

REGULATION OF INTEREST IN INTERNATIONAL CONTRACTS UNDER THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

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Abstract

The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) allows for claims of interest on damages, delayed payments or the price already paid (refunds) in articles 78 and 84. However, these articles have become the subject of considerable academic as well as judicial discourse.

The question of interest remains a thorny issue in the Convention, with questions raised about whether in the first place, it is an issue that falls within the scope of the Convention. This article argues that because the CISG provides a platform for the uniform interpretation and enforcement of entitlements to interest in international sales, parties to international sales transactions should clearly specify in their contract the default governing law to govern claims for interest and other supplemental damages to minimise the risks that judicial and arbitral tribunals applies rules that expose them to significant claims. The CISG provides an avenue for the application of general principles of international sales law, and domestic legal provisions, hence, promoting flexibility. But the parties must circumscribe this flexibility to limit their exposure to significant interest claims.

Keywords: International Sale of Goods, Interest on Damages, CISG, Damages under the CISG

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1.0 Introduction

Disputes on payment of interest are a common feature in international commercial transactions. Contracts for the international sale of goods often involve huge sums of money and a significant amount of time may pass between the time when that amount is demanded and the time when that amount is finally paid.¹ Still, delays may arise in the processing and making of refunds and payments. The time gap between when the sums are due and when they are finally paid may necessitate additional financial claims because of the negative impact on the value of the money at the time of payment. Further, there is the lost opportunity cost, i.e. the money could have been used for other purposes. Claims for interest by creditors are founded primarily on value for money and opportunity cost reasons.

However, the validity of claims for interest in any particular legal system depends on the applicable social, cultural, religious and moral mores.² Contracts for the international sale of goods cut across diverse territorial boundaries and the inherent legal, social and economic systems. The diversity in legal, social and economic factors affecting international business generates uncertainty of entitlements in commercial relations. It is difficult, if not impossible, in certain instances, to determine the applicable legal rules (where the parties have not specified them) and whether those rules (even if specified by the parties or the court or tribunal) will actually be implemented in a particular legal, social or cultural setting affecting such contracts. This uncertainty has spurred the development of uniform international commercial law, epitomised by the adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG) at the 1980 Vienna Conference.³

¹ Gotanda, J.Y, 'Supplemental Damages in Private International Law', (1998) 11 KLUWER Law International.

² Other reasons include, firstly, that interest is allowed as an inducement for prompt settlement of legitimate claims or compliance with any award or judgment, See Gotanda, *Id.*, (14) n 12. Secondly, is the theory that the claimant was forced to borrow money at a premium to enable him meet current obligations. See generally, Branson, D J, and Wallace, Jr, R E, 'Awarding Interest in International Commercial Arbitration: Establishing a Uniform Approach', 28 Va J Intl L 919 at 922 n. 12. See also Guest, A.G. (et al), *Benjamin's Sale of Goods*, (3rd Ed, London, Sweet & Maxwell 1987) 750, Par 1246, where *Kemp vs Tollard* (1956) 2 Lloyd's Rep. 681 is cited that breach of the duty to pay deprives the other party of the opportunity to put the money to work. See also, *Library of Congress v Shaw*, 478 U S 310 (1986) at 322 where the Court noted that "interest and compensation for delay are functionally equivalent" (Blackmun, J).

³ See Franco Ferrari, 'Uniform Application and Interest Rates Under the 1980 Vienna Sales Convention', (1995) 24 Georgia Journal of International and Comparative Law 467, 468 for a discussion of the complexities necessitating the adoption of the uniform law.

Interest claims under the CISG Convention is noted for ‘the many questions it raises, rather than the answers it provides.’⁴ The Convention allows for claims of interest on damages, delayed payments or the price already paid (refunds) in articles 78 and 84. However, these articles have become the subject of considerable academic as well as judicial discourse.⁵ The question of interest remains a thorny issue in the Convention, with questions raised about whether in the first place, it is an issue that falls within the scope of the Convention. This article argues that because the CISG provides a platform for the uniform interpretation and enforcement of entitlements to interest in international sales, parties to international sales transactions should clearly specify in their contract the default governing law to govern claims for interest and other supplemental damages to minimise the risks that judicial and arbitral tribunals applies rules that expose them to significant claims. The CISG provides an avenue for the application of general principles of international sales law, and domestic legal provisions, hence, promoting flexibility. But the parties must circumscribe this flexibility to limit their exposure to significant interest claims.

This article is presented in four parts. The first part is the introduction. The second part provides an overview of the provisions of the Convention on interest claims, examines the question of whether the Convention applies to determination of interest claims. The third part examines the provisions of the Convention on specific issues on interest claims, such as the accrual of interest, the nature and amount of interest and the question of interest and damages. The application of the CISG to the specific questions on interest involves a delicate balancing act because of the dual objectives of flexibility and certainty in the regulation of international sales. Thereafter, the fourth part draws a conclusion that even though the ultimate purpose of the Convention is to provide a uniform platform for determination of contractual disputes on interest, the parties should pay particular attention to their contractual

⁴ See Gotanda, (n 1). See also, Jacob S. Ziegel, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods* 149 (198 Francesco G. Mazotta, *Right to Interest: Comparison Between the Provisions of CISG Articles 78 and 84(1) and Counterpart Provisions in PECL*, in John Felemegas (ed), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods* (1980) as Uniform Law,490, 507-508 (2007).

