

CHAPTER 14

A CRITICAL EVALUATION OF METHODS FOR THE CALCULATION OF INTEREST RATE UNDER ARTICLE 78 OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

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I INTRODUCTION

Stipulating only the principal obligation to pay interest and being silent as to the rate,¹ Article 78, the provision governing interest in CISG is considered the 'lowest common denominator' among member states² and is more conspicuous for the

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1 Peter Schlechtriem "Uniform Sales Law - The Experience with Uniform Sales Laws in the Federal Republic of Germany" (1991/92) *Juridisk Tidsskrift* 1-28.

2 "The statement of the chairman of the UN-Working Group" in Albert H. Kritzer *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (1989) (Kluwer Law and Taxation Publishers, 1989) 498.

questions it fails to answer than the questions it answers.³ Great controversies and differences of opinion can be found.⁴

Article 78 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, without prejudice to any claim for damages recoverable under article 74.

This provision prescribes the general right to interest. According to its wording, interest is not confined to cases of failure to pay the price for the goods, but 'any other sums in arrears',⁵ including exercisable contracted penalties agreed between the parties.⁶ Breach of contract is not a prerequisite for the general entitlement to interest. Interest awarded under Article 78 would remain valid and enforceable in *fora* where the domestic law prohibits interest payments. Only in situations where the purchase price has to be refunded under the avoidance of a contract, Article 78 does not apply as Article 84(1) governs as *lex specialis*.⁷

While Article 78 resolves some conflicting opinions,⁸ further controversies remain.⁹ The Convention does not stipulate the rate and the time at which interest should accrue on sums in arrears.¹⁰ On the one hand, some are of the view that the interest rate problem falls under domestic law. On the other hand, some have advocated various approaches to aid the determination of the interest rate, in

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- 3 Jacob S. Ziegel "Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods" (1981) <www.cisg.law.pace.edu/cisg/text/ziegel78.html>.
 - 4 Peter Schlechtriem "G. Interest (Article 78)" in Schlechtriem (ed). *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods* (Manz, 1986) 99; Jelena Vilus "Provisions Common to the Obligations of the Seller and the Buyer" in Petar Sarcevic & Paul Volken (eds) *International Sale of Goods: Dubrovnik Lectures* (Oceana, 1986) 252.
 - 5 Barry Nicholas "Article 78" in *Bianca-Bonell Commentary on the International Sales Law* (Giuffrè, Milan, 1987) 570.
 - 6 UNCITRAL *UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods 2012*, Digest of Article 78 case law, Para.2.
 - 7 UNCITRAL Case Digest on Article 78, above n 6, at Para.2; Francesco G. Mazzotta "CISG Articles 78 and 84(1) and their PECL counterparts" (2004) <www.cisg.law.pace.edu/cisg/text/peclcomp78.html>.
 - 8 Joseph Lookofsky "Article 78 – Interest" in J. Herbots, R. Blanpain (eds) *International Encyclopedia of Laws - Contracts* (Kluwer Law International, 2000) 158.
 - 9 Peter Schlechtriem, Petra Butler *UN Law on International Sales – The UN Convention on the International Sales of Goods* (Springer, 2008) 221.
 - 10 Tuula Ämmälä "International Trade in Finland - the Applicable Rules" (2003) 5 *Turku Law Journal* 85; John Y. Gotanda "Awarding Damages Under the United Nations Convention on the International Sale of Goods: A Matter of Interpretation" (2005-2006) 37 *Geo. J. Int'l L.* 95 at 108

reference to the Convention and other extrinsic materials. Before considering the proposals, it must be noted that often considered a 'compromise', the determination of the interest rate was intentionally left open during the drafting process of the CISG since no consensus could be reached.¹¹

This paper critically evaluates methods to solve the interest rate problem in CISG, in an attempt to devise a satisfactory approach, which promotes the goal of uniformity. To facilitate a proper interpretation, Part II discusses the purpose and the practical importance of Article 78 CISG, while Part III considers the drafting history of the provision. With reference to the purpose and the legislative history, Part IV puts forward a critical analysis on various approaches by courts, tribunals and commentators on the determination of the interest rate in the absence of explicit guidance from the Convention. Based on the findings above and with reference to Opinion No. 14 of the CISG Advisory Council ("CISG-AC"),¹² in Part V the author strives to devise a commonly accepted approach to solve the interest rate problem, in conformity with the Convention's general principles and the goal to achieve uniformity. To ensure that the suggested proposal is commercially realistic, issues regarding the applicability of compound interest will be considered in Part VI.

II THE PURPOSE OF ARTICLE 78 CISG AND ITS PRACTICAL IMPORTANCE IN INTERNATIONAL COMMERCIAL ACTIVITIES

A The Rationale behind Article 78 CISG

As stated in Article 7(1) CISG, specific provisions of the Convention shall be interpreted with sensitive regard for its purpose and the underlying policy.¹³ As the purpose of Article 78 is not entirely clear,¹⁴ several justifications exist.

One reason is that the payment of interest furthers the principle of full compensation by restoring the claimant to the position he would have enjoyed if the

11 Sieg Eiselen "Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Article 78 of the CISG" (2004) <www.cisg.law.pace.edu/cisg/principles/uni78.html>.

12 CISG-AC Opinion No. 14, Interest under Article 78 CISG, Rapporteur: Professor Doctor 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 2013.

13 Peter Huber "Some introductory remarks on the CISG" (2006) 6 *Internationales Handelsrecht* 228 at 231; John O. Honnold "Interpretation of the Convention" in John O. Honnold (ed) *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd ed, Kluwer Law International, 1999) 88.

14 Christian Thiele "Interest on Damages and Rate of Interest under Article 78 of the U.N. Convention on Contracts for the International Sale of Goods" (1998) 2 *Vindobona Journal of International Commercial Law and Arbitration* 3 at Para. B(5).

wrongdoings had not occurred.¹⁵ It is presumed that money naturally produces interest (legal fruits) over time. From the creditors' perspective, interest rates preserve the time value of money,¹⁶ recognising the lost opportunity to generate income due to deferred receipt of funds.¹⁷ In addition, nominal rates protect the claimant from inflation and currency depreciation between the date of injury and the date of full reinstatement.¹⁸ The creditor's costs incurred to obtain alternative finance can be addressed.¹⁹

Another function of the interest rate is to prevent unjust enrichment. From the debtors' point of view, it is argued that the debtor should not be benefited unfairly by delaying payments. Retaining the sum in arrears, the debtor would receive the earning capacity of the sum borrowed at the creditor's expense.²⁰ Under this rationale, the debtor should at least be liable for a rate that reflects his cost of borrowing.²¹

Regardless of the perspective taken, the payment of interest promotes efficiency and deters non-payment or delayed payments.²² For debtors, interest payments impose heavier costs on their decision to breach the contract and discourage the use of delaying tactics. For creditors, the costs of taking precautions to avoid future litigation can be reduced.²³ Therefore, awarding interest facilitates the smooth operation of international trade.

B The Practical Importance of Article 78 CISG

In 1986, Schlechtriem predicted that Article 78 will probably have practical impact only in exceptional cases, where the debtor can claim an exemption under

15 John Y. Gotanda "A Study of Interest" (2007) Villanova University School of Law Working Paper Series Paper 83, 4; Gotanda, above n 10.

16 Lu Song "Award of Interest in Arbitration under Article 78 CISG" (2007) 12 Unif. L. Rev. n.s. 719, 722.

17 Thierry J. Sentchal, John Y. Gotanda "Interests as damages" (2008-2009) 47 Colum. J. Transnat'l L. 491 at 495-496.

18 Karin L. Kizer, "Minding the Gap: Determining Interest Rates under the U.N. Convention for the International Sale of Goods" (1998) 65 U. Chi. L. Rev. 1279 at 1288-89; Thiele, above n 14, at Part III, Para. B(5).

19 Song, above n 16, at 722

20 Kizer, above n 18, at 1288; Song, above n 16, at 722; Thiele, above n 14, at Part III, Para. B(5)

21 Sentchal and Gotanda, above n 17, at 496

22 Song, above n 16, at 723

23 Sentchal and Gotanda, above n 17, at 496.

Article 79 for his default.²⁴ However, from an economic perspective, interest is far from minor.²⁵ Statutory default interest rates vary significantly among member states.²⁶ For parties from countries with high interest rates,²⁷ interest substantially increases the amount claimed and so damages could only reflect a fraction of the total amount outstanding that the debtor may encounter.²⁸ Therefore, the importance of interest must not be understated.

Article 78 is one of the most contentious and most frequently litigated issues in CISG. In the 2012 UNCITRAL digest of case law for CISG, 240 cases related to interest were cited.²⁹ It is observed that all kinds of goods (from rice,³⁰ corn,³¹ chairs³² to bulletproof vests³³) in any amount (ranging from hundreds to millions of U.S. Dollars) can be involved. Unfortunately, a number of courts apply Article 78 as they see fit without giving any reasons. In light of the corresponding massive growth in international business transactions and the Convention's aim to achieve

24 Schlechtriem, above n 4, at 99.

25 Volker Behr "The Sales Convention in Europe: From Problems in Drafting to Problems in Practice" (1998) 17 *Journal of Law and Commerce* 263 at 266.

26 Behr, above n 25, at 266; Udo Reifner, Michael Schröder, *Usury Laws: A Legal and Economic Evaluation of Interest Rate Restrictions in the European Union* (Books on Demand, 2012) at 89-103.

27 For example, see the interest rate in Belarus, discussed in Ernst & Yong *Doing Business in Belarus* (2012) <[www.ey.com/Publication/vwLUAssets/Doing-Business-in-Belarus-ENG/\\$FILE/Doing-Business-in-Belarus-ENG.pdf](http://www.ey.com/Publication/vwLUAssets/Doing-Business-in-Belarus-ENG/$FILE/Doing-Business-in-Belarus-ENG.pdf)> 14.

28 Alan F. Zoccolillo, Jr. "Determination of the Interest Rate under the 1980 United Nations Convention on Contracts for the International Sale of Goods: General Principles vs. National Law" (1997) 1 *Vindobona Journal of International Commercial Law and Arbitration* 3 at Part I.

29 "UNCITRAL Digest cases for Article 78 plus added cases for this Article" <www.cisg.law.pace.edu/cisg/text/digest-cases-78.html>.

30 Bulgaria 20 December 2012 Municipal Court of Pazardzik (Rice case) <<http://cisgw3.law.pace.edu/cases/121220bu.html>>.

31 Germany 17 August 2011 Lower Court Geldern (Corn case) <<http://cisgw3.law.pace.edu/cases/110817g1.html>>.

32 Switzerland 20 January 2011 Higher Cantonal Court Valais (Clothes case) <<http://cisgw3.law.pace.edu/cases/110120s1.html>>.

33 Greece 2009 Decision 4505/2009 of the Multi-Member Court of First Instance of Athens (Bullet-proof vest case) <<http://cisgw3.law.pace.edu/cases/094505gr.html>>.

uniformity,³⁴ clear and convincing decisions as to the interpretation of Article 78 are much needed.³⁵

C Summary

The abovementioned factors illustrate the purposes and the practical importance of Article 78 CISG. It must be noted that deriving the interest rate from different perspectives would lead to completely different results.³⁶ To ensure certainty and predictability in international trade, a uniform and commercially realistic approach for the calculation of the rate of interest has to be found.

