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# Using the Unidroit Principles to Fill Gaps in the CISG

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# USING THE UNIDROIT PRINCIPLES TO FILL GAPS IN THE CISG

John Y. Gotanda\*

## I. Introduction

In 1980, the United Nations promulgated the Convention on the International Sale of Goods to provide a uniform set of rules for international commercial transactions. The goal was to increase the efficiency of such transactions and promote the development of international trade.<sup>1</sup> To date, seventy countries have adopted the Convention, including Australia, China, France, Germany, Italy, Mexico, Russia and the United States.<sup>2</sup>

Although the CISG has proved successful in many areas, it has been less successful in the area most important to parties in a dispute: damages for breach of contract.<sup>3</sup> Indeed, of

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<sup>1</sup> United Nations Convention on Contracts for the International Sale of Goods, Preamble, U.N. Doc. A/Conf.97/18 Annex I (1980) [hereinafter CISG]. For a discussion of the CISG, see P. Schlechtriem & I. Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (CISG) (2d ed. 2005); F. Enderlein & D. Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods* (1992); J. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3d ed. 1999); *The Convention for the International Sale of Goods: A Handbook of Basic Materials* (R. Kathrein & D.B. Magraw eds., 1987); A. Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (1994).

<sup>2</sup> For a list of contracting States, see <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>.

<sup>3</sup> C. Gillette & R. Scott, "The Political Economy of International Sales Law," 25 *Int'l Rev. L. & Econ.*, 446 (2005) (noting judicial disagreement over "the calculation of interest rates for damages, the award of attorneys' fees, and damages in lost volume cases," among others, and concluding that this results from vague and ambiguous terms in the CISG which over time generates varying interpretations by different courts and will eventually result in "a sales law that

all the articles in the CISG, the articles on economic remedies are the most litigated and written about.<sup>4</sup> Because uniform rules are lacking, similarly situated parties sometimes receive vastly different results; the disparities undermine the purpose of the CISG and may lead parties to choose to apply a sales law other than the CISG.<sup>5</sup>

Why has this happened? One of the main reasons is that these provisions of the CISG do not set out specific economic remedies. Instead, they state only a basic framework for the recovery of damages. This should come as no surprise. As John Honnold, one of the principal drafters of the CISG commented, “a breach of contract can occur in an almost infinite variety of circumstances [and thus] no statute can specify detailed rules for measuring damages in all possible cases.”<sup>6</sup> What the CISG provisions try to do is “state basic principles to govern compensation” when a breach occurs.<sup>7</sup> These principles afford a tribunal broad authority to determine the aggrieved party’s loss based

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lacks both substantive and formal uniformity and . . . is likely to result in a net increase in contracting costs); *see also* G. Cuniberti, “Is the CISG Benefiting Anybody?,” 39 *Vand. J. Transnat’l L.*, p. 1511 (2006) (arguing that the two main goals of the CISG have not been met because it contains vague rules that do not provide precise answers, which reduces legal certainty since the rules are likely to be interpreted differently by courts and this ultimately jeopardizes harmonization of the field).

<sup>4</sup> *See generally* B. Zeller, *Damages under the Convention on Contracts for the International Sale of Goods* (2005); C. Thiele, “Interest on Damages and Rate of Interest Under Article 78 of the U.N. Convention on Contracts for the International Sale of Goods,” 2 *Vindobona J. Int’l Com. L. & Arb.*, pp. 3-35 (1998); C. Liu, *Remedies for Non-performance: Perspectives from CISG, UNIDROIT Principles and PECL*, § 14.2.5 (Sept. 2003), <http://www.cisg.law.pace.edu/cisg/biblio/chengwei-74.html>.

<sup>5</sup> *See* CISG art. 6 (“The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.”); *see also* Gillette & Scott, *op. cit.*; Cunibert, *op. cit.*

<sup>6</sup> Honnold, *op. cit.*, p. 445.

<sup>7</sup> *Ibid.*

on circumstances of the particular case.