⁵ 240 cases involve Art 78, and 26 cases deal with Art 84 entitlement to damages in the UN-CITRAL Digest, 2012, available at <http://www.cisg.law.pace.edu/cisg/text/digest-cases-78.html>.

provisions on interest so as to be certain of the applicable social, cultural and legal rules.

2.0 Interest: Governed by the CISG or Private International Law?

The first question is whether the CISG applies to questions of determination of interest claims. Although article 78 provides for a general entitlement to interest, the failure to specify the applicable interest rate, or when interest begins to run, or how the interest is to be calculated provides significant gaps that raise the question of whether the Convention applies to entitlement of interest or this is to be governed by private international law.⁶ Similarly, the lack of specificity on interest rate in respect of claims for interest under article 84(1) is a gap that may be filled by applicable private international law. These gaps must be resolved in claims for interest under the Convention.

2.1.0 Article 78 Claims for Interest

Article 78 of the CIG 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.’⁷ This broad formulation provides for entitlement to interest as a right, but leaves out a number of issues unresolved.⁸ First, the rate of interest applicable is left open. Second, where the breach of the defaulting party is excused under article 79, it is unclear whether interest is payable. Third, it is unclear whether the amount due must be liquidated before the interest accrues. Fourth, it is unclear whether interest is payable on any amount due. Finally, the question of whether compound interest can be claimed is also unresolved. Because of these unresolved issues, and the resulting uncertainties on interest claims, it is unclear what rules arbitral tribunals and judicial bodies should apply to plug in these gaps.

⁶ Mazotta, *supra* n. 4, 492-493.

⁷ Article 78, CISG, available at <http://www.cisg.law.pace.edu/cisg/text/treaty.html>

⁸ Sieg Eiselen, *Interest on Sums in Arrears: 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*, in John Felemegas (ed), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Law*, 231, (2007).

2.2.0 Article 84(1) Interest Claims

Article 84(1) provides that if the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid. Although it resolves some of the issues that arise in the context of article 78 interest claims such as when the interest begins to run, the interest rate applicable is unresolved.⁹ Similar to article 78 interest claims, it is important to determine how these gaps are to be resolved. Article 7(2) of the Convention offers some guidance on how unresolved issues in the Convention are to be dealt with.

2.3.0 Gap Filling in Article 7

Article 7 of the Convention provides some guidance on how unresolved issues should be handled as follows:

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

The gaps in articles 78 and 84 raise the question of whether in the first place, the entire claim for entitlement to interest is a matter within the provisions of the Convention (*intra legem*) or, is a matter outside the confines of the Convention, but nevertheless, to be interpreted in light of the provisions of the Convention (*praeter legem*).¹⁰

Where the question is a ‘matter governed by th[e] Convention,’ but not expressly settled in the Convention, then that question ought to be resolved in conformity with the general principles on which the Convention is based. On the other hand, if it is not governed, at all, by the Convention, then it must be resolved by the applicable rules of the domestic legal system identified by the rules of private international law.

⁹ Mazotta, *supra* n. 4, 497.

¹⁰ See generally Franco Ferrari, *Interpretation of the Convention and Gap Filling: Article 7*, 1 CILE Studies 138, 158 in the draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention (Franco Ferrari, Harry Flechtner, & Ronald Brand, eds. 2005).

The provisions of article 78 and 84(1) were arrived at after a great deal of controversy and differences of opinions.¹¹ Some delegates wanted to delete the provisions entirely,¹² others favoured more detailed provisions,¹³ and others felt that such a special provision on interest was unnecessary because lost use of capital could be recovered as damages.¹⁴ Thus, the present provisions are largely a product of compromises.

The CISG gives deference to domestic legal provisions where the issue at hand, is not governed by the Convention. The CISG is organised in such a way that there is no unified interpretative framework. As such, a determination of whether the Convention is applicable in a particular case, and on a particular issue, depends on the analysis conducted by the individual judge or arbitrator hearing a commercial dispute in a particular legal system. Indeed, even the level of application of the Convention on a particular issue depends on the decision of the individual decision maker. This approach achieves two principal functions. First, it allows for flexibility of interpretation, and hence, expands the room for the applicability of the CISG rules. Secondly, it crystallises the principal rules governing international sales transactions, providing some level of certainty. The flexibility and certainty will, however, be under constant tension. As Bonnell has noted, '[i]t is equally important that [the] provisions . . . be interpreted in the same way in various countries.'¹⁵

Articles 78 and 84(1) provide two instances where parties can claim for interest in international sales transactions. The first instance applies to claims of failure to pay the price or other sums in arrears (article 78 claims), and the second instance applies to claims for price refunds (article 84(1) claims). Any

¹¹ See Peter Schlechtriem, *Uniform Sales Law – The UN Convention on Contracts for the International Sale of Goods*, available at <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem.html> at 76. Also see 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*, 252, (1986).