III THE DRAFTING HISTORY OF ARTICLE 78 CISG

The difficulties encountered during the drafting of Article 78 CISG reflected the irreconcilable differences in political, economic, cultural and religious views and ideologies among the Contracting States. Bearing that in mind, to ensure a proper interpretation of Article 78, its legislative history (*travaux préparatoires*) has to be taken into account.³⁷

A Antecedents of Article 78 CISG

The CISG's antecedent, Article 83 of the Uniform Law of International Sale of Goods 1964 ("ULIS") contained express rules for determining the interest rate precisely. It provided for the seller's entitlement to interest in situations where the breach of contract consisted of delay in the payment of the price, at 1% above the official discount rate in the creditor's country. Despite its definitiveness and certainty, the Convention's drafters did not retain this formula.³⁸ The provision was technically deficient since official discount rates were not implemented in certain states.³⁹ Some developing countries argued that the interest rate was excessive,⁴⁰

34 T. S. Twibell "Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) under Shari'a Law: Will Article 78 of the CISG Be Enforced When the Forum Is an Islamic State?" (1997) 9 *International Legal Perspectives* 25 at 44.

35 Behr, above n 25, at 295.

36 Kizer, above n 18, at 1288.

37 Friso Garbers "The Dogmatic and Practical Implications of Article 78 of the United Nations Convention on Contracts for the International Sale of Goods on Claims for Interest under International Sales Contracts" (2003) <www.jus.uio.no/pace/the_dogmatic_and_practical_implications_of_cisg_article_78_on_claims_for_interest.friso_garbers/1.html>.

38 Franco Ferrari "Uniform Application and Interest Rates Under the 1980 Vienna Sales Convention" (1995) *The Cornell Review of the Convention on Contracts for the International Sale of Goods* 3 at 4.

39 Garbers, above n 37, at Para.3.2.

40 Mazzotta, above n 7.

while in Muslim countries arrangements on interest are prohibited in the Islamic Law.⁴¹

Hence, subsequent drafts, including Article 58 of the 1976 Geneva Draft⁴² and Article 69(1) of the 1978 UNCITRAL Draft⁴³ were made. Article 58 of the Geneva Draft was substantively similar to Article 83 ULIS. Article 69(1) of the 1978 UNCITRAL Draft only provided interest if the seller is bound to refund the price. Although both drafts failed,⁴⁴ they provided a framework for further amendments submitted during the 1980 Diplomatic Conference.⁴⁵

B Drafts Presented at the 1980 Vienna Diplomatic Conference

At the 1980 Diplomatic Conference, a number of proposals, including the German proposal for a fixed interest rate, the Czechoslovakian proposal in favour of the prevailing interest rate in the debtor's country and the 'joint proposal' advocating the use of the customary rate for commercial credit at the creditor's place of business, were submitted at the 29th meeting.⁴⁶

An ad hoc working group was created to consolidate the aforementioned proposals.⁴⁷ Three separate Alternatives, each proposing a new article (Article 73 *bis*) were then formulated. Alternative II (which resembled the Czechoslovakian proposal) was adopted.⁴⁸ Before submitting Alternative II, some seemingly confusing modifications had been made by the drafting committee.⁴⁹

The revised Article 73 *bis* then stipulated that:

(1) 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 at the normal rate for a short-term commercial credit

41 Ibid.

42 Report of Committee of the Whole I relating to the draft Convention on the International Sale of Goods, Doc. B(1) Reproduced from UNCITRAL Yearbook VIII (1977), A/32/17.

43 Report of the First Committee in the 1980 Vienna Diplomatic Conference, Document A/CONF.97/11 <<http://cisgw3.law.pace.edu/cisg/firstcommittee/summaries/intro.html>>

44 Document A/32/17; Document A/CONF.97/11.

45 Garbers, above n 37.

46 Ferrari, above n 38, at 5.

47 Outline of committee proceedings, Report of the First Committee in the 1980 Vienna Diplomatic Conference, Document A/CONF.97/11 <www.cisg.law.pace.edu/cisg/1stcommittee/summaries78_84.html#a>.

48 Summary Records of Meetings of the First Committee, 34th meeting, 1980 Vienna Diplomatic Conference <www.cisg.law.pace.edu/cisg/firstcommittee/Meeting34.html>

49 Zoccolillo, above n 28.

prevailing in the main financial center in the State where the party in default has his place of business or, in the absence of such a rate, at another similar appropriate rate prevailing in that center.

(2) However, if the other party's actual credit costs are higher, he is entitled to interest on the sum in arrears at a rate corresponding to such credit costs, but not in excess of the rate defined in the proceeding paragraph prevailing in the main financial center in the State where he has his place of business.⁵⁰

Considering its obscure and incomprehensible wording, it was foreseeable that the provision would cause significant uncertainties in interpretation, especially regarding paragraph (2).⁵¹ Many objections had been made and Article 73 *bis* was not adopted.⁵²

Nevertheless, a new working group was established to prepare a new text for Article 73 *bis*.⁵³ As stated by the President of the group, owing to the overwhelming differences in national legal systems, the group decided to recommend a provision based on the 'highest common factor' between the Contracting States.⁵⁴ As a result, the amended Article 73 *bis* only provides the general entitlement to interest. The proposal was subsequently approved by 30 votes to 2, with 12 abstentions and became Article 78 CISG.⁵⁵

Regarding the delegates' persistent effort in adopting Article 78 as illustrated above, one commentator explained the absence of provisions on interest would lead to unintended divergences.⁵⁶ Thus, a general rule on interest would preclude the vagaries of domestic law.⁵⁷

50 (J. Draft Articles of the Convention submitted to the Plenary Conference by the First Committee in the 1980 Vienna Diplomatic Conference, Document A/CONF.97/11/Add.1 and 2 <www.cisg.law.pace.edu/cisg/jdraft.html>.

51 Zoccolillo, above n 28.

52 Summary Records of the Plenary Meetings for the 10th plenary meeting, 1980 Vienna Diplomatic Conference <www.cisg.law.pace.edu/cisg/plenarycommittee/summary10.html>.

53 *Ibid.*

54 Summary Records of the Plenary Meetings for the 11th plenary meeting, 1980 Vienna Diplomatic Conference <www.cisg.law.pace.edu/cisg/plenarycommittee/summary11.html>.

55 *Ibid.*

56 John O. Honnold "Article 78 - Interest on Sums in Arrears" in John O. Honnold (ed.) *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd ed, Kluwer Law International 1999) at 465.

57 Nicholas, above n 5, at 570.

C Principle Sources of Difficulties Encountered

In reference to the drafting history, the principal sources for the divergence in opinions among Contracting States can be classified into three aspects. Economically and politically, the issue regarding whether the interest rate should be determined by the rate of the creditor's or the debtor's country was contentious.⁵⁸ Stemming from lines drawn parallel to the Cold War,⁵⁹ interest rates in the former socialist countries and the western industrialised countries differ significantly.⁶⁰ The market-determined interest rate in the West is substantially higher than in the Eastern countries where the interest rate depends on the administration. For the Anglo-American legal sphere, specific provisions as to the rate of interest are unnecessary, since interest, losses can be adequately compensated by damages.⁶¹

For Muslim countries,⁶² the prohibition against interest ("*Riba*"⁶³) and usurious practices constituting *Riba*⁶⁴ is rooted in the *Qu'ran*.⁶⁵ Islamic jurisprudence aims to establish an economic system eliminating all forms of exploitation.⁶⁶ In particular, the equitable sharing of profits and risks between the entrepreneur and the financier is cherished, and unlawful advantages obtained in usurious practices are closely scrutinised.⁶⁷

58 Kathryn S. Cohen "Achieving a Uniform Law Governing International Sales: Conforming the Damages Provisions of the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code" (2005) 26 University of Pennsylvania Journal of International Economic Law 601 at 615-616.

59 Zoccolillo, above n 28.

60 Garbers, above n 37, at Para. 3.2.

61 Garbers, above n 37.

62 For a detailed discussion between Islamic Law and the CISG, see Twibell, above n 34.

63 The Arabic word *Riba* linguistically means 'an addition to, or an increase of, a thing over and above its original size or amount.' For a detailed discussion as to the meaning of *Riba* in Islam, see for example Umer Chapra "The Nature of Riba in Islam" (2006) 2(1) The Journal of Islamic Economics and Finance (Bangladesh) 7; Julius Bertillo and Josefina Bertillo "Principles and Practice of Islamic Finance Systems" (2013) <<http://ssrn.com/abstract=1880028>>.

64 Twibell, above n 34, at 77-80.

65 Bertillo, above n 63, at 10.

66 Chapra, above n 63, at 7.

67 Twibell, above n 34, at 77-80.

D Summary

The drafting history clearly indicates that Article 78 was made under an uneasy compromise.⁶⁸ Due to vast divergence in political, economic and religious views among the Contracting States, it was impossible for them to reach a consensus.⁶⁹ Hence, a satisfactory approach to determine the interest rate shall be made in light of the difficulties encountered during the drafting of Article 78 CISG.

IV A CRITICAL EVALUATION OF METHODS FOR THE CALCULATION OF THE INTEREST RATE

Before examining various methods to solve the interest rate problem under Article 78, several issues regarding the interpretation of the CISG must be considered.

A Promoting the Goal of Uniformity

Stipulated in Article 7(1) CISG, the international character of the Convention, the observance of good faith in international trade and the need to promote uniformity in its application had never been denied.⁷⁰ However, despite more and more courts refer to foreign decisions,⁷¹ express references to Article 7(1) were seldom made in rulings involving Article 78.⁷² Instead of promoting uniformity, writers are more interested in advocating their own 'better' solutions,⁷³ while some courts rendered their decisions without providing reasons. Disappointingly, the application of the CISG has been far from uniform.

Albeit elusive, the importance of Article 7(2) CISG as a tool for gap filling should be observed.⁷⁴ It states that:

68 John Y. Gotanda "When Recessions Create Windfalls: The Problems of Using Domestic Law to Fix Interest Rates under Article 78 CISG" (2009) 13 *Vindobona Journal of International Commercial Law & Arbitration* 231.

69 Ferrari, above n 38, at 5.

70 Bruno Zeller "The UN Convention on Contracts for the International Sale of Goods" (2000) 12 *Pace International Law Review* 79; Alexander S. Komarov "Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7(1)" (2005-06) 25 *Journal of Law and Commerce* 75 at 76-82; UNCITRAL *UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods 2012*, Digest of Article 7 case law.

71 Komarov, above n 70, at 77.

72 Except in one case: Italy 29 December 1999 District Court Pavia (*Tessile v. Ixela*) <<http://cisgw3.law.pace.edu/cases/991229i3.html>>; See Behr, above n 25, at 287.

73 Behr, above n 25, at 290.

74 Tamo Zwinge "The United Nations Sale Convention: Delimitation, Influences, and Concurrent Application of Domestic Law" (2010-2011) 10 *Rich. J. Global L. & Bus.* 227 at 231-232.

Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

As indicated above, Article 7(2) prescribes a two-tier gap-filling method for the interpretation of matters not explicitly settled in the Convention. Since the success of uniform law lies in its independence from the domestic law, deducing general principles from the CISG should always be placed in the first priority.⁷⁵ As suggested by one commentator, the general principles reflect the spirit of the Convention.⁷⁶ Primarily, interpretation should be based on the general principles of the Convention. This enables gap filling by analogy and reference to broader principles.⁷⁷ Ascertaining the rate of interest pursuant to the rules of private international law should only be used as a last resort.⁷⁸ Given the importance of predictability in international trade, it is submitted that a uniform approach to the calculation of the interest rate would foster international trade relations.

B The Rate of Interest: A Matter within the Scope of the Convention?

In filling the interest rate gap in the Convention, one must decide whether it constitutes a *lacuna praeter legem* (matter governed by but not expressly settled in the Convention), or a *lacuna intra legem* (matter excluded from the sphere of application of the Convention).⁷⁹ This issue is crucial in determining the Convention's exact sphere of application.⁸⁰

Solutions to the interest rate problem differ widely from each other, depending on whether it is perceived as a gap *intra legem* or *praeter legem*.⁸¹ If interest rate is

75 CISG-AC Opinion No. 14, above n 12, at Para. 3.2.

76 Michael Bridge "Uniform and Harmonized Sales Law: Choice of Law Issues" in Jaies J. Fawcett, Jonathan M. Harris and Michael Bridge *International Sales of Goods in the Conflict of Laws* (Oxford University Press, 2005) 937.

