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ARTICLE 7 OF THE CISG: INTERPRETING THE CONVENTION AND FILLING ITS GAPS

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ABSTRACT:

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is the result of uniformization efforts meant to create a uniform set of rules to govern international sale contracts. In order to ensure the CISG provisions would be interpreted and applied in a uniform way, the international legislators included Article 7 to the text. Article 7(1) sets forth interpretative standards which stipulate that regard is to be had to the international character of the Convention and to the need of promoting uniformity in its application. In order to comply with these standards, it is suggested that one should make use of interpretative methods that move away from the influence of notions of domestic law, such as the resort to *travaux préparatoires*, the use of autonomous interpretation method, the resort to foreign practice and reference to CISG-AC opinions. Article 7(2) sets forth a gap-filling method to provide answers for issues governed by the CISG but not expressly settled in it. This method prescribes that the gaps should be filled in conformity with the general principles underlined in the CISG or, in the absence of such principles, in accordance with the law applicable by virtue of rules of private international law. In addition to Article 7, the interpretation of and gap filling within the CISG can be supplemented by the application of Articles 8, which deals with interpretation of statements made by and conduct of the parties, Article 9 which recognizes the prevalence of usages. Recourse to instruments of soft law such as the UPICC and the PECL as a way to fill gaps in the CISG should only be done as a result of the express agreement by the parties.

Key words: CISG, Uniformization, Interpretation of CISG, Gap-Filling, Article 7.

RESUMO:

A Convenção de Viena sobre Contratos de Compra e Venda Internacional de Mercadorias (CISG) é resultado dos esforços da UNCITRAL no sentido de criar um instrumento legal uniforme para regular a compra e venda internacional. Para assegurar que a CISG fosse interpretada e aplicada de forma harmônica por uma variedade de corpos jurídicos, o legislador internacional incluiu no texto o Artigo 7°. O Artigo 7(1) da CISG estabelece balizas interpretativas, quais sejam, a necessidade de se levar em conta o caráter internacional da Convenção e de promover a uniformidade em sua aplicação. Para que os preceitos do Artigo 7(1) sejam respeitados, sugere-se que recurso seja feito a métodos interpretativos que afastem a influência de noções de direito doméstico, tais quais referência aos trabalhos preparatórios da CISG, a conceitos internacionais autônomos, à jurisprudência estrangeira, e às opinioões do CISG-AC. O Artigo 7(2) da CISG, por sua vez, estabelece um método para preechimento de lacunas no texto da Convenção, o qual prescreve que matérias reguladas pela CISG que não forem expressamente resolvidas serão dirimidas segundo os princípios gerais que a inspiram ou, à falta destes, de acordo com a lei aplicável segundo as regras de direito internacional privado. Ademais, a interpretação da Convenção e preenchimento de suas lacunas podem ser suplementados pelo uso dos Artigos 8° e 9°, os quais lidam com a interpretação de declarações e condutas das partes, e com a prevalência de usos e costumes, respectivamente. O recurso a instrumentos de *soft law* como forma de preencher lacunas no texto da Convenção somente deve ser utilizado frente ao acordo das partes.

Palavras-chave: CISG, Uniformização, Interpretação da CISG, Lacunas, Artigo 7.

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INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (CISG or Convention) is the result of efforts intended to create a uniform system of rules to govern international sale contracts. Its main goal is to stimulate international commerce, based on the equality of stand of traders from different countries, irrespective of their legal traditions or level of economic development.

The importance of CISG can be expressed in more than one way. First, it is an instrument that contains uniform and modern provisions, which stimulates international trade by providing the parties with a common set of rules to govern any dispute resulted from their transaction. Second, it decreases costs of the transaction by eliminating the necessity of a party to familiarize with foreign trade law, and by eliminating disputes regarding the applicable law to the contract.

Notwithstanding, the existence of a uniform set of rules presupposes a uniform interpretation of its provisions as well, at the risk of the uniformization advantages to be lost within its disharmonic application. For that reason, scholars suggest that the interpretation of CISG provisions should not be based on domestic interpretative solutions, but on international ones. The interpretation should be made in accordance with Art 7(1) of CISG, which stipulates that regard is to be had to its international character, to the need to promote uniformity, and to the observance of good faith in its application.

Accordingly, scholars suggest that when faced with doubts the interpreter of the CISG provisions should resort to the *travaux préparatoires* of the Convention, and to the practice established by courts of other Contracting States in applying the uniform law[1]. Another proposed solution is to resort to the autonomous interpretation method, making use of referenced autonomous concepts of international law, and avoiding employment of approaches of domestic law[2]. In addition, it would be possible to resort to the opinions of CISG Advisory Council[3].

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[1] FERRARI, Franco. **Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing**, 1995. Available at http://www.cisg.law.pace.edu/cisg/biblio/2ferrari.html. Access in 12 April 2017.

[2] OLIVEIRA, Renata Fialho de. ***Harmonização Jurídica no Direito Internacional***. *Quartier Latin*, 2008, p. 72. See as well, SIEHR, Kurt. ***Internationales Privatrecht****: deutsches und europäisches Kollisionsrecht für Studium und Praxis*. Heidelberg, 2001, p. 386.

[3] "*The CISG-AC is a private initiative which aims at promoting a uniform interpretation of the CISG. It is a private initiative in the sense that its members do not represent countries or legal cultures, but they are scholars who look beyond the cooking pot for ideas and for a more profound understanding of issues relating to the United Nations*

Another question that arises with the application of the CISG is how to fill the gaps existent in its text. The Convention stipulates in Article 7(2) that questions concerning matters governed by the CISG, but not expressly settled in it, are to be settled in conformity with general principles in which the CISG is based, or, in the lack of such principles, in conformity with the law applicable according to the rules of private international law of the forum.

The goal of this work is to present the methods for interpreting the CISG in accordance with the standards set out in Article 7(1); and to throw light upon the method for filling its gaps prescribed by Article 7(2).

Further, it aims to analyse other ways of interpreting the Convention and filling the *lacunae* in it, through the investigation of the intent of the parties in accordance with Article 8, and through the prevalence of usages as provided by Article 9. Finally, the question whether it is possible to fill gaps in the Convention resorting to instruments of *soft law* such as UNIDROIT Principles and the Principles of European Contract Law will be addressed.

To achieve the objectives of this work, the provisions of the Convention, its *travaux préparatoires*, and case law of the Contracting States will be scrutinized in order to reveal a logic for the application and interpretation of CISG rules. Additionally, scholarly writings, as well as opinions by the CISG Advisory Council (CISG-AC), will be analysed, in the hope they will provide some elucidation.

Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG)." See Scope and Aims of the CISG-AC, available on http://www.cisgac.com/home/. Access in 15 April 2017.

PART A
INTERPRETING THE CISG

I. Imprecisions in the text of the CISG

For the CISG to be applicable to a contract it must fulfil certain requirements. The first one, is that there should be an international status of the sale, with the parties having their respective places of business in the territory of different Contracting States[4]. Second, it is also necessary that the contract fall within the *ratione materiae* scope of the Convention.

Article 1(1) of the CISG states that the Convention is to be applied to "*contracts of sale of goods*". From this expression, two main elements can be pointed out: a transaction defined as a *sale*, and the object of this transaction, a *good*.

Even though the CISG governs exclusively the sale of goods, it does not define in precise terms what would be considered a *sale*. Part of the doctrine believes that this is consequence of the fact that there are no essential differences in the legal concept of sale as defined by most legal traditions[5]. However, the understanding here followed is that, precisely because of existing differences among domestic concepts of sale, the CISG is silent on this matter. Such gap was intended to guarantee a broader acceptance of the text by the Contracting States, which could be influenced by notions of domestic law when deciding to sign or not the Convention.

Accordingly, the CISG does not define what a *good* is. It contains no express clarification whatsoever, for the same reason it does not define *sale*: to avoid limiting its acceptance by the Contracting States by way of overlooking the differences existent in notions of national law. What the Convention contains is only express exclusions to its scope of application, *e.g.* in Articles 2, (a) to (f)[6]. These exclusions are of three types: either based on

[4] By force of Article 1(1) (b), the Convention may also be applicable to transactions in which one of the parties is not from a Contracting State, if the rules of private international law lead to the application of the law of a Contracting State.

[5] See, BERNARDINI, Piero. ***La compravendita Internazionale***. In FERRARI, Franco. *Op cit* fn 1.

[6] Article 2, CISG: "*This Convention does not apply to sales (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew or ought to have known that the goods were bought for any such use; (b) by auction; (c) on execution or otherwise by authority of law; (d) of stocks, shares, investment securities, negotiable instruments, or money; (e) of ships, vessels, hovercraft or aircraft; (f) of electricity*".

the purpose for which the goods were purchased; on the type of transaction; or on the kinds of goods sold[7].

The rationale for such exceptions to the application of CISG was to avoid incompatibilities with domestic laws, as these excluded matters were often governed by special national provisions of mandatory character. A second reason for excluding some of these matters from CISG's scope was the controversy as to whether the objects of certain transactions, *i.e.* commercial papers, and electricity, could be considered *goods*[8].

Furthermore, the application of CISG can also be excluded in an implicit manner. One example can be found Article 53, which provides that "*the buyer must pay the price for the goods*", and by doing so, it implicitly excludes countertrade or barter transactions, in which both parties fulfil their obligations by delivering goods or performing services in benefit of each other[9]. This view is of course opposed by part of the doctrine, which states that the term *price* is not defined in the text of the CISG and therefore is not limited only to money. In addition, most legal traditions would consider barter contracts as a type of sales contracts[10].

Finally, special mention should be made to Article 4 of the CISG. This provision states that the Convention governs only the formation of the contract, and the rights and obligations of the seller and the buyer arising out of it. The Convention is not concerned, unless otherwise expressed, (a) with the validity of the contract, or of any of its provisions; and (b) with the effect which the contract may have on the property in the goods sold[11]. The CISG, however, does not provide a formal definition of what are validity issues or effects of the contract on the property of the goods sold.

As a result of the way the text of CISG was elaborated, one could say that its scope of application is delineated by broad descriptions of matters to be regulated by its provisions, combined with a non-exhaustive list of issues to be excluded[12]. Thus, the scope of application of the CISG has not been clearly defined. In addition, the text contains several gaps, which create doubt among the practitioners on how to proceed regarding certain matters.