Unfortunately, the lack of specificity has resulted in much litigation, and seemingly conflicting results. Is there a solution?

Some have argued that we should fill the gaps in the CISG damages provisions with the UNIDROIT Principles of International Commercial Contracts.<sup>8</sup> My view is that the UNIDROIT Principles should not be used of their own force as a gap-filler for the CISG. However, the Principles may still have a role to play. They help us understand the general principles of the CISG that guide courts and tribunals in resolving matters not expressly dealt with in the Convention. In addition, they provide support for solutions to open issues reached through an analysis of the Convention itself.

I begin by giving a very brief overview of the damages provisions of the UNIDROIT Principles as compared to the CISG. I then focus on the interplay between the two and ultimately conclude that while the UNIDROIT Principles should not be used as a formal source of law to formulate principles that cannot be derived from the CISG, they can play an important role in interpreting the Convention.

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<sup>8</sup> See M.J. Bonell, "The UNIDROIT Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments?" 1 *Unif. L. Rev.*, pp. 26, 36 (1996); A. Garro, "The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG," 69 *Tul. L. Rev.*, pp. 1149, 1153 (1995) (arguing that "UNIDROIT principles offer the judge or arbitrator a rule that is likely to be more suitable to an international commercial contract than a domestic rule of contract law"); U. Magnus, "Die allgemeinen Grundsätze im UN-Kaufrecht," 59 *RabelsZ*, pp. 469, 493 (1995) (arguing that the UNIDROIT Principles can be used to fill gaps in the CISG even if "they

## II. The UNIDROIT Principles and the CISG

The UNIDROIT Principles set forth general rules for international contracts. Their goal “is to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied.”<sup>9</sup>

The drafters of the UNIDROIT Principles intended them to apply in a wide variety of circumstances. The preamble states that:

They shall be applied when the parties have agreed that their contract be governed by them.

They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.

They may be applied when the parties have not chosen any law to govern their contract.

They may be used to interpret or supplement international uniform law instruments.

They may be used to interpret or supplement domestic law.

They may be used as a model for national and international legislators.<sup>10</sup>

While the UNIDROIT Principles reflect concepts found in many legal systems,

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formulate general principles that cannot be derived directly from CISG”).

<sup>9</sup> *UNIDROIT Principles of International Commercial Contracts*, p. xiv (2004).

they also “embody what are perceived to be the best solutions, even if still not yet generally adopted.”<sup>11</sup> Thus, they do not simply restate existing rules found in most legal systems; they are aspirational.<sup>12</sup>

In a number of circumstances, however, the rules found in the UNIDROIT Principles are based upon or track language from articles of the CISG.<sup>13</sup> For example, UNIDROIT Principles Article 1.9(1), stating that “[t]he parties are bound by any usage to which they have agreed and by any practices which they have established between themselves[,]” is identical to CISG Article 9(1).<sup>14</sup> In addition, UNIDROIT Principles Article 5.1.7(1), which sets forth the general rule for determining the contract price when

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<sup>10</sup> UNIDROIT Principles, pmbi.

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

<sup>12</sup> In this way, they resemble the modern Restatements of Law published by the American Law Institute. See K. Berger, “The *Lex Mercatoria* Doctrine and the UNIDROIT Principles of International Contract Law,” 28 *L. & Pol’y in Int’l Bus.*, pp. 943, 946 (1997). For a discussion of the original purposes of the Restatement of the Law of Contracts, see E. Patterson, “The Restatement of the Law of Contracts,” 33 *Colum. L. Rev.*, p. 397 (1933). A number of commentators, however, have been critical of the more recent Restatements, arguing that they no longer restate the law. See F. Vandall “Constructing a Roof before the Foundation is Prepared: The Restatement (Third) of Torts: Products Liability Section 2(b) Design Defect” 30 *U. Mich. J. L. Reform*, p. 261 (1997) (arguing that the restatement of law of torts is not an accurate representation of the law and that the ALI’s mission is no longer to restate the law, but to issue political documents); D. Thomas “Restatements Relating to Property: Why Lawyers Don’t Really Care,” 38 *Real Prop., Probate & Trust J.*, p. 655 (1994) (evaluating the Restatements of Property and concluding that the reason they are not often followed is because after the First Restatement, they have taken on the role of law reform rather than restating existing law); see also F. Juenger “A Third Conflicts Restatement?,” 75 *Ind. L.J.*, p. 403 (2000); P. Corboy, “The Not-So-Quiet Revolution: Rebuilding Barriers to Jury Trial in the Proposed Restatement (Third) of Torts: Products Liability” 61 *Tenn. L. Rev.*, p. 1043 (1994); R. Banks, “Restating the Restatement (Second), Section 402A - Design Defect” 72 *Or. L. Rev.*, p. 411 (1993); W.N. Keyes, “The Restatement (Second): Its Misleading Quality and a Proposal for its Amelioration” 13 *Pepp. L. Rev.*, p. 23 (1985).