77 Zwinge, above n 74, at 232; Jan Hellner "Gap-Filling by Analogy - Art. 7 of the U.N. Sales Convention in Its Historical Context" in Lars A. E. Hjermer, Jan Ramberg, Ove Bring and Said Mahmoudi (eds) *Studies in International Law: Festschrift til Lars Hjermer* (Norstedts, 1990).

78 Zwinge, above n 74, at 234, 257-258; UNCITRAL Case Digest on Article 7, above n 69, at Para. 10.

79 Ferrari, above n 38, at 5; Behr, above n 25, at 295-296; Zoccolillo, above n 28, at Part III; Arthur B. Colligan, Jr., "Applying the General Principles of the United Nations Convention on Contracts for the International Sale of Goods to Fill the Article 78 Interest Rate Gap in Zapata Hermanos, S.A. v. Hearthside Baking Co. Inc. (2001)" (2002) 6 *Vindobona Journal of International Commercial Law & Arbitration* 40 at 47.

80 Michael Joachim Bonell "Article 7" in *Bianca-Bonell Commentary on the International Sales Law* (Giuffrè, Milan, 1987) 75-77.

81 Ferrari, above n 38, at 4.

considered outside of the scope of the CISG, it must be settled by the applicable domestic law, which is determined by the private international law rules. If, on the other hand, the interest rate is regarded a matter within the scope of the Convention not expressly settled, Article 7(2) CISG applies. General principles in the Convention should then be ascertained to guide interpretation. Only if no general principles could be found, may the private international law be invoked.

Considering the irreconcilable differences that emerged during the Vienna Diplomatic Conference,⁸² an overwhelming number of Convention commentators agree that the interest rate issue should be considered outside of the scope of the CISG.⁸³ Nevertheless, some insisted that in light of the international character of the Convention and the need to promote uniformity, the interest rate issue is governed by the CISG.⁸⁴ For the purposes of this paper, the two conflicting opinions will be further discussed in Part V, where the author argues that the interest rate issue should be considered a *lacuna praeter legem*.

Taking into account the purpose and the drafting history of Article 78, the importance of uniformity and the nature of the gap illustrated above, solutions to the interest rate problem can be classified into: (A) Approaches relying on the domestic law; (B) Approaches aiming to achieve uniformity; and (C) Not deciding the applicable law. An appraisal on the merits and criticisms of each approach will be made, with reference to the corresponding court decisions, arbitral awards and legal literature.

C Recourse to the Applicable Domestic Law

Due to the absence of express provision as to the details of the rate of interest in Article 78, a majority of courts and authors⁸⁵ argued that the interest rate gap constitutes a *lacuna intra legem*,⁸⁶ and therefore, a matter governed by domestic law.⁸⁷ For instance, in *Landgeright Hamburg*,⁸⁸ the court held that since the interest

82 UNCITRAL Case Digest on Article 78, above n 6, at Para.9.

83 Lookofsky, above n 8, at 158; Zwinge, above n 74, at 250.

84 Thiele, above n 14, at Part IV, Para. C(2).

85 Eiselen, above n 11; UNCITRAL Case Digest on Article 78, above n 6, at Para.10; Nicholas, above n 5, at 570; Jorge Galvañ "The CISG and its provisions on damages" <<http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1557681&fileId=1564402>> 41; Christiana Fountoulakis "Remedies for breach of contract under the United Nations Convention on the International Sale of Goods" (2011) 12 ERA Forum 7 at 21.

86 For example, see Greece 2008 Decision 43945/2007 of the Single-Member Court of First Instance of Thessalonika (Clothes case) <<http://cisgw3.law.pace.edu/cases/080002gr.html>>.

87 For examples of cases holding this statement, see United States 15 April 2009 Federal District Court [New Jersey] (*San Lucio, S.r.l. et al. v. Import & Storage Services, LLC et al.*)

rate is not expressly regulated within the scope of CISG, it has to be determined in accordance with the relevant national law.⁸⁹ Unfortunately, in a large number of cases, only a concise, conclusive statement that 'as Article 78 does not fix an interest rate, domestic law applies' was made without further explanation.⁹⁰ Meanwhile, some courts merely cited commentators' supporting views without adequate elaboration.⁹¹

To clarify the underlying rationale, this approach can be understood from a historical perspective. As illustrated above, Article 78 'represents an uneasy compromise between those who were altogether opposed to an interest provision and those who wanted a statement, however bland, at least recognising the right'.⁹² Owing to the lack of consensus as to the calculation of the interest rate during the

<<http://cisgw3.law.pace.edu/cases/090415u1.html>>; Switzerland 28 January 2009 Tribunal cantonal [Higher Cantonal Court] Valais (Fiberglass composite materials case) <http://cisgw3.law.pace.edu/cases/090128s1.html>; Netherlands 21 January 2009 Rechtbank [District Court] Rotterdam (Sleeping Europe B.V. v. Calesco Foil A.B.) <<http://cisgw3.law.pace.edu/cases/090121n2.html>>; Switzerland 26 November 2008 Handelsgericht [Commercial Court] Aargau (Fruit and vegetables case) <<http://cisgw3.law.pace.edu/cases/081126s1.html>>; Switzerland 19 June 2007 Handelsgericht [Commercial Court] Aargau (Railway rails case) <<http://cisgw3.law.pace.edu/cases/070619s1.html>>; Switzerland 19 April 2007 District Court Lugano (Children's play structure case) <<http://cisgw3.law.pace.edu/cases/070419s1.html>>; Germany 15 July 2003 District Court Mönchengladbach (Filters case) <<http://cisgw3.law.pace.edu/cases/030715g1.html>>; Switzerland 30 April 2003 Canton Appellate Court Valais (Furniture case) <<http://cisgw3.law.pace.edu/cases/030430s1.html>>; Serbia 9 December 2002 Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce (Aluminum case) <<http://cisgw3.law.pace.edu/cases/021209sb.html>>; Switzerland 25 February 2002 District Court Schaffhausen (Machines, devices and replacement parts case) <<http://cisgw3.law.pace.edu/cases/020225s1.html>>; Russia 30 July 2001 Arbitration proceeding 198/2000 <<http://cisgw3.law.pace.edu/cases/010730r1.html>>; Bulgaria 12 March 2001 Arbitration Case 33/98 <<http://cisgw3.law.pace.edu/cases/010312bu.html>>.

88 Germany 26 September 1990 District Court Hamburg (Textiles case) <<http://cisgw3.law.pace.edu/cases/900926g1.html>>.

89 The said court cited Caemmerer/Schlechtriem/et al. *Kommentar zum Einheitlichen UN-Kaufrecht - CISG* (München 1990).

90 For example, see Switzerland 28 January 2009 *Tribunal cantonal* [Higher Cantonal Court] Valais (*Fiberglass composite materials case*) <<http://cisgw3.law.pace.edu/cases/090128s1.html>>; Germany 18 June 2003 District Court Tübingen (Computers and accessories case) <<http://cisgw3.law.pace.edu/cases/030618g1.html>>; Serbia 21 February 2005 Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce (Young chickens case) <<http://cisgw3.law.pace.edu/cases/050221sb.html>>; Russia 10 February 2005 Arbitration proceeding 133/2003 <<http://cisgw3.law.pace.edu/cases/050210r1.html>>; ICC Arbitration Case No. 9771 of 2001 (Commodity contract case) <<http://cisgw3.law.pace.edu/cases/019771i1.html>>.

91 For example, see Switzerland 25 January 2005 Commercial Court Aargau (Floor tiles case) <<http://cisgw3.law.pace.edu/cases/050125s1.html>>; Germany 27 July 2004 District Court Kiel (Fat for frying case) <<http://cisgw3.law.pace.edu/cases/040727g1.html>>.

92 Ziegel, above n 3, at Para. 1.

Diplomatic Conference, no relevant formula is provided in the Convention. Seen from the rulings of most courts, it can be said that the rate of interest constitutes a deliberate omission by the Convention's drafters.⁹³ Following this view, the interest rate should be considered a deficiency in the Convention, which must be accepted.⁹⁴ As a result, the only solution to the interest rate problem is by recourse to the applicable domestic law.

Alternatively, some courts, tribunals and commentators believed that the interest rate gap constitutes a *lacuna praeter legem* and therefore Article 7(2) CISG should be applied when interpreting Article 78. In spite of the repeated efforts, they concluded that no general principles can be found.⁹⁵ Consequently, the interest rate question has to be decided according to the law applicable by virtue of private international law rules.

D Domestic Law Applicable by Virtue of the Rules of the Private International Law

Occasionally being referred to as the 'unanimous opinion', the vast majority of courts and tribunals, especially those from Germany and Switzerland,⁹⁶ preferred

93 Behr, above n 25, at 295.

94 Francesco G. Mazzotta "CISG Article 78: Endless disagreement among commentators, much less among the courts" (2004) <<http://www.cisg.law.pace.edu/cisg/biblio/mazzotta78.html#1>> Part IV(E).

95 Behr, above n 25; Zeller, B., *Damages Under the Convention on Contracts for the International Sale of Goods* (Oceana Publications Inc, New York, 2005) at 133-42; Mazzotta, above n 94.

For cases, see Hungary 6 June 2007 Congrad County Court (Clothing case) <<http://cisgw3.law.pace.edu/cases/070606h1.html>>; Netherlands 2 January 2007 Appellate Court's-Hertogenbosch (*G.W.A. Bernards v. Carstenfelder Baumschulen Pflanzenhandel GmbH*) <<http://cisgw3.law.pace.edu/cases/070102n1.html>>; Russia 29 December 2006 Arbitration proceeding 54/2006 (Equipment case) <<http://cisgw3.law.pace.edu/cases/061229r1.html>>.

96 For instance, in Switzerland 22 November 2010 Commercial Court Zurich (Clothing case) <<http://cisgw3.law.pace.edu/cases/101122s1.html>> at p. 25, the court regarded the private international law approach a 'prevailing opinion' ('überwiegender Auffassung').

For other case examples, see Switzerland 21 October 1999 District Court Zug (*PVC and other synthetic materials case*) <<http://cisgw3.law.pace.edu/cases/991021s1.html>>; Germany 5 November 1997 Appellate Court Hamm (In-line skates case) <<http://cisgw3.law.pace.edu/cases/971105g1.html>>; Germany 5 April 1995 District Court Landshut (Sport clothing case) <<http://cisgw3.law.pace.edu/cases/950405g1.html>>; Germany 12 December 2006 District Court Coburg (Plants case) <<http://cisgw3.law.pace.edu/cases/061212g1.html>>; Slovak Republic 15 December 2006 District Court in Galanta <<http://cisgw3.law.pace.edu/cases/061215k1.html>>; Croatia 24 October 2006 High Commercial Court <<http://cisgw3.law.pace.edu/cases/061024cr.html>>; Russia 14 December 2005 Arbitration proceeding 150/2004 <<http://cisgw3.law.pace.edu/cases/051214r1.html>>; Netherlands 11 October 2005 Appellate Court 's-Hertogenbosch (*G&G Component Complementaries v. Errelle S.r.l.*) <<http://cisgw3.law.pace.edu/cases/051011n1.html>>; Croatia 26 July 2005 High Commercial Court (*Industria Conciaria S.p.A. v. Simecki d.o.o.*)

fixing the rate of interest according to the national law applicable by virtue of private international law of the forum.⁹⁷ This finding is supported by the 2012 UNCITRAL Case Digest, which reported that 'courts and tribunals demonstrate a clear tendency to apply the rate provided for by the domestic law applicable to the contract under the rules of private international law'.⁹⁸ Given its popularity among courts, some argue that adopting this approach would bring more certainty compared with any other approaches.⁹⁹

E Other Approaches

Alternatively, some courts applied the domestic law of a specific place not being necessarily the applicable law by virtue of the rules of private international law. As illustrated below, these approaches include (i) The Creditor-approach; (ii) The Debtor-approach; (iii) Determined by the Law of the *forum*; and (iv) Determined by the Law of payment currency.

