

**The relationship between the use of the  
Unidroit Principles and the CISG in a compara-  
tive view and how the Unidroit Principles con-  
tribute to the interpretation of the CISG**

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I hereby declare that I have read and understood the regulations governing the submission of Master of Laws 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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## List of abbreviations

Art.	Article
Artt.	Articles
BGB	Bürgerliches Gesetzbuch/ German Civil Code
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11.04.1980
Cf	versus see
ed.	Edition
e-mail	electronic mail
etc.	et cetera
f.	following page
ff.	following pages
i.e.	that is
intern.	International
Nr.	Number
Pg.	Page
Pp.	Pages
UN	United Nations
www	World Wide Web

## 1. Introduction

In the course of globalization and the increasing international communication and trade, the rules governing the international trade are getting more and more important. Some authors even follow the opinion that when the world becomes one market, this market will require one law.<sup>1</sup> Numerous companies and entrepreneurs are challenged and forced to deal with the approaches in foreign countries. In order to counteract the resulting legal insecurities, various international principles and rules got developed such as the Unidroit Principles of International Commercial Contracts<sup>2</sup> and the United Nations Convention on Contracts for the International Sale of Goods<sup>3</sup>.

The former secretary of the United Nations Commission on International Trade Law<sup>4</sup>, Gerold Herrmann<sup>5</sup>, in 2000 proposed the preparation of a Global Commercial Code.<sup>6</sup> It is intended that the Code is a set of special rules relating to the most important kinds of commercial transactions. One of the already existing separate international conventions or model laws is the CISG. The CISG provides a uniform text of law for international sale of goods. The Convention was prepared by the UNCITRAL and adopted by a diplomatic conference on 11 April 1980. Currently 66 countries have ratified, acceded to, or otherwise adopted the CISG.<sup>7</sup> The number is constantly growing. So far only seven<sup>8</sup> of the fifty eight African states<sup>9</sup> joined the Convention.<sup>10</sup> Ghana signed the Convention<sup>11</sup> but not yet set it into force. South Africa considers joining the Convention.<sup>12</sup>

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<sup>1</sup> Lando, pg. 453/ Bonell, Global Commercial Code, pp. 469ff..

<sup>2</sup> International Institute for the Unification of Private Law, Principles of International Commercial Contracts, Rome 1994, 2004, hereinafter Unidroit Principles.

<sup>3</sup> United Nation Convention on Contracts for the International Sale of Goods, April 11, 1980, hereinafter CISG.

<sup>4</sup> Hereinafter UNCITRAL.

<sup>5</sup> Herrmann on <http://www.cisg.law.pace.edu/cisg/biblio/bonell1.html> (09.02.2006).

<sup>6</sup> Bonell: the coordination of the Unidroit Principles has followed the idea and goes even further, Bonell, Global Commercial Code, pg. 469.

<sup>7</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html) (15.11.2005).

<sup>8</sup> Burundi, Egypt., Guinea, Lesotho, Mauritania, Uganda, Zambia.

<sup>9</sup> <http://www.welt-in-zahlen.de/laenderinformation.phtml> (18.11.2005).

<sup>10</sup> <http://www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=658> (16.11.2005).

<sup>11</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html) (16.11.2005).

<sup>12</sup> The reasons for South Africa not having joined the Convention yet dates from the political and historical background as well as the current development of more important law sectors.

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The International Institute for the Unification of Private Law established a working group which prepared the Unidroit Principles of International Commercial Contracts. The Unidroit Principles are an attempt to a progressive harmonisation of the general principles of contract law.<sup>13</sup> The Principles are based on the idea, that private law can also be unified other than by legislative means. The idea was inspired by the American Restatements of the Law of Contracts, according to which the international law of contract was meant to be elaborated in a comparative approach, summarized and structured.<sup>14</sup> Principles were to be laid down that were common to the existing national legal systems and/or which seemed best adapted to the particular needs of international commercial contracts. As such, the aim was "to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied."<sup>15</sup> Although phrased as a rule of law, the Principles were deliberately not drafted as a convention or model law to be transformed into national law. Instead, the idea was to elaborate international principles of contracts without a direct binding force, the acceptance and application of which were exclusively dependent on its persuasive power and the authority of Unidroit.<sup>16</sup>

In 1994 the first edition of the Unidroit Principles appeared and in 2004 the second enlarged edition.<sup>17</sup> The Unidroit Principles have a great influence on the world trade law. Parties to international commercial contracts now often agree that their contract shall be governed by the Unidroit Principles and the latter ones are widely applied by international commercial tribunals.<sup>18</sup> The Principles have exercised considerable influence on modern national codes and statutes.<sup>19</sup> It is generally acknowledged that together with the Principles of European Contract Law<sup>20</sup> the Unidroit Principles are

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<sup>13</sup> Unidroit Principles, page xiv/

[http://www.iue.it/LAW/ResearchTeaching/EuropeanPrivateLaw/Conferences/Lando\\_CISG.pdf](http://www.iue.it/LAW/ResearchTeaching/EuropeanPrivateLaw/Conferences/Lando_CISG.pdf) (15.11.2005).

<sup>14</sup> <http://www.cisg.law.pace.edu/cisg/biblio/baron.html> (10.02.2006).

<sup>15</sup> <http://www.cisg.law.pace.edu/cisg/biblio/baron.html> (10.02.2006).

<sup>16</sup> <http://www.cisg.law.pace.edu/cisg/biblio/baron.html> (10.02.2006).

<sup>17</sup> A rather enlarged than revised edition. Zimmermann, pg. 4.

<sup>18</sup> Zimmermann, pp. 3,4/ Bonell on <http://www.unidroit.org/english/publications/review/articles/2000-2.htm> (17.11.2005).

<sup>19</sup> [http://www.iue.it/LAW/ResearchTeaching/EuropeanPrivateLaw/Conferences/Lando\\_CISG.pdf](http://www.iue.it/LAW/ResearchTeaching/EuropeanPrivateLaw/Conferences/Lando_CISG.pdf) (15.11.2005).

<sup>20</sup> The Principles of European Contract Law were prepared by the Commission on European Contract Law.

part of a new *lex mercatoria*.<sup>21</sup> The CISG has already codified a substantial part of the *lex mercatoria*.<sup>22</sup>

The *lex mercatoria* contains a list including principles as well as rules and customs.<sup>23</sup> It was originally a body of rules and principles laid down by merchants themselves to regulate their dealings.<sup>24</sup> It consisted of usages and customs common to merchants and traders in Europe, with slightly local differences. It originated from the problem that civil law was not responsive enough to the growing demands of commerce. There was a need for quick and effective jurisdiction, administered by specialized courts. Judges were chosen according to their commercial background and practical knowledge. Their reputation rested upon their perceived expertise in merchant trade and their fair-mindedness. Gradually, a professional judiciary developed through the merchant judges. Their skills and reputation would however still rely upon practical knowledge of merchant practice. The guiding spirit of the merchant law was that it ought to evolve from commercial practice, respond to the needs of the merchants, and be comprehensible and acceptable to the merchants who submitted to it. International commercial law today owes some of its fundamental principles to the Law Merchant as it was developed in the medieval ages. This includes choice of arbitration institutions, procedures, applicable law and arbitrators, and the goal to reflect customs, usage and good practice among the parties.<sup>25</sup> Today the *lex mercatoria* often gets involved as a source of law in questions of the applicable law in international business disputes.<sup>26</sup>

The content and scope of the thesis is to demonstrate and elaborate the coherence between the Unidroit Principles and the CISG. Further the focus will be on the differences in power and impact of the Unidroit Principles and the CISG as well as the differences in regulating certain issues. Attention is drawn to specific regulations and their content and scope will be compared in order to determine the influence and help

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<sup>21</sup> <http://www.cisg.law.pace.edu/cisg/biblio/baron.html#b81>(15.11.2005)/  
[http://www.iue.it/LAW/ResearchTeaching/EuropeanPrivateLaw/Conferences/Lando\\_CISG.pdf](http://www.iue.it/LAW/ResearchTeaching/EuropeanPrivateLaw/Conferences/Lando_CISG.pdf)  
(15.11.2005).

<sup>22</sup> Guillemard, pg. 86.

<sup>23</sup> Guillemard, pg. 86.

<sup>24</sup> <http://www.cisg.law.pace.edu/cisg/biblio/baron.html> (02.02.2006).

<sup>25</sup> [http://en.wikipedia.org/wiki/Lex\\_Mercatoria](http://en.wikipedia.org/wiki/Lex_Mercatoria) (07.01.2006).

<sup>26</sup> Prokati, pg.1.

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of the Unidroit Principles to interpret the CISG and answer the question if the two sets of provisions can be seen as alternatives or complementary instruments.

## **2. Scope of application**

In order to apply the Unidroit Principles and the CISG it is necessary to determine the scope of application of the Principles and the Convention. In both cases the scope of application is restricted by the relevant rules respectively principles.<sup>27</sup> The regulations have common elements and common fields of application such as they are applicable for contracts with international character and not to consumer contracts. But there are elements of application where the regulations differ. The CISG deals with a specific contract, the international sale of goods and the Unidroit Principles cover contract in general. The CISG deals with a certain number of subjects identical or similar to those of the Unidroit Principles and the CISG was an obligatory point of reference in the preparation of the Unidroit Principles.<sup>28</sup> In the following an overview of the scope of application of both the Unidroit Principles and the CISG is given.

### **2.1 Scope of application of the CISG**

Artt. 1 – 6 CISG determine the scope of application of the CISG. The latter provisions can be divided into two groups. Artt. 1, 2, 3, and 6 lay down which contracts fall within the scope of the CISG. Whereas Artt. 4 and 5 determine the extent to which they are governed by the Convention, i.e. which parts of sales law and general contract law are to be governed by the CISG. The scope of application is defined by geographical criteria in terms of Art. 1 CISG in conjunction with Art. 10 CISG and substantive criteria in terms of Art. 1 (1), 3, 4, 5 CISG. The temporal scope is laid down by Art. 100 CISG. The geographical criteria, the places of business, are determined by application of Art. 10 (a) CISG without reference to the nationality, civil or commercial character of the parties or of the contract<sup>29</sup>, place of incorporation, or place of head office.<sup>30</sup>

The articles on scope of application state both what is included in the coverage of the CISG and what is excluded from it. In terms of Art. 1 (1) CISG the Convention ap-

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<sup>27</sup> This thesis does not purport to advance a conceptual debate over the notions of “rules” and of “principles”.

<sup>28</sup> Guillemand, pg. 85.

<sup>29</sup> Art. 1 (3) CISG.

<sup>30</sup> <http://www.cisg-online.ch/cisg/materials-commentary.html#Article%201> (15.11.2005)/ Schlechtriem, pg. 8.

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plies to contracts of sale of goods between parties whose places of business are in different states and either both of those states are contracting states or the rules of private international law lead to the law of a contracting state. A few states have availed themselves of the authorization in Art. 95 CISG to declare that they would apply the Convention only in the former and not in the latter of these two situations. As the Convention becomes more widely adopted, the practical significance of such a declaration will diminish. The CISG only applies to international commercial sales of goods. Each of these elements constitutes an important limitation on the scope of the CISG's applicability. The sale must be international in character. A sale is considered "international" if it involves "parties whose places of business are in different states."

The adoption of the CISG by countries provides important benefits. Parties negotiating international sales contracts often find the "choice of law" issue to be among the most contentious. Each party is familiar with its own domestic sales law, and prefers that its local rules apply to the transaction. The CISG enables the parties to avoid difficulties in negotiating "whose law will govern the contract" by putting into place internationally accepted substantive rules on which contracting parties, courts, and arbitrators may rely.<sup>31</sup>

If both states in which the parties have their places of business are contracting states, the CISG provisions apply even if the international private law forum would normally designate the law of a third country such as the law of the State in which the contract was concluded. This result could be defeated only if the litigation took place in a third non-contracting state, and the rules of private international law of that state would apply the law of the forum, i.e., its own law, or the law of a fourth non-contracting state to the contract.<sup>32</sup>

A further application of this principle is that if two parties from different States have chosen the law of a Contracting State as the law of the contract, the CISG is applicable even though the parties have not specifically mentioned the Convention. The basic principle of contractual freedom in the international sale of goods is recognised by

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<sup>31</sup> <http://www.osec.doc.gov/ogc/occic/cisg.htm> (15.11.2005).

<sup>32</sup> <http://www.cisg-online.ch/cisg/materials-commentary.html#Article%201> (15.11.2005).

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Art. 6 CISG. The provision determines the principle of party autonomy and permits the parties to exclude the application of the Convention (“opting out”)<sup>33</sup> or derogate from or vary the effect of any of the provisions. The exclusion of the Convention would most often result from the choice by the parties of the law of a non-contracting state or of the domestic law of a contracting state to be the law applicable to the contract. Derogation from the Convention would occur whenever a provision in the contract provided a different rule from that found in the Convention.<sup>34</sup>

In addition to the possibility to exclude or vary the provisions the parties may also agree to the CISG even though their contract does not underlie the CISG because of the missing conditions of application.<sup>35</sup> This rule however does not derive from the CISG itself but rather from the decisive national law and its provisions of substantial party autonomy.<sup>36</sup>

In terms of Art. 2 CISG, the Convention only applies to commercial transactions, and does not apply to sales of goods that are "bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known" that the goods involved were bought for such use. Additionally, the CISG does not apply to the following types of sales: by auction; on execution or otherwise by authority of law; of stocks, shares, investment securities, negotiable instruments or money; of ships, vessels, hovercraft or aircraft; or of electricity. In many states some or all of such sales are governed by special rules reflecting their special nature.<sup>37</sup>

In terms of Art. 3 CISG, the Convention distinguishes contracts of sale from contracts for services in two respects. A contract for the supply of goods to be manufactured or produced is considered to be a sale unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for their manufacture or production. When the preponderant part of the obligations of the party who

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<sup>33</sup> Schlechtriem, g. 14.

<sup>34</sup> Schlechtriem, pg. 14/ <http://www.cisg.law.pace.edu/cisg/text/p23.html> (15.11.2005).

<sup>35</sup> Schlechtriem, pg. 17.

<sup>36</sup> Schlechtriem, pg. 17.

<sup>37</sup> <http://www.osec.doc.gov/ogc/occic/cisg.htm> (15.11.2005).

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furnishes the goods consists in the supply of labour or other services, the Convention does not apply.

In particular Art. 4 CISG and several other articles make clear that the subject matter of the Convention is restricted to formation of the contract and the rights and duties of the buyer and seller arising from such a contract. In particular, the Convention is not concerned with the validity of the contract or of any of its provisions or of any usage, the effect which the contract may have on the property in the goods sold or in terms of Art. 5 CISG the liability of the seller for death or personal injury caused by the goods to any person.

## 2.2 Scope of application of the Unidroit Principles

The Unidroit Principles constitute a major achievement in the progressive development of international commercial law and built a solid foundation for a modern *lex mercatoria* for the international trading community.<sup>38</sup> The Unidroit Principles best serve the international and national trade community with many potential uses such as being used as inspiration for future conventions in the contractual area, as aids in the interpretation of existing conventions, such as CISG, and the filling of gaps; as a replacement for domestic contract rules where the principles of private international law lead to the application of the domestic rules of a country; and as an important model for the introduction of domestic contract codes or the revision of existing codes. The purpose of application of the Unidroit Principles is determined in the Preamble. The preamble states that:

*“The Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them. They 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. They may be used to interpret or supplement international uniform law instruments. They may be used to interpret or supplement domestic law. They may serve as a model for national and international legislators.”*

Both editions, the edition of 1994 and the edition of 2004, of the Unidroit Principles of International Commercial Contracts are published together with comments on the Principles in order to interpret them. The Unidroit Principles are applicable to all sorts of contracts as long as the contract has an international character and is in the commercial field. For the international character it is only necessary to exclude situations where no international element at all is involved and therefore has to be construed extensively as possible.<sup>39</sup> Even though the Unidroit Principles are construed for international commercial contracts it is still in the parties' discretion to agree on the Unidroit Principles for domestic contracts. The parties must only be aware that

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<sup>38</sup> Ziegel on <http://www.cisg.law.pace.edu/cisg/biblio/ziegel2.html> (12.05.2005).

<sup>39</sup> Unidroit Principles, pg. 2.

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their contract will be subject to mandatory domestic law governing the contract.<sup>40</sup> The commercial element has also to be interpreted in a very broad way. The intention is to exclude consumer transactions in order to avoid mostly mandatory rules for consumer contracts in various legal systems.<sup>41</sup>

There are different ways in which the Unidroit Principles may be used. There are cases where the parties expressly have chosen the Unidroit Principles and there are cases when the Unidroit Principles might be applicable in the case of the absence of a choice by the parties.

In the case the parties have expressly agreed on the Unidroit Principles they may have chosen them instead of domestic law, in conjunction with particular domestic law or in connection with international uniform rules.<sup>42</sup> The problem with the choice of the Unidroit Principles by the parties is that the application of the Unidroit Principles will normally be considered to be a mere incorporation into the contract and the law governing the contract will still be determined on the basis of the private international law rules.<sup>43</sup> Art. 1.4 Unidroit Principles states that the Principles will only be binding to the parties to the extent that they do not affect the rules of the applicable law from which the parties may not derogate. In order to avoid the infringement of domestic law rules an additional arbitration agreement can be seen as a solution<sup>44</sup> since arbitrators are not necessarily bound by a particular domestic law.

The Unidroit Principles are also applicable when the parties to the contract have agreed that their contract shall be governed by general principles of law, the *lex mercatoria* or the like. Parties usually agree on such rules in the case they cannot agree on the choice of a specific domestic law.<sup>45</sup> Due to the vagueness of the concept it is highly recommended in Comment 4 b on the Unidroit Principles 2004 to have recourse to a systematic and well-defined set of rules such as the Unidroit Principles instead of only referring to general principles of law, *lex mercatoria* or the like.

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<sup>40</sup> Unidroit Principles, pg. 3.

<sup>41</sup> Unidroit Principles, pg. 2.

<sup>42</sup> Bonell on <http://www.unidroit.org/english/publications/review/articles/2000-2.htm> (17.11.2005)/ Unidroit Principles, pg. 3.

<sup>43</sup> <http://www.cisg.law.pace.edu/cisg/biblio/bonell96.html> (06.02.2006).