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[7] UNCITRAL. ***Travaux Préparatoires*, Commentary on the draft Convention on the International Sale of Goods (A/CN.9/116/Annex II).** 17th of March 1976. Available at http://www.uncitral.org/pdf/english/yearbooks/yb-1976-e/vol7-p96-142-e.pdf. Access in 24 April 2017.
[8] *Idem*.
[9] FERRARI. *Op cit* fn 1.
[10] PEROVIC, Jelena. **Selected Critical Issues Regarding the Sphere of Application of CISG.** Available at http://www.cisg.law.pace.edu/cisg/biblio/perovic.html. Access in 25 April 2017.
[11] The only exception in the text to this provision can be found in Article 11, according to which the contract of sale of goods does not need to be concluded in or evidenced by writing, nor is subject to any requirement of form.
[12] KRÖLL, Stefan. **Selected Problems Concerning the CISG's Scope of Application**. Available at https://www.uncitral.org/pdf/english/CISG25/Kroll.pdf. Access in 23 April 2017.

As evidenced above, the existence of imprecisions in the text of CISG is noticeable. These imprecisions are not only created by the use of broad and vague terms which require interpretation, but also by the existence of gaps, or *lacunae*, in the Convention's provisions.

Most of these imprecisions are not considered to have been the result of oversights from the drafters of the Convention, or from their lack of will to cover the whole subject matter governed by the CISG[13]. In order to obtain maximum acceptance by the Contracting States, and because not all participants of the Diplomatic Conference would agree on all points, the working group had to allow domestic policies to prevail over the uniformization interests.

Consequently, the CISG was drafted with express exclusion of the matters regarding which the major disputes and controversies arose, and with the employment of broad concepts and intentional gaps that would leave room for flexibilization of its terms.

It was still necessary, however, to guarantee that the text would be interpreted and applied in a coherent way, in order to achieve the ultimate uniformization goals. The solution found by the working group was then to attempt to promote uniformity of interpretation and application by including Article 7 in the text. This provision sets standards for interpretation of the Convention, and recognizes the existence of gaps which need to be filled.

II. The Interpretation Standards of Article 7(1)

The imprecisions on the CISG wording, even though important to maximize its acceptance in diverse jurisdictions, hinder the definition of a clear scope of its application, and leave room for doubt and controversy in regard to the interpretation of its provisions. Having in mind the need to remedy the effects of these imprecisions, the UNCITRAL working group included in the text standards for interpreting the Convention.

These standards for uniform interpretation of the CISG can be found in Article 7(1), which provides that *"in the interpretation of this Convention, regard is to be had its international character, to the need to promote uniformity in its application, and to the observance of good faith in international trade*".

In reference to this provision, the UNCITRAL Secretariat wrote in its Explanatory Note that the CISG would better fulfil its purpose if interpreted in a consistent manner in all legal systems. The Secretariat stated that

[13] ZELLER, Bruno. **CISG and the Unification of International Trade Law**. Ed. Routledge-Cavendish, 2007, p. 10.

> [G]reat 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 admonished to observe its international character and to promote uniformity in its application and the observance of good faith in international trade[14].

Accordingly, as pointed out by Komarov[15], only a special legal mechanism would be able to preserve the uniform interpretation of the text of the Convention, avoiding domestic-oriented interpretation that would likely lead to conflicting application of provisions.

Notwithstanding, the Convention is not clear as to what methodology should be employed in order to achieve the goals of uniformity. Stating the need to have regard to the international character of the Convention, to promote uniformity of its application, and to observe good faith does not shed any light on how to actually accomplish it.

For this reason, already during the elaboration of the text of the Convention, different suggestions were made as to what should be the sources of interpretation of provisions of the CISG[16]. These suggestions were to resort to the *travaux préparatoires* of the Convention, to make use of the Autonomous Interpretation method, and to resort to practice established by the courts of Contracting States. In addition, a more recent solution has presented itself: resort to the opinions of the CISG Advisory Council (CISG-AC).

1. Resort to the travaux préparatoires

Resort to the *travaux préparatoires* is a commonly used method for interpretation of the CISG. It is the mere application of the theory of interpretation of the original intent[17] to the provisions of the Convention.

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[14] UNCITRAL. **Explanatory Note by the UNCITRAL Secretariat on the United Nation Convention on Contracts for the International Sale of Goods**. Part One, C. Available at http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf. Last Access on 25 Jan 2018.
[15] KOMAROV, Alexander S. **Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG**: Some Remarks on Article 7(1). In Journal of Law and Commerce, 2005-06, p. 76.
[16] Idem, p. 77.
[17] For more information on the theory of original intent see POWELL, H. Jefferson. **The Original Understanding of Original Intent**. Harvard Law Review, vol. 98, n° 5. March 1985. P. 885-948.

The legislative history and parliamentary debates on the Convention are often used by judges and arbitral tribunals in the interpretation of articles of the CISG. Once analysed, they can elucidate the purposes of the UNCITRAL Working Group at the time of drafting the instrument. Once these purposes are revealed, they can be used as guidelines to the practical application of a provision.

As an example of resort to the *travaux préparatoires*, one can point out judgment n° 01-7541 of the U.S. District Court of the Southern District of Florida[18]. In this decision, taking into account the legislative history of the Convention, the Court noted that Article 1 of the CISG rejected the Universalist approach of the 1964 Hague Conventions, according to which the uniform rules should apply irrespective of the Parties having their place of business in one of the Contracting States. The Court then proceeded to reject the application of the CISG as the substantive law governing the contract.

The resort to this method for interpretation of the CISG is, however, not without critics. There are those who argues that employment of extrinsic material, such as the *travaux préparatoires*, should only be done under extreme circumstances or when all other means are exhausted, as it is only a starting point, and not the full history behind the provision[19]. They consider that, the older the convention, the less relevant the *travaux préparatoires*[20].

Nonetheless, the general opinion here adopted is that the *travaux préparatoires*, and especially the Commentary on the Draft Convention on the International Sale of Goods prepared by the UNCITRAL Secretariat, can be used as a primary source for interpreting the Convention as they provide immediate answers to questions that may arise in regard to the application of a CISG provision. Furthermore, once established the original purposes of the drafters of the Convention, it is up to the interpreters of the law to reflect if they are still able to cover the necessities of international trade, and, if not, to adapt them to the new reality.

2. Autonomous Interpretation of Concepts

The Commentary on the Draft Convention on the International Sale of Goods highlights the need to respect the international character of the Convention and to promote

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[18] USA: U.S. District Court, Southern District of Florida, Case n° 01-7541. *Impuls I.D. International, S.L., Impuls I.D. Systems Inc., and PSIAR S.A. v. Psion Teklogix Inc.,* 22 Nov 2002.

[19] ZELLER, Bruno. **Four-Corners**: The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods. May 2003. Available at: http://www.cisg.law.pace.edu/cisg/biblio/4corners.html#chp3. Last access on 27 January 2018

[20] See MAXIMILIANO, Carlos. ***Hermenêutica e aplicação do Direito***. 8. ed. Rio de Janeiro: Forense, 1965, p. 156.

uniformity in its application. It points out that national courts and arbitral tribunals should not rely on domestic concepts of law, as they differ from jurisdiction to jurisdiction:

> National rules on the law of sales of good are subject to sharp divergences in approach and concept. Thus, it is especially important to avoid differing constructions of the provisions of this Convention by national courts, each dependent upon concepts used in the legal system of the country of the forum[21].

There are expressions employed in the text of the CISG which are similar to ones normally employed by domestic law, such as "validity", "reasonable", or "avoidance". These expressions have particular meanings in each legal system they are used, and are not necessarily adequate to international trade.

Having in mind the standards of Article 7(1), the expressions employed in the CISG should not be interpreted in accordance with similar domestic expressions, but in an independent way. They should be interpreted as neutral concepts, found from a common understanding of the many domestic meanings of each expression[22]. Thus, through a broad comparative analysis, it would be possible to find common traits which repeat themselves in different concepts of law, and consequently arrive to an independent and international meaning for a particular expression.

Schwenzer pointed out that one solution proposed by the drafters of the Convention for interpretation in accordance with the standards of Article 7(1) was to develop a particular terminology and specific list of concepts to be employed in the interpretation of the CISG[23]. This however has not yet been achieved.

In practice, even though many interpreters still rely on national concepts of law to determine the scope of application of CISG, a trend towards applying the autonomous interpretation rules can be seen[24]. A great example is the decision of the Court of Padova, Italy,

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[21] UNCITRAL. ***Travaux Préparatoires*, Commentary on the draft Convention on the International Sale of Goods, prepared by the Secretariat (Document A/CONF.97/5).** 14 March 1979. Available at http://www.uncitral.org/pdf/english/texts/sales/cisg/a_conf.97_5-ocred.pdf

[22] BONNEL, Michael J., **Article 7**. In Commentary on the International Sales Law. Eds. BIANCA M.C.; BONNEL Michael J. Giuffrè: Milan, 1987, p.74.

[23] SCHWENZER, Ingeborg. **Interpretation and Gap-Filling under the CISG**. *In* Current Issues in the CISG and Arbitration: international commerce and arbitration, vol 15. Eds. Ingeborg Schwenzer, Yeşim M. Atamer, and Petra Butler. Eleven International Publishing, 2014, p. 110.

[24] See New Zealand: Court of Appeal of New Zealand – (2011) NZCCLR 27, (2012) 2 NZLR 109 (CA). *RJ & AM Smallmon v. Transport Sales Limited & anor*, 22 July 2011. CLOUT Abstract nº 1256; Germany: Oberlandsgericht

issued on *Ostroznik Savo v. La Faraona soc. coop. a r.l.*[25], in which the Italian Court found that the typification of the contract under Italian Law as a contract for delivery of goods in instalments ("*contratto di somministrazione*") was to be included in the broad concept of sale under the CISG, thus falling under the *ratione materiae* scope of the Convention.

The *contratto di somministrazione* is regulated by Articles 1559 to 1570 of the Italian Civil Code. It amounts to a periodic and continued performance, for supplying products or services, and is considered a type of contract different from contracts of sale. The Italian Court disregarded this separation done under its own domestic tradition, in order to qualify the contract in question under a sale of goods in instalments, in the terms of the CISG.

3. Resort to the Practice Established by Courts of Contracting States

Another method that should be employed to realize the CISG goals of uniformization is the resort to the practice established by foreign courts and by international arbitral tribunals. By analysing foreign decisions, a judge or arbitrator may find interpretative solutions given to issues similar to the one that must be decided, and, if adequate, apply these solutions to the case at hand. Thus, resort to foreign practice minimizes the disharmonic interpretation of the CISG.

