of the enrichment to be determined according to the contractually agreed price or market price, including full compensation for the use (usufruct) of the subject matter of the enrichment ("Nemo sine causa alterius jactura locupletari debet"; "condictio indebiti"; "unjust enrichment").'

<sup>203</sup> Secretariat Commentary on article 70 of the 1978 Draft [that became article 74 of CISG], available on <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-74.html>, accessed on 2006-03-31.

a) Non-performance

Article 74 CISG refers to ‘breach of contract’ without any further indication. No definition of breach of contract is provided. In conformity with articles 45(1) and 61 of the Convention, breach of contract might be interpreted as any non-performance of contractual obligations, whether principal or secondary. It might be held that the Vienna Convention provides for an ‘unified notion of breach.’<sup>204</sup> Here again, such a solution is in conformity with the analysis of the concept of fundamental breach of contract (Part II) in which it was demonstrated that breach of secondary obligations might also be considered as fundamental under article 25 CISG.

About the intention of the defaulting party, scholars agree to consider that article 74 CISG provides for a strict liability, i.e fault or fraud of the non-performing party is not taken into account.<sup>205</sup>

b) A Loss

Article 74 CISG first sentence provides that damages consist of ‘a sum equal to the loss, including lost profits’. Like the Central List counterpart, no definition of loss neither a list of illustrations is provided. It shall be determined whether or not damages for future losses and non-pecuniary losses are recoverable under the Convention and how lost profits are calculated.

1) *Damages for future losses*

Like the Central List Principles, the Vienna convention does not expressly provide for future loss, but compared with principle VII.3.1, Article 74 does not refer to an ‘actual loss’. Here again, recourse to the UNIDROIT Principles and, in particular, to Article 7.4.3 on ‘Certainty of Harm’ might be helpful. Indeed, Article 7.4.3 explicitly provides the liability for future damages and in itself, nothing in article 74 CISG

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<sup>204</sup> Handelsgericht Zürich, case number HG920670, 26.04.1995, Switzerland, available on [www.unilex.info](http://www.unilex.info) (Abstract), accessed on 2006-03-31. In that case, damages were awarded for breach of the secondary obligations of transportation and installation of the good.

<sup>205</sup> See for instance Victor Knapp, ‘Article 74’ in ‘Bianca-Bonell *Commentary*’ at 540, available on <http://www.cisg.law.pace.edu/cisg/biblio/knapp-bb74.html>, accessed on 2006-03-31; Joseph Lookofsky, *supra* footnote 129 at 152.

prevents for the recover of future damages. In particular and according to a South African Professor,<sup>206</sup> a Court may follow two approaches: on one hand, the amount of the loss including future loss is established with certainty, the court will award that amount. On the other hand, the loss cannot be established with sufficient certainty and, thus, the Court will use of its discretion.

### 2) *Non-pecuniary losses*

Article 74 of the CISG does not make any reference about non-pecuniary losses. However, article 5, that deals with the sphere of application of the Convention, provides that the Convention does not apply ‘to the liability of the seller for the death or personal injury caused by the goods to any person’. Thus, it differs from the TLDB Principles. Nevertheless, according to Sieg Eiselen,<sup>207</sup> the fact that the UNIDROIT Principles contain a provision dealing with non-pecuniary damages (Article 7.4.2(2)) ‘provides good grounds for arguing that the provisions of article 5 CISG should be restrictively interpreted and only the liability for personal injury or death should be excluded, but not other personal damages such as damage to reputation’. In a French decision it was decided that, in itself, damages for loss of commercial reputation are not to be rewarded but the buyer was entitled to recover them under article 74 CISG as soon as such a loss had resulted in a monetary damage.<sup>208</sup>

### 3) *Lost profits*

Article 74 CISG entitles the aggrieved party to recover loss of profits. However, contrary to TLDB Principle VII.3.2, CISG article 74 does not provide a specific method to calculate lost profits. According to the Secretariat Commentary, lost profits must be calculated ‘in the manner which is best suited to the circumstances of the breach’.<sup>209</sup> Different examples are given depending whether the buyer or the

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<sup>206</sup> Sieg Eiselen ‘Remarks on the Manner in which the UNIDROIT Principles of International commercial Contracts May be Used to Interpret or Supplement Article 74 of the CISG’, Editorial Remark, October 2004 in ‘Guide to article 74’, supra footnote 196.

<sup>207</sup> Ibid.

<sup>208</sup> Court of Appeal of Grenoble, Sté Calzados Magnanni v. Sarl Shoes General International - S.G.I., case number 96J/00101, 21.10.1999, available on [www.unilex.info](http://www.unilex.info), accessed on 2006-03-31.