¹² For example, the Muslim countries argued that the provisions on interest would be contrary to Islamic faith which forbids any arrangement of interest. For a discussion of the Islamic prohibition of interest, see Sharawy, H.M., *Understanding the Islamic Prohibition of Interest: A Guide to Aid Economic Cooperation between the Islamic and Western Worlds*, 29 GA. J. INT'L & COMP L. 153 (2000).

¹³ It was argued that there was a need for detailed provisions so as to prevent interest from being considered as damages and thereby maintaining the obligation to pay interest in case of exemptions under Article 79.

¹⁴ See Schlechtriem, *Supra* n.11 and Vilus, *Supra* n.11.

¹⁵ Michael J. Bonell, *Article 7: Interpretation of Convention*, in C.M. Bianca & Michael J. Bonell (eds.), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention*, 74(1987).

other claims for interest beyond these limited contours are beyond the scope of the Convention, and must, thus, be governed by the applicable domestic law. As the legislative history of the Convention shows, the development of the principle of entitlement to interest was adopted with the State Parties at pains to suggest that other details required, such as the interest rate and the accrual period were to be determined by the private international law applicable to the contract. As such, it can be concluded that articles 78 and 84(1) govern entitlement to interest in an international sales transaction to which the CISG applies.

3.0 The CISG and Claims for Interest

There are gaps in the CISG regarding claims for interest rates, and the Convention under article 7(2) allows for such gaps to be filled either by the general principles on which the Convention is based, or by the applicable rules determined by conflict of law rules. In this part, this article examines how the gaps can be filled on the specific issues of entitlement to interest, compounding of interest, interest rate applicable, whether interest can be claimed on unliquidated damages and the accrual of interest. These gaps can be filled by applying the broad principles on which the Convention is based, and the applicable rules of private international law. This twin approach reflects the compromise reached by the parties, on the one hand to encourage uniformity and certainty through the application of the broad principles of the Convention, while on the other hand, allowing for the application of private international law rules as a deference to domestic legal rules.

3.1.0 Entitlement to Interest

In light of the varied social, cultural, economic, political and religious settings of international commerce, it is important to consider whether the CISG allows for interest claims in the first place. In some legal systems, the applicable religious or economic norms may forbid entitlement to a claim for interest.¹⁶ Indeed, in the negotiating process for the adoption of the CISG, it

¹⁶ See e.g. Fatima Akaddaf, *Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?*, 13 PACE International Law Review (2001) 1-58, also available at <http://www.cisg.law.pace.edu/cisg/biblio/akaddaf.html#vid>.

was noted that interest claims raised difficult issues and that it would have been more appropriate not to have any clause on interest at all. Accordingly, it is necessary to examine how the provisions of the CISG address whether a party to an international sales transaction is entitled to interest.

Article 78 provides for an entitlement to interest in instances where there has been a failure to pay the price, or where some other sum is in arrears. On the other hand, article 84(1) price refunds attract interest from the payment date. These provisions strongly posit that under the Convention, parties are entitled to interest on failure to pay the price or arrears and price refunds.¹⁷ The other details about the interest rate, compounding, accrual and whether it can be claimed for unliquidated damages can be then dealt with under the applicable private international law.

3.2.0 *The CISG and Compound Interest*

Whether the interest claim can be compounded is a separate question from that of legal entitlement to interest.¹⁸ Where the interest claimed is compounded at specified intervals, interest accumulates on unpaid interest.¹⁹ In compounding of interest, interest is lumped with the principal sum so that interest accrues on the ‘new’ aggregated capital.

On the one hand, compounding of interest is rejected. One tribunal stated that it was excluded under the Convention, as it is not provided for in the Convention itself, and ‘does not appear to be in keeping with international trade usages’.²⁰ Commentators have, likewise, opined that compound interest cannot be claimed because ‘it is not customary in international sales law’ for there has to be a ‘specific clause on it’.²¹ The argument is that there is an absence of any usages or clues hinting at the existence of a rule in international sales law that allows for claims for compound interest.

¹⁷ 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?* 9 *International Legal Perspectives* (1997) 25-92.

¹⁸ Schlechtriem, (n 11) para 318.

¹⁹ John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, (3rd ed) 469 (1999).

²⁰ See ICC Court of Arbitration – Milan, Award No 8908 of December 1998 available at <http://cisgw3.law.pace.edu/cases/988908i1.html>

²¹ Enderlein, F. and Maskow, D., *International Sales Law: The UN Convention on Contracts for the International Sale of Goods; Convention on the Limitation Period in the International Sale of Goods*, 315, (1992).