1 Law of the creditor's place of business

Without being necessarily the domestic law applicable by virtue of the private international law, some courts applied the domestic law of the creditor's place of business to determine the rate of interest.¹⁰⁰ Quite frequently, the private

<<http://cisgw3.law.pace.edu/cases/050726cr.html>> Germany 17 August 2011 Lower Court Geldern (Corn case) <<http://cisgw3.law.pace.edu/cases/110817g1.html>>; Switzerland 21 June 2011 Commercial Court Aargau (Cosmetic products case) <<http://cisgw3.law.pace.edu/cases/110621s1.html>>; Germany 30 December 2010 District Court Lübeck (Chairs case) <<http://cisgw3.law.pace.edu/cases/101230g1.html>>.

97 Behr, above n 25; Schlechtriem, above n 1; André Corterier "A New Approach to Solving the Problem of the Interest Rate Under Article 78 CISG" (2000) 5 International Trade and Business Law Annual 33; Nicholas, above n 5; see also Schlechtriem and Butler, above n 9, at 223.

For a list of cases supporting this approach, see UNCITRAL Case Digest on Article 78, above n 6, at Para.13

98 UNCITRAL Case Digest on Article 78, above n 6, at Para.15.

99 Mazzotta, above n 94, at Part IV(E).

100 Germany 16 September 1991 District Court Frankfurt (Shoe case) <<http://cisgw3.law.pace.edu/cases/910916g1.html>>; ICC Arbitration Case No. 7197 of 1992 (Failure to open letter of credit and penalty clause case) <<http://cisgw3.law.pace.edu/cases/927197i1.html>>; Germany 24 January 1994 Appellate Court Berlin (Wine case) <<http://cisgw3.law.pace.edu/cases/940124g1.html>>; Switzerland 9 December 1994 District Court Arbon (Cloth case) <<http://cisgw3.law.pace.edu/cases/941209s1.html>>; Hungary 24 March 1992 Metropolitan Court (*Adamfi Video v. Alkotók Stúdiósa Kiszövetkezet*) <<http://cisgw3.law.pace.edu/cases/920324h1.html>>; Germany 21 October 1994 Lower Court Riedlingen (Ham case) <<http://cisgw3.law.pace.edu/cases/941021g1.html>>; Germany 25 October 1994 District Court Darmstadt (Beef case) <<http://cisgw3.law.pace.edu/cases/941025g1.html>>; Russia 15 April 1994 Arbitration proceeding 1/1993 <<http://cisgw3.law.pace.edu/cases/940415r1.html>>; Germany 8 February 1995 Oberlandesgericht München <<http://www.unilex.info/>

international law approach also leads to the application of the creditor's domestic law. Based on the presumption that the creditor borrows money in replacement of the sum in arrears,¹⁰¹ this approach emphasises the importance of compensating for the losses incurred by the creditor.¹⁰²

Commentary

According to Corterier, this approach corresponds to one that treats interest as a form of damages.¹⁰³ To support this argument, in *Richteramt Laufen* the court explained that the determination of the rate of interest by the law of the interest-creditor is of significance where the seller is 'in arrears with his obligation to pay the price, with the liability for damages under Article 74'.¹⁰⁴ Nevertheless, it can be argued that the creditor-approach ignores the restitution principle for awarding damages. This approach is also criticised as being 'decidedly one-sided'.¹⁰⁵

Statutory interest rates granted under this approach are often considered commercially unrealistic. As explained below, some commentators also advocated that average commercial interest rates should prevail over the statutory interest rates.¹⁰⁶ In a number of cases, the average bank lending rate at the seller's place of business was applied instead.¹⁰⁷ For instance, in a Russian arbitration award,¹⁰⁸ the

case.cfm?id=118>; Switzerland 5 February 1997 Commercial Court Zürich (Sunflower oil case) <<http://cisgw3.law.pace.edu/cases/970205s1.html>>.

101 36. For example, see China October 2005 CIETAC Arbitration proceeding (Filling and sealing machine case) <<http://cisgw3.law.pace.edu/cases/051000c1.html>>; ICC Arbitration Case No. 7331 of 1994 (Cowhides case) <<http://cisgw3.law.pace.edu/cases/947331i1.html>>.

102 Corterier, above n 97, at 38.

103 Corterier, above n 97, at 38, Chengwei, Liu "Recovery of Interest" (2003) Issue 2003 (1) Nordic Journal of Commercial Law of the University of Turku, Finland Para. 8.3.1.

For cases supporting, see Switzerland 7 May 1993 District Court Laufen, Canton Berne (*Automatic storage system case*) <<http://cisgw3.law.pace.edu/cases/930507s1.html>>.

104 Switzerland 7 May 1993 District Court Laufen, Canton Berne (*Automatic storage system case*) <<http://cisgw3.law.pace.edu/cases/930507s1.html>>.

105 Corterier, above n 97, at 38.

106 Thiele, above n 14, at Part IV, Para. C(3)c.

107 For example, see Germany 3 April 1990 District Court Aachen (Shoes case) <<http://cisgw3.law.pace.edu/cases/900403g1.html>>; Belgium 8 November 1995 District Court Hasselt (*Ca'del Bosco v. Francesco*) <<http://cisgw3.law.pace.edu/cases/951108b1.html>>; Belgium 9 October 1996 District Court Hasselt (*Margon v. Sadelco*) <<http://cisgw3.law.pace.edu/cases/961009b1.html>>; Russia 28 March 1997 Arbitration proceeding 38/1996 <<http://cisgw3.law.pace.edu/cases/970328r1.html>>.

108 Russia 10 February 2000 Arbitration proceeding 340/1999 <<http://cisgw3.law.pace.edu/cases/000210r1.html>>.

tribunal granted interest at 22% per annum calculated by the seller based on reports of three banks. Hence, in reality the creditor-approach does not represent an application of the creditor's domestic law.¹⁰⁹

In summary, it is the author's opinion that although awarding interest under domestic statutory rates may be inconsistent with the aim of compensating the creditor, the creditor-approach has the potential to become a uniform approach given its popularity in practice. To be further elaborated in Part V, it is submitted that a satisfactory approach should produce an interest rate that is commercially reasonable, preferably without the need to distinguish interest awarded as a part of damages or restitution of benefits.

2 *Law of the debtor's place of business*

The rate at the debtor's place of business was applied in a number of cases.¹¹⁰ In *Rechtbank van koophandel*¹¹¹ and *Landgericht Berlin*,¹¹² interest at the statutory rate provided under the debtor's domestic law, which was awarded in light of the circumstances. In contrary, in *Tribunal Cantonal de Vaud*,¹¹³ considering that the obligation of the buyer (the debtor) was the only disputed performance, the court held that the domestic law of the buyer's country should be applicable for the determination of the interest rate. In *Landgericht Bamberg*, the court reasoned that this approach 'adheres to the uniform standard which establishes a link to the notion of adjustment of profit'.¹¹⁴ Parallel to CISG-AC Opinion No. 9¹¹⁵ and based on the

109 Liu, above n 103, at Para. 8.3.4

110 Switzerland 12 May 2006 Appellate Court Genève (Office furniture case). <<http://cisgw3.law.pace.edu/cases/060512s1.html>>; Switzerland 11 March 1996 Appellate Court Vaud [01 93 1061] (Aluminum granules case) <<http://cisgw3.law.pace.edu/cases/960311s2.html>>.

111 Belgium 16 December 1996 District Court Kortrijk (*Namur-Kreidverzekering v. Wesco*) <<http://cisgw3.law.pace.edu/cases/961216b1.html>>.

112 <www.unilex.info/case.cfm?pid=1&do=case&id=921&step=Abstract>.

113 Switzerland 11 March 1996 Appellate Court Vaud [No. 01 93 0661] (Clay case) <<http://cisgw3.law.pace.edu/cases/960311s1.html>>.

114 Germany 13 April 2005 District Court Bamberg (Furnishings case) <<http://cisgw3.law.pace.edu/cases/050413g1.html>>.

115 CISG-AC Opinion No. 9, Consequences of Avoidance of the Contract, Rapporteur: Professor Michael Bridge, London School of Economics, London, United Kingdom. Adopted by the CISG-AC following its 12th meeting in Tokyo, Japan on 15 November 2008.

principle of restitution,¹¹⁶ this approach prevents debtors from obtaining unjust enrichment.¹¹⁷

Commentary

In the case of delayed payments, the idea of restitution seems convincing as the debtor is unjustly enriched by retaining the use of the money during the period he is in arrears to the creditor.¹¹⁸ The debtor-approach also obviates delaying tactics by the debtor.¹¹⁹

In *Oberlandesgericht Frankfurt*, the court described the debtor-approach as 'an isolated deviating opinion'.¹²⁰ Citing this case, Liu predicted that this approach would not attract a large following as it takes a decidedly one-sided approach.¹²¹ It is submitted that this argument may not be true. Illustrated in a number of subsequent German cases,¹²² Stoll's work advocating the debtor-approach received a considerable degree of support.¹²³

On the other hand, the strongest argument against the debtor-approach is that interest awarded under Article 78 CISG is not based on the principle of unjust enrichment, but on allowing the creditor to recover his costs.¹²⁴ To be explained in

116 Behr, above n 25, at 289.

117 John Felemegas "The award of counsel's fees under Article 74 CISG, in *Zapata Hermanos Sucesores v. Hearthside Baking Co. (2001)*" (2002) 6 *Vindobona Journal of International Commercial Law and Arbitration* 30 at 38-39.

118 Ingeborg Schwenzer, Christiana Fountoulakis, Mariel Dimsey, *International Sales Law* (2nd edn, Hart Publishing, 2012) at 579.

119 Schlectreiem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd ed, Oxford, 2010) 1056.

120 Germany 18 January 1994 Appellate Court Frankfurt (Shoes case) <<http://cisgw3.law.pace.edu/cases/940118g1.html>>.

121 Liu, above n 103, at Para. 8.4.

122 Germany 2 November 2005 District Court Heidelberg (Natural stones case) <<http://cisgw3.law.pace.edu/cases/051102g1.html>>; Germany 27 July 2004 District Court Kiel (Fat for frying case) <<http://cisgw3.law.pace.edu/cases/040727g1.html>>.

123 Stoll "Internationalprivatrechtliche Fragen bei der landesrechtlichen Ergänzung des Einheitlichen Kaufrechts" in Andreas Heldrich and Hans Jürgen Sonnenberger (eds.) *Festschrift für Murad Ferid zum 80. Geburtstag* (Verlag für Standesamtswesen 1988) 510; See also 孫揮 (Sun Hui), 《聯合國國際貨物銷售合同公約》第 78 條利率問題的探究 (A Study of the Calculation of Interest Rate under Article 78 of The United Nations Convention on Contracts of International Sales of Goods) (2012) 2 *Journal of Jiangxi University of Finance and Economics* 122 at 126-127.

124 Behr, above n 25, at 290; Liu, above n 103, at Para. 8.4; CISG-AC Opinion No. 14, above n 12, at Para. 3.30.

Part V, the author prefers the argument that the principle of full compensation should prevail over the principle of restitution of benefits in Article 78.

3 *Law of the forum*

One court directly applied the rate of the *lex fori*, by 'exercising its discretion'.¹²⁵ Some other courts applied the rate stipulated in the Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on Combating Late Payment in Commercial Transactions without making justifications,¹²⁶ while some other decisions relied on private international law analysis.¹²⁷

Commentary

Apparently relying on the *lex fori* inevitably leads to inconsistent results.¹²⁸ It is always undesirable that no reasons are provided, since the underlying rationale cannot be evaluated. In addition, like the two abovementioned approaches, issues related to over-compensation and inflation remain unsolved.