To overcome previous criticism on the difficulty of finding decisions issued by foreign judicial bodies, several online databases have been created to make readily available case law from all over the world, in translated abstracts[26]. Since then, reference to foreign judicial and arbitral practice became common, as evidenced by the number of judgments and arbitral awards which expressly refer to solutions found by foreign courts and arbitral tribunals[27].

München – 7 U 2959/04, 15 September 2004, CLOUT Abstract nº 595; Germany: Bundesgerichtshof, VIII ZR 67/04, 2 March 2005, CLOUT Abstract nº 774; Spain: Audiencia Provincial de Pontevedra – Recurso nº 681/2007. *Kingfisher Seafoods Limited v. Comercial Eloy Rocio Mar SL*, 19 Dec 2007, available at: http://cisgw3.law.pace.edu/cases/071219s4.html. Serbia: Foreign Trade Court of Arbitration attached to the Serbia Chamber of Commerce, Arbitral Award T-4/05, 15 July 2008, CLOUT Abstract nº 1021

[25] Italy: *Tribunale di Padova – Sez. Este*. *Ostroznik Savo v. La Faraona soc. coop. a r.l*. 11 January 2005. CLOUT Abstract n° 651.

[26] FERRARI, F. **Gap-Filling and Interpretation of the CISG**: Overview of International Case Law. Vindobona Journal of International Commercial Law & Arbitration, 2003, p. 63-92 See, for instance, the Pace University Institute of International Commercial Law (http://www.cisg.law.pace.edu/); UNILEX (http://www.unilex.info/); and the UNCITRAL CLOUT Database (http://www.uncitral.org/clout/index.jspx). More databases can be found on the website for the Autonomous Network of CISG Databases (http://iicl.law.pace.edu/cisg/page/autonomous-network-cisg-websites).

[27] See, for instance Serbia: Foreign Trade Court of Arbitration attached to the Serbia Chamber of Commerce, Arbitral Award T-8/08, 28 January 2009, CLOUT Abstract nº 1020; Arbitral Award T-4/05, 15 July 2008, CLOUT Abstract nº 1021; Italy: *Tribunale di Vigevano, Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina*

Special mention should still be made to the judgment rendered by the *Tribunale di Rimini* in the case *Al Palazzo S.r.l. v. Bernardaud di Limoges S.A.*[28], in which the court noted that the existence of these online databases are an important tool to comply with the standards of Article 7(1). The tribunal also noted that the practice of foreign courts or arbitral tribunals, even though not binding, could be persuasive.

4. Opinions of the CISG-AC

The last method here discussed for interpreting the CISG with regard to its international character, and to the need to promote uniformity in its application, is the resort to the opinions of the CISG-AC.

The CISG-AC is a private initiative of academics, founded in 2001, which aims to promote uniformity in the application of the Convention, by regularly issuing opinions on controversial points of its text, or by providing solutions to fill its gaps. It can do so on request, or by its own initiative[29]. The CISG-AC has, until now, issued 17 different opinions, the last one on Limitation and Exclusion Clauses in CISG Contracts, dated 30 June 2016[30].

The opinions of the CISG-AC are of importance to the harmonic interpretation of the Convention, as they provide solutions to recurrent issues that practitioners face when dealing with the CISG. The solutions proposed in these opinions have been employed as guidance by several courts, with the first judgment dating from 2004[31]. Since then, the number of decisions referring to the opinions increased exponentially[32].

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s.p.a., 12 July 2000, CLOUT Abstract nº 378; The Netherlands, Court of Appeal, The Hague. *Feinbäckerei Otten GmbH & Co. Kg v HDI-Gerling Industrie Versicherung AG*. Case n° 200.127.516-01, 22 April 2014. Abstract available at http://www.unilex.info/case.cfm?id=1900.

[28] Italy: Tribunale di Rimini, *Al palazzo S.r.l. v. Bernardaud s.a.*, 26 November 2002. CLOUT Abstract nº 608. In this case, the tribunal pointed such databases as useful tool to mitigate interpretative differences, thus preventing that the parties resort to forum shopping.

[29] MISTELIS, Loukas. CISG-AC Publishes First Opinions. Available at https://www.cisg.law.pace.edu/cisg/CISG-AC.html . Last access 25 January 2018

[30] Information provided by the CISG-AC on http://www.cisgac.com/. Last accessed on 25 January 2018.

[31] USA: Federal District Court, State of Washington, C03-2292 JLR, *Delizia v. Columbia Distributing Company*. 9 September 2004. Available at http://cisgw3.law.pace.edu/cases/040909u1.html.

[32] A summary of all decisions referring to the CISG-AC opinions can be found on http://www.cisgac.com/case-law/. An increase of the number of judgments with reference to CISG-AC opinions can be seen, especially in the last few years.

PART B
FILLING THE GAPS IN THE CISG

I. The existence of gaps in the text of CISG

1. Recognizing the existence of gaps

As noted, the recourse to the *travaux préparatoires*, the use of autonomous interpretation method, the resort to foreign practice and to CISG-AC opinions in CISG related cases are powerful devices in preventing a non-uniform application of the Convention's provisions. Their relevance is in facilitating a harmonic application of the Convention, by providing interpretative solutions that take into account its international character.

These methods of interpretation prevent judges and arbitrators from being influenced by notions of their own national laws, and offer access to a plethora of interpretative and gap-filling solutions that take into account the standards set out by Article 7(1). Their goal is to increase the reliability of judicial decisions, and to ensure that no plurality of results for solving disputes under the CISG will prejudice its goals of uniformity.

However, when faced with *lacunae* in the text, the interpreters of CISG will find no use in these methods, because one cannot interpret what is missing from the text. The interpreters will then need to resort to the tools provided by Article 7(2) in order to fill the gaps and reach a solution, while still having in mind the standards set on Article 7(1).

Before proceeding with a deeper analysis Article 7(2), it is important to categorize the types of gaps existent in the CISG text. They can be external[33] or internal, according to whether they concern matters governed by the CISG or not.

2. Internal Gaps

[33] Part of the doctrine criticizes the terminology external gap, claiming that if a matter is expressly excluded from CISG, it cannot be considered a gap. See GEBAUER, Martin. **Uniform Law, General Principles and Autonomous Interpretation**, Uniform Law Review, 2000, p. 696. For practical purposes, however, the use of the terminology *external gap* in this paper shall include both excluded and omitted matters.

Internal gaps in the text of the CISG concern the matters governed by the Convention, but not expressly settled in it. They are the issues to which the CISG refers, but does not regulate in an exhaustive manner.

An example of an internal gap in the CISG is the place of performance for claims of money that are not the price. That is the case, for instance, when the seller is obliged to pay back the buyer in case of avoidance of the contract under Article 81(2). Even though the Convention provides for the paying back of the price, it does not provide for the place of this payment.

The solution can then be found in Article 57, which provides a general principle to solve this internal gap. This provision states that if the parties have not indicated a place for payment of the price, the buyer must do it (a) at the seller's place of business; or (b) where the handing over of the goods or of documents occur, when the performance should be concurrent. One can then extract, from this article, the principle of performance at the place of business of the creditor, and apply it to the gap in Article 81(2) related to the place of repayment of the price[34].

3. External Gaps

On the other hand, external gaps concern the matters which the drafters of the Convention expressly excluded from its scope of application, such as consumer contracts and the sale of ships and vessels, in accordance to Article 2. External gaps can also concern matter not included in the original uniformization efforts, about which the CISG is silent, such as burden of proof. Accordingly, external gaps are divided in two distinct groups[35].

Regarding the first group, *i.e.* the matters expressly excluded form CISG, there is no question that it was the UNCITRAL working group's purpose to avoid creating a set of uniform rules governing them. As pointed out by Flechtner, "*the Convention itself intentionally incorporates non-uniformity within its text*"[36] in order to maximize the acceptance of the Convention by the Contracting States. Thus, it promotes uniformity on international sales of goods, by excluding from its scope the issues to which no compromise could be achieved.

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[34] Austria: *Oberster Gerichtshof*, 3Nd 509/02. 18 December 2002. In this case, the Supreme Court of Austria decided for the application of Article 57(1)(a) by analogy to all monetary obligations, stating that payments should be made at the creditor's place of business.

[35] ZELLER. *Op cit.* fn 19, p. 30.

[36] FLECHTNER, Harry M. **Uniformity and Politics: interpreting and filling the gaps in CISG**. Legal Studies Research Paper Series, Working Paper nº 2014-16, April 2014. Available on https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2426565. Access in 17 May 2017.

Consequently, in respect to these expressly excluded matters, the CISG shall not be applicable, leading to the application of domestic law in consonance with the rules of private international law of the forum.

However, in regard to the second group, *i.e.* matters to which the CISG is silent about, there is no clear intent of excluding them from the scope of application of the Convention. Bridge wrote that a gap in the CISG might refer to a matter that is completely omitted from its text, but falls under its scope of application[37].

A clear example of a matter to which the CISG is completely silent, but can fall under the scope of application of the CISG is the burden of proof. Even though there is conflicting case law in this regard, with judgments excluding it altogether from the scope of the CISG[38], a trend exists towards settling the issue of burden of proof in accordance with general principles contained in the Convention[39].

The judgment 4C.198/2003 from the Federal Supreme Court of Switzerland[40], for instance, reveals that the court found different principles that would allow settling the issue based on the CISG. The Court decided that the allocation of the burden of proof could be determined by the proximity of the evidence. The tribunal then ruled that the buyer who had accepted the goods without claiming their non-conformity had the burden of proving it, once the goods had entered into his sphere of control. The Federal Supreme Court of Switzerland, therefore, applied the CISG to fill an external gap caused by an omission in the text.

II. The method of filling the gaps set in Article 7(2)

While Article 7(1) of the CISG sets standards for the interpretation of the Convention, Article 7(2) provides a method for filling the gaps existent in the text. Although a distinction between the objectives of each of these provisions can be made, in practice, the limits between the application of each of them is often blurred[41].