However, there is no absolute prohibition in the CISG for claims of compounded interest.²² First, in article 74, where as a result of the breach, the injured party suffers a quantifiable loss, such as payment of compounded interest to a third party, then compound interest can be claimed. Second, parties can also define in their contract that interest claims, if any, can be compounded. Indeed, the CISG Advisory Council opines that under article 78, ‘compound interest may be payable if the parties have agreed to its payment, or if the court at the creditor’s place of business would allow compound interest in a similar contract of sale not governed by the CISG’.²³

The parties can in their contracts provide that in the event of default, if there is entitlement to interest, then, the interest so granted shall be capitalised and accrue from day to day, as opposed to annual accrual. Such a clause is capable of being enforced, given that the fundamental pillar of international contracts is the concept of party autonomy.²⁴

3.3.0 Interest on Damages

While article 78 allows a party entitled to interest for either the price or any sum due to claim for damages which might be recoverable under article 74,²⁵ it is unclear whether this entitlement to damages in addition to interest is also applicable for interest claims under article 84(1) where the seller is bound to refund the price. The Convention provides a clear clarification that under article 78, entitlement to interest does not preclude claims for damages.²⁶

The aim of article 84(1) is restitution i.e. the parties are to account to each other for the benefits derived from either the price (seller) or the goods

²² CISG-AC Opinion No. 14, *Interest under Article 78 CISG*, Rapporteur: Professor Doctor Yesim 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, available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op14.html>

²³ Ibid.

²⁴ Article 6, CISG.

²⁵ Article 74 provides:

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

²⁶ See Enderlein & Maskow, (n 21) 315 and also Schelechtriem, (n 11) 599.

(buyer).²⁷ The seller is required to account for the benefits derived from use of the price where it has been paid and he is bound to refund it.²⁸ The buyer, on the other hand, is to account for all benefits derived from the goods.²⁹

Interest due under article 84(1) should not be regarded as damages, but as an equalisation of benefits.³⁰ The seller, it is argued, was able to use the sum received and to work with it, but he is not entitled to that benefit, after the avoidance of the contract.³¹ As such, under article 84(1), the amount of interest to be charged should take first account of the conditions at the seller's place of business, because that is where the seller had the possibility of using the price paid.³² It is argued that the rate of interest applicable should be that of the seller's place of business, in order to wipe out any benefits obtained by the detention and/ or use of the price due to be repaid.

On the other hand, article 84(1) provides for an independent entitlement to interest for the buyer, where the price is to be refunded. Given the broad nature of article 74 on damages, it can be argued that article 84(1) allows for further claims for damages, as for instance, where the buyer had to take out a loan at a higher rate of interest.

The purpose of article 84(1) is to wipe out advantages obtained by the seller in holding the price, and does not provide for an exclusive remedy for the buyer where he has paid the price and it is due to be refunded. Therefore, any other loss suffered by the buyer should be capable of recovery as damages under article 74.³³

Interest and damages have a significant degree of overlap, and in certain jurisdictions, in the absence of a statutory or contractual entitlement to interest, interest was not recoverable for delay in payment of a debt beyond when it was contractually due, but special damages were recoverable in respect of interest paid by the plaintiff for the defendant's breach of contract, if the

²⁷ See Enderlein & Maskow, (n 21) 349 and Schlechtriem, (n 11) 658.

²⁸ See Article 84 (1).

²⁹ See Article 84 (2).

³⁰ See Schlechtriem, (n 11) 657.

³¹ *Ibid.*

³² *Ibid.*

³³ This position seems approved by Enderlein & Maskow, *Supra* Note at Pg. 349 – 350, (“This does not ... exclude the buyer from claiming further damages when the avoidance of the contract is based on a breach of contract by the seller and/or the later commits a breach of contract which leads to the buyer being withdrawn means.”).

consequences were not too remote to the cause.³⁴ Thus, where the plaintiff can prove the losses incurred as a result of the defendant's breach of the contract, irrespective of what that damage represents, those losses were recoverable as special damages.

It is unclear whether interest should be awarded on unliquidated damages. Interest is defined as the money paid for the loss of use of money.³⁵ Conceptually, interest is an item of damages, compensating for the temporary withholding of money.³⁶ Treated in this way, interest is almost always awarded, including in jurisdictions which reject as immoral the proposition that a party should automatically be paid interest for loaning another the use of money. A party in such jurisdictions is entitled to compensation if it can demonstrate that it has suffered actual damage as a result of withheld funds.³⁷ Under this perception, therefore, the ordinary rules for the recovery of damages i.e. foresight and proof of damage must apply.³⁸

3.4.0 Interest and Unliquidated Damages

The language of article 78 that there is an entitlement to interest for 'failure to pay the price or any sum that is in arrears' could be said to import a requirement that it must be a demand for a liquidated amount, and casts doubt as to an award of interest on damages. The principal argument in this line is that the amount of damages is unascertained and depends on a value of loss claimed to have been sustained, which may be fluctuating.³⁹ The other argument is that until it can be fully and firmly determined how much a party owes another, interest should not be awarded on a "floating" sum of money.

Opinions on this point are diverse. On the one hand, 'interest is payable on damages claims, ... from the time when the damage occurred, irrespective of whether or not the precise amount of the claim has already been established'.⁴⁰ On the other hand, interest 'becomes due when they have been liquidated

³⁴ See Benjamin's Sale of Goods, (n 2) at Par 1246, citing *President of India v La Pintada Compania Navigacion SA* (1985) AC 104, discussing English Law perspectives on this.