<sup>209</sup> Supra 203.

seller is in breach, whether the goods have been already manufactured or not and, if so, whether they can be resold.<sup>210</sup> Moreover, Arts 75 and 76 CISG provide methods of calculation when the contract has been avoided for breach of either the buyer or the seller: according to article 75 CISG, where the seller is in breach and the buyer made a replacement transaction or where the buyer is in breach and the seller had to resell the goods, the damages including lost profits are equal to the difference between the contract price and the price of the substitute transaction. Article 76 provides for the difference between the contract price and the market price in those cases where no purchase or resale was made under article 75.

Difficulties might arise in more specific situations. Indeed, according to Professor Schneider, although re-sale lost profits are recoverable, less direct losses like profits lost by a manufacturer-buyer 'when [for example] goods necessary for the production are defective' should not be recoverable under the Convention but by application of the *lex fori*.<sup>211</sup> In practice, U.S Courts went far beyond in alleging that calculation of lost profits was a matter not specifically dealt within Convention and that recourse to domestic law was to be made: 'lost profits are determined by calculating the hypothetical revenues to be derived from unmade sales less the hypothetical variable costs that would have been, but were not, incurred'.<sup>212</sup> Such a recourse to domestic law endangers the Convention's goal to provide for a uniform law. Moreover, although not specifically, the Convention provides methods of calculation even though their choice depends on the specific circumstances of the case. In other cases, Courts have calculated depending on whether there was a substitute transaction<sup>213</sup> or a market price for the goods concerned.<sup>214</sup> The limit of those methods is that, under the Vienna Convention, they are applicable only where the contract is avoided. However not any breach of contract can lead to the avoidance of the contract under article 25 CISG. In situations in which the contract has not been

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<sup>210</sup> Supra.

<sup>211</sup> Eric C. Schneider (U.S.), 'Measuring Damages under the CISG' in an Editorial Analysis of article 74 CISG, available on <http://www.cisg.law.pace.edu/cisg/text/cross/cross-74.html>, accessed on 2006-04-01.

<sup>212</sup> U.S. District Court, N.D., New York Delchi Carrier S.p.A. v. Rotorex Corp., case number 88-CV-1078, 09.09.1994, [www.unilex.info](http://www.unilex.info), accessed on 2006-04-01, and the decision rendered on appeal from which the quotation was taken, supra footnote 114 .

<sup>213</sup> Supra footnote 115.

<sup>214</sup> Arbitral Award, Schiedsgericht der Börse für Landwirtschaftliche Produkte – Wien, P. v. P, case number: S2/97, 10.12.1997, available on [www.unilex.info](http://www.unilex.info) (Abstract. ), accessed on 2006-04-01.

avoided, Courts should have discretion as soon as they comply with the general rule of full compensation. For instance, in a Belgian decision, the amount of lost profits was determined ‘ex aequo et bono, taking into account the probability of a cover sale by the seller at a price significantly lower than the one agreed upon in the contract.’<sup>215</sup>

c) The causal relation between the non-performance and the loss

Article 74 CISG first sentence provides that damages consist of a sum equal to the loss suffered by a party ‘as a consequence of the breach’. The provision on foreseeability in the second sentence provides also a solution. It refers to ‘a possible consequence of the breach of contract’. As seen above, the Central List Principle provides for ‘the likely result’ of the defaulting’s party non-performance. According to Jacob S. Ziegel and borrowing his example from Lord Reid, ‘if one takes a well-shuffled pack of cards it is quite *possible*, though not *likely*, that the top card will prove to be the nine of diamonds even though the odds are 51 to 1 against’ [emphasis added].<sup>216</sup> It means that literally, the test within the Convention (possibility test) is easier to comply with, compared with the Central List (probability test). Nevertheless, Professor Ziegel considers that the wording of article 74 should be read down ‘to prevent the injured party being saddled with extravagant claims’.<sup>217</sup> Following that, it should be pointed out that the second sentence of article 74 provides that regard has to be had to ‘the facts and matters’ of the particular case. This provision should limit the ‘possibility test’ although it is still not similar to the ‘probabililty test’.

**B. An important limitation: The foreseeability of the loss**

Both the Central List and the Vienna Convention limit the right of the aggrieved party to recover its losses to their foreseeability by the defaulting party. That rule is contained in Principle VII.2 of the Central List and Article 74 second sentence of the Convention.

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<sup>215</sup> Rechtbank van Koophandel Hasselt, *Vital Berry Marketing NV v. Dira-Frost NV*, case number AR 1849/94, 02.05.1995, [www.unilex.info](http://www.unilex.info) (Abstract), accessed on 2006-04-01.