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[37] BRIDGE, Michael G. **The International Sale of Goods**. Third edition, Oxford University Press, 2013, p. 511.
[38] Argentina: *Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires* – 40919/2008. *Sanovo International S.A. v. Ovoprot Internartional S.A.* 24 June 2010, available at http://www.unilex.info/case.cfm?id=1590; Switzerland: Bezirksgericht der Saane, 20 February 1997, CLOUT Abstract nº 261.
[39] Switzerland: *Handelsgericht des Kantons Zurich* – HG970238, 10 February 1999, CLOUT Abstract nº 331; Italy: *Tribunale di Vigevano, Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina s.p.a.*, 12 July 2000, CLOUT Abstract nº 378; Germany: *Bundesgerichtshof* – VIII ZR 321/03, 30 June 2004, CLOUT Abstract nº 773.
[40] Switzerland: Federal Supreme Court - 4C.198/2003, 13 Nov. 2003, CLOUT Abstract nº 885.
[41] SCHWENZER, Ingeborg, *Op cit* fn 14, p. 114-115.

> It is impossible to differentiate between the interpretation and the gap-filling of the CISG, as at the same time the clarification of a provision fixes its scope of application and therefore answers the primary question whether a gap exists that need to be filled[42].

As an example, Article 79(1) of the CISG provides that a party is not liable for a failure to perform an obligation, if proved that such failure was due to an "*impediment beyond his control and that he could no reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract*"[43]. Could such impediment be interpreted solely as *force majeure*, or as well as hardship? Is there a *lacuna* in the CISG concerning hardship that must be filled?[44]

These questions may arise when dealing with the provisions of CISG. Judges and Arbitrators dealing with the Convention must then carefully analyse the situation, and establish if it there is an interpretation issue and/or a gap in the text that need to be filled. If verified that gap-filling should be done, the interpreter of CISG will then resort to Article 7(2).

Article 7(2) of the CISG provides 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 the Convention is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

It is said that the methodology of Article 7(2) is a product of compromise between the "true code" approach proposed by legislators from civil law traditions, and the scepticism

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[42] JANSSEN, *Op. cit*. fn. 26.
[43] Article 79, CISG.
[44] It can be said that the "*impediment*" in Article 79 refers to a flexible standard that would include hardship, and not only *force majeure*. Along these lines, see RIMKE, Joern. **Force Majeure and Hardship**: Application in the international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts. Pace Review of the Convention on International Sale of Goods, Kluwer (1999-2000), p. 197 – 243; LOOKOFSKY, Joseph. **Not Running Wild with the CISG** (January 1, 2011). Journal of Law and Commerce, Vol. 29, No. 2, 2011. Available at SSRN: https://ssrn.com/abstract=2376353. Access on 18 May 2017; CISG-AC: Opinion nº 7, Exemption of Liability under Article 79 of the CISG, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007.

of legislators from a common law background[45]. On one hand, the true code approach proposed by civil law legislators provides that any and all gaps should be referred to principles and policies on which the text is based, as a code is a pre-emptive enactment which should contain answers to all possible questions[46]. On the other hand, common law legislators were not convinced that broad and vague principles of law could provide certainty in filling the gaps in the text of the CISG, and preferred to refer gaps to domestic law.

The compromise reached by the UNCITRAL Working Group was to create a new method, according to which filling gaps in the Convention based on the principles contained therein would have priority over referring the matter to domestic law. This method would keep in mind the goals of uniformity, but still offer some degree of certainty in case no answer can be found in the CISG.

Article 7(2) provides for a procedure of three steps: first, defining if a certain matter not expressly settled is governed by the CISG or not. Second, finding in the Convention, if possible, a general principle underlined in the text that might be able to settle this matter. Third, if no general principle can be discerned, making recourse to the domestic law applicable as determined by the PIL of the forum.

As to the first step, defining if a certain matter not expressly settled in the CISG falls under the scope of the Convention, the interpreter of the law shall primarily define what is the type of gap that is being dealt with: internal or external. Internal gaps concern matters that always fall under the scope of the Convention. Contrarily, external gaps originated from of express exclusions in the text never fall under the scope of the Convention, and will be settled through the application of domestic law.

A problem however surfaces when one finds himself in front of an external gaps originated from omissions in the text: it is not possible to establish if it falls under the scope of CISG until looking for an answer in general principles contained in the Convention. It is then supported that, having in mind the standards of uniform interpretation set in Article 7(1), the interpreter of the law shall equal these gaps to internal gaps, in the sense of assuming he or she might find a solution within the Convention. Only if this method does not come to a conclusive result, should then the interpreter of CISG resort to domestic law[47].

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[45] HILLMAN, Robert A. **Applying the United Nations Convention on Contracts for the International Sale of Goods**: The Elusive Goal of Uniformity. *In* Review of the Convention on Contracts for the International Sale of Goods, Cornell International Law Journal, ed. 1995, p. 22-23.

[46] GILMORE, Grant. **Legal Realism**: Its Cause and Cure, Yale Law Journal, vol. 70, n° 7, 1961, p. 1043.

[47] It can also be said that filling the gaps related to matters the Convention is silent about would be possible for issues so closely connected to the CISG that making recourse to a national law would take them out of context.

In conclusion, while external gaps originated from express exclusions from the scope of CISG can only be filled through the application of domestic law in accordance to the rules of private international law of the forum; internal gaps, and external gaps originated from omissions, can be filled by recourse to the Convention.

After defining the type of gap being dealt with in the first stage, if the gap is not external, the interpreters of CISG shall proceed to the second step of the method set out by Article 7(2), which is searching for general principles underlined in the text of the Convention that could fill the gap.

III. General Principles underlying the CISG

1. Finding general principles within CISG

Once an internal gap or an external gap caused by omission is established, the matter it regards is to be primarily settled by use of general principles contained in the Convention, as prescribed by Article 7(2). The reason for that, as stated by Rabel, is to keep in mind the uniformity goals of the Convention:

> Since the judges applying this Statute are subject to different laws and used to their application, the greatest danger for maintaining a truly uniform legal situation lies in diverging judicial interpretations. We have to fear strongly that the courts will either consciously or subconsciously use their national law to fill gaps. Thus the desired legal uniformity would quickly fall apart. (...) a common basis for decision-making is absolutely indispensable. Therefore, this Article provides that cases not expressly settled in this Statute nevertheless are subject to it and thus have to be resolved in the spirit of the Statute in conformity with the principles permeating it. These principles are called *principes généraux* (...)[48]

See JANSSEN, André. **The CISG and its General Principles**. In CISG Methodology, Eds. Janssen, Meyer, Sellier: Munich, 2009, p. 261-285.

[48] RABEL, E. ***Der Entwurf eines einheitlichen Kaufgesetzes***, 1935, In MAGNUS, Ulrich. General Principles of UN-Sales Law. Lisa Haberfellner, trans., *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht*, vol 59 (1995), Issue 3 – 4 (October).

One of the difficulties in filling the gaps in the CISG through referral to general principles of the Convention is a lack of general principles expressly pointed out or described in the text. Notwithstanding, it is possible to find underlined principles in the CISG by interpreting its provisions.

Having that in mind, general principles can then be divided into three categories[49]. The first category would contain principles that can be discovered through the interpretation of one single article. These are found, for instance, in Articles 6 and 7(1), and correspond to the principles of party autonomy, regard to the international character, promotion of uniformity, and observance of good faith, which are part of the General Provisions of the Convention[50].

The second category would consist of principles, which can be identified through the analysis of several articles that point to a same general purpose underlined in the text. An example of this would be the principle of continuation of the contract, which can be extracted from Articles 25, 49(2), 71, and 82.

Third, there is also possibility of a single provision containing a rule that can be generalized to other similar or analogous situations. The difference between the first category and this one should be noted. While the first one refers to principles of general applicability in the Convention; this third category relates to filling *lacunae* regarding situations so closely connected to another situation already settled by the CISG that adopting a different solution would be unjustified[51].

An example of the need to fill gaps through analogy is found in Article 29(1) of the Convention. This provision prescribes that a contract may be terminated by mere agreement of the parties, leaving however an internal gap regarding the effects of this termination. The solution can then be found in Article 81(2), which refers to the effects of avoidance of the contract, and provides that a party who has performed the contract may claim restitution from the other party of whatever it as supplied or paid. Accordingly, the effects of Article 81(2) have been applied to an analogous situation described by Article 29(1)[52].

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[49] JANSSEN, *Op. cit*. fn. 26; see also DIMATTEO, Larry A.; DHOOGE, L.; GREENE, S.; MAURER V. **The Interpretative Turn in International Sales Law**: An Analysis of Fifteen Years of CISG Jurisprudence. Northwestern Journal of International Law and Business, vol. 24, issue 2 (2003-2004), p. 299.

[50] MAGNUS, *Op cit* fn 34.

[51] FERRARI, Franco. **Uniform Interpretation of the 1980 Uniform Sales Law**, Georgia Journal of International and Comparative Law, 1994-1995, p.183-228. Available at http://www.cisg.law.pace.edu/cisg/biblio/franco.html. Last access on 30 January 2018.

[52] The effects of avoidance will be applied to matters not settled by the termination agreement signed by the parties. Austria: Oberster Gerichtshof, 1 Ob 74/99 K, 29 June 1999. Available at http://www.unilex.info/case.cfm?id=419.

As the general principles in CISG are not usually expressed in the Convention the judges and arbitrators must carefully analyse its provisions and look for "hidden purposes". They must interpret the articles in CISG in order to find overarching principles that are unspoken in the text.

This interpretative work can then be assisted by the resort to the *travaux préparatoires.* In addition, interpreters may also consult judicial and arbitral practice, scholarly writings, and CISG-AC opinions, as an aid to their efforts. As pointed out by Janssen, case law and the doctrine have been able to provide lists of general principles that can be found in the CISG, thus making it easier for interpreters of the law to apply the Convention in a more uniform way[53].

The analysis of the *travaux préparatoires*, case law, scholarly writings and CISG-AC opinions is of special importance when it comes to applying the CISG in a uniform manner, as they provide the interpreter with the tools to avoid recourse to domestic law.

2. General principles most commonly pointed out

To this date, the table of possible principles that can be derived from the CISG is not a uniform issue among practitioners and scholars. As described by Bridge, neither courts, arbitral tribunals, nor academics have been able so far to perform the task of putting together a harmonic catalogue of principles found the CISG, which results in the existence of several lists with principles that differ in generality and significance[54].

However, some principles that appear recurrently in case law and scholarly writings can be discerned. The principles that are most often pointed out as contained in the CISG are the following:

a) Good Faith

The principle of observance of good faith is expressed in Article 7(1) and thus constitutes a standard of interpretation of the CISG provisions. Notwithstanding, it is also generally recognized as a tool to interpreting the parties' agreement and to fill the gaps contained in the Convention[55].