³⁵ See Gotanda, (n 1) 1.

³⁶ See Branson and Wallace, *Supra* (n 2) 922, No 14.

³⁷ *Ibid.*

³⁸ See also Article 74.

³⁹ See Schlechtriem, (n 11) 594.

⁴⁰ *Ibid.*

vis-à-vis the other party, and in the amount in which later they turn out to be justified.⁴¹

Resolution of this issue will tend to hinge upon a textual interpretation of the Convention, whether unliquidated damages are, or can constitute, “sums in arrears” within the purview of the Convention. This interpretation will have to accord with the article 7(1) mandate of uniformity and internationality of the Convention.

3.5.0 *Accrual of Interest*

There is no provision for article 78 interest claims corresponding to article 84(1) that specifies the time when interest begins to run, in situations where the seller is bound to refund the price. Article 84(1) is specific that interest begins to accrue from the date when the price was paid, not any other later date. It can be argued that the underlying philosophy of claims of this nature is for the lost use of money, and, therefore, an interest of this nature cannot be awarded for the period prior to the payment because, there, the funds are still within the dominion of the buyer, and it cannot be claimed that he was denied use of the money.

However, a question arises with respect to an interest award from a date later than the payment date in interest claims under article 84(1). In one case, it has been held to accrue from the date of cancellation of the contract, even where the payment was made earlier.⁴²

With respect to the price or other sums being in arrears under article 78, the Convention offers no guidance on when time begins to run: that is when the interest begins to accrue. Similarly, the Convention offers no guidance with respect to interest claimed as damages. As such, the Convention presents a challenge when determining the time when interest begins to accrue in article 78 claims, and in claims of interest as damages. It is argued that this is an issue falling under the scope of article 7(2) of the Convention, requiring issues not expressly settled in, but governed by the Convention to be settled in accordance with the general principles upon which the Convention is based,

⁴¹ See Enderlein & Maskow (n 5) 314.

⁴² See *Foliopack AG v Daniplast S P A*, the decision of Pretura Circondariale di Parma, 24 November 1989 (English text translation), available at <http://cisgw3.law.pace.edu/cases/891124i3.html>>

or where such principles are absent, to be settled in conformity with the law applicable by virtue of the rules of private international law.⁴³

Adopting this line of thought, two principles upon which the Convention is based are unjust enrichment and full compensation.⁴⁴ Under the principle of prevention of unjust enrichment, a party should not benefit from its own breach of the contract and the other party must be compensated fully for all the losses it incurred as a consequence of the breach. The principle of full compensation demands that the aggrieved party must be fully compensated for the harm it has sustained as a result of the non-performance of the contract.⁴⁵

Both principles can apply to article 78 claims without much issue. If the other party is to account for the benefits that it derived from withholding the funds, then, interest begins to accrue from the date when the funds were withheld.

Similarly, under the principle of full compensation for losses incurred, the losses, if any, accruing from withheld funds accrue for the injured party, from the date when the funds were due. As such, under both principles of unjust enrichment and full compensation, the key date is the date when the funds were due for payment, which is the date of receipt by the other party. This essentially is the effective date when the obligation for payment arose.⁴⁶

⁴³ See Gotanda, (n 1) 41, 42. Article 7 of the Convention deals generally with the issue of interpretation and states:

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

2) 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.

⁴⁴ See, however, Arbitral Award of the ICC Court of Arbitration – Paris No. 7565/1994, available at <http://cisgw3.law.pace.edu/cases/947565i1.html>, accessed on 11th December, 2016 where it was opined that the “general principles do not settle the matter...”

⁴⁵ Phanesh Koneru in ‘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* 105-152, available at <http://www.cisg.law.pace.edu/cisg/biblio/koneru.html>.

⁴⁶ See the decision of the SCH Award No. 4366 of 15 June 1994, available at <http://cisgw3.law.pace.edu/cases/940615a3.html>, accessed on 11th December, 2016. See also the Arbitral Award of ICC Court of Arbitration – Paris No. 7585 of 1992, available at <http://cisgw3.law.pace.edu/cases/927585i1.html>, accessed on 11th December, 2016 (“Seller is entitled to interest from the day on which the buyer had to pay ...”) and Award No. 8962 of September 1998 of the ICC Court of Arbitration, available at <http://cisgw3.law.pace.edu/cases/978962i1.html>, accessed on 11th December, 2016 (interest awarded from the date of obligation to pay).

On the other hand, domestic laws can be applied in circumstances where the presiding court or arbitrator holds that the issue of accrual of interest, not being specifically determined by the Convention, is a matter outside the scope of the Convention, or where it is deemed that no general principles upon which the Convention is based are deducible and, hence, resort is sought to private international law rules. Whereas it would be expected that a similar approach would be applicable under domestic law, variations have emerged from the courts and tribunals.