<sup>13</sup> See UNIDROIT Principles, *op. cit.*, p. xv.

the agreement does not fix or make provision for determining the price, is based upon CISG Article 55.<sup>15</sup> And in some instances, the UNIDROIT Principles follow a basic approach found in the CISG, but adapt the rule “to reflect the particular nature and scope of the Principles.”<sup>16</sup> For example, UNIDROIT Principles Article 7.2.2, dealing with the right to require performance of non-monetary obligations, follows the general approach of CISG Article 46, but adds “certain qualifications.”<sup>17</sup>

In many ways, the damages provisions of the UNIDROIT Principles are comparable to those found in the CISG.

CISG Article 74 sets forth a basic framework for the recovery of damages. It

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<sup>14</sup> UNIDROIT Principles art. 1.9(1); CISG art. 9.

<sup>15</sup> UNIDROIT Principles art. 5.1.7(1) provides:

Where a contract does not fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned or, if no such price is available, to a reasonable price.

CISG art. 55 similarly provides:

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

The Comment to UNIDROIT Principle 5.1.7 states that “this article is inspired by Art. 55 CISG.” UNIDROIT Principles art. 5.1.7 cmt. *See also* A. Chandrasenan, “UNIDROIT Principles to Interpret and Supplement the CISG: An Analysis of the Gap-Filling Role of the UNIDROIT Principles,” 11 *Vindobona J. Int’l Com.l L. & Arb.*, pp. 65, 77-78 (2007).

<sup>16</sup> UNIDROIT Principles, *op. cit.*, p. xv.

<sup>17</sup> *See* UNIDROIT Principles art. 7.2.2 cmt. In addition, while UNIDROIT Principles Article 1.9(2) is similar to CISG Article 9(2), unlike the CISG, the Principles contains language stating that a trade usage regularly observed by the generality of business people in a particular trade may not be applied if its application in any given case would be unreasonable. *See* UNIDROIT Principles art. 1.9(2).

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.<sup>18</sup>

CISG Article 74 thus provides for the recovery of both actual loss suffered and net gains prevented.<sup>19</sup> However, it does not provide specific guidelines for calculating damages.<sup>20</sup> Instead, CISG Article 74 allows a tribunal to determine the aggrieved party's

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<sup>18</sup>CISG art. 74; *see also* CISG-AC Opinion No. 6, Calculation of Damages under CISG Article 74 (2006); Schlechtriem & Schwenger, *op. cit.*, p. 763.

<sup>19</sup> For a discussion of the calculation of damages under Article 74, *see* CISG-AC Opinion No. 6, *op. cit.*

<sup>20</sup> The Secretariat Commentary provides:

Since article 70 [draft counterpart to CISG Article 74] is applicable to claims for damages by both buyer and the seller and these claims may arise out of a wide range of situations, including claims for ancillary damages to a request that the party in breach perform the contract or to a declaration of avoidance of a contract, no specific rules have been set forth in article 70 describing the appropriate method of determining “the loss . . . suffered . . . as a consequence of the breach.” The court or the arbitral tribunal must calculate the loss in the manner which best suits the circumstances.