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[53] JANSSEN, *Op. cit*. fn. 26.
[54] BRIDGE. *Op cit* fn 24, p. 512.
[55] JANSSEN, *Op. cit*. fn. 26.

There is however controversy as to what good faith means, as differences can be found between civil law and common law approaches. And even among jurisdictions of civil law traditions, where good faith is considered a broad and general principle, the concept varies. In this sense, Sheehy wrote:

> while good faith can be advocated as a healthy reaction to formalism in contractual interpretation and give the adjudicators flexibility in ensuring that the spirit of the agreement is implemented, what and how such interpretations are to be developed and applied remains unclear[56].

As good faith is a broad and vague concept, it is then necessary to deduce aspects of the general ideas of good faith that can be applied to concrete situations. The principle of good faith would then give rise to other principles which are more specific, and easier to apply to a gap in the CISG. An example would be the principles of estoppel and prohibition of *venire contra factum proprium*, long ago established as general principles of CISG by the case law[57]. Other principles pointed out by the scholars as deriving from good faith are the prohibition of abuse[58], the principle that a party must not take advantage of an unlawful act[59], reasonable reliance[60], and the duty to supply information for the correct performance of the contract[61].

b) Party Autonomy

It is of general agreement within the doctrine that party autonomy is one of the most important principles in the Convention[62]. As said by Honnold, "*the Convention does not interfere with the freedom of sellers and buyers to shape the term of their transactions*"[63].

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[56] SHEEHY, Benedict. **Good Faith in the CISG**: The interpretation problems of Article 7. Review of the Convention on Contracts for the International Sale of Goods (CISG), ed. by Pace International Law Review 153-196. Available at https://ssrn.com/abstract=777105. Access in 29 May 2017.
[57] Austria: *Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft*, Arbitral Award SCH-4318, 15 June 1994, available at http://www.unilex.info/case.cfm?id=56; Russia: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 302/1996, 27 July 1999, available at http://cisgw3.law.pace.edu/cases/990727r1.html
[58] Principle also taken from Article 29(2). See MAGNUS, *Op cit* fn 34.
[59] Principle also found in Article 80. Idem
[60] Idem.
[61] HONNOLD, John. **Uniform Law for International Sales under the 1980 United Nations Convention.** 3 eds. Kluwer Law International, 1999, p.106. See Germany: Oberlandesgericht Naumburg, 12 U 153/12, 13 February 2013, available at http://www.unilex.info/case.cfm?id=1697
[62] JANSSEN, *Op. cit*. fn. 26.
[63] HONNOLD, *Op cit* fn 48, p. 3.

The party autonomy principle is derived from Article 6 of the CISG, which states that the parties may exclude the application of the Convention, derogate from, or vary the effect of any of its provisions. In regard to the exclusion of the application of the Convention, it has been settled by case law that the parties must do it expressly[64]. As to derogation or variation of specific provision of the CISG, however, it can be done either expressly or implicitly. The parties can actively exclude the application of a certain provision of the Convention; or imply it, when they agree on terms that differ from what the CISG stipulates[65].

The only limit to party autonomy expressed in the CISG lies in Article 12. Article 96 of the Convention provides that a Contracting State whose law requires that contracts are concluded or evidenced in writing may make reservations repelling the provisions according to which there are no form requirements for concluding or modifying a contract governed by CISG. When any of the parties have their place of business in a Contracting State that made this reservation, these provisions excluding form requirement will not apply. The parties cannot derogate from it by force of Article 12, and will need to comply to the writing requirement, even if they have agreed otherwise.

c) Full compensation

The principle of full compensation can be derived from Articles 74, 78, and 84(1) of the CISG[66]. According to Article 74, loss of profit is also included in the damages a party is entitled to as a consequence of a breach of contract by another party. Articles 78 and 84(1), on the other hand, institute the obligation of payment of interest when the buyer fails to pay the price, and when the seller is bound to refund the price, respectively.

d) Favor contractus or preservation of the contract

The principle of preservation of the contract can be found in analysis of Articles 37, 46 (2) and (3), 47, 48 (1), 49 (2) 51, 63, 64(2), and 82. As affirmed by Janssen, it is probably

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[64] Germany: *Oberlandesgericht Stuttgart*, 6 U 220/07, 31 March 2008. Available at http://www.unilex.info/case.cfm?id=1317; *Oberlandesgericht Rostock*, 6 U 126/00, 10 October 2001, available at http://www.unilex.info/case.cfm?id=906; Italy: *Tribunale di Padova, Ostroznik Savo v. La Farona soc. coop. a r.l.*, 11 January 2005 available at http://www.unilex.info/case.cfm?id=1005.

[65] France: *Cour d'appel de Paris*, 03/21335, 25 February 2005, available at http://www.unilex.info/case.cfm?id=1095; Poland: Court of Appeals of Warsaw, I Aca 1258/07, 20 November 2008, available at http://www.unilex.info/case.cfm?id=1721

[66] Switzerland: *Tribunal Cantonal du Valais*, C1 08 45, 28 January 2009, available at http://www.unilex.info/case.cfm?id=1678; Spain: *Audiencia Provincial de Giron*a, *Depuradora Servimar S.L. v. G. Alexandridis & Co.O.E.SC*, 80/20152, 21 Jan 2016. Available at http://www.unilex.info/case.cfm?id=1977.

the principle most commonly acknowledged by scholars when it comes to principles underlined in the CISG[67].

The principle of preservation of the contract provides that, only under certain circumstances, the contract can be avoided. Article 46 (2) and (3) provides that, if the goods do not conform to the contract, the buyer may require delivery of substitute goods or reparation. Along the same lines, under Articles 47 and 63, it is also possible for one party to extend the time limit for another party to either pay the price or perform an obligation, in order to avoid the discontinuation of the agreement.

e) Rebus sic stantibus

The principle of *rebus sic stantibus*, according to which the circumstances that lead to the conclusion of a contract should stay the same throughout its performance, can be extracted from Article 79 of the CISG.

This article recognizes the possibility exempting a party from liability if proved that the failure was due to an impediment beyond control, which could not reasonably be expected to have been considered at the time of conclusion of the contract. This provision would relate to situations of force majeure, hardship, commercial impracticability, the german *Wegfall des Geschäftsgrundlage*, or the French *imprévision*, among other concepts derived from *rebus sic stantibus*.

Nevertheless, this view is not unopposed, as the term *impediment* in the wording of Article 79 is deemed to create controversy. For some, this term would refer solely to the ultimate impossibility of performance, and not to situations in which performance has become excessively onerous but not impossible[68]. On the other hand, some scholars consider the term *impediment* to be a more flexible standard that does not mean only impossibility, but also extreme difficulty to perform[69].

Another issue then arises as to the effects of including hardship in the concept of impediment within the meaning of CISG: can the judge or arbitrator revise the contract to restore balance, even if there is no provision in the Convention that would allow such measure?

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[67] JANSSEN, *Op. cit*. fn. 26.
[68] FLAMBOURAS, Dyonisios P. **The Doctrines of Impossibility of Performance and *clausula rebus sic stantibus* in the 1980 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law**: A Comparative Analysis. Available at https://www.cisg.law.pace.edu/cisg/biblio/flambouras1.html. Access in 28 May 2017.
[69] LOOKOFSKY. *Op cit* fn 33; CISG-AC. *Op cit* fn 33.

This question has not yet been settled. While part of the doctrine states that it is possible to refer to Article 6.2.3(4) of the UNIDROIT Principles or to Article 6:111 of the Principles of European Contract Law (PECL), this view is still controversial[70]. Furthermore, the CISG-AC has stated that "*Article 79(5) may be relied upon to open the possibility for a court or arbitral tribunal to determine what is owed to each other, thus "adapting" the terms of the contract to the changed circumstances*"[71]. Taking into consideration the wording of this provision, however, seems correct to state that the reliance on the application of Article 79(5), as a way of authorizing the judge or arbitrator to revise and adjust the terms of the contract, is subject to a request by one of the parties.

f) Freedom of form

The principle of freedom of form for contracts under the CISG can be found underlined in Article 11 of the Convention. This provision states that a contract does not need to be concluded in or evidenced by writing, and is not subject to any other form requirement. Furthermore, this principle can also be derived from Article 29(1), which states that the contract can be modified or terminated by mere agreement between the parties, without setting any additional form requirement.

The only restraints to the freedom of form in the CISG are found in Articles 12 and 96. These provisions create the possibility for a Contracting State to make a reservation to the lack of form requirements of Articles 11 and 29(1). As a result, where any of the parties of the contract has its place of business a Contracting State that made such reservation, the contract must be concluded, evidenced, modified, and terminated in writing.

g) Right to withhold performance

Article 71(1) of the CISG provides that a party may suspend the performance of an obligation if becomes apparent that the other party will not perform a substantial part of his or her obligation. Accordingly, Article 85 provides that the seller who incurs in expenses for preservation of the goods, because of delay of the buyer in paying the price or taking delivery, may withhold performance until reimbursement of these expenses.

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[70] See FLAMBOURAS. *Op cit* fn 55; BRUNNER, Christoph. **Force Majeure and Hardship under General Contract Principles**: Exemption for non-performance in International Arbitration, Kluwer Law International, 2009, p. 218. A further analysis regarding the possibility of application of UNIDROIT Principles and PECL as a supplementary way of interpreting the Convention and filling its gaps will be done in Part C.

[71] CISG-AC. *Op cit* fn 33.

The right to withhold performance can be found in both provisions, being limited to the exhaustive list of hypothesis expressed in the Convention. Notwithstanding, the case law defines that the right to withhold performance is also present when the buyer, faced with non-conformity that amount to fundamental breach, requests the substitution of the goods in accordance with Article 46 (2)[72]. In these cases, the buyer may suspend the performance of the contract until delivery of substitute goods, as a result of the application of Article 71 to an analogous situation. Another alternative would be to resort to a general principle of good faith, according to which the seller should not receive the price if he has not performed his own contractual obligation.

In addition, the suspension of the performance must not stretch in time further than the lack of performance by the other party. Otherwise, the unjustified extension in time of the suspension of performance amounts to breach of contract by the party who resorts to it[73].

h) Duty to mitigate losses

In accordance to the first part of Article 77, a party who relies on a breach of contract must take reasonable measures to mitigate losses resulting from such breach. Thus, from this provision emerges a duty, already acknowledged by scholars[74] and by case law[75], to keep damages and losses to a minimum.