4 *Law of payment currency*

Some courts preferred the view that the interest rate should be determined by the *lex monetae*, the law of the currency in which payment of the sum in arrears was to be made.¹²⁹ Interestingly, it seems that arbitral tribunals favour this approach since it

125 United States 9 September 1994 Federal District Court [New York] (*Delchi Carrier v. Rotorex*) 14 <<http://cisgw3.law.pace.edu/cases/940909u1.html>>, Para. 14.

126 Switzerland 17 August 2009 Handelsgericht [Commercial Court] Bern (Clothes and accessories case) <<http://cisgw3.law.pace.edu/cases/090817s1.html>>; Germany 15 August 2003 District Court Bielefeld (Strapping machine case) <<http://cisgw3.law.pace.edu/cases/030815g1.html>>.

127 Hungary 22 November 2007 Judicial Board of Szeged [Appellate Court] (Clothing case) <<http://cisgw3.law.pace.edu/cases/071122h1.html>>; Switzerland 6 September 2007 Kantonsgericht [District Court] Appenzel Ausserhoden (Clothing case) <<http://cisgw3.law.pace.edu/cases/070906s1.html>>.

128 Phanesh Koneru "The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles" (1997) 6 Minnesota Journal of Global Trade 105 at 128.

129 See also: Spain 24 April 2009 Appellate Court Alicante <<http://cisgw3.law.pace.edu/cases/090424s4.html>>; Serbia 5 January 2009 Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce (Paper handkerchiefs production line case) <<http://cisgw3.law.pace.edu/cases/090105sb.html>>; Belgium 18 February 2002 District Court Ieper (*L. v. SA C.*) <<http://cisgw3.law.pace.edu/cases/020218b1.html>>; Belgium 25 April 2001 District Court Veurne (*BV BA G-2 v. AS C.B.*) <<http://cisgw3.law.pace.edu/cases/010425b1.html>>; Hungary 5 December 1995 Budapest Arbitration proceeding Vb 94131 (Waste container case) <<http://cisgw3.law.pace.edu/cases/951205h1.html>>; Hungary 17 November 1995 Budapest Arbitration proceeding Vb 94124 (Mushrooms case) <<http://cisgw3.law.pace.edu/cases/951117h1.html>> Belgium 25 April 2001 District Court Veurne (*BV BA G-2 v. AS C.B.*) <<http://cisgw3.law.pace.edu/cases/010425b1.html>>.

tends to arrive at market realistic rates.¹³⁰ For example, in *ICC Case No.8769*¹³¹ and *No.8908*,¹³² both courts reasoned that rates for the contractual currency are more commercially reasonable.

Commentary

Being described as a 'probably unanimous opinion',¹³³ this approach may be the most logical one from the economic point of view.¹³⁴ The parties can decide the interest rate, and the distinction of the nature of interest awarded as damages or restitution will be rendered unnecessary.¹³⁵ In view of the advantages of this approach, it is submitted that when considering a satisfactory approach to solving the interest rate problem, the payment currency should be taken into account.

In spite of the abovementioned advantages, it must be noted that the interest rates determined by this approach would be greatly affected by inflation.¹³⁶ If the creditor's country has a 'strong' currency (where the interest rate is usually low) while the payment currency is 'weak' (where the interest rate is usually high), over-compensation to the creditor may result, leading to unjust results.¹³⁷

F Shortcomings of the Domestic Law Approach

Summarising the above, a number of practical difficulties arising from the domestic law approach can be seen. It is often argued that recourse to national law promotes uncertainty.¹³⁸ It is not always clear which domestic law is the governing applicable law under the private international law rules.¹³⁹ Application of foreign laws will often be required, which judges may not have expertise.

130 Liu, above n 103, at Para. 8.6.1; 8.6.2.

131 ICC Arbitration Case No. 8769 of December 1996 (Electrical appliances case) <<http://cisgw3.law.pace.edu/cases/968769i1.html>>.

132 ICC Arbitration Case No. 8908 of December 1998 (Pipes case) <<http://cisgw3.law.pace.edu/cases/988908i1.html>>.

133 Behr, above n 25, at 284.

134 ICC Arbitration Case No. 6653 of 26 March 1993 (Steel bars case) <<http://cisgw3.law.pace.edu/cases/936653i1.html>>.

135 Corterier, above n 97, at 37.

136 Thiele, above n 14, at Part IV, Para. C(3)c, C(3)d.

137 ICC Arbitration Case No. 7585 of 1992 (Foamed board machinery) <<http://cisgw3.law.pace.edu/cases/927585i1.html>>

138 Zoccolillo, above n 28, at Part IV

139 Kizer, above n 18, at 1292.

Moreover, domestic interest rates are not commercially realistic. Local statutory interest rates under domestic law often fail to reflect market conditions,¹⁴⁰ as they are considerably lower than prevailing commercial rates.¹⁴¹ This leads to under-compensation or over-compensation, representing unjust enrichment to one of the parties.¹⁴² Incentive problems may also arise. According to Gotanda, interest rates awarded vary greatly, from 3% to 31%.¹⁴³ If the rate awarded is lower than the interest rate of the debtor's country, the debtor may be motivated to refuse settling at the creditor's actual costs incurred or withhold payments.¹⁴⁴ Furthermore, domestic interest rates may not protect creditors who borrow in a foreign currency against inflation.¹⁴⁵

The most fundamental criticism against the domestic law approach is that the international character of the Convention and its goal to promote uniformity are ignored.¹⁴⁶ Although the rules of private international law may constitute a uniform approach to solve the interest rate problem, inconsistent results remain.

Summary

Given the irreconcilable differences that emerged during the Diplomatic Conference and that no relevant formula for calculating interest exist, some considered interest under Article 78 as a deficiency of the Convention which must be accepted. Consequently, the appropriate domestic law is the only solution. However, this approach is neither consistent nor commercially realistic. If domestic law applies, incongruity¹⁴⁷ arises due to divergence in solutions.¹⁴⁸ As one primary goal of the Convention is to promote uniformity, courts and tribunals must be hesitant in resorting to the domestic law to determine the interest rate.

140 Gotanda, above n 68, at 237.

141 David J Branson, Richard E Wallace "Awarding Interest in International Commercial Arbitration: Establishing a Uniform Approach" (1987-1988) 28 Va. J. Int'l L. 919 at 924-27.

142 Gotanda, above n 68, at 237.

143 John Y. Gotanda "Damages in Private International Law" (2007) 326 *Recueil des cours* 187 at 256-257.

144 Kizer, above n 18, at 1292.

145 Kizer, above n 18, at 1292.

146 Jeffrey S. Sutton "Measuring Damages under the United Nations Convention on the International Sale of Goods" (1989) 50 *Ohio State Law Journal* 737 at n.123.

147 Zoccolillo, above n 28, at Part III(C).

148 Denis Phillippe, *the Rate of Interest under CISG and Peculiarities of International Commercial Arbitration* (2012) <www.philippelaw.eu/UploadDirectory/UserFiles/files/The%20Rate%20of%20Interest%20under%20CISG.pdf> 649.

G Approaches Attempting to Achieve Uniformity

Alternatively, a number of proposals have been made to ascertain the interest rate under Article 78. As shown below, they include (1) Applying the general principles of the Convention; (2) Using the UNDRIT Principles of International Commercial Contracts (hereafter: "the UNDRIT Principles" or the "PICC") / the Principles of European Contract Law ("PECL") to supplement the CISG; (3) Considering international usages; and (4) Determined by the commonly used 'commercially reasonable' rate.

1 Applying the general principles of the Convention

Premised on the assumption that Article 78 was designed to establish a general rule free from the vagaries of domestic law,¹⁴⁹ Honnold argues that recourse to domestic law would be contrary to the uniformity, which the drafters sought.¹⁵⁰ By virtue of Article 7(2) CISG, it is argued that unresolved questions on the rate of interest under Article 78 can be settled in conformity with the general principles of the Convention.¹⁵¹ By a scrutiny of analogous provisions contained in the Convention,¹⁵² three general principles, namely full compensation for the loss endured, reasonableness and restitution of unjust enrichment can be discerned.¹⁵³

(a) Full compensation

Seen from Article 74 CISG, it is widely accepted that full compensation is one of the general principles of the Convention.¹⁵⁴ By analogy to Article 74,¹⁵⁵ some advocate that the interest rate should fully compensate the aggrieved party.¹⁵⁶ Under this approach, the interest paid to an aggrieved party should restore him to a position where he would have been, had the contract not been breached. Referring to

149 Honnold, above n 56, at 466.

150 For articles supporting Honnold's argument, see Franco Ferrari "CISG Case Law on the Rate of Interest on Sums in Arrears" (1999) *Int'l Bus. L.J.* 86 at 89; Gotanda, above n 10, at 135; Gotanda, above n 68, at 235-236.

151 Honnold, above n 56, at 466.

152 Zoccolillo, above n 28, at Part III (A).

153 Gotanda, above n 10, at 120.

154 CISG-AC Opinion No. 6, Calculation of Damages under CISG Article 74, Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA, Black-letter Rule 1; Koneru, above n 128, at 125; James J. Callaghan "U.N. Convention On Contracts For the International Sale of Goods: Examining the Gap-Filling Role of CISG in Two French Decisions" (1995) 14. *J.L. & Com.* 183 at 200; Colligan, above n 79, at 49-52; Gotanda, above n 10, at 136.

155 Also considering the relevant rules stipulated in Article 75 and 76 CISG.

156 Gotanda, above n 10, at 135.

analogous provisions under Article 75 and 76 CISG, interest can be measured by the cost of a substitute transaction, while the current price of credit may be used, in circumstances where the seller internally financed the losses.¹⁵⁷

Two approaches for calculating the rate of interest can be derived under the principle of full compensation. Referring to Article 57 that payments must be made in the sphere of control of the creditor, the first method assumes that the creditor would take out a loan at his place of business to finance the transaction and advocates that interest should be calculated in light of the creditor's place of business.¹⁵⁸ For instance, after stating that full compensation is one of the general principles underlying the CISG, one Austrian tribunal awarded the aggrieved party interest at the rate commonly practised in his country with respect to the currency of payment.¹⁵⁹ Alternatively, the second method advocates awarding interest at a savings rate commonly used in the country of the currency in which payment is to be made. This is based on the premise that the creditor would be deprived of the opportunity to make an investment, instead of the borrowing costs incurred to cover the shortfall.¹⁶⁰

However, it is argued that the first approach represents a re-introduction of the proposal suggested by the Western nations rejected at the Diplomatic Conference through interpretation.¹⁶¹ In addition, from the drafting history, interest and damages were deliberately put into separate sections.¹⁶² Some courts and commentators criticise that this approach blurs the distinction between interest and damages,¹⁶³ making Article 78 superfluous as actual loss can be claimed under Article 74 in any event.¹⁶⁴ In response, the author submits that these issues are less relevant to the solution to the interest rate problem. Focus should be on whether the

157 Zoccolillo, above n 28, at Part III(A).

158 Zoccolillo, above n 28, at Part III(A); Thiele, above n 13, at Part V.

159 Austria 15 June 1994 Vienna Arbitration proceeding SCH-4318 (Rolled metal sheets case) <<http://cisgw3.law.pace.edu/cases/940615a4.html>>.

160 Gotanda, above n 68, at 236.

161 Colligan, above n 79, at 47, Mazzotta, above n 94, at Part IV(C).

162 Mazzotta, above n 94, at Part IV(C).

163 Zoccolillo, above n 28; Eiselen, above n 11; Ferrari, above n 150, at 89; Liu, above n 103, at Para. 8.8.1.

164 Eiselen, above n 11; 張湘蘭, 朱強 (Zhang Xianglan, Zhu Qiang), 《聯合國國際貨物買賣合同公約》下利率的確定 (Study on the Fixing of Interest Rate under CISG) (2006) 4(1) *Presentday Law Science* 80 at 85-87; For cases supporting this argument, see Germany 24 April 1990 Lower Court Oldenburg in Holstein <<http://cisgw3.law.pace.edu/cases/900424g1.html>>; Germany 18 January 1994 Appellate Court Frankfurt <<http://cisgw3.law.pace.edu/cases/940118g1.html>>.

method effectively encourages international trade by bringing uniformity and consistency. Since the use of the principle of full compensation promotes a consistent approach, it should be followed even if the resulting method was not adopted at the Convention.