In *Foliopack AG v Daniplast S.P.A.*,⁴⁷ the court held that interest accrues from the date of avoidance of the contract, and not the date when the buyer paid the purchase price. In another case, *Elaster Sacifia v Bettecher Inc.*,⁴⁸ a case involving deferred payments, accrual of interest during the agreed period in case of deferred payment constitutes a usage widely known and regularly observed in international trade'. In another award, interest was held to accrue from the date when the aggrieved seller would normally have resold the goods.⁴⁹

However, in light of these judicial interpretation, the majority view is that interest begins to accrue from the date when the obligation to pay the price, or other sums in arrears was due to be performed. Any accrual from a different date would be an aberration.

3.6.0 The Question of Interest Rates

Article 78 and 84(1) of the CISG do not stipulate any rate of interest to be applied to a successful claim of interest, unlike its predecessor, article 83 of the Convention Relating to a Uniform Law on the International Sale of Goods (ULIS),⁵⁰ which set the rate of interest to be applied at one percent above the

⁴⁷ *Supra* Note 15.

⁴⁸ Case No. 50272 of 20/20/1991 at the Juzgado Nacional de Primer Instancia en lo Comercial No. 7, available at <http://cisgw3.law.pace.edu/cases/911023a1.html> accessed on 11th December, 2016.

⁴⁹ See Arbitral Award of the ICC Court of Arbitration – Paris No. 7565/1994 (The *Coke* case), available at <http://cisgw3.law.pace.edu/cases/947565i1.html>, accessed on 11th December, 2016.

⁵⁰ The 1964 Convention Relating to a Uniform Law on the International Sale of Goods, available at <http://www.unidroit.org/instruments/international-sales/international-sales-ulis-1964>, accessed on 15 December 2016. Article 83 provided:

Where the contract is not avoided, damages for a breach of contract by one party shall consist of a sum equal to the loss, including loss of profit, suffered by the other party. Such damages shall not exceed the loss which the party in breach ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which then were known or ought to have been known to him, as a possible consequence of the breach of the contract.

official discount rate in the creditor's country.⁵¹

The absence of specific guidance by the Convention on how to determine the interest rate raises the question of whether determination of interest rates is a matter to be dealt with, as being governed, but not settled by the Convention, or is excluded from the sphere of application of the Convention.⁵² In the former case i.e. as a matter governed but not settled by the Convention, the provisions of article 7(2) would require that it be settled based on the general principles upon which the CISG is based, or in the absence of such principles, the domestic law arrived at by virtue of private international law rules. If the issue is treated as a matter outside the scope of the Convention, then it is to be settled by domestic law of the contract and, thus, is not bound by article 7(1)'s requirement of uniform interpretation.⁵³

One view holds that the interest rate is a matter purely within the confines of the domestic law and, hence, the Convention is not applicable: '[t]he obligation to pay interest – in particular, the amount – are governed by the applicable domestic law chosen by the conflicts rule.'⁵⁴

Another view argues that 'deference to domestic law seems inconsistent with the policy underlying article 78 and other articles of the Convention designed to provide compensation for the loss resulting from breach of the

⁵¹ The 1980 Vienna Conference generated diverse views of the rate of interest applicable. See Vilus, (n 6) ("Developing countries were very concerned by 1%... was considered by the developing countries to be extremely high.") See also Enderlein, F. and Maskow, D., *International Sales Law: The UN Convention on Contracts for the International Sale of Goods; Convention on the Limitation Period in the International Sale of Goods, Oceana; New York; 1992* (Enderlein & Maskow) at p. 310 "At the time of the diplomatic Conference, there were serious differences between the western industrialized nations, where the amount of interest is found in the market... and the socialist countries where the interest was fixed by law and relatively low".)

⁵² See Ferrari F, (n 4) 475, 476. Exclusion can be seen in light of other conceptions such as validity of the contract or tort actions, see Article 4 and 5 of the Convention.

⁵³ The debate is between whether this constitutes *lacunaes intra laegem* or *lacunaes praeteer laegem*.

⁵⁴ See Schlechtriem, *Supra* n.11 at p.99 and at Note 414 that to the extent that applicable domestic law prohibits interest payments then article 78 is unenforceable. See also Sevón, L., *Obligations of the Buyer under the UN Convention on Contracts for the International Sale of Goods* in Sarvevic P., and Volken, P. (Eds), *International Sale of Goods: Dubrovnik Lectures*, Oceana; New York; 1986 at p. 203 (Interest "must be decided according to the law applicable to the contract."), See also Bianca and Bonell, (n 7) 570, 612 ("It is thus governed by the applicable domestic law") and Vishny, P H (ed), *International Trade for the Non-specialist*, American Law Institute; Philadelphia; 1997 at p. 82, where it is urged that the "rate of interest in the country with the closest contact to the agreement" should be given careful attention.

contract'.⁵⁵ Article 78 was designed to establish a general rule that would be free from the vagaries and variances of domestic law.⁵⁶ Because article 7(1) requires that the construction of the Convention takes into account its internationality and the need for uniformity, general principles that can be said to form the basis for the uniform application of the Convention should be sought and applied.⁵⁷ Among those principles upon which the Convention is said to be based is that of full compensation, entitling a party to the market rates of interest.⁵⁸

Judicial treatment of the interest issue offers little insight as to a uniform rule for determining the rate of interest. Some courts have held that the 'amount of interest is not governed by the Convention, hence, the internal law of the forum is applicable'.⁵⁹ Other courts and tribunals have, however, held that the rate in force at the creditor's place of business should be applied.⁶⁰ It has also been stated that the 'percentage that must be retained is the one that corresponds to the use which the creditor could have made of the sum to be reimbursed'.⁶¹ Another award held that 'the application of article 78 of the said Convention

⁵⁵ Honnold, John O, *Uniform Law for International Sales Under the 1980 United Nations Convention*, (3rd ed 1999) 466-467 n 2.