<sup>44</sup> Unidroit Principles, pg. 3.

<sup>45</sup> Unidroit Principles, pg. 4.

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In terms of Comment 4 c on the Unidroit Principles, the Unidroit Principles might be applicable in the absence of any choice of law by the parties in the case the dispute is referred to arbitration and when it can be inferred from the circumstances that the parties intended to exclude the application of a domestic law or when the contract presents connecting factors with many countries none of which is predominant enough to justify the application of one domestic law to the exclusion of all the others.

The Preamble further states that the Unidroit Principles may be used to interpret and supplement international uniform law instruments. No difficulties arise when the parties include an express reference to the Unidroit Principles which is very frequently done.<sup>46</sup> If there is no reference to the Unidroit Principles there is a prevailing opinion that international uniform law instruments shall be interpreted in accordance with International Principles in order not to lose the original international character. However the decision whether or not the Principles might be applicable is in the discretion of the judges and arbitrators. Traditionally international uniform law instruments have been interpreted on the basis of, and supplemented by, principles and criteria of domestic law.<sup>47</sup>

The Unidroit Principles may also be used to supplement or interpret domestic law. In some cases the domestic law is burdened with disadvantages that the court or the arbitration tribunal is faced with doubts as to the proper solution to be adopted under that law.<sup>48</sup> The reasons therefore can be that the court or arbitration tribunal has different alternatives and it is therefore impossible for them to establish the relevant rule or there might be no specific solution at all which often happens in countries with rudimentary legal sources.<sup>49</sup> Further the Unidroit Principles may also be used to substitute domestic law when it is impossible or extremely difficult to establish the relevant rule of that particular domestic law with respect to a specific issue, i.e. it would entail disproportionate efforts and/ or costs.<sup>50</sup> In cases where the dispute relates to an international commercial contract the Unidroit Principles are a valuable resource in

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<sup>46</sup> Bonell on <http://www.unidroit.org/english/publications/review/articles/2000-2.htm> (17.11.2005).

<sup>47</sup> Comment 5 on Unidroit Principles.

<sup>48</sup> Comment 6 on Preamble of the Unidroit Principles.

<sup>49</sup> Bonell on <http://www.unidroit.org/english/publications/review/articles/2000-2.htm> (17.11.2005).

<sup>50</sup> Comment 8 on Preamble of the Unidroit Principles.

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order to interpret and supplement the applicable domestic law rules in order to serve the special need of the international relationship.<sup>51</sup>

In addition the scope of application of the Unidroit Principles is extended to being a model for national and international legislators. In national law the task in helping to develop and update foreign economic relationships could be fulfilled by the Principles when such countries lack of a developed body of legal rules or when due to dramatic changes in socio-political structures the country has a need to change the existing rules in particular the rules relating to economic and business activities.<sup>52</sup> In international law the Unidroit Principles can be regarded as an important source for drafting of conventions and model laws in order to avoid inconsistency in the terminology.<sup>53</sup>

### **2.3 The borderline between the CISG and the Unidroit Principles**

The Unidroit Principles have to be regarded as "soft law"<sup>54</sup> or as private codification<sup>55</sup> because they do not involve Governments and therefore are not binding instruments and in consequence their acceptance depends upon their persuasive authority.<sup>56</sup> The Unidroit Principles are not mandatory, but rather amount to "non-legislative instruments of harmonisation of law"<sup>57</sup>. They aim to aspire to be a model for national and international legislators<sup>58</sup> and provide contracting parties with an international restatement of general principles of contract law. The Unidroit Principles are applicable to all kinds of international commercial contracts whereas the CISG's scope of application is limited to international commercial contracts for the sale of goods. The crucial difference between the Unidroit Principles and the CISG is that the latter one is a states agreement which can be seen as one important binding instrument in the field of trans-national commercial law and contains the core of a

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<sup>51</sup> Comment 6 on Preamble of the Unidroit Principles.

<sup>52</sup> Comment 7 on Preamble of the Unidroit Principles.

<sup>53</sup> Comment 7 on Preamble of the Unidroit Principles.

<sup>54</sup> Bonell on <http://www.unidroit.org/english/publications/review/articles/2000-2.htm> (17.11.2005).

<sup>55</sup> Kupsch on <http://64.233.161.104/search?q=cache:U-6t3I-QUtQJ:www.jurawelt.com/download/studentenwelt/seminararbeiten/international/pecl.pdf+unterschied+un+kaufrecht+und+Unidroit+principles&hl=de> (18.11.2005).

<sup>56</sup> Unidroit Principles, page xv.

<sup>57</sup> Unidroit Principles, at introduction.

<sup>58</sup> Guillemand, pg. 85.

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true international commercial code whereas the Unidroit Principles are not mandatory provisions.<sup>59</sup>

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<sup>59</sup> Guillemard, pg. 85.

### **3. Comparable view, description and analysis of certain rules in the CISG and the Unidroit Principles**

In the following the specific provisions in the CISG and in the Unidroit Principles will be compared. Both sets of rule appear to be extremely successful. To some extent, as discussed before they have the same scope of application and it has to be investigated how and to what extent they differ or may be co-exist and possibly even support each other in practise.

#### **3.1 Formation of contracts**

The second part of the CISG, Artt. 14ff., regulates the formation of sale contracts. The CISG does not refer to the pre-contractual phase<sup>60</sup> and therefore takes an abbreviated approach beginning with descriptions and definitions of offer<sup>61</sup> and acceptance<sup>62</sup>.<sup>63</sup> The rules regarding the pre-contractual phase only belong partly to the rules covering the sales law. As far as the pre-contractual obligations concentrate on protecting the goods of the other party it has to be regarded as part of the non-contractual liability.<sup>64</sup> However where pre-contractual obligations regarding the assurance of the conclusion of the contract<sup>65</sup> are concerned they have to be regarded as factual issues regulated in the regulations in the CISG regarding breach of contract, liability for goods conforming to the contract or the regulations regarding the cancellation of the contract in terms of Art. 72 CISG.<sup>66</sup>

In the CISG a contract is formed when the parties agreed on two concurrent declarations of intent in succession, offer and acceptance.<sup>67</sup> It is assumed that the declarations were executed and can be determined, even in a long negotiation process. For a valid offer is it compulsory that the proposal was sent to one or more specific persons and that the offeror intended to be bound to the eventual contract in the case of acceptance. It is not necessary that he intends to be bound by the offer, i.e. that he in-

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<sup>60</sup> Schlechtriem, pg. 58.

<sup>61</sup> Artt. 14-17 CISG.

<sup>62</sup> Artt. 18-22 CISG.

<sup>63</sup> Guillemand , pg. 87.

<sup>64</sup> EuGH of 2002.09.17, NJW 2002, 3159: Gerichtsstand der unerlaubten Handlung für Ansprüche aus culpa in contrahendo.

<sup>65</sup> E.g. cancellation of contract negotiations, nature of the goods, etc..

<sup>66</sup> Schlechtriem pg. 58.

<sup>67</sup> Artt 14-24 CISG.

tends the offer to be irrevocable.<sup>68</sup> There are no particular words which must be used to indicate such an intention; therefore it may sometimes require a careful examination of the offer in order to determine whether such an intention existed. The offer has clearly to be distinguished from other declarations and especially has to be differentiated from the *invitatio ad offerendum*. This is particularly true if one party claims that a contract was concluded during negotiations which were carried on over an extended period of time, and no single communication was termed by the parties as an offer or as an acceptance. Whether there is the requisite intention to be bound in case of acceptance will be established in accordance with the rules of interpretation in terms of Art. 8 CISG.<sup>69</sup>

The rules regarding the formation of contract in the Unidroit Principles are stipulated in Chapter 2, section 1. Art. 2.1.1 Unidroit Principles determines that a contract may be concluded either by the acceptance of an offer or by the conduct of the parties which is sufficient to show agreement. In terms of Art. 3.2 Unidroit Principles a contract is concluded by the mere agreement of the parties without any further requirement. This is one of the basic ideas of the Principles.<sup>70</sup> Offer and acceptance are used to determine whether or not the parties have reached agreement.<sup>71</sup>

Same as in the CISG it is recognized that it is not always clear if a contractual agreement was reached by the parties, especially in the case the parties negotiated over a long time. Even though the moment of the formation of the contract might not be determinable a contract can be held concluded if the conduct of the parties sufficiently shows agreement, e.g. when the parties start to perform.<sup>72</sup> The parties' intention to be bound by the contract and the conduct of the party has to be interpreted in accordance with the criteria set forth in Art. 4.1 ff. Unidroit Principles.<sup>73</sup> An illustration hereof can be found in Comment 2 on Art. 2.1.1 Unidroit Principles. Two parties enter into negotiations with the goal in mind to set up a joint venture. The parties begin to perform but there was neither a determinable offer nor an acceptance and a

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<sup>68</sup> Art. 14 CISG revocability of an offer.

<sup>69</sup> [http://www.cisg-online.ch/cisg/materials-commentary.html#Article%2012 \(10.01.2006\)](http://www.cisg-online.ch/cisg/materials-commentary.html#Article%2012%20(10.01.2006))/Schlechtriem, pg. 59.

<sup>70</sup> Comment 1 on Art. 2.1.1 Unidroit Principles.

<sup>71</sup> Comment 1 on Art. 2.1.1 Unidroit Principles.

<sup>72</sup> Comment 2 and 3 on Art. 2.1.1 Unidroit Principles.

<sup>73</sup> Comment 2 on Art. 2.1.1 Unidroit Principles.

few minor points had not been settled. Subsequently the parties fail to reach agreement on these minor points but a court or arbitral tribunal may decide that a contract was nevertheless concluded since the parties had begun to perform, thereby showing their intention to be bound by a contract.<sup>74</sup>

The article on manner of formation also includes automated contracting. In the case e.g. an automobile manufacturer and a components supplier set up an electronic data interchange system which, as soon as the stocks of the manufacturer of components fall below a certain level, automatically generates orders for the components and executes such orders. The fact that the parties have agreed on the operation of such a system makes the orders and performances binding to the parties, even though they have been generated without the personal intervention of the manufacturer and supplier.<sup>75</sup> This illustration shows that the article of the Unidroit Principles for the manner of formation of contracts is very broad and anxious to cover practical advanced situations of everyday business life.

Artt. 14ff. CISG very clearly show symptoms of old age. Very important practical issues in connection with the formation of contracts are left open as a comparison with chapter 2 of the Unidroit Principles shows.<sup>76</sup> However there is no doubt that gaps regarding matters which were not dealt with in the CISG due to the later technical development for e.g. communication instruments will be filled by analogy in terms of Art. 7 (2) CISG.<sup>77</sup> The drafters of the Unidroit Principles had the advantage in including these matters since e.g. the technical advanced communication instruments were already common and showed the first problems which might occur when using them.

#### **3.1.1 Withdrawal of offer and acceptance**

Art. 15 (1) CISG provides that an offer becomes effective when it reaches the offeree. Art. 18 (2) CISG provides that an acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror [...]. Art. 15 (2) CISG deals

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<sup>74</sup> Comment 2 on Art. 2.1.1 Unidroit Principles.

<sup>75</sup> Comment 3 on Art. 2.1.1 Unidroit Principles.

<sup>76</sup> Schlechtriem, pg. 56.

<sup>77</sup> Art. 13 CISG will be analogue used for communication via fax or e-mail. Schlechtriem, pg. 45.

### 3. Comparable view of the CISG and the Unidroit Principles

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with the withdrawal of an offer by an offeror<sup>78</sup> and Art. 22 CISG deals with the withdrawal of an acceptance by an offeree. As such the CISG provides the parties with the opportunity to permissibly withdraw an offer, respectively an acceptance of an offer. The withdrawal of the offer, respectively the withdrawal of the acceptance of the offer, must reach the offeree, respectively the offeror, before or at the same time as the offer, respectively the acceptance, would have become effective. Both articles<sup>79</sup> provide a rule on the timing for an effective withdrawal. These provisions must be analyzed in the context of the basic rule of the CISG that an offer or an acceptance can not be withdrawn after it has become effective. Art. 22 CISG complements the rule in Art. 23 CISG, that a contract is concluded at the moment when an acceptance of an offer becomes effective. Regarding the application of Art. 22 CISG it has been noted that, by permitting an effective withdrawal of an acceptance, it creates the opportunity for an offeree to perhaps speculate about the expense of the offeror.<sup>80</sup> That problem is likely to arise mainly where traditional means of communication have been used by the parties. For instance, an offeree who may have sent an acceptance by ordinary paper mail may later withdraw it by sending a notice of withdrawal using a faster method of transmission<sup>81</sup> that reaches the offeror before the ordinary mail.

The Unidroit Principles provide a similar regime for the effective withdrawal of an offer<sup>82</sup> and the withdrawal of an acceptance of an offer<sup>83</sup>. It is a similar provision dealing with the timing for an effective withdrawal of an offer by an offeror and the withdrawal of an acceptance by an offeree. The wording of the Unidroit provisions Artt. 2.1.3 and 2.1.10 are completely identical to that used in its counterpart provisions of the CISG Art. 2.1.3 (1) Unidroit Principles is literally taken from Art. 15 CISG.<sup>84</sup> Comment 1 on Art. 2.1.3 Unidroit Principles refers to Art. 1.10 (3) Unidroit Principles for the definition of “reaches”. In practice there is another reason for which it might be very important to determine the moment at which the offer be-

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<sup>78</sup> The CISG very clearly distinguishes between the withdrawal of an offer if the withdrawal reaches the offeree before or at the same time as the offer in Art. 15 (2) CISG and the revocation if the revocation reaches the offeree before he has dispatched an acceptance in Art. 16 CISG.

<sup>79</sup> Artt. 15(2), 22 CISG.

<sup>80</sup> Felemegas on <http://cisgw3.law.pace.edu/cisg/principles/uni22.html#ed> (10.02.2006).

<sup>81</sup> E.g. fax or email.

<sup>82</sup> Art. 2.1.3 Unidroit Principles.

<sup>83</sup> Art. 2.1.10 Unidroit Principles.

<sup>84</sup> Comment 1 on Art. 2.1.3 Unidroit Principles.

comes effective.<sup>85</sup> Up to the moment the offer becomes effective the offeror is free to change its mind and to decide not to enter into the agreement at all, or to replace the original offer by a new one, irrespectively of whether or not the original offer was intended to be irrevocable. There is only one condition the offeror has to fulfil, the offeree has to be informed of the offeror's altered intentions before or at the time as the offeree is informed of the original offer. By expressly stating this in the article, it is made clear that a distinction is to be drawn between 'withdrawal' and 'revocation' of an offer. The possibility to revoke an offer arises only after that moment.<sup>86</sup> Furthermore, based on the similar regime for offers and acceptances and the same policy adopted in the CISG and the Unidroit Principles to permit an effective withdrawal of an offer and acceptance of an offer, it can be concluded that the counterpart provisions regarding withdrawal of an offer and acceptance of an offer are substantively identical. Thus it is arguable that the official Unidroit Comments on Art. 2.1.10, which recognizes that the offeree enjoys his freedom of choice to enter a contract longer than the offeror,<sup>87</sup> helps to interpret the meaning of the provision contained in Art. 22 CISG.

#### **3.1.2 Revocation of an offer**

In countries such as Belgium, Austria, Greece, Portugal and Germany an offer is binding when it reaches the offeree, in Nordic law when it comes to one's knowledge.<sup>88</sup> In general an offer can only be revoked if it shows that it is revocable. However, many law systems will allow a party to revoke his offer before it has been accepted.<sup>89</sup> This is also the rule in Art. 16 (1) CISG and in Art. 2.1.4 Unidroit Principles.

Art. 16 (1) CISG stipulates that until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance. In terms of Art. 16 (2) CISG there are two exceptions. An offer cannot be revoked (i) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (ii) if it is reasonable for the offeree to rely on the offer as being irrevocable

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<sup>85</sup> Comment 2 on Art. 2.1.3 Unidroit Principles

<sup>86</sup> Comment 2 on Art. 2.1.3 Unidroit Principles.

<sup>87</sup> Comment on Art. 2.1.10 Unidroit Principles.

<sup>88</sup> Lando, pg. 459.

<sup>89</sup> Lando, pp. 459f..

and the offeree has acted in reliance on the offer. The solution of the CISG has to be regarded as a compromise solution that in terms of Art. 16 (1) CISG in general an offer is revocable and that in terms of Art. 16 (2) CISG the offeror is bound in certain cases.<sup>90</sup> There are situations where it is reasonable for the offeree to rely on the offer as being irrevocable, and where the offeree has acted in reliance on the offer.<sup>91</sup> In such cases it should also not be revocable and the CISG provision is drafted in accordance with these considerations.<sup>92</sup> An illustration hereof would be in the case a contractor gets a sub-contractor to submit an offer, which the contractor then uses in his bid for a constructions contract, the subcontractor should not be permitted to revoke his offer.<sup>93</sup> A reader of Art. 16 (2) (a) CISG could receive the impression that the fixing of a time for the acceptance of an offer would always make it irrevocable, however that can not be seen as the common interpretation of the intention of the provision.<sup>94</sup> The provision is not universally agreed on. Delegates from the common law would not accept that the fixing of a time for acceptance should make the offer automatically irrevocable while the delegates from the civil law countries would. The formulation used in Art. 16 (2) (a) CISG avoided to face the problem and it seems that the outcome is that whether the offer is irrevocable or not depends upon the intention of the offeror as it was reasonably understood by the offeree.<sup>95</sup> In practice this means that the offer is irrevocable where the offeror and the offeree both are from civil law countries where the stating of a fixed time for acceptance alone makes the offer irrevocable. In contrast the offer may be revocable where both parties are from common law countries, where the stating of a fixed period for acceptance alone does not make the offer irrevocable. Where the offeror comes from a common law country and the offeree from a civil law country the solution has to be found in line with Art. 8 (1) CISG and therefore will depend upon whether the offeree knew or could not have been unaware of the offeror's intention not to be bound by the offer. If not, the solution will in terms of Art. 8 (2) CISG depend upon the understanding of a reasonable person of the same kind as the offeree which might be unclear.<sup>96</sup>

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<sup>90</sup> Schlechtriem, pg. 64.

<sup>91</sup> Lando, pg. 459.

<sup>92</sup> Lando, pg 460.