In a hypothetical situation, the duty to mitigate losses is respected when a seller, once aware that the buyer will not pay the price, takes measures in order to sell his products to a third party. In another hypothetical situation, the duty to mitigate losses is also respected when a buyer, once receiving products that do not conform to the contract, takes measures in order to prevent deterioration of those goods until they are returned to the seller.

The second part of Article 77, on the other hand, provides that if the party relying on the breach fails to take measure to mitigate losses, the party in breach may claim a reduction in the damages in the same amount by which the loss could have been mitigated.

Therefore, in the previously mentioned hypothetical scenarios, the first buyer could claim a reduction of the amount of damages if proved that the seller had the opportunity to sell

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[72] Poland: Supreme Court of Poland, V CSK 456/06, 11 May 2007, available at http://www.unilex.info/case.cfm?id=1374; Austria: *Oberster Gerichtshof*, 4 Ob 179/05k, 08 November 2005, available at http://www.unilex.info/case.cfm?id=1082

[73] Canada: British Columbia Supreme Court, *Mansonville Plastics v. Kurtz GmbH*, C993594, 21 August 2003, available at http://www.unilex.info/case.cfm?id=1168

[74] MAGNUS, *Op cit* fn 34.

[75] Germany: *Landgericht Darmstadt*, 10 O 72/00, 09 May 2000, available at http://www.unilex.info/case.cfm?id=501; China: Rizhao Intermediate People's Court, Shandong Province, Ri Jingchuzi nº 29 (1997), 17 December 1999, available at http://www.unilex.info/case.cfm?id=1029

the goods, or part of it, to a third party, but did not do so. In the second scenario, the seller could claim a reduction on damages to be paid, in an amount equivalent to the deterioration of the goods to be returned if proved that the buyer did not take measures to mitigate losses.

It is noticeable, however, that the party in breach of the contract has the burden of proof when it comes to showing that the innocent party did not take the correct measures to mitigate losses. This was the conclusion of the Federal Court of Australia, in the judgment VID 1080 of 2010[76]. In its decision, the court stated

> 324. Article 77 thus creates an obligation in one party to mitigate loss and confers a correlative right upon the party in breach to enforce that obligation. The natural and ordinary reading of Article 77 structured as it is, is that the right of enforcement conferred by the second sentence of the Article is an exhaustive statement of the rights of the party in breach. (…).
>
> 325. That view accords with commercial common sense. It would be distinctly surprising if the onus of proof cast upon the party in breach by the second sentence of Article 77 could be cast off by that party simply asserting non-compliance by the innocent party with the obligation created by the first sentence of the Article.
>
> 326. Insofar as the second sentence of Article 77 is concerned, it is for the party in breach to make good its claim for a reduction in damages. (…).

In another case, the Tribunal of International Commercial Arbitration at the Russian Federation reached a similar conclusion in the Arbitral Proceeding 340/1999[77]. In its decision, the arbitral tribunal ruled that both seller and buyer where in breach of contract, and that the seller was entitled to damages. These damages, however, should be limited to a quarter of the price that was supposed to be paid by the buyer, because the seller failed to prove that he had taken measure to mitigate losses resulting from the deterioration of the goods in his warehouse.

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[76] Australia: Federal Court of Australia, *Castel Electronics v. Toshiba Singapore*, VID 1080 of 2010, 20 April 2011, available at http://www.unilex.info/case.cfm?id=1641;

[77] Russia: Tribunal of International Commercial Arbitration at the Russian Federation, Arbitral Award 340/1999, 10 February 2000, available at http://www.unilex.info/case.cfm?id=876

i) Burden of Proof

As previously mentioned, there is still controversy among scholars as to whether the burden of proof falls within the scope of the CISG or not. The line here followed is that it does, as it is an external gap caused by omission, which can be filled through the analysis of provisions in the text of the Convention.

In that sense, it is possible to deduct from the CISG rules for fixing the burden of proof[78]. Article 79(1) of the Convention[79], for instance, provides that the party who claims liability exemptions must prove that the failure was due to an impediment beyond his control. Other provisions implicitly presuppose who carries the onus of proof, such as Article 44. According to this article, a buyer may reduce the price of the goods, based on non-conformity or based on the existence of intellectual property claims over them, even if his notice is defective, as long as he has a reasonable excuse for it. It is then presupposed that the burden of proof can only rely on the buyer asserting these reasonable excuses.

The burden of proof has also been recognized and established through case law. The judgment 4C.198/2003 from the Federal Supreme Court of Switzerland[80], already referred to in item PART B, I, 3 (p. 14) of this work, shows that the court ruled that the buyer, who accepted the goods without claiming non-conformity, had the burden of proving this non-conformity once the goods entered his sphere of control. In another case, the *Cour d'Appel de Paris*[81] stated that burden of proving a common intent of the parties to implicitly exclude the application of the CISG, by referring to a domestic law in the choice of law clause, lied with the party alleging it. In yet another case, the U.S. District Court of Minnesota[82] ruled in favour of the seller claiming breach of contract from the buyer who refused to pay the price, for considering that the buyer did not provide sufficient evidence that the goods had been damaged during transportation.

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[78] MAGNUS, *Op cit* fn 34.
[79] Article 79(1) of the CISG is the only provision in the Convention which expressly determines who is to carry the burden of proof.
[80] Switzerland: Federal Supreme Court - 4C.198/2003, 13 Nov. 2003, CLOUT Abstract nº 885.
[81] France: *Cour d'Appel de Paris*, 4607/2000, 06 November 2001, available at http://www.unilex.info/case.cfm?id=772
[82] USA: US District Court, Minnesota, *Dingxi Longhai Dairy v. Becwood Technology Group*, Civ. 08-762 DSD/SRN, 17 June 2010. Available at http://www.unilex.info/case.cfm?id=1579

Consequently, from the reasoning of certain provisions in the CISG and from case law, an overarching principle regarding burden of proof can then be established. It can be said that that a party asserting facts on its own benefit should bare the onus of proving them[83].

IV. Recourse to domestic law

Matters expressly excluded from the scope of the CISG will not be governed by the provisions or principles underlined in the Convention, but by rules of domestic law. That is necessary in order to respect the drafters' intentions, as well as the Contracting States expectations at the time of signing and ratifying the Convention.

Recourse to domestic law can also be made in order to fill *lacunae* in the text, in case the interpreter of the Convention cannot find a solution for a gap within the underlined principles of the CISG. This is the third and final step of the method prescribed by Article 7(2).

For part of the doctrine, as case law and academic writings regarding underlined principles in the CISG develop, the list of general principles available to judges and arbitrators gets longer. This would reach a point where the general principle would provide solutions for all gaps in the text. Along these lines, Schwenzer wrote:

> As more and more general principles are developed under de CISG, it can be expected that one day in the future, having recourse to domestic law will prove superfluous[84].

Contrary to that view, there are those who remain sceptic about the recourse to general principles underlined in the Convention in order to fill gaps. Andersen wrote that the recourse to these principles, instead of providing a uniform solution to filling gaps, would actually provide "*ways of expressing homeward trends by choice and application of general principles, as a "*carte blanche*" for interpretation*"[85]. Her reasoning is that this would be the consequence of a lack of interpretative guidelines, and of the difficulty of identifying and placing principles within the CISG.

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[83] Italy: *Tribunale di Rimini, Al palazzo S.r.l. v. Bernardaud s.a.*, 26 November 2002. CLOUT Abstract nº 608; Switzerland: *Handelsgericht des Kanton Zürich*, HG9702038, 10 February 1999, CLOUT Abstract nº 331.
[84] SCHWENZER, *Op cit* fn 14, p. 117.
[85] ANDERSEN, Camilla B. **General Principles of the CISG** – Generally Impenetrable? Available at http://cisgw3.law.pace.edu/cisg/biblio/andersen6.html. Access in 30 May 2017.

The conclusion here reached, however, is that an intermediary position should be adopted. The CISG should be further studied so that general principles can be identified and established in a uniform manner. That would make the list of principles available to judges and arbitrators not only longer, but more precise. On the other hand, one cannot assume that the CISG will be able to provide general principles to fill all the gaps existent in its text, as the Convention has a limited scope. The CISG does not cover most subjects in an extensive or exhausting manner and, even though it provides general principles capable of filling gaps, it cannot cover specificities of all of the matters covered by the Convention.

Trying to force the interpreters of the law to find a solution within the Convention, when there is none, will only lead to application of the CISG in a disharmonic manner, as it gives room to unpredictability and arbitrariness. A good example of that is the matter of interest rates. Article 78 of the CISG provides that "*If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it (…)*". The provision, however, has an internal gap and does not determine the rate for calculation of this interest.

This lack of specification regarding the interest rates has created several conflicting judgments. While some have considered to be impossible to determine the interest rates based on general principles and have resorted to the applicable domestic law[86]; others have considered possible to find underlining principles in the Convention that would allow determining interest rates, such as recourse to interest rates fixed by the European Central Bank[87] or recourse to interest rates regularly used for savings in the first-class banks at the place of payment[88].

Consequently, what happened is that, just like the application of domestic law to determine interest rates has created non-uniformity, the plurality of solutions extracted from the CISG has also done so.

Aiming to settle these issues, the CISG-AC issued the opinion nº 14, in which the solution proposed was the following: the applicable rate of interest should be the rate which the

[86] Spain: *Audiencia Provincial de Zaragoza*, 238/2014, *Bühler Motor Gmbh v. SMR Automotive Systems España S.A.U.*, 27 May 2014, CLOUT Abstract nº 1583; Poland: Supreme Court, I CSK 105/08, *L.M. v. Grażyna S.*, 17 October 2008, CLOUT Abstract nº 1307, The Netherlands: Court of Appeal of s'-Hertogenbosch, C0400803/HE, 11 October 2005, CLOUT Abstract nº 944

[87] Belgium: *Rechtbank van Koophandel*, Hasselt, 03 October 2007, Abstract available at http://www.unilex.info/case.cfm?id=1244;

[88] Serbia: Foreign Trade Court of Arbitration attached to the Serbia Chamber of Commerce, Arbitral Award T-8/08, 28 January 2009, CLOUT Abstract nº 1020

court at the creditor's place of business would grant in a similar contract of sale not governed by CISG[89]. In its opinion, the advisory council wrote:

> Since in the vast majority of the cases it can be assumed that the creditor would invest the money at its place of business, (…), the interest rate at this very place should be decisive in defining the amount of loss claimable as interest. This solution would in most of the cases be predictable for an obligor who delays payment.
>
> Consequently, the reference point for the interest rate applicable to any mature sum shall be defined according to the law of the state where the creditor has its place of business. (…)
>
> This proposal overlaps to a certain extent with the results in current practices of the tribunals. From the analyzed 274 decisions 103 were either directly, or by way of reference to PIL rules, applying the law of the state of the creditor. For sake of uniformity and predictability it is preferable to come to the same solution, (…).[90]

It is noticeable that, in this particular matter, the CISG-AC found that it was more predictable to create a third option that deviates from the methodology of Article 7(2). It neither refers to general principles underlined in the Convention, nor to the law applicable by virtue of rules of private international law of the forum. The CISG-AC proposed a solution that refers to the judicial practice of domestic court in domestic cases.