<sup>216</sup> Jacob S. Ziegel, *supra* footnote 105 at 9-38.

<sup>217</sup> *Supra*.

## 1. The Central List

TLDB Principle VII.2 provides that '[c]laims for damages are limited to the loss which the non-performing party foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being the likely result of its non-performance'. This rule is recognized in most of the legal systems although not necessarily expressly. In some legal systems, 'the rule is merged with the notion of causality'.<sup>218</sup> It is the case for Dutch, German and Swiss law.<sup>219</sup> In French law, the rule is expressly provided in article 1150 of the civil code. In English law, the rule was first stated in *Hadley v. Baxendale*, the test being of remoteness: an unforeseeable loss is a loss too remote.<sup>220</sup> To the extent that, from a comparative point of view, the rule on foreseeability is shared by many legal systems, it is without surprise that in International Law the same rule became a principle, repeatedly confirmed by Arbitral Tribunals<sup>221</sup> and by the Doctrine.<sup>222</sup>

It shall be pointed out that the TLDB principle VII.2 introduces a mixture between a subjective (the non-performing party actually foresaw the loss) and an objective (the non-performing party ought to have foreseen) criteria. The introduction of a standard of reasonableness is an element to be added to the criteria of objectivity. As already demonstrated, such a standard is included in many other TLDB Principles and it is expressly provided as a general provision in Principle I.2., the purpose being to take into account the particular circumstances of the case.

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<sup>218</sup> Denis Tallon 'Damages, Exemption Clauses, and Penalties', (1992) 40 Am.J.Comp.L., at 678, also available on [www.TLDB.de](http://www.TLDB.de) – DocID : 129100, accessed on 2006-04-01.

<sup>219</sup> Ibid.

<sup>220</sup> Supra.

<sup>221</sup> See ICC Award 1526, supra footnote 201; ICC Award 2404, 1976 *Clunet*, at 995-996, available on [www.TLDB.de](http://www.TLDB.de) – DocID 202404 (Abstract), accessed on 2006-04-01.

<sup>222</sup> Michael Mustill, supra footnote 15 at 113 : principle 14 provides that '[d]amages for breach of contract are limited to the foreseeable consequences of the breach'; 'Fouchard, Gaillard, Goldman', supra footnote 23 at 833: 'some awards have held by way of a general principle, that only direct and foreseeable losses are capable of giving rise to compensation'; Jan Paulsson 'La Lex Mercatoria dans l'Arbitrage C.C.I.', 1990 *rev.d.Arb.* at 93, available on [www.TLDB.de](http://www.TLDB.de) – DocID 127800, accessed on 2006-04-01.

## 2. The Vienna Convention

Article 74 CISG second sentence provides that ‘(...) damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the lights of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.’

As demonstrated above, the rule on foreseeability is common rule in many legal systems. The rule was also provided in article 82 of ULIS. Thus, its introduction within the Vienna Convention was not subject to lengthy debate.<sup>223</sup> According to Professor Schlechtriem, ‘[t]he underlying idea [of such rule] is that the parties, at the conclusion of the contract, should be able to calculate the risks and potential liability they assume by their agreement.’<sup>224</sup>

A question arisen by a commentator<sup>225</sup> was to know what is to be foreseen by the party in breach. According to the wording of the article, it is the amount of the loss suffered. Nevertheless, the solution appeared to be ambiguous for the same author and, he finally considers that article 74 should be interpreted as the foreseeability of ‘(a) the possibility of loss caused to the other party by the breach of contract; and (b) the probable extent of the loss under (a)’.<sup>226</sup> In practice, an Arbitral Tribunal did not consider as a normal foreseeable cost the expenses of a legal dispute of the aggrieved party with a forwarder.<sup>227</sup> On the contrary, and in another case, because it knew that the aggrieved party was a car dealer, the party in breach foresaw or ought to have foreseen the damages paid by the former to its customer.<sup>228</sup>

Compared with the TLDB Principle VII.2, Article 74 CISG second sentence does not includes a standard of reasonableness. During the Vienna Conference, an amendment

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<sup>223</sup> See the various Uncitral Reports already mentioned above and the internet link about the legislative history of article 74 CISG available on <http://www.cisg.law.pace.edu/cisg/chronology/chrono74.html>, accessed on 2006-04-03.

<sup>224</sup> Peter Schlechtriem, *supra* footnote 118 at 97.

<sup>225</sup> Victor Knapp, *supra* footnote 203 at 541.

<sup>226</sup> *Supra*.