Similarly, the CISG-AC also adopted the view that the loss of the creditor should be regarded as the focal point:¹⁶⁵

Whereas Article 84 has a restitutionary character and reflects the idea of disgorgement, Article 78 follows similar principles to damages and aims at compensation.

(b) Reasonableness

Being expressly referred in 37 provisions in the CISG,¹⁶⁶ reasonableness is a general principle of the CISG even though not specifically mentioned in Article 78.¹⁶⁷ For instance, in *Zapata Hermanos v Hearthside Baking*,¹⁶⁸ the jury was instructed to determine the rate of interest based on the parties' agreement. If no agreements can be found, they should decide a reasonable interest rate. Embracing the general principles of full compensation and reasonableness,¹⁶⁹ it can be said that the court in *Zapata* was aware of the intrinsic international perspective required for the proper interpretation of the CISG.¹⁷⁰ In addition, in CIETAC practice, the principle of reasonableness is frequently used to solve the interest rate problem.¹⁷¹

Hence, in light of the reasonableness principle, some advocated that interest should accrue at a common rate between the parties, in particular the interest rate used in the country of the currency in which payment is to be made.¹⁷² To be further discussed in Part V, this approach adequately reflects prevailing market conditions and currency valuations.

165 CISG-AC Opinion No. 14, above n 12, Black Letter Text, Para. 2; Paras. 3.5-3.6.

166 Colligan, above n 79, at 49.

167 Albert H. Kritzer, Reasonableness, Overview Comments, at <<http://cisgw3.law.pace.edu/cisg/text/reason.html#view>>; Colligan, above n 79, at 49.

168 United States 22 August 2001 Federal District Court [Illinois] (*Zapata Hermanos v. Hearthside Baking*) <<http://cisgw3.law.pace.edu/cases/010822u1.html>>.

169 Colligan, above n 79, at 53.

170 Felemegas, above n 117, at 36.

171 Song, above n 16, at 724; For example, in China November 2006 CIETAC Arbitration proceeding (Nitrile exam gloves case) <<http://cisgw3.law.pace.edu/cases/061100c1.html>>, the court held that 'It is reasonable for the [seller] to assert an interest rate of annual rate 5.40%'.

172 Gotanda, above n 10, at 138.

Yet, Mazzotta warned that lacking any international common understanding as to the standard of reasonableness, further uncertainty and unpredictability would emerge.¹⁷³ It is submitted that to ensure a coherent approach, the reasonableness principle must be considered in conjunction with the principle of full compensation.

(c) Restitution

The principle of restitution addresses the concern that a party may take advantage of the other by delaying payment, due to the availability of either high interest rates or cheap credit.¹⁷⁴ By adhering to this approach, interest is awarded on the interest rate in debtor's place of business,¹⁷⁵ as the debtor should be deprived of any benefits gained because of retaining the sum in arrears.

Considering that most commentators are of the view that the general principle preventing unjust enrichment constitutes a separate matter governed by Article 84,¹⁷⁶ it is submitted that the principle of full compensation should prevail over restitution. Once this goal is accomplished, unjust enrichment can be disgorged, depending on the factual circumstances of the case, based on the principle of good faith and fair dealings of the parties involved.¹⁷⁷

(d) Commentary

In support of this approach, the concern, that recourse to domestic law would lead to results that are contrary to the goals of the Convention, had been repeatedly cited by various courts and tribunals.¹⁷⁸ For instance, as 'the immediate recourse to the domestic law may lead to results incompatible with principles embodied in Article 78,' one Austrian arbitral court held that fixing the rate of interest according to general principles was preferable.¹⁷⁹ More importantly, this approach fully realises the Convention's goal of uniformity.¹⁸⁰

173 Mazzotta, above n 94, at Part IV(C).

174 Zoccolillo, above n 28, at n 155.

175 See Germany 13 June 1991 Appellate Court Frankfurt (Textiles case) <<http://cisgw3.law.pace.edu/cases/910613g1.html>>.

176 Zoccolillo, above n 28, at n 155.

177 Zoccolillo, above n 28, at n 161; Koneru, above n 128, at 129.

178 Hungary 5 December 1995 Budapest Arbitration proceeding Vb 94131 (*Waste container case*) <<http://cisgw3.law.pace.edu/cases/951205h1.html>>.

179 Austria 15 June 1994 Vienna Arbitration proceeding SCH-4366 (Rolled metal sheets case) <<http://cisgw3.law.pace.edu/cases/940615a3.html>>.

180 Colligan, above n 79, at 56.

On the other hand, the strongest argument against the use of general principles is that the Convention is silent as to the rate of interest, so it constitutes an issue outside the scope of the Convention. Some concluded that despite assuming the applicability of Article 7(2), it is impossible to extract general principles from Article 78.¹⁸¹ Even conceding that general principles can be found, they would produce wide discretionary if not even arbitrary solutions¹⁸² contrary to the requirement of certainty.¹⁸³

To be further elaborated in Part V, it is the author's view that by analogy to various provisions in the CISG, general principles can be derived from Article 78. With the guidance of the principle of full compensation and reasonableness, a satisfactory solution to the interest rate problem can be established. In addition, the use of general principles is compatible with other attempts to unify international commercial law.¹⁸⁴

2 *Applying the UNDROIT Principles / PECL*

In addition to a statement of the general entitlement to interest,¹⁸⁵ precise formulae as to the determination of interest are stipulated in the PICC and the PECL. Article 7.4.9(2) PICC states:

The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.

On the other hand, Article 9:508(1) PECL provides that interest should be calculated:

...from the time when payment is due to the time of payment at the average commercial bank short-term lending rate to prime borrowers prevailing for the contractual currency of payment at the place where payment is due.

Designed for worldwide application, these approaches are suited to the needs of international trade and most appropriate to ensure adequate compensation of the

181 Corterier, above n 97, at 39.

182 Italy 31 March 2004 District Court Padova (Pizza boxes case) <<http://cisgw3.law.pace.edu/cases/040331i3.html>>.

183 Mazzotta, above n 94, at Part IV(A).

184 Corterier, above n 97, at 41.

185 Article 7.4.9 PICC; Article 9.508(1) PECL.

harm sustained.¹⁸⁶ In addition to Article 9:508(1) PECL, Article 7.4.9(2) PICC remedies the concerns of developing countries which use their foreign export earnings to pay for their imports,¹⁸⁷ by fixing rates equivalent to the prevailing rate of the currency of payment at the place of payment.

(a) UNIDROIT Principles

In a few decisions, the interest rate specified in the PICC was applied.¹⁸⁸ One issue concerns the applicability of the PICC. As illustrated above, the CISG is not a self-contained body of rules.¹⁸⁹ Considering the preamble of the PICC, some argued that the UNIDROIT Principles might be adopted to supplement international uniform law instruments such as the CISG.¹⁹⁰ One arbitrator appreciated the commercial reasonableness of the solution,¹⁹¹ while another held that Article 7.4.9(2) PICC constitutes a general principle, in particular, the right to full compensation under Article 7(2).¹⁹²

The main argument supporting the view that the PICC plays no role in gap filling is that the interest rate is a matter outside the scope of the CISG.¹⁹³ Cases supporting

186 UNIDROIT Principles of International Commercial Contracts Official Commentary on Article 7.4.9, Comment 2

187 This occurred since they would normally have to resort to credit on foreign markets well above what they would be compensated for under their own interest rates. See Zoccolillo, above n 28.

188 ICC Arbitration Case No. 8769 of December 1996 (Electrical appliances case) <<http://cisgw3.law.pace.edu/cases/968769i1.html>>; ICC Arbitration Case No. 8128 of 1995 (Chemical fertilizer case) <<http://cisgw3.law.pace.edu/cases/958128i1.html>>; Austria 15 June 1994 Vienna Arbitration proceeding SCH-4366 (Rolled metal sheets case) <<http://cisgw3.law.pace.edu/cases/940615a3.html>>

189 Alejandro M. Garro "The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG" (1994-1995) 69 Tul. L. Rev. 1149 at 1189; Viola Heutger "The UNIDROIT Principles 2010: Towards a Global Law of International Commercial Contracts (17-18 February 2012)" (2012) 3 European Review of Private Law 889 at 893.

190 Preamble, UNIDROIT Principles of International Commercial Contracts 2010; Garro, above n 189, at 1189; See also Yang Fan *Contracts for the International Sale of Goods in China* (Wolters Kluwer Law & Business and CCH Hong Kong 2012) at 150, that '[The PICC] incorporates a considered, uniform and international method of calculating interest'.

191 ICC Arbitration Case No. 8769 of December 1996 (Electrical appliances case) <<http://cisgw3.law.pace.edu/cases/968769i1.html>>.

192 ICC Arbitration Case No. 8128 of 1995 (Chemical fertilizer case) <<http://cisgw3.law.pace.edu/cases/958128i1.html>>; Austria 15 June 1994 Vienna Arbitration proceeding SCH-4318 (Rolled metal sheets case) <<http://cisgw3.law.pace.edu/cases/940615a4.html>>.

193 Eiselen, above n 11.

this approach are sparse,¹⁹⁴ while very often no justifications are given.¹⁹⁵ The reasoning in a CIETAC case that Article 7.4.9(2) PICC should apply, as 'both China and France are Member States of the PICC and the CISG' seems overly superficial.¹⁹⁶ Considering that the UNIDROIT Principles were adopted 10 years after,¹⁹⁷ these external principles did not inspire the drafting of CISG. Stemming from the view, that interests should be separated from damages,¹⁹⁸ it is also argued that the underlying rationale of the UNIDROIT principles is not equivalent to the general principles of CISG.¹⁹⁹

In addition, Zoccolillo argues that for nations that do not maintain foreign accounts for imports and require payments in their own States, Article 7.4.9 PICC does not guard against a debtor's purposeful delay in payment so as to obtain cheap credit or accrue extra sums.²⁰⁰ To prevent that, the general principle of unjust enrichment must also be applied.²⁰¹

(b) PECL

Criticisms against the application of the PECL are similar to that of the UNIDROIT Principles. It is suggested that interest under the PECL is to remunerate a party from unjust enrichment, which does not have a compensatory goal.²⁰² As any indication on the determination of the interest rate is deliberately omitted and no guiding general principles exist, allowing courts to apply any ad hoc and ex post method is a clear violation of the Convention.²⁰³

(c) Commentary

Given the preponderance of criticism against the uniform application of the PICC and the PECL, it is the author's opinion that these extrinsic methods should not be

194 Ibid.

195 For example, see Belarus 20 May 2003 Supreme Economic Court of the Republic of Belarus (*Holzimpex Inc. v. State Farm-Combine Sozh*) <<http://cisgw3.law.pace.edu/cases/030520b5.html>>.

196 China 2 September 2005 CIETAC Arbitration proceeding (Freezing units case) <<http://cisgw3.law.pace.edu/cases/050902c1.html>>.

197 Phillippe, above n 148, at 644.

198 Mazzotta, above n 94, at Part IV(D).

199 Franco Ferrari, "Gap-Filling and Interpretation of the CISG: Overview of International Case Law" (2003) *Int'l Bus. L.J.* 221 at 230; Liu, above n 101, at Para. 8.6.2; 8.6.3.

200 Zoccolillo, above n 28, at Part III(B).

201 Zoccolillo, above n 28, at Part III(B).

202 Mazzotta, above n 94, at Part IV(D).

203 Mazzotta, above n 7.

adopted as a blanket rule in place of the CISG. Yet it is observed that the principle of full compensation substantially corresponds with Article 7.4.9(2) PICC.²⁰⁴ Hence, considering the rationale behind the UNIDROIT Principles, it is submitted that it may clarify the true meaning of full compensation and reasonableness, which is useful to corroborate a solution as to the rate on interest under the CISG.