The CISG-AC proposal is not considered optimal, as it does not follow the methodology of Article 7(2). Notwithstanding, in light of the lack of agreement between scholars and practitioners, and having in mind the need to promote uniformity established by Article 7(1), it may present a solution for defining applicable interest rates under the CISG.

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[89] CISG-AC: Opinion nº 14, Interest under Article 78 CISG, Rapporteur: Prof. Dr. Yeşim M. Atamer, Istanbul Bilgi University, Turkey. Adopted unanimously by the CISG Advisory Council following its 18th meeting, in Beijing, China, on 21 and 22 October 2003.

[90] Idem. Items 3.35 to 3.37 of the Opinion.

PART C
OTHER WAYS OF INTERPRETING THE CISG AND FILLING ITS GAPS

I. Article 8 of the CISG: parties' intent and reasonable standards

Article 8 of the CISG concerns not the interpretation of the provisions of the Convention, but of the statements and conduct by the parties. Accordingly, whenever the statement or conduct of a party relates to a matter governed by the Convention, the interpretative criteria established by Article 8 should be used[91].

Article 8(1) of the CISG provides that "*statements made by and other conduct of a party are to be interpreted according to his [or her] intent where the other party knew or could not have been unaware of what that intent was*". As a result of this provision's wording, the intentions expressed by the parties, either orally or in their written statements, are of extreme importance when interpreting contractual terms governed by the CISG.

Article 8(2) of the CISG, on the other hand, provides that where Article 8(1) is not applicable, "*statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances"*. Article 8(2) also sets forth a hierarchical approach, prioritizing interpretation in accordance with Article 8(1).

Honnold noticed that, while the solution presented in Article 8(1) is built on a subjective approach, the solution presented in Article 8(2) is built on an objective approach[92]. He then proceeded to point out that, because of the difficulty of proving the real intent of parties, as they are unreliable witnesses to what was their state of mind by the time the contract was concluded, most of the situations will require application of Article 8(2).

For Magnus, the rule set in Article 8(2) would also have the power of providing one more general principle to be applied to the CISG in cases of filling *lacunae*: the principle of a standard of reasonableness[93]. According to this principle, objective standards based on the view of a neutral person of the same kind and in the same situation of a party should generally be applied. This principle would be helpful to fill the gaps in articles such as 16(1)(b), 33(c), 39(1),

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[91] UNCITRAL, **Digest of Case Law on the United Nations Convention on the International Sale of Goods**, 2016, p. 54. Available at: http://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf. Last Access on 29 January 2018.
[92] HONNOLD, *Op cit* fn 48, p. 117
[93] MAGNUS, *Op cit* fn 34.

or 44, which require either "reasonable time" or "reasonable measures" to be respected, without defining how much is reasonable time or what is a reasonable measure.

Finally, Article 8(3) provides that in determining the intent of a party or the understanding a reasonable person would have had, "*due consideration is to be given to all relevant circumstances of the case, including negotiations, any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties*". Accordingly, any document that can clarify the real intent of the parties, communications exchanged in the pre-contractual stage, or records of oral agreements can be submitted as evidence[94]. Furthermore, the business experience of the parties can be considered when interpreting statements made by them or their conduct[95].

From Article 8, it is possible to extract standards that might assist judges and arbitrators in their task of interpreting parties' statements and conduct, as well as contractual terms, in regard to matters which fall under the CISG. Finally, the provision also helps to fill gaps in the Convention by setting out the principle of reasonableness.

II. Article 9 of the CISG: prevalence of usages

In the field of international commerce, the inexistence of a global legislative entity generated the necessity of creating rules from others sources other than codes of law. In this sense, usages became the most important source of obligations of merchants. In the 20th Century, as the phenomena of globalization became stronger, worries with harmonization and international sources of law became more evident.

In this context, the efforts towards harmonization of sales law of institutes such as ICC, UNIDROIT and UNCITRAL commenced. These efforts resulted not only in the consolidation of new rules, but also in the affirmation of usages and general practice as a source of law, as principles such as the prevalence of usages, good faith, and equality of the parties were confirmed[96].

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[94] It is believed that in common law jurisdictions, where the Parol Evidence Rule exists as part of the substantive law, Article 8(3) is incompatible and precludes the application of the domestic law, allowing parties to present evidence that might contradict a written agreement. Along these lines, see LOOKOFSKY, Joseph. **Article 8 – Interpretation of Statements by Parties**. In The 1980 United Nations Convention on Contracts for the International Sale of Goods, available at https://cisgw3.law.pace.edu/cisg/biblio/loo8.html. Access in 01 June 2017.

[95] Germany: *Bundesgerichtshof*, X ZR 111/04, 27 November 2007, available at http://www.unilex.info/case.cfm?id=1345

[96] GLITZ, Frederico E. Z. ***Contrato, Globalização e Lex Mercatoria:*** *Convenção de Viena 1980 (CISG), Princípios Contratuais Unidroit (2010) e INCOTERMS (2010)*, Clássica, 2012, p. 29.

The CISG is one of the uniform laws that resulted from this harmonization efforts. It constitutes an artificial code of laws that does not conflict with customary international law, an *impromptu* set of rules created by the repetition of practices. Rather the contrary, the CISG and customary international law are complementary, as one of the purpose of the Convention is also to recognize the importance of usages and to stimulate national courts and tribunals to apply them[97].

In the text of CISG, usages are explicitly recognized as a source of international commercial law. Article 9(1) of the Convention provides that the parties are bound by any usages to which they have agreed upon and by any practices which they have established between themselves. In addition, Article 9(2) provides that the parties are considered to have tacitly made applicable to their agreement a usage of which they knew or ought to have known, and which is globally known and observed in their particular trade, unless otherwise expressed.

The Convention then approaches usages in two different manners[98]. First, they are applicable because of the parties' consent, as the parties are bound by any usages they agreed upon or by any practices they have established between themselves[99]. Second, they are applicable because of the presumption that the parties tacitly agreed to it, as they knew or ought to have known of the existence of usages in relation to their trade.

The most common example of how usages can be applicable as a result of an agreement by the parties is the use of INCOTERMS such as CIF or DAP. INCOTERMS, which relate to common contractual practice, can be incorporated to contracts of sale of goods governed by the CISG through parties' choice, and their function is to complement contractual clauses and define the allocation of risks and the moment of its passing[100], as well as to provide for a place of delivery of the goods[101].

The second way through which usages are applicable to transactions governed by the CISG comes from the assumption that the parties have impliedly agreed to them.

Johnson proposes that the court or the arbitral tribunal, before ruling for the prevalence of usages in accordance to Article 9(2) ask the following questions: (a) whether the usage is

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[97] AUDIT, Bernard. **The Vienna Sales Convention and the Lex Mercatoria,** 1990, Available at http://www.cisg.law.pace.edu/cisg/biblio/audit.html. Access in 02 June 2017.

[98] Idem

[99] In this sense, see Finland: Court of Appeal of Turku, 12 April 2002, available at http://www.unilex.info/case.cfm?id=939

[100] See UNCITRAL, **Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contract for the International Sale of Goods**, Part Three, letter D. UN document number V.89-53886

[101] Poland: Supreme Court of Poland, II CK114/04, 22 October 2014, available at http://www.unilex.info/case.cfm?id=1985; China: Xiamen Intermediate People's Court, 05 September 1994, available at http://www.unilex.info/case.cfm?id=211

known or ought to have been known by the parties; (b) whether it is an internationally known usage; and (c) whether it is regularly observed by merchants of the same trade of the parties[102]. The three-question-test proposed by Johnson is of importance because it avoids that usages confined to a certain region or specialized group are indiscriminately imposed to parties not familiar to them. This test then provides that equality of the parties, as proposed by the CISG in its preamble, is dully respected.

From the analysis of Article 9, it can be concluded that usages are still considered an important source of international sales law. The CISG itself, even though it provides for a written set of rules to regulate international trade, provide for a possibility of resorting to internationally recognized usages as a way of filling gaps that might have been overlooked by the parties in their agreement.

III. Recourse to Soft Law

1. UNIDROIT Principles

The UNIDROIT Principles of International Commercial Contracts (UPICC) are *soft law*, and will be applicable to contracts when the parties have agreed upon it. They are considered a new way of approaching international sales law, first on account of the wide range of subjects it governs, and second because its goal is not to harmonize sales law, but to re-establish its interpretation[103].

One of the goals of elaborating the UPICC was to provide for a way of interpreting and supplementing instruments of uniform law, as stated in the Preamble of the 1994 edition[104]. The CISG also had influence in the elaboration of the first edition of the principles, especially regarding terminology, as express reference to the Convention is made.

However, the UPICC is an instrument broader than the CISG, when it comes to it scope of application. That is result of it being *soft law* which did not need to be sanctioned by

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[102] JOHNSON, William P. **Analysis of INCOTERMS as Usages Under Article 9 of the CISG**, available at http://cisgw3.law.pace.edu/cisg/biblio/johnson02.html. Access 03 June 2017. For the author, the burden of proof of showing that all three questions of the test are answered positively, and thus lead to the prevalence of the usage, lies with the party that argues that the usage should be binding as an implied term under Article 9(2).
[103] BONNEL, Michael J. **The UNIDROIT Principles of International Commercial Contracts and the harmonisation of international sales law.** In FLETCHER, Ian F. / MISTELIS, L. / CREMONA, M. (Eds.), Foundations and Perspectives of International Trade Law. London: Sweet and Maxwell, 2001, p. 298-309.
[104] UNIDROIT. UNIDROIT Principles 1994, item 6, p. 4, available at http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-1994

Contracting States to be applicable. The drafters were then able to include several matters in the scope of the UPICC that otherwise had to be left out of the CISG because no compromise could be reached.