Secretariat Commentary, art. 70 [draft counterpart to CISG art. 74], ¶ 4, *reprinted in* J Honnold, *Documentary History of the Uniform Law for International Sales*, p. 449 (1989) [hereinafter “Secretariat Commentary”], *also available at* <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-74.html>. There exists no official commentary on the CISG. The Secretariat Commentary is on the 1978 Draft of the Convention. Nevertheless, the Commentary reflects that Secretariat's impressions of the purposes and effects of the Commission's work and provides a helpful analysis of the official text of the CISG. *See* Kritzer, *op. cit.*, p. 2 (“[The Secretariat] Commentaries are the closest available counterpart to an



loss based on the circumstances of the particular case, with the goal of placing the aggrieved party in the same economic position it would have enjoyed if the breach had not occurred.<sup>21</sup> In other words, CISG Article 74 is designed to give the aggrieved party the “benefit of the bargain.”<sup>22</sup> Accordingly, CISG Article 74 is liberally construed to compensate an aggrieved party for all disadvantages suffered as a result of the breach. However, all claims for damages included under CISG Article 74 are subject to the traditional limitations imposed on the recovery of damages for breach of contract, for example, the doctrines of foreseeability and mitigation.<sup>23</sup>

CISG Articles 75 and 76 provide limited alternatives to CISG Article 74. CISG Article 75 sets forth the method for calculating damages when the aggrieved party has avoided the contract and entered into a substitute transaction. Here, the aggrieved party “may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under Article 74.”<sup>24</sup> By contrast,

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Official Commentary on the Convention and, when they are relevant, constitute the most authoritative citations to the meaning of the Convention that one can find.”).

21. See Schlechtriem & Schwenzler, *op. cit.*, p. 746; Honnold, *op. cit.*, p. 445 (citing G. Treitel, *Remedies for Breach of Contract*, p. 82 (1998)).

22. See E.A. Farnsworth, *Damages and Specific Relief*, 27 *Am. J. Comp. L.*, pp. 247, 249 (1979); Sutton, “Measuring Damages Under the United Nations Convention on the International Sale of Goods,” 50 *Ohio State L.J.*, pp. 737, 742 (1989).

23. See CISG arts. 74, 77.

24. CISG art. 75. The purpose of CISG Article 75 is to ensure that the aggrieved party will receive the “benefit of the bargain” if the aggrieved party mitigates its damages by engaging in a substitute transaction. One leading treatise explains:

If the contract is declared avoided for breach by the buyer, the seller is free to resell the goods. As a rule, it will be in his interest to do so. Analogously, if the contract is avoided for breach by the seller, the buyer will be interested in purchasing the same goods from another seller if possible. If the non-breaching

CISG Article 76 provides that when an aggrieved party has avoided the contract but has not made a substitute transaction under CISG Article 75, it is entitled to damages measured by “the difference between the price fixed by the contract and the current price . . . as well as any further damages recoverable under Article 74.”<sup>25</sup>

In many respects, the damages provisions of the UNIDROIT Principles are similar to those found in the CISG. Like CISG Article 74, the UNIDROIT Principles set forth the basic premise that the breaching party is liable to compensate the aggrieved party for

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party succeeds in reselling or replacing the goods, his effective loss will thereby be diminished. Article 75 takes this into account and sets forth special rules for calculating damages in such cases.

C.M. Bianca & M.J. Bonell, *Commentary on the International Sales Law, The 1980 Vienna Sales Convention*, p. 549 (1987).