<sup>93</sup> Example taken from Lando.

<sup>94</sup> Lando, pg 459.

<sup>95</sup> Art. 8 CISG / Lando, pg 460.

<sup>96</sup> Lando, pg. 460./ Schlechtriem in von Caemmerer & Schlechtriem, pg. 154 f.

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A further possibility to be bound is regulated in Art. 16 (2) (b) CISG. If it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer. This rule contains a general principle known as “estoppel” and can play an important role for the filling of gaps in terms of Art. 7 (2) CISG.<sup>97</sup> Both misfeasance and nonfeasance are included in the provision.<sup>98</sup>

In terms of Art. 2.1.4 Unidroit Principles an offer may be revoked until a contract is concluded if the revocation reaches the offeree before the offeree has dispatched an acceptance. The exceptions hereof are stipulated in Art. 2.1.4 (2) Unidroit Principles and as same worded as Art. 16 (2) CISG.

The Unidroit Principles determination shares the same background with the CISG provision in this regard and is seen as one of the most controversial issues in the context of the formation of contracts.<sup>99</sup> The common law regimes approach that an offer is as a rule revocable whereas the most civil law countries have the contrary approach and would only allow revoking an offer in exceptional circumstances.<sup>100</sup> As a rule Art. 16 CISG and Art. 2.1.4. (1) Unidroit Principle state that until the contract is concluded offers are revocable under the condition that the revocation reaches the offeree before the offeree has dispatched his acceptance.<sup>101</sup> In the event the offeree orally accepts the offer or when the offeree may indicate assent by performing an act without giving notice to the offeror, the offeror’s right to revoke the offer continues to exist until such time as the contract is concluded.<sup>102</sup> However when the offer is accepted by a written indication of assent, the contract is concluded when the acceptance reaches the offeror, the offeror’s right to revoke the offer terminates earlier, i.e. when the offeree dispatches the acceptance.<sup>103</sup> On the one hand in practice this solution might cause some inconvenience to the offeror who will not always know whether or not it is still possible for him to revoke the offer but on the other hand it is

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<sup>97</sup> Schlechtriem, pg. 64.

<sup>98</sup> Schlechtriem, pg. 64.

<sup>99</sup> Comment on Art. 2.1.4. Unidroit Principles.

<sup>100</sup> Comment on Art. 2.1.4. Unidroit Principles.

<sup>101</sup> Comment 1 on Art. 2.1.4. Unidroit Principles.

<sup>102</sup> Comment 1 on Art. 2.1.4. Unidroit Principles.

<sup>103</sup> Comment 1 Art. 2.1.4. Unidroit Principles.

justified in the view of the legitimate interest of the offeree in the time available for the revocation being shortened.<sup>104</sup>

Same as Art. 16 (2) (a) CISG, the Unidroit Principles also consider the different approach regarding the indication of an offer to be irrevocable and *inter alia* follows the same solution that regards has to be given to the legal background of the parties.<sup>105</sup> In the Illustration 2 on comment 2 on Art. 2.1.4 Unidroit Principles the situation is demonstrated that A invites B to submit a written offer of the terms on which B is prepared to construct a building. B presents a detailed offer containing the statement "Price and other conditions are not good after 1 September". If A and B operate within a legal system where such a statement is considered to be an indication that the offer is irrevocable until the specified date, B can expect the offer to be understood as being irrevocable. The same may not necessarily be the case if the offeree operates in a legal system where such a statement is not considered as being sufficient to indicate that the offer is irrevocable.<sup>106</sup>

The second exception stipulated in Art. 2.1.4 (2) (b) Unidroit Principles is an application of the general principle prohibiting inconsistent behaviour laid down in Art. 1.8 Unidroit Principles<sup>107</sup>.<sup>108</sup> The reasonable reliance of the offeree can be evoked either by the conduct of the offeror or by the nature of the offer itself.<sup>109</sup> A case for the reasonable reliance of the offeree due to the nature of the offer could be in the case an offer whose acceptance requires extensive and costly investigation on the part of the offeree or an offer made with a view to permitting the offeree in turn to make an offer to a third party.<sup>110</sup> Illustrations hereof are made in the comment on Art. 2.1.4 Unidroit Principles. One example is the case were A seeks an offer from B for incorporation in a bid on a project to be assigned within a stated time. B submits an offer on which A relies when calculating the price of the bid. Before the expiry of the date, but after A has made the bid, B informs A that it is no longer willing to

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<sup>104</sup> Comment 1 on Art. 2.1.4. Unidroit Principles.

<sup>105</sup> Comment 2 on Art. 2.1.4. Unidroit Principles.

<sup>106</sup> Comment 2 on Art. 2.1.4. Unidroit Principles.

<sup>107</sup> Art. 1.8 Unidroit Principles states: A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.

<sup>108</sup> Comment 2 on Art. 2.1.4. Unidroit Principles.

<sup>109</sup> Comment 2 on Art. 2.1.4. Unidroit Principles.

<sup>110</sup> Comment 2 on Art. 2.1.4. Unidroit Principles.

stand by its offer. B's offer is irrevocable until the stated date since in making its bid A relied on B's offer.

The rules in the CISG as well as in the Unidroit Principles regarding revocable offers are criticized to be very unclear and cause legal uncertainty.<sup>111</sup> Both rules do not constitute a satisfactory solution in terms of international trade. One of the major aims of the CISG is promote uniformity in its application and the observance of good faith in international trade.<sup>112</sup> Art. 1.6 Unidroit Principles state that in the interpretation of these Principles, regard is to be had to their international character and to their purposes including the need to promote uniformity in their application. The solutions found for the revocation of an offer is conflictive with the CISG as well as the Unidroit Principles..

### **3.2 Interest on delayed payment**

The only provision of the CISG on this issue is Art. 78 which provides 'If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74'. The rule mentions neither the rate of interest to be charged nor over what period of time it is payable. The question regarding interest caused difficulties at the Vienna Conference. The applications and suggestions reflected different opinions due to the different needs. For example some Islamist countries forbid the charging of interest on religious grounds or for reasons of public policy, which was one of the major reasons that prevented agreement on these issues.<sup>113</sup> Other states regarded specific rules for interest as unnecessary because there is a possibility to claim damage in the case of missed out use of capital.<sup>114</sup> In contrast, other states regarded specific interest regulations as very important and did not want interest to be regarded as damage.<sup>115</sup> It was especially impossible to find a solution for the rate of interest.<sup>116</sup> In the case the courts have to apply the CISG it is almost always necessary for them to deal with Art. 78 CISG, because regularly it is claimed for the sales price plus interest or dam-

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<sup>111</sup> Lando, pg 460.

<sup>112</sup> Art. 7 (1) CISG.

<sup>113</sup> <http://www.cisg.law.pace.edu/cisg/biblio/akaddaf.html> (07.02.2006)/ Schlechtriem, pg. 204.

<sup>114</sup> Schlechtriem, pg. 204.

<sup>115</sup> Schlechtriem, pg. 204.

<sup>116</sup> Schlechtriem, pg. 205.

age plus interest.<sup>117</sup> It is commonly assured that the duty to pay interest starts at the time the payment is due to the time of payment whereas the rate of interest is debatable. In terms of the determination of the rate of interest no uniform opinion exists. Some Commentators suggested filling the gap in terms of Art. 7 (2) CISG.<sup>118</sup> The International Court of Arbitration on 01.01.1993 filled the gap in terms of Art. 7 (2) CISG applying LIBOR<sup>119</sup> as the decisive rate of interest.<sup>120</sup> Contrary commentators<sup>121</sup> however state that it is impossible to fill the gap in terms of Art. 7 (2) CISG for the reason that the majority of the delegates at the Vienna Conference dismissed a specific regulation regarding the rate of interest and therefore a recourse to national law is decisive.<sup>122</sup> However the commentators even differ here about the determination of the applicable law for the rate of interest. Courts and a few commentators are of the opinion that the applicable law for the calculation of the rate of interest must not necessarily be the applicable law to the contract. They rather recommend that the law of the place of the obligee is decisive arguing that the right to interest is similar to the claim for damage.<sup>123</sup> Other commentators state that the law of the place of the obligor is decisive because the obligor unjustifiably used the restrained goods and therefore the unjust enrichment was received at the place of the obligor.<sup>124</sup> A further observation is that the law which was agreed on for the currency or the law of the place of payment can be decisive for the determination of the rate of interest.<sup>125</sup>

Art. 7.4.9 Unidroit Principles provides that

- (1) 'If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment whether or not the non-payment is excused.
- (2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the

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<sup>117</sup> Ziegel on <http://www.cisg.law.pace.edu/cisg/biblio/ziegel2.html> (12.05.2005).

<sup>118</sup> Based on the Principle of Full Compensation, see <http://www.cisg.law.pace.edu/cisg/biblio/ulr96.html> (15.01.2006)/Schlechtriem, pg. 205.

<sup>119</sup> London Inter Bank Offered Rate.

<sup>120</sup> ICC case no. 6653/1993, CISG-online Nr. 71/ C.f. Schlechtriem, pg. 205.

<sup>121</sup> E.g. Frigge, pg.79/ Schlechtriem, pg. 46,205.

<sup>122</sup> Farnsworth, pg 570.

<sup>123</sup> Awards of the International Arbitration Court of the Union Chamber for the Industrial Economy in Austria of 15.06.1994, Cismg-online Nr. 120 and 121.

<sup>124</sup> Neumayer/ Ming.

<sup>125</sup> Schlechtriem, pg. 206.

currency of payment. In the absence of such rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.

- (3) The aggrieved party is entitled to additional damages if the non-payment caused greater harm.’

By expressly stating that the right to interest is independent of whether or not the non-payment of the sum of money due is excused, provides an answer to a question which Art. 78 CISG leaves open.<sup>126</sup> Even for the delay caused by force majeure interest has to be paid, not as damages but as compensation for the enrichment of the debtor as a result of the non-payment as the debtor continues to receive interest on the sum which it is prevented from paying.<sup>127</sup> The parties may of course agree in advance on a different rate of interest which would in effect subject it to Art. 7.4.13 Unidroit Principles.<sup>128</sup>

7.4.9 (2) Unidroit Principles fixes in the first instance as the rate of interest the average bank short-term lending rate to prime borrowers. This solution is regarded to be that best suited to the needs of international trade and most appropriate to ensure an adequate compensation of the harm sustained.<sup>129</sup> The rate in question has to be calculated as the rate at which the aggrieved party will normally borrow the money which it has not received from the non-performing party.<sup>130</sup> That normal rate is the average bank short-term lending rate to prime borrowers prevailing at the place for payment for the currency of payment.<sup>131</sup> If no such rate however exists for the currency at the place for payment, the Unidroit Principles provide additional tools to determine the rate of interest either by an average prime rate in the state of the currency of payment or an appropriate rate fixed by the law of the State of the currency of payment.<sup>132</sup>

7.4.9 (3) Unidroit Principles states that additional damage is recoverable for the reason that interest is intended to compensate the harm sustained as a consequence of delay in payment of a sum of money. Such delay may however cause additional harm

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<sup>126</sup> <http://www.cisg.law.pace.edu/cisg/biblio/bonell.html#mjb69> (01.01.2006).

<sup>127</sup> Comment 1 on Art. 7.4.9 Unidroit Principles.

<sup>128</sup> Comment 1 on Art. 7.4.9 Unidroit Principles.

<sup>129</sup> Comment 2 on Art. 7.4.9 Unidroit Principles.

<sup>130</sup> Comment 2 on Art. 7.4.9 Unidroit Principles.

<sup>131</sup> Comment 2 on Art. 7.4.9 Unidroit Principles.

<sup>132</sup> Comment 2 on Art. 7.4.9 Unidroit Principles.

to the aggrieved party for which it may recover damages.<sup>133</sup> An illustration hereof is given in the case if A concludes a contract with B, a specialized finance company, for a loan which will permit the renovation of its factory in Singapore. The loan specifically mentions the use of the funds. The money lent is transferred three months later than agreed. During that period the cost of the renovation has increased by ten percent. A is entitled to recover this additional sum from B.<sup>134</sup>

Further the Unidroit Principles in Art. 7.4.10 provides a rule on the interest on damages for non-performance of non-monetary obligations. It is provided that unless otherwise agreed, interest on such damage accrues as from the time of non-performance.

### **3.3 Price as an essential term of the contract**

In the CISG it is difficult to find the prevailing perception regarding the determination of, respectively the agreement on the price as an essential term of the contract. This issue in finalizing the CISG at the conference in Vienna in 1980 was seen as very difficult and almost foundered the establishment of the regulations.<sup>135</sup> The reason therefore was that France and other civil law jurisdictions such as the former Soviet Union and various less developed countries following the *Code Napoleon* tradition regarded the agreement on the price as an essential term of the contract whereas common law jurisdictions and other civil law and mixed jurisdictions favoured a more flexible approach.<sup>136</sup> Art. 14 (1) CISG adopted the French rule. Art. 14 CISG adopts the same rule in respect of the price that it does in respect of quantity. Thus, for the proposal to constitute an offer it must expressly or implicitly fix or make provision for the price. In the final stages of the Vienna conference, after long discussions, Art. 55 CISG was adopted as a compromise solution but without deleting Art. 14 CISG. Art. 14 (2) sentence 2 CISG and Art. 55 CISG are inconsistent because under the latter provision a contract gets into being without the fulfilment of the condition that the parties determined the price. In fact Art. 14 (1) CISG does neither forbid a silent determination of the price nor an implied determination of the

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<sup>133</sup> Comment 3 on Art. 7.4.9 Unidroit Principles.

<sup>134</sup> Comment 3 on Art. 7.4.9 Unidroit Principles.

<sup>135</sup> Ziegel on <http://www.cisg.law.pace.edu/cisg/biblio/ziegel2.html> (12.05.2005).

<sup>136</sup> Ziegel on <http://www.cisg.law.pace.edu/cisg/biblio/ziegel2.html> (12.05.2005)/ Schlechtriem, pg. 60.

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price. Therefore very often negotiations or customs between the parties open the way to supplements of the offer due to a fixed price or a price which can be determined.

Where the buyer sends an order for goods listed in the seller's catalogue or where he orders spare parts, he may decide to make no specification of the price at the time of placing the order. This may occur because he does not have a price list of the seller or he may not know whether the price list he has is current. Nevertheless, it may be implicit in his action of sending the order that he is offering to pay the price currently being charged by the seller for such goods. If such is the case, the buyer has implicitly made provision for the determination of the price and his order for the goods would constitute an offer. Similarly, where the buyer orders goods from a catalogue for future delivery it may be implicit in his order and from other relevant circumstances that the buyer is offering to pay the price currently being charged by the seller at the time of the delivery. In order to determine whether a proposal implicitly fixes or makes provision for determining the price it is necessary to interpret the proposal in the light of Art. 7 CISG.<sup>137</sup>

The OGH<sup>138</sup> held in terms of Art. 8 II CISG that in order to accept an offer it is sufficient if a reasonable person of the same kind as the other party would have had interpreted in the same way in the same circumstances. In terms of Art. 8 III CISG the determination of the intent of a party or the understanding of a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties. In specific it has to be paid attention to the negotiations between the parties, the customs and the later behaviour between them. In conclusion it is possible to have a silent determination and a mere agreement which makes it possible to specify the price or the quantity of the goods.<sup>139</sup> The decision was based on the following case.

In the case of a sales contract between parties situated in Germany and Austria a price was determined within the range of 35 and 65 DM<sup>140</sup> for Chinchilla furs. The offence against the validity of the contract, due to the missing determination of the

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<sup>137</sup> <http://www.cisg-online.ch/cisg/materials-commentary.html#Article%2012> (10.01.2006).

<sup>138</sup> OGH=Supreme Court.

<sup>139</sup> OGH of 10.11.1994, CISG-online Nr. 117 = JBI 1995, 253-254 m. Anm. Karollus.

<sup>140</sup> DM= Deutsche Mark (former German currency).

price, failed. The price must be determined either explicitly or silently, respectively it must be possible to determine the price. In terms of Art. 14 I CISG a silent determination is possible. With a silent determination it is meant a sign which makes it possible to interpret and to guide to a specific price. But it is sufficient when the price is determinable. This criterion is fulfilled when the parties silently refer to a price which is determinable without recourse to facts which lead to the price determination. In the foregoing case the parties sufficiently agreed on a price range of 35 to 65 DM for fur of middle to good quality. Depending on the quality of the fur a specific price can be determined. This determination of the price is regarded as sufficient in terms of Art. 14 I CISG. Therefore the sales contract got into being with a determinable price.

Moreover the requirement of a determined or determinable price has to be regarded as set aside in terms of Art. 6 CISG if the parties carried out a contract or if it is clear from their behaviour that they intend to enter into a binding contract. A binding contract between the parties is concluded and the criterion of the missing specification of the price has to be regarded as in terms of Art. 55 CISG.<sup>141</sup>

In the case *Pratt & Whitney v. Malev Airlines*<sup>142</sup>, with the application of Art. 14 I (2) CISG, the danger arose that through a very narrow interpretation of the provision the Supreme Court of Hungary held that the contract is not valid. The reasons therefore are not clear. In the case the American producer of aircraft engines Pratt & Whitney offered engines and engine systems for the rebuilding of old machines and for new airbuses which have to be new acquisitioned by the Hungarian Airline Malev. In the supporting documents which were delivered by Pratt & Whitney the prices for many but not for all engines and engine systems were determined. The offer of Pratt & Whitney was open for a limited period of time and one day before the expiry date of the offer Malev accepted the offer via Telex for a specific engine for the basic equipment, further they stated that they look forward to a good business relationship. Later however Malev informed Pratt & Whitney that they decided to prefer the Rolls Roys Turbines. The first instance decided that a binding contract got into force between Pratt & Whitney and Malev, however the Hungarian Supreme Court held that

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<sup>141</sup> Schlechtriem, pg. 62.