⁵⁶ *Ibid.*

⁵⁷ *Id.*

⁵⁸ Bonnell M.J., *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*, (2nd Ed, Transnational Publishers 1997) 79. It is argued in this regard that the market rates of interest should be made applicable. *Strictu sensu*, contracts for the international sale of goods are not commercial loan contracts, which would entitle a party to market commercial rates of interest. Where there has been fluctuation of the interest rates, it would be difficult to make a determination of the market rate even if the foreseeability test under Article 74 is invoked.

⁵⁹ See Decision of Oberlandesgericht Celle, 24 May 1995 (*Used Printing Press Case*), available at <http://cisgw3.law.pace.edu/cases/950524g1.html>, accessed on 11th December 2016. See also Award of the Hamburg Arbitration Proceedings, 29 December 1998, CLOUT abstract No. 293, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V00/509/00/PDF/V0050900.pdf?OpenElement>, accessed on 11 December 2016 "The amount of interest claim is attained through the supplementary application of national (German) law," and ICC Court of Arbitration Award No. 9187 of 1999 (the *Coke case*), available at <http://cisgw3.law.pace.edu/cases/999187i1.html> and ICC Court of Arbitration Award No. 9978 of 1999 available at <http://cisgw3.law.pace.edu/cases/999978i1.html> "...buyer granted interest at the rate determined by the law governing the contract."

⁶⁰ 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, available at <http://cisgw3.law.pace.edu/cisg/biblio/thiele.html>. See e.g. ICC Arbitration Case No. 7197 of 1992, available at <http://cisgw3.law.pace.edu/cases/927197i1.html>; *Judgment BG 341/1994*, Bezirksgericht Arbon (12 December 1994) (Switzerland), available in UNILEX.

⁶¹ See ICC Arbitration Case No. 6653 of 1993 (English translation by Kristin Stadlander), available at <http://cisgw3.law.pace.edu/cases/936653i1.html>.

implies that a commercially reasonable interest is due.⁶² Another tribunal held that ‘the rates generally applied in international trade for contractual currency⁶³ is applicable. And yet another held that the rates upon which the financial aspects of the sale are linked, such as currency, are applicable.⁶⁴

This diversity of opinions on determining the interest rate applicable brings to fore the complexity inherent in applying the Vienna Conference ‘compromise.’⁶⁵ On the one hand, some courts and tribunals determine the interest rate applicable in accordance to the principles of the Convention as directed under article 7(2) for matters governed but not settled by the Convention. Most courts however consider that the issue is not governed at all by the Convention and therefore apply domestic law.⁶⁶

3.7.0 Interest Rates and the Principles of the Convention

The principles of unjust enrichment and full compensation have been applied where a court or tribunal determines that the Convention governs but does not settle the issue of interest rate. Under the unjust enrichment principle, the applicable rate is that of the defaulter’s place of business, so as to wipe out any potential advantages that might have been obtained by the defaulter by the default or breach of the contract. The assumption would be that the defaulter used the money at their place of business, and obtained some advantages by so doing that ought to be disgorged through an interest claim.

Under the full compensation principle, however, the rate applicable would be that of the aggrieved party’s place of business, so as to compensate him fully for any loss that he might have suffered as a result of the default.⁶⁷

⁶² See ICC Court of Arbitration Award No. 8962 of September, 1997, available at <http://cisgw3.law.pace.edu/cases/978962i1.html>.

⁶³ See ICC Court of Arbitration – Milan Award No. 8908 of December 1998, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=401&step=FullText>.

⁶⁴ See ICC Court of Arbitration – Paris Award no. 7585 of 1992, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=134&step=FullText>. See also the award of the Internationales Schiedsgericht der Bundeskammer der gewerblichen Wutschaft – Wien (Vienna) No. SCH 4366 of 15 June 1994 (*Rolled Metal Sheets* Case), available at <http://cisgw3.law.pace.edu/cases/940615a3.html> where the rate applied was of that practiced in the country of currency of payment.

⁶⁵ Harry Flechtner, Article 78, 813.

⁶⁶ *Ibid*, 815.

⁶⁷ See the award of Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft – Wien (Vienna), Austria No. SCH – 4318 of June 15 1994, available at <http://cisgw3.law.pace.edu/cases/940615a4.html>, accessed on 11th December, 2016.

The assumption is that the aggrieved party suffered some disadvantage at its place of business as a result of the other party's default, and therefore ought to be fully compensated for the loss arising as a result.