The UPICC can be chosen by the parties to complement the application of the Convention, or, as a consequence of derogation in accordance to Article 6 of the CISG, to substitute provision of the Convention for rules that the parties find more favourable to their relationship. However, as pointed out by Bonnel, the probability of this latest hypothesis happening is rather small, because when the parties exclude the application of the CISG, it is usually for the reason that they want to avoid the uncertainties surrounding it. Therefore, the parties will usually prefer the certainties of a certain national law over venturing into the application of *"something as novel as the UNIDROIT Principles, whatever their intrinsic merits*"[105]. Replacing provisions of the CISG for other provisions also surrounded by uncertainties would then be illogical.

It is undeniable that the UPICC can be used to fill gaps in in the CISG, on a case-by-case basis, if the parties of the transaction have agreed to it. However, it is controversial if the UPICC can be used as a way of filling gaps in the Convention, as a result of the application of the mandate of Article 7, which refers to interpretation with regard to the international character of the Convention and to general principles.

In this regard, the scholars are divided. While some deny the possibility of interpreting the CISG and filling its gaps with UPICC, others defend that referring to them will eliminate the necessity of resorting to domestic law, thus minimizing the chances of the Convention being interpreted in a non-uniform way.

The fiercest critique that could be made to deny the application of UPICC as a way of filling gaps in the CISG is that it would be contrary to what the Contracting States consented. Along these lines, Flechtner states that using UPICC to fill gaps that could not be remediated through general principles underlined in the CISG would render the second part of Article 7(2) meaningless by excluding resort to domestic law. That would violate the understanding the Contracting States had at the moment they signed the Convention. In addition, it would be incorrect to refer to the UPICC because of the wording of Article 7(2), which provides for filling gaps with general principles on which the Convention is based, and not with principles found in texts the Contracting States have not agreed to[106].

[105] BONNEL, *Op cit* fn 89.
[106] FLECHTNER, *Op cit* fn 23.

Also arguing against the use of UPICC as gap-fillers, Bridge points out that courts and tribunal may try to justify the application of UPICC to the contract governed by the CISG under Article 9(2) of the Convention, stating that they are widely known and regularly observed by parties of the same trade. He then proceeds to condemn such position because, even though this could be done to provisions which deal with performance or means of payment, it is not appropriate to provisions which deal with general contract rules and thus do not qualify as usage. Furthermore, the UPICC were elaborated based on the better-rule principle, and not on the most-widespread-rule principle, which would impair referring to them as general usage[107].

On the other hand, among those who believe the UPICC can be helpful in interpreting and filling gaps in the Convention, the arguments most common are that (a) it was already among UPICC's goals to complement the application of the CISG, and (b) that their objectives of providing a balanced set of rules tailored specially for international transactions are aligned. In that sense, for Bonnel, showing that a provision of the UPICC is an expression of general principles underlined in the CISG would be enough to justify resorting to that provision as a way of filling the gaps as set out in Article 7(2) of the Convention[108].

Notwithstanding, the argument that UPICC should be used to fill gaps in the CISG because it was designed with that purpose sounds fragile. An instrument drafted by a private institution such as the UNIDROIT should not have the power to prevail over the will of the Contracting States of the CISG, which reached the agreement that, once a general principle could not be found within the Convention, domestic law should be applicable. It seems correct to state that the UPICC, as *soft law*, should only be addressed when the parties have chosen so.

Irrespective of the merits of scholarly debate, the application of UPICC by courts and arbitral tribunals as a way of complementing the interpretation of the CISG and filling its *lacunae*, even without express designation by the parties, seems to be increasing[109]. In one case, the UPICC were considered source of law reflecting international trends which provide insightful solutions to disputes[110], thus being referred as gap fillers for the CISG. In another

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[107] BRIDGE, *Op cit* fn 24.

[108] BONNEL. **The UNIDROIT Principles and the CISG**, available at http://www.cisg.law.pace.edu/cisg/biblio/bonell.html. Access in 03 June 2017.

[109] France: *Cour d'Appeal de Grenoble*, 23 October 1996, available at http://www.unilex.info/case.cfm?id=222; France: ICC Court of Arbitration – Paris, Arbitral award nº 8817, December 1997, available at http://www.unilex.info/case.cfm?id=398; Spain: *Audiencia Provincial de Madrid*, 66/2016, 17 February 2015, available at http://www.unilex.info/case.cfm?id=1976.

[110] Russia: International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Award 147/2005, 30 January 2007, available at http://www.unilex.info/case.cfm?id=1333.

case, the court found that, in respect to the uniformization goals of the Convention, it would be useful to resort to the UPICC if considered that one of its sources was the CISG itself[111].

2. PECL

The Principles of European Contract Law (PECL) were elaborated by the Commission on European Contract Law (or Lando Commission), and its purpose was to serve as a first draft of a part of a European Civil Code[112]. The concern was to create the legal basis for future uniformity, despite the different legal traditions within the European Union, and to formulate a set of *soft law* rules adequate to the context of regional integration.

Like the UPICC, the PECL can be employed through party autonomy to complement the application of CISG to international sales contracts[113]. There is, however, a major difference between the PECL and the UPICC: while the PECL was elaborated envisaging application in a domestic and regional level within Europe, the UPICC are supposed to be applicable to transactions on the international level.

From this, one may conclude that the PECL are even less adequate than the UPICC to assist the interpretation or fill gaps in the CISG in accordance with Articles 7 or 9(2) of the Convention. That is because they were elaborated by an institution of regional reach, whose goal was to promote uniformity merely on a regional level. Therefore, they do not, and cannot aim to promote global uniformity on sales law.

Notwithstanding, in a judgment[114], a Dutch court saw fit to refer to Art. 2.104 PECL to fill a gap in the CISG concerning standard terms in a transaction between a Dutch buyer and a French seller. The court first resorted to UPICC, and not finding a solution there, looked for an answer in the PECL. The court decided that the rule contained in Art. 2.104 PECL coincided with both French and Dutch domestic law, and promoted observance of good faith in international trade.

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[111] Argentina: *Cámara Nacional de Apelaciones em lo Comercial*, 16 October 2013, available at http://www.unilex.info/case.cfm?id=2037.

[112] LANDO, Ole. **The Principles of European Contract Law and the Lex Mercatoria**, in: Private Law in the International Arena, T.M.C., Asser Institute Press, 2000, p. 397.

[113] Hesselink argues that the most important source of inspiration for the PECL were the UPICC, because they look similar in format and content, and because the drafters of the PECL have followed the wording of the UPICC in several points. See HESSELINK, Martijn W. **The Principles of European Contract Law**: Some choices made by the Lando Comission, available at http://ssrn.com/abstract=1098869. Access in 03 June 2017.

[114] The Netherlands: *Hof 'S-Hertogenbosch*, 16 October 2002, available at http://www.unilex.info/case.cfm?id=960

While one can assume that the court would have found the same conclusion if it had resorted to domestic law through Article 7(2), the method of resorting to PECL as a way of filling a gap in the CISG is inadequate.

CONCLUSION

Because of the elaboration methods employed in the drafting of the CISG, the Convention is characterized by uncertainties and gaps in its text. To remediate these uncertainties, the drafters have included Article 7 in the text, setting standards for interpretation and defining a method to fill the *lacunae* in accordance with the Conventions general principles.

In order to comply with the interpretative standards set forth in Article 7(1), judges and arbitrators should employ interpretative methods that move away from their domestic interpretative solutions, such as the resort to *travaux préparatoires*, to the autonomous interpretation method, as well as recourse to foreign judicial and arbitral practice. Furthermore, the interpreter of the CISG can resort to opinions of the CISG-AC, which aim to resolve controversial points of the Convention and to provide solutions to fill its gaps.

Article 7(2) establishes a novel method of filling gaps in the CISG by combining the "true code" approach proposed by legislators from a civil law background, and resort to domestic law suggested by legislators from a common law background. The method set forth in Article 7(2) consist of three steps: first, defining if a matter not expressly settled in the CISG is governed by it; second, finding general principles underlined in the text that might be able to settle this matter; and third, if no general principle can be discerned, making recourse to the law applicable by virtue of rules of private international law of the forum.

The general principles underlined in the CISG can be discovered through the analysis of the Convention's provisions. They can be extracted from the interpretation of one single provision that can be generalized to the whole Convention, or from the interpretation of a number of provisions that reveal an overarching purpose. It is also possible to fill the gaps in the Convention by analogy, applying rules of a provision to situations that, even though are not inside its hypothesis of application, are so similar or closely connected to those hypothesis that any other solution would be incongruent and unjustified.

The Convention also provides, in Article 8, that statements made by or other conduct of a party should be interpreted according to his or her intent, where the other party knew or could not have been unaware of what that intent was. It also provides that, when it is not possible to establish the intent of the parties, the solution will be to seek for the understanding that a reasonable person under the same circumstances would have had. Finally, Article 8 provides that due regard is to be had to all circumstances surrounding the case, including negotiations and subsequent conducts of the parties.

Article 9, on the other hand, provides that usages to which the parties agreed, or practices they have established between themselves are relevant to interpret contractual clauses that fall under the scope of CISG. This provision also states that regard is also to be had to usages known or that ought to have been known by the parties, and that are internationally recognized and observed in relation to their trade, as there is a presumption that they are applicable to the contract unless otherwise expressed.

In case, however, no general principle can be found and Articles 8 and 9 prove to be of no use to fill the gaps in the CISG, recourse should be made to domestic law. Trying to force judges and arbitrators to find a solution within the Convention, when there is none, will only lead to application of the CISG in a non-uniform manner, as it gives room to unpredictability and arbitrariness.

Finally, it is argued that instruments of *soft law*, like UPICC and PECL, should only be used to complement the application of provisions of the CISG if expressly chosen by the parties. These instruments are inadequate to assist interpretations of provisions of the Convention and to fill its gaps in accordance with Articles 7(2), because that would supersede the will of the Contracting States, who agreed that recourse should be made to domestic law in case no general principle could be found within the CISG. Furthermore, they cannot be applied in accordance with Article 9, because they do not constitute usages.

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