<sup>142</sup> Decision of 25.09.1992, CISG-online Nr. 63, also VIDA, Iprax 1995, 261ff.

no binding acceptance and therefore no contract got into force on the grounds that by the chosen engines the specification was missing, respectively the determination of the price was not given and therefore for such engines no price determination was possible in terms of Art. 55 CISG. It is not to judge if through the negotiations of the parties the price for the specific engine is determinable. An American commentator<sup>143</sup> while analyzing the case has spoken from *Hometown Justice*. He dramatically concerned herewith the question whether or not domestic party is favoured when interpreting Art. 14 I 2 CISG too narrowly.<sup>144</sup>

The Unidroit Principles does not require the offer to contain reference to the price. In terms of Art. 2.1.2 Unidroit Principles a proposal for concluding a contract constitutes an offer if it is sufficiently defined and indicates the intention of the offeror to be bound in case of acceptance. The comment on Definiteness of an offer in Art. 2.1.2 Unidroit Principles state that even essential terms such as the precise description of the goods or the services to be delivered or rendered, the price to be paid for them, the time or place of performance, etc., may be left undetermined in the offer without necessarily rendering it insufficiently definite. The decisive thing is whether both parties intended to make a contract, and whether the missing terms can be determined by interpreting the language in accordance with the rules on interpretation<sup>145</sup> or supplied in accordance with the rules on supplementation<sup>146</sup>.

### 3.4 Force majeure

In general a party is bound to perform its obligation under the contract even though it has become more onerous.<sup>147</sup> This principle means that each party to an agreement is responsible for its non-execution, even if the cause of the failure is beyond his power and was not or could not be foreseen at the time of signing the agreement.<sup>148</sup> In practice the importance to this principle has to be emphasised since effective economic activity is not possible without reliable promises. The two major legal terms/ characters dealing with the problem of changed circumstances are those of force majeure

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<sup>143</sup> Amato, pg. 16ff.

<sup>144</sup> Schlechtriem, pg. 63.

<sup>145</sup> Art. 4.1 ff. Unidroit Principles.

<sup>146</sup> E.g. Art. 5.1.7 Unidroit Principles Price determination.

<sup>147</sup> Pacta sunt servanda.

<sup>148</sup> <http://www.cisg.law.pace.edu/cisg/biblio/rimke.html> (17.01.2006) referring to Puelinckx, p.g. 47.

### 3. Comparable view of the CISG and the Unidroit Principles

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and hardship. The concept of force majeure, providing for the discharge of one or both parties when a contract has become impossible to perform, has evolved progressively in international trade practice by assuming many original and autonomous features distinct from similar legal concepts.<sup>149</sup> There exist various definitions for the term force majeure. The following is a possible definition.

*'Force majeure occurs when the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it impossible. I promised to do this but I cannot due to some irresistible unforeseeable and uncontrollable event.'*<sup>150</sup>

In the case of force majeure<sup>151</sup> an exception of the general rule *pacta sunt servanda* is made in most legal systems although the rules are not the same in all legal systems they all show the following main feature.<sup>152</sup> If a performance has become impossible in law or fact the debtor is relieved from his obligation. Some legal systems even go further and allow relief of the duty to perform also in the case of quasi impossibility<sup>153 154</sup>.

Under the CISG, any party that fails to perform its contractual obligations may be liable to the other party for damages. However, under certain extraordinary circumstances, a party's obligation to perform may be excused if an unforeseen and unavoidable impediment, beyond the non-performing party's control, obstructed performance. It states in Art. 79 (1) CISG that 'a party is not liable to perform any of its obligations if it proves that the failure was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it

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<sup>149</sup> <http://www.cisg.law.pace.edu/cisg/biblio/rinke.html> (17.01.2006) referring to Draetta, pg. 547.

<sup>150</sup> <http://www.cisg.law.pace.edu/cisg/biblio/rinke.html> (17.01.2006) referring to Puelinckx, pg. 50.

<sup>151</sup> Alternative definition: An overwhelming force of nature having unavoidable consequences that under certain circumstances can exempt one from the obligation. [Synonyms: Latin *vīs māior* : *vīs*, force + *māior*, greatervis major, act of god, unavoidable accident] <http://www.tiscali.co.uk/reference/dictionaries/difficultwords/data/d0013615.html> (17.01.2006)/ 'The words force majeure could cover the dislocation of a business due to a universal coal strike or accidents to machinery, but would not cover bad weather, football matches, or a funeral' c.f. Brauer and Co. v. James Clark, 1952 W.N. 422 (Eng. 1952).

<sup>152</sup> Lando, pg. 464.

<sup>153</sup> The obligation in general is possible but cannot be requested in the specific case.

<sup>154</sup> Lando, pg. 464

or its consequences.’ This provision makes it possible to exculpate from the duty to perform under the contract in certain circumstances under the condition not being responsible for the breach of duty.<sup>155</sup> In general it is assumed that the debtor is responsible for the breach of duty and therefore it is the onus of the debtor to prove the contrary.<sup>156</sup> In the case of force majeure the failure to perform is beyond the control of the debtor however it has to be distinguished from cases where the debtor guaranteed his performance. Guaranteed performances include situations where the debtor has influence in the fulfilling of its obligation and neglected to do so.<sup>157</sup> The debtor is liable for the breach of his duty even if the failure was due to an impediment beyond his control when it was reasonably to be expected at the time of conclusion of the contract or when it existed at the time of the conclusion of the contract. There are contrary opinions regarding the case whether or not initial impediment to performance shall be covered by Art. 79 (1) CISG.<sup>158</sup> If it is not included in the applicability of Art. 79 CISG, the question arises if and how the debtor can exculpate his duty to perform. The following possibilities would exist under the CISG. There could be no possibility for the debtor and he would be liable for warranty<sup>159</sup>, the filling of gaps in terms of Art. 7 (2) CISG through recourse to applicable national law or the filling of gaps on grounds of the general principles<sup>160</sup> on which the Convention is based.<sup>161</sup>

In drafting Art. 79 CISG, they failed to resolve several important issues. For instance, Art. 79 CISG does not state whether an impediment excuses performance entirely if partial performance is possible. However, if a party can perform in part, then it should not be wholly excused from its obligation to perform; it should only be excused for the part of the contract it cannot perform. Also the excuse of "any obligation" by Art. 79 CISG rather than excuse of "contract performance" suggests that performance is required to the extent possible. Furthermore, the CISG drafters dealt with partial performance explicitly in several other provisions; thus, the drafters probably did not intend an "all or nothing" approach for Art. 79 CISG. In addition, Art. 79 CISG does not state whether a party must accept performance once the im-

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<sup>155</sup> Schlechtriem, pg 183.

<sup>156</sup> Schlechtriem, pg 183.

<sup>157</sup> Schlechtriem, pg 185.

<sup>158</sup> Schlechtriem, pg. 185 (+), Fischer, pg. 249 (-).

<sup>159</sup> Schlechtriem, pg. 185.

<sup>160</sup> There are no general principles known to the author which could be applicable.

<sup>161</sup> Schlechtriem, pg. 185.

pediment passes and the excused party's obligation to perform is reinstated. For example, suppose that a seller was excused from the obligation to perform because of an impediment but seven months later the seller is capable of performing. Art. 79 CISG makes it clear that the seller must perform, but the question whether or not the buyer is still obligated to perform is left open. Art. 79 CISG does not resolve this issue directly. Under Art. 79(5) CISG, however, the buyer retains the right to avoid the contract for a fundamental breach. If the buyer avoids the contract, then its duty to take delivery should be discharged. However, if the buyer does not avoid the contract, the seller could point out that the duty to take delivery impliedly is not discharged. Thus, the buyer is obligated to perform unless the seller's delay amounts to a fundamental breach.<sup>162</sup>

The similar correspondent rule in the Unidroit Principles is Art. 7.1.7. The term *force majeure* was chosen, even though it is not identical, for the reason that it is widely known in international trade practice.<sup>163</sup> In common law systems it is known as the doctrines of frustration and impossibility of performance and in civil law systems by doctrines such as *force majeure* and *Unmöglichkeit*.<sup>164</sup> The definition of *force majeure* in the Unidroit Principles is necessarily of a rather general character and international commercial contracts mostly contain much more elaborate and precise provisions.<sup>165</sup> It is therefore recommended to contracting parties to adapt the content of the Unidroit provision so as to take account of the particular features of the specific transaction.<sup>166</sup>

Art. 7.1.7 (2) Unidroit Principles deals with the case of a temporary impediment which will delay performance. In this case extra time is given to fulfil performance. It has to be noted that in this event the extra time may be greater or less than the length of the interruption because it will be determined by the effect of the interruption on the progress of the contract as the following illustration shows. One party contracts to lay a natural gas pipeline across another country. Normally it is impossible to work in this country between 1st November and 31st March due to climatic

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<sup>162</sup> <http://www.cisg.law.pace.edu/cisg/biblio/bund.html> (10.02.2006).

<sup>163</sup> Comment 1 on Art. 7.1.7 Unidroit Principles.

<sup>164</sup> Comment 1 on Art. 7.1.7 Unidroit Principles.

<sup>165</sup> Comment 4 on Art. 7.1.7 Unidroit Principles.

<sup>166</sup> Comment 4 on Art. 7.1.7 Unidroit Principles.

conditions. The contract is timed to be finished on the 31<sup>st</sup> October but the start of the work was delayed by a month by a civil war in a neighbouring country which makes it impossible to bring in all the piping in time. If the consequence is reasonably to prevent the completion of the work until recommencement in the following spring the party who has to lay the gas line may be entitled to an extension of five months even though the delay was itself of one month only.<sup>167</sup>

For the case that a situation could be considered at the same time as a case of hardship and of force majeure Comment 3 on Art. 7.1.7 Unidroit Principles refers to Comment 6 on Art. 6.2.2 Unidroit Principles. Factual situations are considered which can at the same time be considered as cases of hardship and of force majeure under the Unidroit Principles in view of the respective definitions of hardship and force majeure. If this is the case, the party affected by these events can decide which remedy to pursue.<sup>168</sup> If the affected party on one hand calls upon force majeure, it is with a view to its non-performance being excused. If, on the other hand, the affected party calls upon hardship, this is in the first instance for the purpose of renegotiating the terms of the contract so as to allow the contract to be kept alive although on revised terms.<sup>169</sup>

Particular reference has to be made to Art. 7.1.7 (4) Unidroit Principles. It reflects the aim of force majeure to settle the problems resulting from non-performance, by expressly mentioning among the remedies not affected by the occurrence of an impediment preventing a party from performance the right to terminate the contract in the case the non-performance is fundamental<sup>170</sup>; to withhold performance and to request interest on money due, but not the right to performance<sup>171</sup> and where it applies the excuse of the non-performing party from liability in damages.<sup>172</sup> It makes it clearer than does the corresponding provision Art. 79 (5) CISG that as to this latter

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<sup>167</sup> Comment 2 on Art. 7.1.7 Unidroit Principles.

<sup>168</sup> Comment 3 on Art. 7.1.7 Unidroit Principles referring to Comment 6 on Art. 6.2.2 Unidroit Principles.

<sup>169</sup> Comment 3 on Art. 7.1.7 Unidroit Principles referring to Comment 6 on Art. 6.2.2 Unidroit Principles.

<sup>170</sup> Comment 2 on Art. 7.1.7 Unidroit Principles.

<sup>171</sup> The generic language in Art. 79 (5) CISG may be misunderstood as if the remedy for specific performance were always available in situations covered by Art. 79. C.f. Bonell on <http://www.cisg.law.pace.edu/cisg/biblio/bonell.html> (18.11.2005).

<sup>172</sup> Comment 2 on Art. 7.1.7 Unidroit Principles.

remedy the solution has to be found in each single case, in accordance with the criteria laid down for its availability in general.<sup>173</sup>

## 3.5 Hardship

Hardship has to be clearly distinguished from force majeure. The difference between the two concepts can be described as follows. Hardship is at stake where the performance of the disadvantaged party has become much more burdensome, but not impossible, while force majeure means that the performance of the party concerned has become impossible, at least temporarily.<sup>174</sup> Moreover the two concepts provide a functional difference. Hardship constitutes a reason for a change in the contractual program of the parties. The aim of the parties remains to implement the contract. Force majeure, however, is situated in the context of non-performance, and deals with the suspension or termination of the contract.<sup>175</sup>

Especially for contracts of duration such as contracts for a continuous supply of goods or services, long lasting construction contracts or cooperation agreements the hardship rule can become of great importance in the event that unforeseen contingencies which may make performance excessively onerous for one party, since the rule is more lenient than force majeure.<sup>176</sup> Parties to a contract are free to include a regulation for the case the performance has become expressly onerous so that the economic basis on which the contract was made has lapsed.<sup>177</sup> All legal systems have to determine when a contracting party should be excused from performance of its obligations because of supervening circumstances. Some systems only accept a narrow range of excuses; other a more generous.<sup>178</sup>

### 3.5.1 The hardship approach in the CISG

There is no rule contained in the CISG that specifically refers to situations, where as a result of radically changed circumstances, the performance of one of the parties becomes much more onerous and difficult. This problem therefore has to be consid-

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<sup>173</sup> Bonell on <http://www.cisg.law.pace.edu/cisg/biblio/bonell.html> (18.11.2005).

<sup>174</sup> Maskow, pg. 663.

<sup>175</sup> Maskow, pg. 664.

<sup>176</sup> Lando, pg. 464.

<sup>177</sup> Lando, pg. 465.

<sup>178</sup> <http://www.cisg.law.pace.edu/cisg/biblio/ziegel2.html> (12.05.2005).

ered in the context of Art. 79 CISG. The term “impediment” in Art. 79 CISG does not only deal with the case the performance became impossible but also in exceptional circumstances in the case the performance became much more burdensome.<sup>179</sup> However, as mentioned before, in general there is no excuse in the case the performance became more onerous<sup>180</sup> as the following case shows. An Italian seller sold chrome steel to a Swedish buyer. The seller asked for adjustment or termination of the contract for the reason that the market price for chrome steel increased by 30% since the conclusion of the contract. The court denied the claim of the seller because it was not seen as a case of hardship even though the performance became more onerous.<sup>181</sup>

It has even been suggested that, since the CISG is silent on hardship, the relevant provisions contained in the Unidroit Principles could be used to supplement the CISG on this point.<sup>182</sup> Indeed, if one accepts that Art. 6.2.2 – 6.2.4 Unidroit Principles are the expression of the basis idea of *favor contractus*, the link to the CISG would be established, since this idea is doubtless also one of the general principles of CISG as well. What is less certain, however, is whether the silence of the Convention on this point constitutes a true gap to be filled in accordance with Art. 7 (2) CISG or whether in Art. 79 the Convention sets out to regulate the grounds for exemption of liability in an exhaustive manner so that, to the extent that hardship cannot be considered to constitute an “impediment” as defined in Art. 79 (1) CISG, it must be denied any relevance under the Convention.<sup>183</sup> As the rule in Art. 79 (1) CISG is phrased there is a danger that each court will interpret it in accordance with its domestic rules.<sup>184</sup> The adjustment of contracts can not be solved through the filling of gaps however the solutions provided in the Unidroit Principles and the Principles of the European Contract Law are much more appropriate.<sup>185</sup> Therefore one might consider Art. 6.2.3 Unidroit Principles as a usage in international trade in terms of Art. 9 (2) CISG if the conditions thereof are fulfilled.<sup>186</sup>

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<sup>179</sup> Schlechtriem, pg. 187.

<sup>180</sup> General Principle *pacta sunt servanda*.

<sup>181</sup> [www.cisg-online.ch](http://www.cisg-online.ch) Nr. 540.

<sup>182</sup> <http://www.cisg.law.pace.edu/cisg/biblio/bonell.html> (15.01.2006).

<sup>183</sup> <http://www.cisg.law.pace.edu/cisg/biblio/bonell.html> (15.01.2006).

<sup>184</sup> Lando, pg. 465.

<sup>185</sup> Schlechtriem, pg. 188.

<sup>186</sup> Schlechtriem, pg. 188.

#### 3.5.2 The hardship approach in the Unidroit Principles

In contrast to the CISG, the Unidroit Principles dedicate an entire section comprising of three articles to hardship. The provisions on hardship in the Unidroit Principles can be found in Articles 6.2.1 to 6.2.3 Unidroit Principles. From a systematic point of view the provisions on hardship are situated in Chapter 6 with the heading “Performance” which indicates that hardship is related to the fulfilment of the contract. The section on hardship starts with Article 6.2.1 stressing that a party for whom performance becomes more onerous is nevertheless bound to perform his obligations. The binding character of the contract as the general rule is similarly mentioned in Article 1.3 and shows that the Unidroit Principles adopted the juridical principle *pacta sunt servanda* as an indispensable basis of their concern.<sup>187</sup> But as Comment 2 on Art. 6.2.1 Unidroit Principles states, the Principle of sanctity of contract is not however considered to be an absolute one. It is accompanied by the counter principle known as *rebus sic stantibus*<sup>188</sup> which comes into action when supervening circumstances create an exceptional situation so as to destroy the basic assumption which the parties had made when they entered into the contract, in other words when a hardship situation, as defined by Art. 6.2.2 Unidroit Principles, occurs.

The term hardship itself is defined in Art. 6.2.2 Unidroit Principles basically as a situation where the occurrence of events, as specified in Art. 6.2.2 (a) to (d) Unidroit Principles, fundamentally alters the equilibrium of the contract, either because the cost of a party’s performance has substantially increased or because the value of the performance a party receives has substantially diminished. The right to rely on hardship is only possible if the performance is not rendered yet.<sup>189</sup> The crucial point is clearly the definition of “fundamental” change which will strongly depend upon the circumstances of each individual case.<sup>190</sup> Art. 6.2.2 Unidroit Principles states that fundamental alteration in the balance of the contract may manifest itself in two ways; either there is an increase in the cost of the disadvantaged party’s performance or decrease in the value of what it has to receive. Usually the party with the non-monetary contract obligation is confronted with the situation of increase of the costs

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<sup>187</sup> Unidroit Principles, Article 6.2.1, comment No.1; Doudko, pg. 494.

<sup>188</sup> Contracts might be altered in the event crucial circumstances change which has to be seen as the basis of the contract. See [http://de.wikipedia.org/wiki/Clausula\\_rebus\\_sic\\_stantibus](http://de.wikipedia.org/wiki/Clausula_rebus_sic_stantibus) (09.02.2006).

<sup>189</sup> Comment 4 on Art. 6.2.2 Unidroit Principles.