3 *Based on international usage*

Parties' trade usages may be applied to determine the rate of interest. Save for any special agreements as to trade usages, Article 9(2) CISG provides that the parties are subject to 'usages' widely known to and regularly observed by others in that area of trade.²⁰⁵ As explained by an Argentinean court,²⁰⁶ international trade usages based on Article 9 prevail over the private international law.²⁰⁷ In *Aguila Refractorios / Conc. Preventive*,²⁰⁸ another Argentinean tribunal held that payment of interest 'at an internationally known and used rate such as the Prime Rate', constitutes 'an accepted usage in international trade, even when it is not expressly agreed between the parties'. In addition, one tribunal applied the London Inter-Bank Offered Rate ("LIBOR"), the rate commonly applied to Eurodollar settlements between operators in international trade.²⁰⁹

Commentary

Customs and trade practices reflect how the parties would normally perform in similar transactions. Hence, it is suggested that examining usages that typically prevail resembles a market-mimicking default rule,²¹⁰ which assists the determination of the interest rate.

Sometimes it may be difficult for the tribunal to infer an international usage in interest rate matters,²¹¹ as the scope of application of these rates is too narrow.²¹²

204 Liu, above n 103, at Para. 8.8.1.

205 See Article 9(2) CISG.

206 Argentina 6 October 1994 National Commercial Court of First Instance (*Bermatex v. Valentin Rius*) <<http://cisgw3.law.pace.edu/cases/941006a1.html>>.

207 Behr, above n 25, at 289; Liu, above n 103, at Para. 8.8.3.

208 Argentina 23 October 1991 National Commercial Court of First Instance, Buenos Aires (*Aguila Refractorios / Conc. preventivo*) <<http://cisgw3.law.pace.edu/cases/911023a1.html>>.

209 ICC Arbitration Case No. 6653 of 26 March 1993 (Steel bars case) <<http://cisgw3.law.pace.edu/cases/936653i1.html>>.

210 Kizer, above n 18, at 1297.

211 Phillippe, above n 148, at 631-632.

212 CISG-AC Opinion No. 14, above n 12, at Para. 3.33.

From the abovementioned Argentinean case, while it may be true that the 'Prime Rate' is well-established in Latin America, one German commentator submitted that it is not common in Germany.²¹³ Much depends on the adjudicator's level of specific expertise. In a national court, it is more likely that a judge may construe 'usages' through his own national perspective, relying on the local practice in the same trade.²¹⁴ Therefore, it is submitted that although prevailing trade usages would be useful in determining the rate of interest, it is expected that in a considerable number of cases, judges will rule that no usages can be found.

4 *Recourse to a 'Commercially Reasonable' rate*

Interest rates widely recognised in international trade, such as the LIBOR or the EURIBOR was referred to in several arbitration cases.²¹⁵ To determine the interest rate for claims expressed in Euros, the Serbian Court of Arbitration has consistently applied the EURIBOR.²¹⁶ This trend is explained in one Serbian arbitral award, that it is an established practice to award interest at the domiciliary rate of the relevant foreign currency.²¹⁷

Such interest rates applied can be said to be commercially realistic. This is illustrated in *Handelsgericht des Kantons Bern*,²¹⁸ where the court considered the parties' agreement on a variable reference interest rate for financial investments in Switzerland and concluded that it is reasonable to assume that the LIBOR would

213 Behr, above n 25, at 299.

214 Kizer, above n 18, at 1298-99.

215 For example, see China January 2007 CIETAC Arbitration proceeding (Business & operation support system case) <<http://cisgw3.law.pace.edu/cases/070100c1.html>>; China January 2007 CIETAC Arbitration proceeding (Business & operation support system case) <<http://cisgw3.law.pace.edu/cases/070100c1.html>>; Russia 19 March 2004 Arbitration proceeding 135/2003 <<http://cisgw3.law.pace.edu/cases/040319r1.html>>; ICC Arbitration Case No. 8908 of December 1998 (Pipes case) <<http://cisgw3.law.pace.edu/cases/988908i1.html>>.

216 Serbia 16 March 2009 Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce (Paper production lines case) <<http://cisgw3.law.pace.edu/cases/090316sb.html>>; Serbia 5 January 2009 Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce (Paper handkerchiefs production line case) <<http://cisgw3.law.pace.edu/cases/090105sb.html>>; Serbia 15 July 2008 Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce (Milk packaging equipment case) <<http://cisgw3.law.pace.edu/cases/080715sb.html>>; Serbia 23 January 2008 Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce (White crystal sugar case) <<http://cisgw3.law.pace.edu/cases/080123sb.html>>; Serbia 30 October 2006 Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce (Trolleybus case) <<http://cisgw3.law.pace.edu/cases/061030sb.html>>.

217 Serbia 1 October 2007 Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce (*Timber case*) <<http://cisgw3.law.pace.edu/cases/071001sb.html>>.

218 Switzerland 22 December 2004 Commercial Court Bern (*Watches case*) <<http://cisgw3.law.pace.edu/cases/041222s1.html>>.

have been agreed on, had the parties known of the inapplicability of the reference rate.

Commentary

In most cases, these rates are expressly provided between the parties. For example, in *Chaperon v S.A.S. NIDERA France* the contractual rate of interest, being the 3-month LIBOR rate increased by 2 points, was applied.²¹⁹ Although the application of a commonly used rate would promote uniformity, some hold the view that there is no indication in the Convention that external interest rates may be used in the absence of parties' express agreement.²²⁰ Premised on the assumption that parties to regular international sales transactions may not have knowledge of the 'commonly-used rate' in reality, Thiele argued that the application of such rates to all international sales transactions would stretch the meaning of 'usage' under Article 9(2).²²¹ In addition, rates such as LIBOR may preclude worldwide application in small everyday business transactions.²²²

In response to the criticisms, the author submits that the external rates should not be used as a blanket rule, as they are not universally accepted. However, as seen from the arbitration cases discussed above, these rates may facilitate the rendering of a customised, commercially realistic solution based on the general principles of full compensation and reasonableness.

H Unidentifiable Law

Some courts did not decide the applicable law.²²³ For example, in *Oberlandesgericht Frankfurt*, 5% interest was awarded but the court left open whether the rate was the statutory rate in France or Germany as they were identical (5%).²²⁴ In *Amtsgericht Duisburg*, the approach was not stated as the application of private international law and creditor-approach would lead to the same results.²²⁵

219 "Chaperon v. S.A.S. NIDERA France, Court of Appeal of Paris, 19 March 2013" in Albert Jan van den Berg (ed) *Yearbook Commercial Arbitration 2013 - Volume XXXVIII, Yearbook Commercial Arbitration, Volume 38* (Kluwer Law International 2013).

220 Ferrari, above n 150, at 89.

221 Thiele, above n 14, at Part IV, Para. C(2)bb; For supporting cases, see France 6 April 1995 Appellate Court Paris (*Thyssen v. Maaden*) <<http://cisgw3.law.pace.edu/cases/950406f1.html>>.

222 Behr, above n 25, at 296.

223 Liu, above n 103, at Para. 8.7.

224 Germany 13 June 1991 Oberlandesgericht [Appellate Court] Frankfurt (Textiles case) <<http://cisgw3.law.pace.edu/cases/910613g1.html>>.

225 Germany 13 April 2000 Lower Court Duisburg (Pizza cartons case) <<http://cisgw3.law.pace.edu/cases/000413g1.html>>.

However, in the very early decisions, some courts awarded interest without explaining the applicable law.²²⁶

Commentary

As noted by Behr, this approach has been rarely used since 1990.²²⁷ It is always undesirable that courts do not state the reasons concerning the rate applied, since one could only speculate on the court approach adopted. Therefore, it is the author's opinion that this method should not be used.

I Concluding Remarks

From the analysis above, approaches to solving the interest rate problem can be classified into two camps: those resorting to the applicable domestic law and those attempting to achieve uniformity. As illustrated below, the author subscribes to the latter view.

V PROPOSED RULE

In view of the vast divergence in methods determining the rate of interest under Article 78, a coherent and uniform solution is much needed. In the author's opinion, an ideal approach should:²²⁸

- (1) Lead to a clear and easily identifiable rate;
- (2) Be firmly rooted within the general principles of the CISG;
- (3) Avoid leading to unfair advantages or disadvantages when confronted with currency fluctuations.

In the author's opinion, the interest rate gap should be considered a *lacuna praeter legem*. In spite of the irreconcilable differences between the Contracting States in the Diplomatic Conference and the fact that the rate of interest was intentionally omitted by the drafters, one should proceed on the assumption that it would be contrary to the drafters' intention if courts are precluded from attempting to establish a uniform approach pursuant to Article 7(2).²²⁹

²²⁶ For further discussions, see Behr, above n 24, at 284-285.

²²⁷ Behr, above n 25, at 285.

²²⁸ Considering Corterier, above n 97, at 38-39: For criteria '3. ...Preferably without classifying interest under Article 78 CISG as either damages or restitution of benefits' and '4. (the approach) should derive its interest rate from considering the payment in question rather than the contract from which it was derived', the author respectfully submits that they are not necessary

²²⁹ Thiele, above n 14, at Part IV, Para. C(2); See also CISG-AC Opinion No. 14, above n 12, Black Letter Text, Para. 1

When deriving a proposed solution to the interest rate problem, the author has had the advantage of reading the recent proposed solution from Prof. Yeşim Atamer,²³⁰ which advocates defining the interest rate according to the law of the state where the creditor has his place of business.²³¹ This is based on the presumption that creditors would invest or take out loans for re-financing at his place of business. Similarly, CISG-AC Opinion No. 14 provides that:²³²

In the absence of [an express] agreement, the applicable rate of interest is the rate which the court at the creditor's place of business would grant in a similar contract of sale not governed by the CISG.

Inspired by drawing an analogy with Article 28 CISG, the proposed rule resembles the effect of a private international law rule, under which judges can directly apply the laws of the creditor's country.²³³ Furthermore, the proposed rule is in conformity with current trends in court practice. Among the 245 analysed decisions, 104 applied the laws of the creditor's state either directly or by virtue of rules of private international law.²³⁴ From the recent EU Proposal for a Common European Sales Law ("CESL"), the approach of the UNDRIT Principles and the PECL is no longer followed. Instead, the Proposal prefers the interest rate applicable at the place of the creditor.²³⁵ Therefore, this proposed rule represents a 'minimum global consensus' approach, which attempts to define the Applicable Law without the help of private international rules.²³⁶

Considering the CISG-AC Opinion and Prof. Atamer's proposed rule, while premised on the principle of full compensation and reasonableness, the author puts forward a three-step approach to determine the interest rate. Firstly, parties' express agreement on the rate of interest and relevant international trade usages should be identified and applied. Secondly, in the absence of parties' express provision, the interest rate should be determined according to the law of the currency in which

230 Yeşim M. Atamer "Interest Claims Under the CISG: Uniform or Domestic Law Approach?" in Ingeborg Schwenzer, Yeşim M. Atamer and Petra Butler (eds.) *Current Issues in the CISG and Arbitration* (Eleven International Publishing, 2014).

231 Atamer, above n 230, at 292.

232 CISG-AC Opinion No. 14, above n 12, Black Letter Text, Para. 9.

233 Atamer, above n 230, at 292.

234 Atamer, above n 230, at 293.

235 The European Law Institute "Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law" COM (2011) 635 final, <www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on_a_Common_European_Sales_Law.pdf>, Article 166.

236 CISG-AC Opinion No. 14, above n 12, Black Letter Text, Para. 9; Paras. 3.38.

payment of the sum in arrears was to be made (ie the law of the payment currency). Thirdly, if no statutory rates exist, the rate should be ascertained in light of the principle of *reasonableness*.