The two principles would seem to lead to different conclusions, and perhaps suggests that the principles apply to either article 78 or article 84(1) claims and not both. Article 84 interest claims are based more on the unjust enrichment principle, is restitutionary in nature, requiring accounting for benefits obtained by a party. As such, for article 84 interest claims, the rate applicable should be that of the defaulting party.

The approach of looking at the Convention as providing guidelines, albeit vague, in determining the rate of interest has produced consistent results. It has been held that a 12% rate of interest is "generally recognised in international trade," and this is applicable by virtue of article 9 of the CISG conferring higher hierarchical status to international trade usages.⁶⁸ The provisions of the UNIDROIT principles, and the Principles of European Contract Law, which offer more detailed guidelines on awarding of interest have also been held to supplement the Convention because 'such rules were applicable as they must be considered general principles on which CISG is based'.⁶⁹ It has been suggested that the full compensation principle should prevail because the 'broader and primary goal of the Convention is to compensate the aggrieved party fully,'⁷⁰ but this would tend to conflate interest claims with claims for damages under article 74. The unjust enrichment principle would appear more apt for interest claims.

3.8.0 Interest Rates and Domestic Law

Domestic law can be applied directly if the issue is deemed to fall outside the scope of the Convention and where the rules of private international law lead to its application. Under this approach, the rate of interest is to be

⁶⁸ See *Bermatex S r l v Valentin Rius Clapers SA v Sbrojavka Vsetin SA*, Case No 56, 179 of 6 October 1994, delivered by Juzgado Nacional de Primera Instancia en lo Comercial No 10 in Argentina, available at <http://cisgw3.law.pace.edu/cases/941006a1.html>.

⁶⁹ See ICC Court of Arbitration – Basel, Arbitration award No. 8128 of 1995, available at <http://cisgw3.law.pace.edu/cases/958128i1.html>.

⁷⁰ See Koneru P, *The International Interpretation of the United Nations Convention on the International Sale of Goods: An Approach based on General Principles*, available at <http://www.cisg.law.pace.edu/cisg/biblio/koneru.html>; also in 6 *Minnesota Journal of Global Trade* 105, 125 (1997).

determined by the law applicable to the contract.⁷¹ Several connecting factors are helpful in the determination of the applicable law. These include the law of the place of business of the debtor,⁷² the law of the seller's place of business,⁷³ the currency of payment,⁷⁴ the place of payment⁷⁵ and the law of the forum.⁷⁶

Although this is the mode preferred by most courts and tribunals, to determine the interest rate based on the domestic law applicable to the contract, there is a risk of divergence in resolving the issue of the interest rate applicable. Article 7(1) of the Convention urges interpreters to have regard to the international character of the Convention, the need for uniformity and observance of good faith in international trade. Commentators have urged for an autonomous interpretation of the provisions of the Convention even within domestic law, so as to preclude 'recourse to domestic interpretive techniques in order to solve problems.'⁷⁷ There is a risk that different courts with different facts at hand applying the same principle: that of looking towards the domestic law identified by private international law concepts may reach different conclusions on which law is to govern the amount of interest under a particular contract.

4.0 Conclusion

The ultimate purpose of the CISG is to provide a uniform platform for determination of contractual disputes, and in light of the diverse social, economic and legal factors governing international sales transactions, the parties should pay particular attention to their contractual provisions on entitlement to interest and interest rates applicable so as to avoid risks of exponential claims.

⁷¹ See Schlechtriem, *Supra* n.11, 598.

⁷² See the decision of the *H V A Tribunal Cantonal de Vaud (Switzerland)* No 01 93 1061 of March 11, 1996, available at <http://cisgw3.law.pace.edu/cases/960311s1.html>.

⁷³ See the decision of Oberlandesgericht Koblenz No. 2 U 1556/98 of November 18, 1999, available at <http://cisgw3.law.pace.edu/cases/991118g1.html>.

⁷⁴ See ICC Court of Arbitration – Paris, Award No. 7585 of 1992, available at <http://cisgw3.law.pace.edu/cases/927585i1.html>.

⁷⁵ See the award of the ICC Court of Arbitration – Paris No. 7153 of 1992, available at <http://cisgw3.law.pace.edu/cases/927153i1.html>.

⁷⁶ See the Arbitral Award of Hungarian Chamber of Commerce and Industry Court of Arbitration of November 17 1995 No. VB/94124, available at <http://cisgw3.law.pace.edu/cases/951117h1.html>. See also ICC Court of Arbitration – Zurich Arbitral award No. 8769 of 1996, available at <http://cisgw3.law.pace.edu/cases/968769i1.html>.

⁷⁷ Ferrari, *supra* n.10, 140, 142.

As can be seen from the foregoing discussion, determination of the interest regime governing a particular transaction can be a difficult and varied experience. To limit the risks of exposure to varied national cultures, it is upon the parties to a contract to clearly stipulate in their contract the specific national or domestic legal framework to govern the issue in their contract. Where the domestic law does not allow for interest, then, it can be deemed that the parties varied their rights under the CISG for entitlement to interest.