<sup>190</sup> Comment 2 on Art. 6.2.2 Unidroit Principles.

in order to perform. Typical examples hereof are situations of increase of the costs due to a dramatic rise in the price of the raw materials necessary for the production of the goods or the rendering of the services, or to the introduction of new safety regulations requiring far more expensive production procedures.<sup>191</sup> The substantial decrease in value of the performance received by one party includes cases where the performance no longer has any value at all for the receiving party. Parties of both, monetary and non-monetary obligations can be confronted with the latter situation. Reasons for the substantial decrease in the value or the total loss of any value of the performance may be due to either drastic changes in market conditions or the frustration of the purpose for which the performance was required.<sup>192</sup> It has to be noted that the decrease of value of the performance underlies an objective measurement and that a mere change in the personal opinion of the receiving party as to the value of the performance is irrelevant.<sup>193</sup> In the case of frustration of the purpose of the performance it can only be taken into account when the purpose in question was known or at least ought to have been known to both parties.<sup>194</sup>

The events have to occur or become known after conclusion of the contract and could not reasonably have been taken into account by the disadvantaged party.<sup>195</sup> This means that even if the change in circumstances occurs after the conclusion of the contract such circumstances cannot cause hardship if they could reasonably have been taken into account by the disadvantaged party at the time the contract was concluded.<sup>196</sup> An illustration on a case where hardship would be negated is the following: A agrees to supply B with crude oil from country X at a fixed price for the next five years, notwithstanding the acute political tensions in the region. Two years after the conclusion of the contract, a war erupts between contending factions in neighbouring countries. The war results in a world energy crisis and oil prices increased drastically. A is not entitled to invoke hardship because such a rise in the price of crude oil was not unforeseeable.<sup>197</sup> Further it is compulsory that the event is beyond the con-

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<sup>191</sup> Comment 2 on Art. 6.2.2 Unidroit Principles.

<sup>192</sup> Comment 2 on Art. 6.2.2 Unidroit Principles.

<sup>193</sup> Comment 2 on Art. 6.2.2 Unidroit Principles.

<sup>194</sup> Comment 2 on Art. 6.2.2 Unidroit Principles.

<sup>195</sup> Art. 6.2.2 (a), (b) Unidroit Principles.

<sup>196</sup> Comment 3 on Art. 6.2.2 Unidroit Principles.

<sup>197</sup> Comment 3 on Art. 6.2.2 Unidroit Principles.

trol of the disadvantaged party and that the risk must not have been assumed by the disadvantaged party.<sup>198</sup>

The effects on hardship are given in Art. 6.2.3 Unidroit Principles. The effects have both procedural and substantive law aspects.<sup>199</sup> The procedural aspect starts with the right of the disadvantaged party to request renegotiation of the original terms of the contract with a view to adapting them to the changed circumstances. An example of that situation is illustrated in Comment 1 on Art. 6.2.3 Unidroit Principles. A, a construction company enters into a lump sum contract with B for the erection of a plant in country Y. Most of the sophisticated machinery has to be imported from abroad but due to an unexpected devaluation of the currency of payment, the cost of the machinery increases dramatically. A is entitled to request B to renegotiate the original contract price so as to adapt it to the changed circumstances.<sup>200</sup>

The request for renegotiation must be made without undue delay after the time at which hardship is alleged to have occurred. The timeframe in which the request must be made depends on the specific circumstances of the case.<sup>201</sup> If the disadvantaged party fails to comply with these requirements, it does not lose its right to request renegotiation. This failure may, however, affect the finding as to whether hardship actually existed and its consequences for the contract.<sup>202</sup> Further the disadvantaged party must indicate the grounds for its request for renegotiation in order to give the other party the possibility to better assess whether or not the request for renegotiation is justified.<sup>203</sup>

After the disadvantaged party has asked for renegotiation it must wait for relief and the request for renegotiation does not itself entitle the disadvantaged party to withhold performance.<sup>204</sup> The reason for this lies in the exceptional character of hardship and the risk of possible abuses of the remedy.<sup>205</sup> However there might exist exceptions such as in the following illustration. A and B enter into a contract for the construction of a plant in country X, which adopts new safety regulations after the con-

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<sup>198</sup> Art. 6.2.2 (c), (d) Unidroit Principles.

<sup>199</sup> Maskow, pg. 663.

<sup>200</sup> Comment 1 on Art. 6.2.3 Unidroit Principles.

<sup>201</sup> Comment 2 on Art. 6.2.3 Unidroit Principles.

<sup>202</sup> Comment 2 on Art. 6.2.3 Unidroit Principles.

<sup>203</sup> Comment 3 on Art. 6.2.3 Unidroit Principles.

<sup>204</sup> Art. 6.2.3 (2) Unidroit Principles.

<sup>205</sup> Comment 4 on Art. 6.2.3 Unidroit Principles.

clusion of the contract. The new regulation require additional apparatus and thereby fundamentally alter the balance of the contract making A's performance substantially more onerous. A is entitled to request renegotiations and may withhold performance in view of the time it needs to implement the new safety regulations, but it may also withhold the delivery of the additional apparatus, for a long as the corresponding price adaptation is not agreed.<sup>206</sup>

Both the request for renegotiations by the disadvantaged party and the conduct of both parties during the renegotiation process are subject to the general principle of good faith in terms of Art. 1.7 Unidroit Principles and to the duty of cooperation in terms of Art. 5.1.3 Unidroit Principles.<sup>207</sup> As a result the disadvantaged party most honestly believe that a case of hardship actually exists and not request renegotiations as a purely tactical manoeuvre and once the request has been made, both parties must conduct the renegotiations in a constructive manner.<sup>208</sup>

If the parties fail to reach agreement on the adaptation of the contract to the changed circumstances within a reasonable time, Art. 6.2.3 (3) Unidroit Principles authorizes either party to resort to the court. Reasons for the resort to court could be either because the non-disadvantaged party completely ignored the request for renegotiation or because the renegotiations did not achieve a positive outcome although the renegotiations were conducted by both parties in good faith.<sup>209</sup> There is no time specified for the possibility of the parties before they can resort to court. It must be a reasonable time and it will depend on the complexity of the issues to be settled and the particular circumstances of the case.<sup>210</sup> It would go beyond the scope of this thesis to debate the term "reasonable" in this regard. Art. 6.2.3 (4) Unidroit Principles provides certain substantive rules for this case which give a legal basis for constructive legal decision making.<sup>211</sup> According to these rules, a court which finds that a hardship situation exists may react in a number of different ways. One of the possibilities given to the court is termination.<sup>212</sup> Termination however does not depend on a non-performance by one of the parties and therefore its effects on the performances al-

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<sup>206</sup> Comment 4 on Art. 6.2.3 Unidroit Principles.

<sup>207</sup> Comment 5 on Art. 6.2.3 Unidroit Principles.

<sup>208</sup> Comment 5 on Art. 6.2.3 Unidroit Principles.

<sup>209</sup> Comment 5 on Art. 6.2.3 Unidroit Principles.

<sup>210</sup> Comment 6 on Art. 6.2.3 Unidroit Principles.

<sup>211</sup> Maskow, pg. 663.

<sup>212</sup> Art. 6.2.3 (4) (a) Unidroit Principles.

ready rendered might be different from those provided for by the rules governing termination in general<sup>213</sup>.<sup>214</sup> Further the court has the possibility to adapt the contract in order to re-establish the balance of the contract.<sup>215</sup> This can be seen as an attempt by the court to seek to make a fair distribution of the losses between the parties.<sup>216</sup> If neither termination nor adaptation is appropriate in certain circumstances, the only reasonable solutions are for the court to either direct the parties to resume negotiations or to confirm the terms of the contract as they stand.<sup>217</sup>

An illustration hereof is the following situation. A, an exporter, undertakes to supply B, an importer, in country X with beer for three years. Two years after the conclusion of the contract new legislation is introduced in country X prohibiting the sale and consumption of alcoholic drinks. B immediately invokes hardship and requests A to renegotiate the contract. A recognises that hardship has occurred, but refuses to accept the modifications of the contract proposed by B. After one month of inconclusive discussions B decided to resort to court. The court would come to a decision that if B has an option to sell the beer in a neighbouring country, although at a significant lower price, the court may decide to uphold the contract but to reduce the agreed price. But in the case B does not have the foregoing possibility, it may be reasonable for the court to terminate the contract, at the same time however obliging B to reimburse A for the last delivery still en route.<sup>218</sup>

### **3.6 Battle of forms**

The "battle of the forms" is the phrase used to describe the exchange of differing written proposals which form a contract between two parties.<sup>219</sup> Usually companies have a standard contract form which is a model they use for the conclusion of contracts. However it happens that both parties to the contract use their general terms and conditions for contracts and that their terms and conditions are in conflict due to the conflict of interest of the parties.<sup>220</sup> For instance, the terms and conditions of the seller could exclude or limit his liability for defects in the goods sold, whereas the

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<sup>213</sup> Artt. 7.3.1 ff Unidroit Principles.

<sup>214</sup> Comment 7 on Art. 6.2.3 Unidroit Principles.

<sup>215</sup> Art. 6.2.3 (4) (b) Unidroit Principles.

<sup>216</sup> Comment 7 on Art. 6.2.3 Unidroit Principles.

<sup>217</sup> Comment 7 on Art. 6.2.3 Unidroit Principles.

<sup>218</sup> Comment 7 on Art. 6.2.3 Unidroit Principles.

<sup>219</sup> <http://www.cisg.law.pace.edu/cisg/biblio/blodgett.html#battle> (10.02.2006).

<sup>220</sup> Comment 1 on Art. 2.1.22 Unidroit Principles.

buyer's terms and conditions expressly provide that the seller is fully liable for defects.<sup>221</sup> The terms and conditions of both parties might not contain unreasonable terms and conditions and we therefore a battle of forms situation would arise.<sup>222</sup> Two questions arise in this connection. First, is there a contract in spite of the conflicting terms and conditions and second, if there is, which terms and conditions apply to the contract?<sup>223</sup> The first question is concerned with the issue whether the acceptance of the offer is unqualified and therefore the 'mirror image rule'<sup>224</sup> is maintained. If this rule is maintained there is no contract when there is a battle of forms.<sup>225</sup>

The battle of forms plays an important role in the daily business life. Business people and enterprises have their own terms and conditions and of course wish that their own standard terms and conditions apply. In order to assure the applicability of their own terms and conditions they usually go even further and determine that they will only deal if their own terms and conditions prevail.<sup>226</sup> Nevertheless, in these and most other cases a party does not react to the standard terms and conditions of the other party, which it receives.<sup>227</sup> The reasons hereof are either it does not discover the conflicting terms and conditions or, if he discovers them, he does not wish to take up the issue.<sup>228</sup> In this case both parties file the two conflicting documents and consider the deal as made. Both parties act as if the mirror image rule did not exist, and at that stage none of them think of invoking it. Very often it happens that one party discovers on a later stage having made a bad bargain and finds out that the terms and conditions are conflicting and claims that he is not bound to the contract due to the mirror image rule. An illustration hereof could be in the case e.g. that the price of the products sold have risen and the seller might sell them elsewhere to a higher price. Further there are situations where after both parties have performed, the incident dealt with in the conflicting terms and conditions comes up. An illustration hereof would be the situation that the goods delivered are defective, and the buyer claims

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<sup>221</sup> Lando, pg. 461.

<sup>222</sup> Piltz, pg. 133ff.

<sup>223</sup> Lando, pg. 461.

<sup>224</sup> An acceptance to an offer has to be a mirror image of the offer.

<sup>225</sup> Lando, pg. 461.

<sup>226</sup> Lando, pg. 461.

<sup>227</sup> Lando, pg. 461.

<sup>228</sup> Comment 3 on Art. 2.1.22 Unidroit Principles.

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damage. The seller then invokes the mirror image rule and maintains that there was no contract.<sup>229</sup>

The Unidroit Principles deal with the battle of forms issue in Art. 2.1.22.<sup>230</sup> The general rules on offer and acceptance do not apply in this case. If they would apply there would be either no contract at all since the purported acceptance by the offeree would in general amount to a counter-offer, or if the two parties have started to perform without objecting to each other's standard terms, a contract would be considered to have been concluded on the basis of those terms which were the last to be sent or to be referred to.<sup>231</sup> In order to counteract the possibility for one party to use the conflicting terms and condition to get out a bargain Art. 2.1.22 Unidroit Principles provide that the mirror image rule does not apply for the reason that the parties did not wish it to apply when they made the contract.<sup>232</sup>

When forming the CISG no specific provision for the battle of forms situation was determined.<sup>233</sup> Despite a few approaches were taken no specific regulation was implemented into the Convention.<sup>234</sup> Therefore Art. 19 CISG will be mostly applicable in the event of collusion of the terms and conditions of the parties.<sup>235</sup> Under the Convention, a varied acceptance in which the variance is material<sup>236</sup> will not conclude a contract. This was intended to encourage parties to negotiate and mutually agree on all of the material terms of a contract prior to beginning performance.<sup>237</sup> The only time an acceptance will conclude a contract when the acceptance varies from the terms of the offer is when it contains additional or different terms "which do not materially alter the terms of the offer" and the offeror does not promptly object to the

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<sup>229</sup> Example taken from Lando, pg. 462.

<sup>230</sup> Art. 2.1.22 Unidroit Principles state that: Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.

<sup>231</sup> Comment 2 on Art. 2.1.22 Unidroit Principles.

<sup>232</sup> Lando, pg. 462.

<sup>233</sup> Schlechtriem, pg. 70.

<sup>234</sup> Van Alstine, pg. 207ff.; del Pilar Perales Viscasillas, pg. 97ff., 101.

<sup>235</sup> Schlechtriem, pg. 70.

<sup>236</sup> The Convention provides a non-exclusive list of those items which would be considered material. The list provides that additional or different terms relating "among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes," are all considered to be items which alter the terms of the offer materially. Because the scope of the list is so broad, an item of importance usually will be considered a material alteration and thus a rejection of the offer.

<sup>237</sup> <http://www.cisg.law.pace.edu/cisg/biblio/blodgett.html#battle> (10.02.2006).

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alteration. Therefore, even if the additional or different terms do not alter the offer materially, if the offeror objects to those terms, no contract will be formed.<sup>238</sup>

However some commentators interpret the provisions of the CISG to that effect that a contract is concluded. This approach is invoked by the Artt. 18 (1) and (3), 16 (2), 8 (1) and (2), 9 (1) and 29 (2)<sup>239</sup> and this view is also supported by a Dutch<sup>240</sup> and a German<sup>241</sup> case. Other commentators will only admit that there is a contract, when both parties have performed before the issue is raised.<sup>242</sup>

The second issue regarding the questions which terms and conditions prevail has to be dealt with very carefully. In the case the buyer for example discovers that the goods sold have defects, the buyer may claim termination of the contract and damages to which he is entitled under his own terms and conditions. Then the seller might invoke his terms and conditions to maintain that the buyer has no claim. One or even both of them may show that his terms and conditions provide that they shall always prevail over the other party's conflicting terms and conditions. In this case three solutions have to be regarded. The three solutions could be the "first shot rule", "the last shot rule" and "the knock each other out rule".<sup>243</sup>

The "first shot rule" maintains when the terms and conditions of the offeree differ from those of the offeror, the offeror's terms and conditions prevail. An argument for this solution is that an offeree who accepts an offer must take it as it is. He should not be permitted to change the terms and conditions.<sup>244</sup> However it must be taken into consideration when supporting that rule that with this solution it is often a coincidence who made the first offer and that it therefore leads to an arbitrary result.<sup>245</sup>

The "last shot rule" prevails when the last shot was the offeree's communication of acceptance and his terms are applicable. That is the solution which is seen by many

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<sup>238</sup> <http://www.cisg.law.pace.edu/cisg/biblio/blodgett.html#battle> (10.02.2006).

<sup>239</sup> Lando, pg. 462.

<sup>240</sup> Dutch Gerechtshof Hertogenbosch 19.11.1995.

<sup>241</sup> German Amtsgericht Kehl 6.10.1995.

<sup>242</sup> The commentary to the 1978 draft of the Convention stated that a contract would have been formed in this situation. However, the final 1980 version does not include a commentary available at <http://www.cisg.law.pace.edu/cisg/biblio/blodgett.html#36> (10.02.2006)/ Schlechtriem, pg. 70ff..

<sup>243</sup> Lando, pg 462f..

<sup>244</sup> Lando,, pg. 463.

<sup>245</sup> Lando,, pg. 463.

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commentators as the one which is most in harmony with the CISG provisions Art. 19 and 18 (1).<sup>246</sup> The main argument therefore is that the one who receives the last shot must be bound by his silence. In a German case<sup>247</sup> the OLG<sup>248</sup> followed the last shot rule. A German company ordered two hundred tons of bacon from an Italian company. In the offer of the German company it was determined that the bacon shall be delivered wrapped in foil. The declaration of acceptance of the offer however determined that the bacon shall be delivered unwrapped. The German buyer did not take up the issue again and accepted the first four part-deliveries; however refused to accept afterwards the outstanding delivery. The court held that the divergence of offer and acceptance has to be seen as essential and that the declaration of acceptance of the offer of the Italian company has to be regarded as a counter offer, which was accepted by the German company. There are however commentators with the contrary opinion and maintaining the view that you cannot rely on Art. 18 (1) and 19 CISG since the delegates refused to deal with the “battle of forms” problem, when it was raised at the Diplomatic Conference in 1980.<sup>249</sup> Same as the “first shot rule” it is a coincidence who fired the last shot.<sup>250</sup>

Under the third solution the conflicting terms and conditions knock each other out. The contract exists of those terms and conditions which are common in substance.<sup>251</sup> The gaps which arise due to the invalidity of the terms and conditions which have knocked each other out have to be filled by the courts or arbitrators.<sup>252</sup> This solution is adopted by Art. 2.1.22 Unidroit Principles.<sup>253</sup> Comment 3 on Art. 2.1.22 Unidroit Principles only regard the “last shot rule” as appropriate if the parties clearly indicate that the adoption of their standard terms and conditions are an essential condition for the conclusion of the contract. If however the parties refer to their standard terms and conditions more or less automatically they will normally not even be aware of the conflict between their respective standard terms and conditions. In such a situation it is seen as unreasonable to allow the parties then to question the very existence of the

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<sup>246</sup> Schlechtriem, pg. 70ff./ Schlechtriem art. 19 n. 20 and Farnsworth in Bianca and Bonell 78ff./ Piltz, pg. 133ff..