In concurrence with the opinion that it is not preferable to go one big leap further to adopt a specific rate, the author advocates taking a small step ahead, by considering the payment currency agreed by the parties. Apart from the presumption that the creditors normally invest and borrow at their place of business, this approach also stems from the assumption that average buyers and sellers in international trade understand the nature of their transactions and the risks arising from currency fluctuations.

It is submitted that the proposed approach is a more commercially realistic solution. In most cases, as the payment currency agreed upon would be the currency of the creditor's state, this approach would generate the same result as the 'minimum global consensus' approach, resembling a private international law rule. In other situations where another currency has been agreed between the parties, this approach takes into account currency fluctuations and better reflects the principle of party autonomy as to the choice of payment currency. Concerning the issue of under-compensation or over-compensation, arising from the creditor's actual credit costs incurred, inflation, currency appreciation or depreciation, and possibly the fluctuations of interest in the Eurozone, between various countries due to budget deficit in certain countries,²³⁷ it is submitted that a correction can be achieved through a damages claim, based on Article 74 CISG. This avoids the controversy regarding the use of a lending rate or a savings rate.²³⁸

In the absence of statutory interest rate, the rate can be defined with the aid of the principle of reasonableness, by taking into account the commercial reality of the parties' transactions and considering the interest rates previously decided by courts of the state of the payment currency. Even though it can be said that reasonableness is a vague concept which empower courts with excessive discretion,²³⁹ this concept reminds courts to adjudicate on a case-by-case basis, instead of simply applying the private international law rules without sufficient justification.

Some may argue that courts are inexperienced in applying foreign law.²⁴⁰ The author submits that it is unfair to come to a conclusion that domestic courts would

237 For fluctuations in the Eurozone, see Phillippe, above n 148, at 646.

238 For example, see Kizer, above n 18, at 1301-1306.

239 Mazzotta, above n 94, at Part IV(C).

240 Zoccolillo, above n 28, at Part IV.

experience more practical difficulties when applying foreign law than adopting the proposed approach, since the same problem is prevalent in the private international law approach and the creditor-approach.

In addition, it may be argued that the proposed approach would encourage picking a payment currency where the country's domestic law does not have a rule for the ascertainment of the interest rate, or one where interest claims are forbidden. Alternatively, CISG-AC Opinion 14 is of the view that this approach fails to reflect the loss of the creditor, given that the money most probably would have been used in his country.²⁴¹ In response, it is submitted that the parties' deliberate arrangement on the payment currency has the same effect as stipulating the applicable law governing the determination of the interest rate explicitly.

To conclude, being firmly rooted within the general principles of full compensation and reasonableness, this proposal aims to provide a coherent rule for the determination of interest under Article 78 CISG, instead of resorting to private international law rules.

VI COMPOUND INTEREST

A General

The applicability of compound interest remains controversial, as Article 78 CISG does not expressly deal with it. Despite the prevailing view that the Convention's silence should be regarded as a hint that compound interest may not be claimed,²⁴² some argued that awarding compound interest produces more commercially realistic results.²⁴³

B Traditional View

Most commentators hold the view that compound interest cannot be claimed,²⁴⁴ while the majority of tribunals and courts which ordered payment of interests under Article 78 had awarded simple interest.²⁴⁵ This phenomenon may indicate that compound interest is an unusual feature in international sales law. For example, one tribunal held that compound interest is not customary in international trade and

241 CISG-AC Opinion No. 14, above n 12, at Para. 3.34.

242 Schlectreiem & Schwenger, above n 119, at 1060.

243 John Gotanda "Compound Interest in International Disputes" Oxford University Comparative Law Forum 2 <<http://ouclf.iuscomp.org/articles/gotanda.shtml>>.

244 Mazzotta, above n 94, at Part IV; CISG-AC Opinion No. 14, above n 12, at Para. 3.45; Similarly, see ICC International Court of Arbitration 1988, award No. 8908 <<http://cisgw3.law.pace.edu/cases/988908i1.html>>.

245 Song, above n 16, at 725.

Article 78 does not constitute sufficient basis supporting such claims.²⁴⁶ Furthermore, the practice of not awarding compound interest may stem from domestic statutes, which provide only for simple interest.²⁴⁷ This approach protects debtors against ruin arising from the accumulation of huge amounts of interests and avoids abuses.²⁴⁸

C Arguments in Favour of Compound Interest

Based on the premise that Article 78 does not explicitly prohibit compound interest, some authors, most notably John Gotanda, insist that the adoption of compound interest is most appropriate way to compensate the claimant's losses.²⁴⁹ As most modern financing instruments involve compound, not simple, interest,²⁵⁰ not recognising this reality would also lead to awarding a windfall, causing over-compensation or under-compensation.²⁵¹

In furtherance of this point, several commentators drew analogy with arbitral awards regarding international investment disputes.²⁵² As rightly observed in *Continental Casualty v Argentina*, the approach of awarding compound interest under international law may represent a form of '*jurisprudence constante*' in International Centre for Settlement of Investment Disputes ("ICSID") Awards.²⁵³ In *Wena Hotels v Egypt*,²⁵⁴ the tribunal explained that:²⁵⁵

An award of compound interest is generally appropriate in most modern, commercial arbitrations... . If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest.'

246 ICC International Court of Arbitration, 1997, award No. 8864
<<http://cisgw3.law.pace.edu/cases/978644i1.html>>.

247 Gotanda, above n 10, at 120.

248 Phillippe, above n 148, at 649.

249 Gotanda, above n 15, at 34; Phillippe, above n 148, at 649-650.

250 Gotanda, above n 10, at 139.

251 Sentchal and Gotanda, above n 17, at 532.

252 Gotanda, above n 15, at 18-30.

253 *Continental Casualty v Argentina*, ICSID Case No. ARB/03/9, Award (2008) at para. 312; Lucy Reed, Jan Paulsson, Nigel Blackab *Guide to ICSID Arbitration* (Kluwer Law International, 2011) 155.

254 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (2002) 41 ILM 896.

255 Id., at 919.

Similar lines of reasoning can be seen in subsequent awards,²⁵⁶ that compound interest furthers the objectives of adequate compensation which reflects the reality of transactions,²⁵⁷ and best approximates the market value of the investment.²⁵⁸ Recently, *Ioan Micula and Viorel Micula v Romania*²⁵⁹ restated the fundamental importance of compound interest, to place the claimant in the position it would have been had it never been injured.

For Article 78 CISG, a Belgian court held that while in any event compound interest is not accorded automatically under CISG, it is possible for the court to grant compound interest if the claimant can prove that he had to pay compound interest to his financier for withdrawn credit.²⁶⁰ However, Schwenzer argued that this ruling cannot be based on Article 78,²⁶¹ and the claimant may only claim compound interest as an additional loss item under Article 74.²⁶²

In summary, relying on the principle of full compensation, a number of commentators advocated the application of compound interest, believing that it is a closer measure of the actual value lost by an investor. However, owing to uncertainties regarding compound interest, it is suggested that parties should reach an agreement in advance, or at least agree on measures to be applied, or the Applicable Law governing the determination of the interest rate.²⁶³

D Commentary

The writer respectfully disagrees with Gotanda's opinion that compound interest should be awarded. In the absence of express stipulations between the parties, compound interest may not be claimed. Firstly, calculation of compound interest can be overly complicated,²⁶⁴ while the compounding period remains contentious.²⁶⁵ It

256 *PSEG Global Inc. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award (2007); *Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (2007); *Sempra Energy International v. Argentine Republic* ICSID Case NO. ARB/02/16, Award (2007); *LG&E Energy Corp v the Argentine Republic*, ICSID Case No. ARB/02/1, Award (2006).

257 *Azurix Corp. v. The Argentine Republic*, ICSID CASE No. ARB/01/12, Award (2006) Para. 440.

258 *Siemens A.G. v. The Argentine Republic*, ICSID CASE No. ARB/02/8, Award (2005) Para. 399-400.

259 *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award (2013) Para 1266.

260 Hof van Beroep Antwerpen, 24 April 2006, CISG-online 1258.

261 Schlectreiem & Schwenzer, above n 118, at 1060.

262 Atamer, above n 230, at 296.

263 Schlechtriem and Butler, above n 9, at 223.

264 Consider Sentchal and Gotanda, above n 17, at 522-533.

may be impractical for arbitrators to perform the role of a financial analyst to compute a 'more-commercially realistic' interest rate as well as to decide the compounding period under a uniform approach.

Secondly, it is the author's opinion that international investment and international sales of goods are fundamentally different in nature. Research revealed that the average duration of ICSID cases is 3.6 years (1,325 days),²⁶⁶ much longer than most international commercial arbitration proceedings.²⁶⁷ Unlike international investments which usually span a long period, where regular income may be derived,²⁶⁸ most international sales of goods contracts only cover one transaction completed within a short period of time. Hence, if the period for computing interest is not that long, the difference between the application of simple interest and compound interest may be significantly narrowed.²⁶⁹ It is also submitted that computing simple interest at a higher rate would generate the same effect of compensating the claimant's cost of securing alternative finance.²⁷⁰

This leads to the third argument that the importance of the issue regarding compound interest will diminish significantly if the principle of full compensation is observed. Parallel to the author's proposed solution as to the interest rate presented in Part V, if the arbitrator bears in mind that the claimant should be adequately compensated, the actual outcome would be made in light of the specific circumstances of the case, reflecting commercial realities. Corrections on any under-compensation can be made by a damages claim pursuant to Article 74 CISG. Thus, the grant of simple interest should be preferred, considering the deficiencies of the application of compound interest.²⁷¹

265 Sentchal and Gotanda, above n 17, at 533.

266 Anthony Sinclair "ICSID arbitration: how long does it take?" (2009) 4(5) *Global Arbitration Review*

267 Giuditta Cordero-Moss *International Commercial Arbitration: Different Forms and Their Features* (Cambridge University Press 2013) 347; The Chartered Institute of Arbitrators "CI Arb Costs of International Arbitration Survey 2011" <www.ciarb.org/conferences/costs/2011/09/28/CIArb%20costs%20of%20International%20Arbitration%20Survey%202011.pdf>, 12.

268 For example, see the test in *Salini Costruttori S.p.A. v Jordan*, ICSID Case No. ARB/02/13, Award (2006).

269 Song, above n 16, at 725.

270 Chartered Institute of Arbitrators "Chartered Institute of Arbitrators Guideline on Awards of Interest" (2004) 70(3) *Journal of the Chartered Institute of Arbitrators* 201 at Para. 15(5).

271 A similar approach can be seen from CISG-AC Opinion No. 14, above n 12, *Black Letter Text*, Para. 10, Para. 3.45.

VII CONCLUDING REMARKS

While it may be true that Article 78 is more conspicuous for the questions it fails to answer than the questions it answers, it does not mean that satisfactory solutions can never be found. To minimise uncertainties surrounding the rate of interest, it is submitted that parties should provide clear stipulations in their contract as to the issue of interest on sums in arrears.²⁷²

To ensure that international traders can rely on the provisions of the Convention without being concerned with the parochial biases and idiosyncrasies stemming from the parties' domestic legal systems,²⁷³ a uniform solution as to the determination of the interest rate under Article 78 should be made. While it is undeniable that Article 78 represents a gap left consciously by the drafters of the Convention, this gap can be filled by the general principles, in particular full compensation and reasonableness. Representing a small step to further the 'global minimum consensus', the author advocates defining the interest rate pursuant to the law of the currency in which payment of the sum in arrears was to be made. This solution recognises the commercial reality of the parties' transaction, at the same time fulfilling the Convention's objective to bring uniformity and certainty to the international trade regime. It is further suggested that it is possible to achieve full compensation by awarding simple interest.

272 Garbers, above n 37; Galvañ, above n 85, at 41; Sutton, above n 146.

273 Koneru, above n 128, at 152.

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