<sup>227</sup> Arbitration Institute of the Stockholm Chamber of Commerce, Award number 107/1997,1998, available on [www.unilex.info](http://www.unilex.info), accessed on 2006-04-03.

<sup>228</sup> Oberlandesgericht Köln (Germany), case number 22 U 4/96, 21.05.1996, [www.unilex.info](http://www.unilex.info), accessed on 2006-04-03.

proposal from Pakistan intended to add the concept of reasonableness in order to provide for a more objective wording. Although that proposal was rejected, article 74 CISG, like the TLDB Principle, contains a mixture of subjective and objective criteria. Moreover the words ‘in the light of the facts and matters (...)’ might be interpreted as constituting a criteria similar to the standard of reasonableness under the Central List. Finally, because the criterion of reasonableness appears many times within the Convention, it might be held that it constitutes a general principle on which the convention is based (Art.7 CISG) and thus applicable to Article 74.

### **Conclusion**

The rules on damages within the Central List and the Vienna Convention are enacted in a broad wording. They share many similarities. On the other hand there are differences mainly on the matter of non-pecuniary damages and probably damages for future losses although the solution is unclear within the Central list. Finally, it should be pointed out that for the calculation of lost profits, in both cases no uniform solution has been found and practitioners would have to look at the particular circumstances of the case.

### **CONCLUSION**

The Vienna Conventions aims to last in times. References to the legislative history of the text in order to interpret its provisions may threaten the capacity of adaptation of the Convention to the new developments of the transnational commercial law. It is particularly true with respect to general concept or principles like the concept of good faith. Whereas scholars are divided on the meaning of the concept when interpreting article 7(1) CISG, the TLDB principle I.1 affords an easy and consensual solution in line with the most recent developments in national laws and according to which parties to a contract have a duty to act in good faith. Consequently, the TLDB Principle is a useful basis for the interpretation of article 7(1) CISG. However, the flexibility and openness of the TLDB list does not fit automatically to every provisions of the Convention. The analysis in Part II demonstrates that the TLDB Principle VI.1 does not provide a definition of fundamental non-performance nor it affords a guideline that would allow the practitioners to know when they precisely

face a fundamental non-performance. On the other hand, it was demonstrated that a definition of fundamental breach under the Convention was necessary in the light of its role within the text. However, article 25 CISG is subjected to different interpretations and fails of some practicability. In the conclusion of the second part, it was held that the substantiality of a contractual breach was to be considered in the light of the specific circumstances of each case. This statement is in line with the structure and goal of the TLDB list which, thus, does not constitute a helpful basis for the interpretation of article 25 CISG. In Part three and four, the solution given by the Convention on the subject-matters of exemption and price determination are rather originals compared with the TLDB counterparts. Indeed, on one hand, whereas the Central provides for Force majeure and Hardship in two different Principles, the CISG adopts a 'neutral' position avoiding any recourse to national concepts that would endanger a uniform interpretation. It was finally held that the concept of exemption within the CISG was in-between the concepts of force majeure and hardship and that the compromise reached on the issue of temporary exemption is jeopardising the uniformity of interpretation. The result thereof is that, in itself, the TLDB Principles are of little help or, at least in a negative way. On the other hand, whereas the Central admits that a contract may be formed although a price is not determined and provides a method of calculation of this price, the Vienna Convention contains two antagonist articles 14 and 55, the first one denying that a contract with undetermined price may exist, the second providing a method of price determination when a contract has been validly made although without a determined price. Again different interpretations to both articles were given and presumably, TLDB principles IV.5 may constitute a basis, at least for the interpretation of article 55 CISG. Finally, the provisions on damages of the TLDB and the CISG share many similarities. In both cases, the principle of full compensation and its main limit, the principle of foreseeability of the loss are admitted. On the other hand, there are some differences on specific issues such as the admission of futures losses, in which the solution seems unclear within the TLDB, or lost profits where a specific method of calculation does not exist within the Vienna Convention. Since the TLDB principles are drafted in terms as broad as the provisions of article 74 CISG, they afford little help to the interpretation of the Convention.

The Central list is an instrument of international trade law completely different to the CISG and almost at the opposite: The TLDB was created by a team of academics and law students under the direction of Professor Klaus Peter Berger whereas the Convention was drafted after a long process of deliberations between scholars and delegates of different legal cultures. The TLDB aims to deal with every aspects of the *lex mercatoria* whereas the CISG is focused on the international sale of goods. The CISG is a traditional codification of rule whereas the purpose of the TLDB is to provide a new form of codification. Consequently, the contribution of the TLDB to the interpretation of the Vienna Convention is not easy to evaluate. The practitioners should use it just as an additional tool for a better understanding of the Convention and of the transnational commercial law.

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