<sup>247</sup> OLG Hamm of 22.09.1992, CISG-online Nr. 57.

<sup>248</sup> Oberlandesgericht = Appellate Court

<sup>249</sup> Lando, pg. 463.

<sup>250</sup> Lando pg. 463 referring to authors such as Magnus and Honnold.

<sup>251</sup> Theory of Legal Validity.

<sup>252</sup> Lando, pg. 463.

<sup>253</sup> Comment 3 on Art. 2.1.22 Unidroit Principles.

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contract or to insist on the application of the terms last sent or referred to.<sup>254</sup> Despite the general rules of offer and acceptance the provisions in the Unidroit Principles provide that if the parties reach agreement except on their standard terms and conditions, a contract is concluded on the basis of the agreed terms and conditions and of any standard terms and conditions which are common in substance.<sup>255</sup> In the case A orders a machine from B indicating on his order form with its “General Conditions for Purchase” the type of machine, the price, the terms of payment, and the date and place of delivery. B accepts by sending an acknowledgement of order form with its own “General Conditions for Sale”. Afterwards A seeks to withdraw from the contract arguing that no contract was concluded since the parties did not reach an agreement as to which set of standard terms should apply. However the parties have agreed on the essential terms of the contract, a contract has been concluded on those terms and on all standard terms which are common in substance.<sup>256</sup>

Even in some cases under the CISG the “knock out doctrine” found application. In the following CISG case the Dutch claimant ordered powdered milk from the defendant, a German company. The claimant resold the powdered milk to an Algerian company which determined that some of the powdered milk had a rancid taste. As a consequence the Algerian customer of the buyer complained to the buyer about the quality of the powdered milk. The Dutch buyer compensated the Algerian company and itself claimed damage from the German company. The defendant refused to pay and referred to their terms and conditions for delivery which stated the limitation of liability. The claimant referred to their terms and conditions regarding warranty of alternative terms of delivery. The LG<sup>257</sup> dismissed the complaint. On appeal by the buyers, the OLG granted the buyer’s claim after obtaining an expert opinion on the cause of the defect and dismissed the appeal as to the rest. On appeal to the BGH<sup>258</sup> the seller requested the dismissal of the case in its entirety. The BGH held that the buyer’s standard terms and conditions are in contradiction with the seller’s standard terms and conditions and that no party wanted to accept the terms and conditions of the other party. Therefore the rules have to be regarded as invalid in terms of the the-

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<sup>254</sup> Comment 3 on Art. 2.1.22 Unidroit Principles.

<sup>255</sup> Comment 3 on Art. 2.1.22 Unidroit Principles.

<sup>256</sup> Comment 3, Illustration 1 on Art. 2.1.22 Unidroit Principles.

<sup>257</sup> Landgericht = Regional Court.

<sup>258</sup> Bundesgerichtshof = Supreme Court.

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ory of legal validity and the court has to fill the gaps left by the terms and conditions which have knocked each other out. Thus the court rejected the application of the last shot rule.<sup>259</sup>

The basis of this solution has to be seen in the priority of the party autonomy which allows the parties to diverge from Artt. 19 (1) and (3) CISG, despite the fact that the parties did not find consent on the standard terms and conditions applicable to the contract. This is especially true in the case the parties were negotiating over a long period of time and the parties often pointed out their own terms and conditions to the other party but it is clear from their negotiations that the conclusion of the contract is important to them also when they have to diverge from their own terms and conditions. Especially if the parties fulfil the contract it can very clearly be seen that the divergence of the terms and conditions should not lead to the cancellation of the contract.<sup>260</sup> As seen from the aforementioned in most cases the parties intended a contract to be concluded in spite of the conflicting terms and conditions and did not raise the issue. In these cases there is no reason to let one party's terms and conditions prevail<sup>261</sup> which clearly speaks in favour of the "knock out rule" provided by the Unidroit Principles. As seen from the above mentioned case the CISG regulates the issue and therefore there exists no given reason to fall back to national law<sup>262</sup> but the application of the "knock out rule", which is favoured by the author, remains possible. However the opinion seems that the most –followed, although in Germany the BGH considers the "knock out rule" as to be the prevailing one, leads to the application of what has been referred to as the "last shot rule".<sup>263</sup>

For those times when parties choose to carry out an international sales transaction without fully negotiating an agreement, relying instead on an exchange of forms, the parties may have a problem under the CISG. If those parties later have a need to de-

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<sup>259</sup> BGH of 09.01.2002, CISG-online Nr. 651=NJW 2002, 1651ff.

<sup>260</sup> Van Alstin, pg. 213 f., 216f., 220ff. "If two parties conduct a contract amicably without the consent on specific points, so due to the lack of contrary indications, it has to be regarded that the parties do not intent to let the contract fail due to the non-consensus on specific points."

<sup>261</sup> Schlechtriem, pg. 71f..

<sup>262</sup> Piltz, pg. 133ff..

<sup>263</sup> Neumayer, pg. 524/ The following cases have applied the last shot rule under the Hague Convention on the Formation of the Contracts for the International Sale of Goods: OLG Hamm, 07.12.1978 (2U 35/78)/ OLG Hamm, 10.10.1982 (2 W 29/ 82)/ LG Landshut, 14.07.1976 (HK 0 135/ 75). In the field of the CISG: OLG Saarbruecken, 13.01.1963 available at <http://cisgw3.law.pace.edu/cases/930113g1.html>; and OLG Muenchen, 11.03.1998 available at <http://cisgw3.law.pace.edu/cases/980311g1.html> (12.01.2006).

termine the particular terms of the contract, the Convention will not provide a clear answer to the conclusion of the contract and to the prevailing terms and conditions. However the provisions in the Unidroit Principles provide good and modern solutions to these issues and hence are more favourable in the opinion of the author.

#### **3.7 Specific performance**

In general contracts provide that one party shall make performance and that the other party shall pay a sum of money for the performance. If one of the parties does not perform the contractual obligation the question arises whether or not the other party is entitled to enforce the performance. One has to distinguish between monetary and non-monetary obligations.

In the case of monetary obligations, in continental law systems a party may require performance of the contractual obligation to pay money.<sup>264</sup> In some of the common law systems an action for an agreed sum of money is available.<sup>265</sup> However common law systems limit the action in certain respects and may be brought only when the price has been earned by performance.<sup>266</sup> There are situations where the buyer does not want the other party to perform anymore. The main rule is that the buyer must receive the performance and pay the price however there are exceptions as the predecessor of the CISG for example shows. The Uniform Law on Contracts for the International Sale of Goods of 1964<sup>267</sup> provides in Art. 61 (2) ULIS that a seller shall not be entitled to require payment of the price by the buyer if it is in conformity with usage and reasonably possible for the seller to resell the goods. In that case the contract shall be regarded as ended, and the seller may only claim damages.<sup>268</sup> The CISG however includes no such rule on restriction on the seller's right to perform and claim the price hereof. Also no such rule can be found in the Unidroit Principles. The latter one in Art. 7.2.1 states that: Where a party who is obliged to pay money does not do so, the other party may require payment. This article reflects the generally accepted principle that payment of money which is due under a contractual obli-

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<sup>264</sup> Lando, pg. 467.

<sup>265</sup> Lando, pg. 467.

<sup>266</sup> Lando, pg. 467.

<sup>267</sup> Hereinafter ULIS.

<sup>268</sup> Lando, pg. 468.

gation can always be demanded and, if the demand is not met, enforced by legal action before a court.<sup>269</sup>

In the case of non-monetary obligations the common law countries recognize specific performance as a remedy. However specific performance is subsidiary to the damage remedy and will only be granted where damages are inadequate and it is in the court's discretion to make their decision in line with the applicable rules.<sup>270</sup> In civil law jurisdictions specific performance is recognized as a prior remedy except where the performance has become impossible or illegal. In this event it would be unreasonable to grant specific performance, for instance in the case the costs to make performance possible would be higher than the value of the goods sold; a further exception exists in a few civil jurisdictions.<sup>271</sup>

Art. 28 CISG considers the extent to which a national court is required to enter a judgment for specific performance of an obligation arising under this Convention. If the seller does not perform one of his obligations under the contract of sale or this Convention, Art. 46 provides that the buyer may require performance by the seller. Similarly, Art. 62 authorizes the seller to require the buyer to pay the price, take delivery or perform his other obligations. The question arises whether the injured party can obtain the aid of a court to enforce the obligation of the party in default to perform the contract. As mentioned above, in some legal systems the courts are authorized to order specific performance of an obligation and in other legal systems courts are not authorized to order certain forms of specific performance and those states could not be expected to alter fundamental principles of their judicial procedure in order to bring the CISG into force.<sup>272</sup> Art. 28 CISG provides that a court is not bound to enter a judgment providing for specific performance unless the court could do so under its own law in respect of similar contracts of sale not governed by this Convention, e.g., domestic contracts of sale. Thus resulting a court has the authority under any circumstances to order a particular form of specific performance, e.g. to deliver the goods or to pay the price, Art. 28 does not limit the application of Artt. 46 or 62

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<sup>269</sup> Comment on Art. 7.2.1 Unidroit Principles.

<sup>270</sup> Lando, pg. 469.

<sup>271</sup> Comment 1 on Art. 7.2.2 Unidroit Principles/ Lando, pg. 469./ Paragraph 275 (2) of the German Civil Code as amended in 2002.

<sup>272</sup> Lando, pg. 469f..

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CISG. Art. 28 CISG limits their application only if a court could not under any circumstances order such a form of specific performance.<sup>273</sup>

Art. 7.2.2 Unidroit Principles states that:

*‘Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless*

- (a) performance is impossible in law or in fact;*
- (b) performance or, where relevant, enforcement is unreasonably burdensome or expensive;*
- (c) the party entitled to performance may reasonably obtain performance from another source;*
- (d) performance is of an exclusively personal character; or*
- (e) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance.’*

Following the basic approach of Art. 46 CISG the Unidroit Principles adopt the principle of specific performance, subject to certain qualifications.<sup>274</sup> In particular this principle is regarded as highly important with respect to contracts other than sales contracts.<sup>275</sup> While Art. 28 CISG provides that ‘a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by [the] Convention’, under the Unidroit Principles specific performance is not a discretionary remedy, i.e. a court must order performance, unless one of the exceptions laid down in Art. 7.2.2 Unidroit Principles applies.<sup>276</sup>

In terms of Art. 7.2.2 (a) Unidroit Principles a performance which is impossible in law or fact, cannot be required. However impossibility does not nullify a contract instead other remedies may be available to the aggrieved party.<sup>277</sup> For example, the refusal of a public permission which is required under the applicable domestic law

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<sup>273</sup> <http://www.cisg-online.ch/cisg/materials-commentary.html#Article%2014> (20.01.2006).

<sup>274</sup> Comment 1 on Art. 7.2.2 Unidroit Principles.

<sup>275</sup> Comment 1 on Art. 7.2.2 Unidroit Principles.

<sup>276</sup> <http://www.cisg.law.pace.edu/cisg/biblio/bonell.html#mjb26#mjb26> (12.01.2006)/ Comment 2 on Art. 7.2.2 Unidroit Principles.

<sup>277</sup> Comment 3 on Art. 7.2.2 Unidroit Principles.

and which affects the validity of the contract renders the contract void, with the consequence that the problem of enforceability of the performance cannot arise. When, however, the refusal merely renders the performance impossible without affecting the validity of the contract, Art. 7.2.2 (a) Unidroit Principles applies and performance cannot be required.<sup>278</sup> Art. 7.2.2 (a) Unidroit Principles also provides regulations for the case the performance has become illegal however in these cases the debtor may also be held liable for damages. The CISG has no such rule and the court will have to order specific performance, also when it has become unreasonably burdensome or expensive.<sup>279</sup>

The Comment on Art. 7.2.2 (b) Unidroit Principles explains the situation of unreasonably burdensome or expensive. If the situation arises where the performance, although still possible, may have become so onerous due to a drastic change of circumstances after the conclusion of the contract, it would run counter to the general principle of good faith and fair dealing in terms of Art. 1.7 Unidroit Principles to require it.<sup>280</sup> An illustration hereof is given in Comment 3 on Art. 7.2.2 Unidroit Principles. In a heavy storm an oil tanker has sunk in costal waters. In this case the shipper may not require performance of the contract of carriage, even if it would be still possible to lift the ship from the bottom of the sea, if this would involve the shipowner in expense vastly exceeding the value of the oil.

The entitlement of one party in terms of Art. 7.2.2 (c) Unidroit Principles is based on the idea that many goods and services are of a standard kind, i.e. the same goods or services are offered by many suppliers.<sup>281</sup> In the case of contract involving such staple goods or standard services, and the other party is not performing, most customers will not wish to waste time and effort extracting the contractual performance from the other party. In general business life is very fast moving and they cannot even afford to wait unreasonably long. Instead, they will go into the market, obtain substitute goods or services and claim damages for non-performance.<sup>282</sup> The word "reasonably" specifies that the simple fact that the same performance can be obtained from another source is not in itself sufficient, since the aggrieved party could not in

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<sup>278</sup> Comment 3 on Art. 7.2.2 Unidroit Principles.

<sup>279</sup> Lando, pg. 471.

<sup>280</sup> Comment 3 on Art. 7.2.2 Unidroit Principles.

<sup>281</sup> Comment 3 on Art. 7.2.2 Unidroit Principles.

<sup>282</sup> Comment 3 on Art. 7.2.2 Unidroit Principles.

certain situations reasonably be expected to have the option to an alternative supplier.<sup>283</sup> An illustration hereof would be the situation where A, situated in a developing country where foreign exchange is scarce, buys a machine of a standard type from B in Tokyo. In accordance with the contract, A pays the sales price before delivery however B does not deliver. Although A has the possibility to obtain the machine from another source in Japan, it would be regarded as unreasonably in view of the scarcity and high price of foreign exchange in its home country to require A to take this route. Resulting that, A is entitled to require delivery of the machine from B.<sup>284</sup>

In the comment on Art. 7.2.2 (d) Unidroit Principles it is explained by the consideration that the exception in the case the performance is of an exclusively personal character would be a severe interference with a party's personal freedom. Further, such performance rendered under force would often be unsatisfactory because the performance would impair its quality, and finally it would be difficult for a court to control the proper enforcement of the order.<sup>285</sup> In particular regard has to be rendered to the phrase "exclusively personal character". Comment 3 (d) on Art. 7.2.2 Unidroit Principles determines that a performance is of exclusively personal character if it is not delegable and requires individual skills of an artistic or scientific nature or if it involves a confidential and personal relationship. The exceptional circumstances do not include obligations undertaken by a company, ordinary activities of a lawyer, surgeon or engineer. An illustration hereof would be an undertaking by a firm of architects to design a row of 10 private homes can be specifically enforced as the firm can delegate the task to one of the partners or employ an outside architect to perform it. However, if it would be an undertaking by a world famous architect to design a new city hall, embodying the idea of a city of the 21<sup>st</sup> century, cannot be enforced because it is highly unique and calls for the exercise of very special skills.<sup>286</sup>

The exception in Art. 7.2.2. (e) Unidroit Principles is explained in its comment 3 and is based on the consideration that performance of a contract often requires special preparation and efforts by the obligor. If the time for performance has passed but the obligee has failed to demand performance within a reasonable time, the obligor may

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<sup>283</sup> Comment 3 on Art. 7.2.2 Unidroit Principles.

<sup>284</sup> Comment 3 on Art. 7.2.2 Unidroit Principles.

<sup>285</sup> Comment 3 on Art. 7.2.2 Unidroit Principles/ C.f. Lando, pg. 470.

<sup>286</sup> Comment 3 on Art. 7.2.2 Unidroit Principles.

be entitled to assume that the obligee will not insist upon performance. If the obligee were to be allowed to leave the obligor in a state of uncertainty as to whether performance will be required, the risk might arise of the obligee's speculating unfairly, to the detriment of the obligor, upon a favourable development of the market.<sup>287</sup> In order to counteract the uncertainty Art. 7.2.2 (e) Unidroit Principles was developed to exclude the right to performance if it is not required within a reasonable time after the obligee has become or should have become aware of the non-performance. What can be seen as “reasonable time” must be determined in each single case and to go further into the term reasonable in this context would go beyond the scope of the thesis.

### **3.8 Good faith**

Art. 1.7 Unidroit Principles states that ‘Each party must act in accordance with good faith and fair dealing in international trade and that the parties may not exclude or limit this duty.’ Throughout the Unidroit Principles there are a number of provisions constituting a direct or indirect application of this principle which means that good faith and fair dealing may be considered to be one of the fundamental ideas underlying the Unidroit Principles.<sup>288</sup> This article makes it clear that even in the absence of special provisions in the Unidroit Principles the parties’ behaviour throughout the life of the contract, including the negotiating process, must conform to good faith and fair dealing.<sup>289</sup> Examples are illustrated in the comments on Art. 1.7 Unidroit Principles.

Comment 2 on Art. 1.7 Unidroit Principles illustrates examples which would be typical behaviour contrary good faith and fair dealing and refers to the term used in some legal systems as “abuse of rights”. Examples for the malicious behaviour are cases where a party exercises a right merely to damage the other party, for another purpose for which it had been granted or when the exercise of a right is disproportionate to the original intention. One of the two examples given in Comment 2 on Art. 1.7 Unidroit Principles is a case of disproportionableness. One party rents premises from the other party to open a restaurant. The operator of the restaurant sets up tables out

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<sup>287</sup> Comment 3 on Art. 7.2.2 Unidroit Principles.

<sup>288</sup> Comment 1 on Art. 1.7 Unidroit Principles.

<sup>289</sup> Comment 1 on Art. 1.7 Unidroit Principles.

of doors during the summer month. The noise outdoor is increased due to the tables outside and it is difficult to find renters for the apartments in the same building. In this case it would be an abuse of rights if the operator of the restaurant would be told that he may not serve outdoor at all instead of requesting to not serve outside during late evening times.

The reference to good faith and fair dealing in international trade in the Unidroit Principles make it clear that in the context of the Unidroit Principles the two concepts are not to be applied in accordance to the standards ordinarily adopted within the different domestic law systems.<sup>290</sup> However these domestic standards might be taken in consideration to the extent that they are shown to be generally accepted among various legal systems.<sup>291</sup> The reference to good faith and fair dealing should always be understood as a reference to good faith and fair dealing in international trade and must be also construed in the light that standards of business practice may vary considerably from one trade sector to another, or even between one trade sector depending on various factors such as technical skills.<sup>292</sup>

The principle on good faith and fair dealing is of mandatory character and the parties may not exclude or limit the provision. The parties must act strictly in accordance with it, however it is in the parties' discretion to provide in their contract a duty to observe more stringent standards of behaviour.<sup>293</sup>

The CISG has no such rule. However Art. 7 (1) CISG provides that in the interpretation of the CISG regard it to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. Various commentators have outlined four possible approaches to the role and scope of good faith within the CISG: (i) that the good faith provision in Art. 7 (1) CISG should be used only in interpreting the Convention, (ii) that the conduct of contracting parties is governed by a positive obligation of good faith provided in

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<sup>290</sup> Comment 3 on Art. 1.7 Unidroit Principles.

<sup>291</sup> Comment 3 on Art. 1.7 Unidroit Principles.

<sup>292</sup> Comment 3 on Art. 1.7 Unidroit Principles.

<sup>293</sup> Comment 4 on Art. 1.7 Unidroit Principles.

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Art. 7 (1) CISG, (iii) that good faith is a general principle of the CISG and (iv) that good faith is a general principle of the *lex mercatoria* and Unidroit.<sup>294</sup>

Good faith in the Unidroit Principles occupies a very important place throughout the life of the contractual relationship, whereas it is only referred to in the CISG in connection with the interpretation of the contract.<sup>295</sup> Same as the Unidroit Principles the CISG has to be interpreted autonomously and it shall be avoided to apply it in accordance with a specific domestic law.<sup>296</sup> This is in order to counteract the “homeward trend” in interpretation that is the risk that judges from different cultural and legal backgrounds are apt to rely upon individual national legal heritages.<sup>297</sup> Further it has to be pointed out that single terms of the Convention have to be interpreted autonomously and that there shall be no interpretation in the light of a specific domestic law.<sup>298</sup> However this approach is criticised by Lando. He states that:

“Should a court only apply the principle of good faith if it has assurance that certain behaviour is covered by ‘internationally recognized principles of honourable conduct and, as far as possible, with the maximum measure of agreement between the courts of contracting states’. If a court can apply the principle only when it has ascertained that there is such maximum measure of agreement there is a risk that courts will not dare to apply the good faith principle when it finds that it should cover a certain conduct in international trade, and this regardless of whether or not other legal systems have endorsed the solution.”

A further medium to promote uniformity in the interpretation of the CISG is the reference to follow the foreign decisions,<sup>299</sup> literature and comments on the CISG and make use of the available database such as CISG-online.<sup>300</sup> In the case a factual issue is decided by a supreme court of one of the member states it shall be regarded as “persuasive authority” even if another interpretation is considerable.<sup>301</sup> Partly an

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<sup>294</sup> <http://www.cisg.law.pace.edu/cisg/biblio/keily.html> (25.01.2006).

<sup>295</sup> Guillemard, pg. 110/ Bonell on <http://www.cisg.law.edu/cisg/biblio/bonell.html> (18.11.2005).

<sup>296</sup> <http://www.cisg.law.pace.edu/cisg/text/digest-art-07.html> (25.01.2006).

<sup>297</sup> <http://www.cisg.law.pace.edu/cisg/biblio/keily.html> (25.01.2006).

<sup>298</sup> Schlechtriem, pg. 39.

<sup>299</sup> United Nations General Assembly: Uncitral Digest of case law on the United Nations Convention on the International Sale of Goods Art. 7 / A/CN.9?SER.C/DIGEST/CISG/7/ <http://daccessdds.un.org/doc/UNDOC/GEN/V04/547/56/PDF/V0454756.pdf?OpenElement> (27.01.2006).

<sup>300</sup> Schlechtriem, pg. 40.

<sup>301</sup> Schlechtriem, pg. 40.

international standard of good faith may already exist and may clearly be revealed and defined, at least in business branches with a long-standing tradition. Partly that standard may not exist but remains to be developed by business circles, arbitrators and courts, for instance in fresh modern trade branches like e.g. telesales.<sup>302</sup>

Art. 7 (1) CISG only determines the interpretation of the CISG and makes no reference to the behaviour of the contract parties by the conclusion or the fulfilling of the contract and the interpretation of the declarations of the parties. The inclusion in the Convention of a provision creating an obligation of good faith was the occasion for extensive and at times obscure disputes not only between socialist and capitalistic representatives, but also between common law and civil law delegates and even among representatives who shared a common cultural and legal background.<sup>303</sup> Opinions on the role to be played by good faith ranged from the idea that it should be viewed as an obligation present at all stages of the contracting process to the view that good faith should not be explicitly mentioned in any provision.<sup>304</sup> In view of these sharply divided opinions, a compromise was finally reached in article 7(1) providing that the Convention must be interpreted taking into account the observance of good faith in international trade. Although the only express reference to the good faith principles can be solely found in Art. 7 (1) CISG which relates to the CISG's interpretation, there are numerous applications of that principle throughout the CISG.<sup>305</sup> Indications hereof can be found in Artt. 16 (2) (b), 21 (2), 29 (2), 37, 40, 47 (2), 64 (2) and 85 to 88 CISG.<sup>306</sup> Although contractual obligations can not be implied by good faith in a contract governed by the CISG, in contrast to the position in the Unidroit Principles, it is argued that nevertheless, it is widely accepted that also under the CISG additional obligations can be implied such as a general duty to cooperate.<sup>307</sup> This rule can be understood as an expression of the general principle, which is based on good faith, that neither party must hinder performance through the other nor otherwise militate against the contractual purpose.<sup>308</sup> It should be noted that the doc-

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<sup>302</sup> Magnus on <http://www.cisgw3.law.pace.edu/cisg/principles/uni7.html> (22.01.2006).

<sup>303</sup> <http://www.cisg.law.pace.edu/cisg/biblio/powers.html#inter> (10.02.2006).

<sup>304</sup> <http://www.cisg.law.pace.edu/cisg/biblio/garro1.html> (10.02.2006).

<sup>305</sup> <http://www.cisg.law.pace.edu/cisg/text/digest-art-07.html> (25.01.2006).

<sup>306</sup> <http://www.cisg.law.pace.edu/cisg/text/digest-art-07.html> (25.01.2006).

<sup>307</sup> Bundesgerichtshof, Germany, 31 October 2001, Internationales Handelsrecht, 2002, 14 ff./ Magnus on the Pace website: <http://www.cisgw3.law.pace.edu/cisg/principles/uni7.html> (22.01.2006).

<sup>308</sup> Magnus on <http://www.cisgw3.law.pace.edu/cisg/principles/uni7.html> (22.01.2006).

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trine of good faith is broader in its scope, but these examples do give an indication of the type of obligation a duty of good faith requires.<sup>309</sup>

Common is a sense that parties to a contract for the international sale of goods are required to do all that is reasonable, and prohibited from doing all that is not reasonable, to ensure the contract remains on foot.<sup>310</sup> This is consistent with the principle of contract continuance embodied within the CISG.<sup>311</sup> Further it is noted that it is not possible in practice to distinguish a problem of interpretation from one of supplementation.<sup>312</sup> It is not seen as reasonable that a question of interpretation of a rule in the CISG is, and the interpretation of a term in the sales contract is not to be governed by the principle of good faith. It is requested that the principle must also govern the parties' behaviour.<sup>313</sup> There are cases where the courts applying CISG have in fact applied the principle of good faith to the interpretation of the contract<sup>314</sup> and the parties' behaviour<sup>315</sup>.<sup>316</sup>

Despite these obvious differences of wording both texts accord in their essence. Therefore, it is common ground that under the CISG the good faith principle also applies to the interpretation of the individual contract and to the parties' contractual relationship as such.<sup>317</sup> Both the CISG and the Unidroit Principles acknowledge that good faith plays an important role in international contracts. Furthermore, both texts do not exclusively rely on one abstract and general rule of good faith but try to specify the concept by more specific rules which elaborate the principle in some detail.<sup>318</sup> In a number of situations the Unidroit Principles prove to be helpful assistance for the good faith interpretation in the CISG.<sup>319</sup> Combining the CISG and the Unidroit Principles one gets a good impression what good faith in international commercial

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<sup>309</sup> <http://www.cisg.law.pace.edu/cisg/biblio/keily.html> (25.01.2006).

<sup>310</sup> <http://www.cisg.law.pace.edu/cisg/text/digest-art-07.html> (25.01.2006).

<sup>311</sup> <http://www.cisg.law.pace.edu/cisg/text/digest-art-07.html> (25.01.2006).

<sup>312</sup> Lando, pg. 457.

<sup>313</sup> Lando, pg. 457.

<sup>314</sup> Swiss Handelsgericht Zürich 30.11.1998, Schweizerische Zeitschrift für Internationales Recht und Europarecht 1999, pg. 195.

<sup>315</sup> OLG Hamburg, 05.10.1998.

<sup>316</sup> Lando, pg. 457.

<sup>317</sup> Staudinger (-Magnus), Art.7 no. 10.

<sup>318</sup> Magnus on the Pace website: <http://www.cisgw3.law.pace.edu/cisg/principles/uni7.html> (22.01.2006).

<sup>319</sup> Hartkamp/ Hesselink./ Hondius/ du Perron/ Vranken , pg. 37.

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relations should and could mean.<sup>320</sup> However the practice shows that there is an inconsistent application and interpretation of the good faith provision in the CISG. This causes a great insecurity and a party when entering into a sales contract does not know how a conflict will be handled in the case it arises and what consequences it may have.

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<sup>320</sup> Magnus on the Pace website: <http://www.cisgw3.law.pace.edu/cisg/principles/uni7.html> (22.01.2006).

## **4. Art. 7 CISG, the link between the CISG and the Unidroit Principles**

The CISG will better fulfil its purpose if it is interpreted in a consistent manner in all legal systems. Great care was taken in its preparation to make it as clear and easy to understand as possible. Nevertheless, disputes will arise as to its meaning and application. When this occurs, all parties, including domestic courts and arbitral tribunals, are required to observe its international character and to promote uniformity in its application and the observance of good faith in international trade in particular when a question concerning Art. 7 (2) CISG arises.<sup>321</sup> Art. 7 (2) CISG states that questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. The CISG has a twofold requirement for filling of gaps. First, the issue must not be expressly settled in the CISG and, second, the gaps must be settled in conformity with the general principles on which the Convention is based.<sup>322</sup> It is made clear that the gaps, if possible, are to be filled without resorting to domestic law, but rather in conformity to the Convention's general principles.<sup>323</sup> It shall only be resorted to domestic law where no such general principles can be identified.<sup>324</sup>

The CISG does not deal with all the issues that arise from international sales contracts.<sup>325</sup> For instance, Art. 4 CISG states that the CISG governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer and expressly states that it is not concerned with either the validity of the contract, any of its provisions, any usage or the effect the contract may have on the property in the goods sold. Art. 4 CISG is not the only evidence that the CISG is not an exhaustive body of rules. In line with Art. 5 CISG, the CISG does not apply to the liability of the seller for death or personal injury caused by the goods. The mentioned issues as well as other issues which are excluded from the sphere of application of the CISG are

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<sup>321</sup><http://www.cisg.law.pace.edu/cisg/text/p23.html> (26.01.2006).

<sup>322</sup> <http://www.cisg.law.pace.edu/cisg/biblio/ziegel2.html> (12.05.2005).

<sup>323</sup> <http://daccessdds.un.org/doc/UNDOC/GEN/V04/547/56/PDF/V0454756.pdf?OpenElement> (26.01.2006).

<sup>324</sup> <http://daccessdds.un.org/doc/UNDOC/GEN/V04/547/56/PDF/V0454756.pdf?OpenElement> (26.01.2006).

<sup>325</sup> Ferrari, pg. 1.

termed as “external gaps”<sup>326</sup>. Art. 7 (2) CISG and gap filling is directly connected to Art. 7 (1) CISG and interpretation because of their substantive relationship with each other.<sup>327</sup> Gaps in law constitute a danger to the uniformity and autonomy of the CISG’s interpretation, for the reason that “one way to follow the homeward trend is to find gaps in the law.”<sup>328</sup> In accordance with the basic criteria established in Art. 7 (1) CISG uniformity in the CISG’s application is the ultimate goal.

The “external gaps” must be distinguished from matters governed by the CISG but which are not expressly settled in it. These gaps are termed as “internal gaps”<sup>329</sup>. This distinction is compulsory since different types of gaps are dealt with differently.<sup>330</sup> The “external gaps” are to be filled by resorting to the “law applicable by virtue of the rules of private international law”<sup>331</sup> and the “internal gaps” are to be “settled in conformity with the general principles on which the Convention is based”<sup>332</sup>. Resorting to the rules of private international law would not only represent regression into the uncertainty of choice of law rules and the escalation of transnational cost for litigants, it would also endanger the CISG’s success by undermining the uniformity of its application.<sup>333</sup> It is evident that courts or tribunals, when interpreting the CISG, should to the largest extent possible refrain from resorting to domestic laws and try to find a solution within the CISG itself.<sup>334</sup> In the CISG only little guidance in order to distinguish between the aforementioned types of gaps is given. That is the reason why there is no unanimous opinion if in the case the “internal gaps” can not be settled in conformity with the general principles on which the CISG Convention is based the recourse to the law applicable by virtue of the rules of private international law should be possible.<sup>335</sup> Burden of proof is one example where the commentators do not agree on whether or not the issue is governed by the CISG.<sup>336</sup>

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<sup>326</sup> *lacunae praeter legem*“ or issues not governed by the CISG.

<sup>327</sup> Felemegas pg 269f..

<sup>328</sup> Felemegas pg 270.

<sup>329</sup> *Lacunae intra legem*.

<sup>330</sup> Ferrari, pg. 2.

<sup>331</sup> Art. 7 (2) CISG.

<sup>332</sup> Ferrari, pg. 2.

<sup>333</sup> Felemegas pg 271.

<sup>334</sup> Felemegas pg 275.

<sup>335</sup> Ferrari, pg. 2 f./ Ferrari, pg. 53 *Juristen Zeitung* 9.

<sup>336</sup> Schlechtriem, pg. 45.

Before the gap filling rule, in terms of Art. 7 (2) CISG, can be put into operation; the matters to which the rule applies must first be identified. In general there exist three different approaches to fill internal gaps. The first approach is known as the “true code approach” where the code is approached as a source of law itself and attention is only given to the code itself, including the purposes of the code and the policies underlying the code.<sup>337</sup> The second approach relies on the use of external legal principles to fill gaps found in the code and is known as the “meta-code approach”.<sup>338</sup> The latter approach is based on the idea that external legal principles should supplement the provisions of a code unless this expressly disallowed by that code.<sup>339</sup> The third approach is a combination of the two foregoing approaches to gap filling. According to this approach one is supposed to first apply the general principles of the code and in the absence of any such principles one should resort to the rules of private international law.<sup>340</sup> The CISG is an approach that combines recourse to general principles with an eventual recourse to the rules of private international law.<sup>341</sup> In the event a matter is governed by the CISG but not expressly settled in it, Art. 7 (2) CISG offers a solution by (i) internal analogy, where the CISG’s other provisions contain an applicable general principle; or (ii) reference to external legal principles, the rules of private international law, when the CISG does not contain an applicable general principle.<sup>342</sup> There exist two complementary methods of gap filling. First, an analogical application of specific provisions of the CISG and second, a consideration of the general principles underlying the CISG as a whole, when the gap cannot be filled by analogical application of specific provisions.<sup>343</sup>

Bonell explains the difference between the two gap filling methods as follows. ‘Recourse to general principles as a means of gap filling differs from reasoning by analogy insofar as it constitutes an attempt to find a solution for the case at hand not by mere extension of specific provisions dealing with analogous cases, but on the basis

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<sup>337</sup> Felemegas pg 277f..

<sup>338</sup> Felemegas pg 278.

<sup>339</sup> Felemegas pg 278.

<sup>340</sup> Felemegas pg 278.

<sup>341</sup> Felemegas pg 279.

<sup>342</sup> <http://www.cisg.law.pace.edu/cisg/biblio/brandner.html> (10.02.2006)/ Felemegas pg 279.

<sup>343</sup> Schlechtriem 42, 45/ Felemegas pg 280f..

of principles and rules which because of their general character may be applied on a much wider scale.<sup>344</sup>

Gap filling by analogy is concerned with the application of certain rules or solutions taken from specific CISG provisions to be applied in analogous cases in order to resolve legislative gaps. One of the elements necessary for gap filling by analogy is the discovery of a specific provision dealing with similar issues to the ones present in the gap.<sup>345</sup> The provisions in the CISG have to be examined to the effect that the analogous provision may be restricted to its particular content and the extension to other situations would be arbitrary and contrary to the intention of the drafters or the purpose of the rule itself.<sup>346</sup> If there is no reason for the limitation of the analogical application of a specific rule to another CISG provision the gap should be filled by an application of that rule by analogy. There is no uniform opinion on the test to be applied finding out whether or not a gap can be filled by analogy.<sup>347</sup>

When the solution to a gap filling problem cannot be achieved by analogical application of a rule found in a specific CISG provision, the filling of gap can be performed by the application of the general principles on which the CISG is based.<sup>348</sup> In this situation the case in question does not get solved solely by extending specific provisions dealing with analogous cases but on the basis of rules which may apply on a much wider scale for the reason of their general character.<sup>349</sup> Further a distinction has to be drawn between those principles extrapolated from within specific CISG provisions and the general principles of comparative law on which the CISG as a whole is founded.<sup>350</sup> Some principles on which the CISG is based are expressly identified such as the principle of good faith and the one which is regarded as the most important principle, the principle of party autonomy.<sup>351</sup> The CISG provides that express contractual provisions take precedence over the default provisions of the CISG.

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<sup>344</sup> Felemegas pg 281.

<sup>345</sup> Felemegas pg 281.

<sup>346</sup> Felemegas pg 281.

<sup>347</sup> Felemegas pg 282/ Ferrari: when matters expressly settled in the Convention and the matters in question are so closely related that it would be unjustified to adapt a different solution one can fill the gap by analogy. Honnold: the cases must be so analogous that the drafters would not have deliberately chosen discordant results. Only in such circumstances it would be reasonable to conclude that the rule embracing the analogous situation is authorized by Art. 7 (2) CISG.

<sup>348</sup> Felemegas pg 283.

<sup>349</sup> <http://www.cisg.law.pace.edu/cisg/biblio/brandner.html> (10.02.2006).

<sup>350</sup> Felemegas pg 289.

<sup>351</sup> Schlechtriem, pg. 42 f..

Thus, contracting parties remain free to specify whatever law or terms they wish to apply to their transaction, and may exclude altogether the application of the CISG to their contractual relationship. Further general principles, upon which the CISG Convention is based, either expressly identified or not. Examples hereof are e.g. estoppel<sup>352</sup> and the principle of full compensation<sup>353</sup>.

In general it has been the courts and arbitrators task to determine in each case those general principles. Further they have to fulfil the task to derive from those general principles the solutions for the specific question to be settled. The Unidroit Principles could facilitate to derive a solution from those specific questions on the condition that it can be shown that the relevant provisions of the Unidroit Principles are the expression of a general principle underlying the CISG.<sup>354</sup>

According to Art. 7 (1) CISG in the interpretation of this Convention regard is to be had to its international character and to the need to promote uniformity in its application. As mentioned above the courts and arbitrators have to find the principles and criteria for the proper interpretation of the CISG each time themselves. In order to assure the uniformity in interpreting the CISG and pay regard to its international character the Unidroit Principles could considerably facilitate their task in this respect.<sup>355</sup>

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<sup>352</sup> More a manifestation of the principle of good faith. One court however stated that estoppel is a matter with which the Convention is not concerned. See <http://daccessdds.un.org/doc/UNDOC/GEN/V04/547/56/PDF/V0454756.pdf?OpenElement> (26.01.2006).

<sup>353</sup> [http://www.cisg.at/6\\_31199z.htm](http://www.cisg.at/6_31199z.htm) (11.01.2006)/ <http://www.cisg.law.pace.edu/cisg/biblio/ulr96.html> (15.01.2006).

<sup>354</sup> <http://www.cisg.law.pace.edu/cisg/biblio/ulr96.html> (15.01.2006).

<sup>355</sup> <http://www.cisg.law.pace.edu/cisg/biblio/ulr96.html> (15.01.2006).

## 5. The Unidroit Principles as a means to interpret and supplement the CISG

As mentioned in the forgoing chapter the link between the CISG and the Unidroit Principles is established on Art. 7 CISG. There are two ways to bring in the Unidroit Principles under a case of the CISG. First: as an interpretation aid in terms of Art. 7 (1) CISG and second: in deriving the solutions of the Unidroit Principles regarding general principles on which the CISG is based in terms of Art. 7 (2) CISG. However the opinion among legal scholars is divided. There are those who categorically deny that the Unidroit Principles can be used to interpret or supplement the CISG, invoking the formalistic argument that the Unidroit Principles were adopted later in time than the CISG and therefore cannot be of any relevance to the latter.<sup>356</sup> A favourable view of the possible use of the Unidroit Principles in interpreting and supplementing the CISG is taken by various commentators such as Cazon<sup>357</sup>, Magnus<sup>358</sup>, Viscasillas<sup>359</sup>.

Both the CISG and the Unidroit Principles are concerned with international commercial contracts. The reason for the recourse to the Unidroit Principles is that the CISG contains important ambiguities and gaps as it is becoming increasingly clear.<sup>360</sup> There is a high practical impact of the gaps. Louis and Patrick Del Duca found that of the 142 reported cases decided up to January 1, 1996, 52 disputes involved issues of law not addressed in the CISG. 42 involved questions of interest rates where the buyer was late in making payment or the seller was late in making refund.<sup>361</sup>

The Unidroit Principles, while building on the CISG's very solid foundation, have remedied many of its unavoidable shortcomings but also include restatements that

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<sup>356</sup> Bonell on <http://www.cisg.law.pace.edu/cisg.biblio/ulr96.html> (15/01/2006).

<sup>357</sup> Cazon, pg.3.

<sup>358</sup> Magnus, *allgemeinen Grundsätze im UN-Kaufrecht*, pp. 492f..

<sup>359</sup> Viscasillas, *Unidroit Principles of International Commercial Contracts*, pg. 404: by contrast, this author warns against "easy" recourse to the Unidroit Principles, which should be applied only when it is impossible to find a solution under CISG either by analogy or by the general principles.

<sup>360</sup> Ziegel on <http://www.cisg.law.pace.edu/cisg.biblio/ziegel2.html> (12.05.2005)/ Bonell on <http://www.cisg.law.pace.edu/cisg.biblio/ulr96.html> (15/01/2006).

<sup>361</sup> <http://www.cisg.law.pace.edu/cisg/biblio/delduca.html>. (10.02.2006). Other issues raised by the cases that are not addressed in the CISG were the following: Burden of proof of non-conformity of goods, validity of penalty clauses, prescription periods of the determination of claims, selection of forum of dispute resolution, the existence of a company, existence of an agency relationship, right of a party to offset claims and currency in which payment should be made.

include provisions derived from the CISG.<sup>362</sup> As demonstrated in chapter three, the Unidroit Principles are much more comprehensive in scope,<sup>363</sup> often more detailed in addressing the same issues and they may fill many of the gaps in the CISG provisions.<sup>364</sup> The reasons hereof will be discussed in the final chapter of the thesis. To the extent that the two provisions address the same issues, the rules laid down in the Unidroit Principles are normally taken either literally or at least in substance from the corresponding provisions of the CISG. Only in exceptional cases the Unidroit Principles depart from the CISG provisions.

The most significant departure of the Unidroit Principles from the CISG is most likely the provision for good faith which was already discussed in chapter three. The Unidroit Principles impose upon the parties a duty to act in good faith throughout the life of the contract, including the negotiation process, while the CISG, in contrast, expressly refers to good faith only in the context and for the purpose of the interpretation of the Convention as such. However as outlined in chapter three the scope of the principle of good faith in the CISG is not limited to the interpretation of the Convention but also finds numerous other applications.

Another departure is the provision according to which usages do not bind the parties whenever their application would be unreasonable.<sup>365</sup> These conflicting provisions were not outlined in chapter three. The reason for this limitation in the Unidroit Principles is, as states in the comment, that the application of a particular usage, though regularly observed by the generality of business people in a particular trade sector, may nevertheless be unreasonable in a given case. Then again the CISG expressly excludes this observation from the scope of the Convention. Reasons therefore is the observation that in order to protect parties from developing countries against usages unknown to them because they were developed in industrialized countries, Art. 9 (2) CISG requires that the parties 'knew or ought to have known' the usage. The

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<sup>362</sup> Felemegas, pg. 289.

<sup>363</sup> New Provisions were included on the manner in which a contract may be concluded, on writings in confirmation, on the case where the parties make the conclusion of their contract dependent upon reaching an agreement on specific matters or in a specific form, on contracts with the terms deliberately left open, on negotiations in bad faith, on the duty of confidentiality, on merger clauses, on contracting on the basis of standard terms, on surprising provisions in standard terms, on the conflict between standard terms and individually negotiated terms and on the battle of forms.

<sup>364</sup> Perillo on <http://soi.cnr.it/~crdcs/crdcs/perillo.htm> (10.02.2006)/  
<http://www.cisg.law.pace.edu/cisg/biblio/carlsen.html> (11.02.2006).

<sup>365</sup> Art. 1.8 (2) Unidroit Principles and Art. 4, 9(2) CISG.

Unidroit Principles seek to accommodate the parties' interest more directly by protecting the parties against the application of unreasonable usages.<sup>366</sup> The provisions in the Unidroit Principles are more favourable than the CISG since it is better to strike out clauses deemed to be unreasonable in the circumstances of a specific case rather than to exclude the application of the conditions as such.

While under the CISG a court, notwithstanding the fact that the right to require performance is expressly stated in Artt. 46 and 62 CISG, is not bound to enter a judgement for specific performance unless it would do so under its own domestic law<sup>367</sup>, according to the Unidroit Principles specific performance is not a discretionary remedy and hence a court must order performance, unless one of the exceptions laid down in Art. 7.2.2 applies.<sup>368</sup> Further the provisions Art. 2.11 Unidroit Principles and Art. 19 (3) CISG are contrary. Likewise, while Art. 19 (3) CISG states that any modifying term contained in the purported acceptance, relating to the price, payment quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes, is considered to be a material modification of the terms of the offer and therefore transforms the acceptance into a counter-offer, no such list is provided in the corresponding Unidroit Principles provision<sup>369</sup>.

Except the aforementioned the provisions in the CISG and the Unidroit Principles addressing the same issues are not necessarily incompatible and indeed can usefully support one another. Notwithstanding the wide acceptance of the CISG it might still occur that a sales contract does not fall within the scope of the CISG but that there is room for applying the Unidroit Principles as an alternative set of internationally uniform rules.<sup>370</sup> However whenever the requirements for the application of the CISG exist, the CISG will normally take precedence over the Unidroit Principles in view of its binding character. Yet even in the event the contract is governed by the CISG, the

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<sup>366</sup> Bonell on <http://www.cisg.law.pace.edu/cisg.biblio/ulr96.html> (15.01.2006).

<sup>367</sup> Art. 28 CISG.

<sup>368</sup> See chapter 3.7.

<sup>369</sup> The Unidroit Principles Comment state that a material modification must be determined in each single case and an important factor to be taken into account in this respect is whether the additional of different terms are commonly used in the trade sector concerned and therefore do not come to a surprise to the offeror.

<sup>370</sup> Either through express to the effect by the parties themselves or because a reference in the contract to 'general principles of law' or the 'lex mercatoria' or the like as the governing law is considered to be equivalent to a reference to the Unidroit Principles.

Unidroit Principles may serve an important purpose as mentioned before on the grounds of Art. 7 CISG.

Examples where the Unidroit Principles serve as an interpretation aid in terms of Art. 7 (1) CISG are the following. The criteria laid down in Art. 7.3.1 Unidroit Principles for the determination of whether or not there has been a fundamental breach of contract may be used for a better understanding of the corresponding CISG provision in Art. 25.<sup>371</sup> Another example which was already discussed in chapter three is Art. 7.1.7 (4) Unidroit Principles which by expressly mentioning among the remedies not affected by the occurrence of an impediment preventing a party from performance the right to terminate the contract, to withhold performance and to request interest on money due, but not the right to performance, makes it clearer that does the corresponding provision in the CISG, Art. 79 (5). Yet besides clarifying unclear language, the Unidroit Principles may also be used to fill gaps found in the CISG by deriving the solutions in the Unidroit Principles for the specific question. Numerous commentators already followed this observation and there already exists a large bibliography on articles and comments on where the Unidroit Principles were used in order to interpret and supplement the CISG provisions, as published on the Pace website.

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<sup>371</sup> In addition to the general criterion laid down in Art. 25 CISG, i.e. the fact that the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, provided the other party could not reasonably have foreseen such result, Art. 7.3.1(2) Unidroit Principles indicates as further factors to be taken into account in each single case whether strict compliance with the non-fulfilled obligation is of essence under the contract, whether the non-performance is intentional or reckless, whether the aggrieved party has reason to believe that it cannot rely on the other party's future performance, and finally whether the defaulting party would suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.

## 6. Conclusion

The Unidroit Principles were drafted by a working group that was specifically formed for this purpose. Its members, representing all different legal and socio-economic systems, were leading experts in the area of comparative law and international trade law, among them were legal scholars, judges and civil servants. It is important to note that the members of the working group were appointed in their own capacity and not as representatives of their governments or their own legal systems.<sup>372</sup> In their comparative work, emphasis was not only placed on considering as many national legal orders as possible but especially on finding a synthesis between the different legal systems, namely between the civil and the common law.<sup>373</sup> As international sources, special attention was given to the CISG and, where appropriate, to non-legislative instruments by professional bodies or trade associations, such as INCOTERMS<sup>374</sup> or the Uniform Customs and Practice for Documentary Credits.<sup>375</sup> The object of the drafting of the Unidroit Principles was not to unify domestic law by means of special legislation, but merely to restate existing international contract law, it was not imperative to take each and every law of every single country into account, nor was it necessary for every legal system to have an equal influence on each issue at stake. It was therefore not decisive which rule was adopted by the majority of countries but rather which of the rules had the most persuasive value and/or appeared to be particularly well-suited for cross border actions.<sup>376</sup> The Unidroit Principles are regarded as very user-friendly. They are neutral, short and concise, clearly arranged and with its simple language, explanations and practical examples easily understandable.<sup>377</sup> The reasons for the favourable acceptance of the Unidroit Principles are manifold<sup>378</sup> .<sup>379</sup>

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<sup>372</sup> [http://www.cisg.law.pace.edu/cisg/biblio/baron.html#b81\(10.02.2006\)/](http://www.cisg.law.pace.edu/cisg/biblio/baron.html#b81(10.02.2006)/) Bonell on <http://www.cisg.law.pace.edu/cisg/biblio/ulr96.html> (15/01/2006).

<sup>373</sup> [http://www.cisg.law.pace.edu/cisg/biblio/baron.html#b81\(10.02.2006\)](http://www.cisg.law.pace.edu/cisg/biblio/baron.html#b81(10.02.2006)).

<sup>374</sup> International commercial terms.

<sup>375</sup> [http://www.cisg.law.pace.edu/cisg/biblio/baron.html#b81\(10.02.2006\)](http://www.cisg.law.pace.edu/cisg/biblio/baron.html#b81(10.02.2006)).

<sup>376</sup> <http://www.cisg.law.pace.edu/cisg/biblio/bonell.html> (10.02.2006).

<sup>377</sup> [http://www.cisg.law.pace.edu/cisg/biblio/baron.html#b81\(10.02.2006\)](http://www.cisg.law.pace.edu/cisg/biblio/baron.html#b81(10.02.2006)).

<sup>378</sup> As pointed out by an eminent Swiss arbitrator: the Unidroit Principles, are likely to find a quite universal acceptance, since they have been worked out [...] with the contribution of over seventy well known specialists from all major areas and legal systems of the world, including formerly socialist countries, Latin America countries and countries of the Far East." However there might also be more practical reasons for the success of the Unidroit Principles. To quote an experienced American lawyer: The great importance of the Principles is that the volume exists. It can be taken to court, it can be referred to page and article number, and persons who are referred to its provisions can locate and

The CISG presents a landmark in the process of international unification of law.<sup>380</sup> The disparity of economic, political, and legal structure of the countries represented at the Vienna Conference suggests the difficulty of achieving legal uniformity. It also suggests the inevitability of compromises in order to integrate different concepts and ideas into an independent, workable, and meaningful system of regulating international sales. This need for compromises is unprecedented in the history of the international unification of private law.<sup>381</sup> The attempt to develop a compromise among radically different legal cultures has inherent difficulties. Understandably, most delegates wanted the Convention to embody as much as possible of their own national legal rules, either because of the assumption that what is familiar is probably better than what is strange, or as a result of the more pragmatic consideration that in international trade law the law of one's own country gives those familiar with it substantial "know-how" advantages.<sup>382</sup> Due to the aforementioned differences and difficulties some issues had to be excluded at the outset from the scope of the envisaged instrument, while with respect to other items the conflicting views could only be overcome by compromise solutions leaving matters more or less undecided.<sup>383</sup> In only being an observer from outside the author cannot deny to have the thoughts and critic that although it is understandable that each delegate tried to achieve that the own domestic rules prevail they should have taken the following thought in consideration. Could it be that the own domestic law rules are outdated anyway? Germany e.g. had a law reform in 2002 and adopted mostly the CISG rules as law applicable for domestic contracts. Further they should have asked themselves whether or not there domestic rules qualify for the needs in international trade and that they are when dealing in an international trade field they get confronted with foreign law rules in any case. Having left open questions unresolved causes a greater insecurity in international trade than dealing with a matter differently than in ones own country.

The negotiations leading up to the CISG had so amply demonstrated that this Convention was the maximum that could be achieved at the legislative level, which was

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review them without difficulty. This alone is a great contribution towards making *lex mercatoria* definitive and provable.

<sup>379</sup> <http://www.cisg.law.pace.edu/cisg/biblio/pr-exper.html> (10.02.2006).

<sup>380</sup> <http://www.cisg.law.pace.edu/cisg/biblio/bonell.html> (10.02.2006).

<sup>381</sup> <http://www.cisg.law.pace.edu/cisg/biblio/garro1.html> (10.02.2006).

<sup>382</sup> <http://www.cisg.law.pace.edu/cisg/biblio/garro1.html> (10.02.2006).

<sup>383</sup> <http://www.cisg.law.pace.edu/cisg/biblio/bonell.html> (10.02.2006).

the main reason for the drafters of the Unidroit Principles to abandon the idea of a binding instrument and instead take another road for its own project.<sup>384</sup> Since the Unidroit Principles were not intended to become a binding instrument aimed at unifying domestic laws they were much less conditioned by the differences existing between the various legal systems and therefore it was possible for them to address a number of matters which are either completely excluded or not sufficiently regulated in the CISG. Another reason for the addition of new provisions included in the Unidroit Principles was that the scope of the Principles is not limited to sales contracts but also includes other kinds of transactions as well as service contracts.

The outlining of the history in forming the instruments for the international trade shows the difficulties for the achievements of prevailing instruments over domestic law in international trade. The shortcomings in the CISG cannot be denied however when being aware of the difficulties and the discussions involved in forming the binding instrument one can understand the reasons hereof and does not get the impression that the drafters neglectfully established the rules. As explained above the conditions and the foundation for the forming of the Unidroit Principles were not as difficult as the ones for the CISG and the freedom in creating the provisions was not as limited as when creating the CISG. Further the Unidroit Principles drafters has the advantage that the CISG already existed and were able to use it as an example whenever it was regarded as reasonable. In the opinion of the author the CISG is the real achievement when paying regard to the conditions under which it was drafted and the goal is reached as binding instrument. However the achievement and application of the Unidroit Principles can not be underestimated as the resulting application in today's international business life reflect. It can not be denied that the Unidroit Principles are often easier and better to apply however since the two sets of rules are no competitors they rather support each other as this thesis show.

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<sup>384</sup> <http://www.cisg.law.pace.edu/cisg/biblio/bonell.html> (10.02.2006).

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