25. CISG art. 76(1). Article 76 may be viewed as an exception to both Articles 74 and 75. It is an exception to Article 74 when a contract has been avoided. It is also an exception to Article 75 because it provides a method for calculating damages when the contract has been avoided but, (1) in the case of an aggrieved buyer, that party has not bought goods in replacement or, (2) in the case of an aggrieved seller, that party has not resold the goods under Article 75. The purpose of Article 76 has been explained as follows:

[Under Article 76,] a concrete demonstration of the non-performance loss is not necessary. The rule is based on the premise that the promisee has the right to make a substitute transaction at the current price. The promisor must bear the costs of a substitute transaction. However, he should not gain an advantage if the promisee has not carried out such a transaction but has instead taken another course of action. The calculation of damages under Article 76 is abstract in the sense that the seller who is liable to pay damages for non-performance, for example, cannot claim that the buyer does not in reality need the goods, has resold them, or will not be exposed to a claim by his customers. Similarly, a seller will not be allowed to argue that a buyer who has received a delivery of goods has agreed to resell those goods below the current price and that his loss was therefore only the profit lost on that transaction and not the greater difference between the contract price and the current price. The buyer may demand to be put into the financial position which would have existed had the contract been performed; any loss which would have been made on a resale is not material.

Schlechtriem & Schwenger, *op. cit.*, p. 781.

all harm that the aggrieved party sustained.<sup>26</sup> Similar to the CISG, the UNIDROIT Principles limit damages to those that were foreseeable.<sup>27</sup> However, in both situations the UNIDROIT Principles contain more detailed provisions and, in the case of the scope of compensation allowed, the UNIDROIT Principles are broader than the CISG.<sup>28</sup>

The UNIDROIT Principles also contain provisions analogous to CISG Articles 75 and 76. Like CISG Article 75, the UNIDROIT Principles Article 7.4.5 states: “Where the aggrieved party has terminated the contract and has made a replacement transaction within a reasonable time and in a reasonable manner it may recover the difference between the contract price and the price of the replacement transaction as well as damages for any further harm.”<sup>29</sup> In addition, similar to CISG Article 76, UNIDROIT Principles Article 7.4.6 states:

Where the aggrieved party has terminated the contract and has not made a replacement transaction but there is a current price for the performance

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<sup>26</sup> UNIDROIT Principles Article 7.4.1 provides: “Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under these Principles.” In addition, Article 7.4.2 states:

(1) The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm.

(2) Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress.

UNIDROIT Principles art. 7.4.2. The UNIDROIT Principles are thus broader than the CISG.

<sup>27</sup> UNIDROIT Principles art. 7.4.4 (“The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance.”).

<sup>28</sup> See UNIDROIT Principles art. 7.4.2 cmt.

<sup>29</sup> UNIDROIT Principles art. 7.4.5.

contracted for, it may recover the difference between the contract price and the price current at the time the contract is terminated as well as damages for any further harm.<sup>30</sup>

It should be noted that one express difference is that CISG Article 5 specifically excludes claims for damages resulting from personal injury or death, while the UNIDROIT Principles include them.<sup>31</sup>

What are some of the issues that the damages provisions of the CISG do not expressly address but are covered by the UNIDROIT Principles? One is that the CISG does not expressly mandate that damages include any gain received by the aggrieved party resulting from the breach. By contrast, the UNIDROIT Principles expressly include

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30. UNIDROIT Principles art. 7.4.6 & cmt. 1. See ICC Court of Arbitration, Case No. 8502, Nov. 1996, available at <http://cisgw3.law.pace.edu/cases/968502i1.html> (discussing CISG art. 76 and UNIDROIT Principles 7.4.6). For a match-up of CISG Article 76 with the counterpart provisions of UNIDROIT Principles, see *Use of the UNIDROIT Principles to help interpret CISG Article 76*, available at <http://www.cisg.law.pace.edu/cisg/principles/uni76.html#ed11#ed11>.

<sup>31</sup> CISG art. 5 (“The Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.”). The drafters of the CISG wished to remove the area of products liability from the scope of the CISG.

It also should be noted that the UNIDROIT Principles are not a panacea to providing solutions to issues not resolved by the text of the CISG. They do not, for example, address whether attorneys’ fees and costs may be recovered as damages under CISG Article 74, which is an issue that has caused considerable controversy and much commentary in recent years. See generally H. Flechtner & J. Lookofsky, “Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal,” *Vindobona J. Int’l Com. L. & Arb.*, p. 93 (2003); J. Felemegas, “The Award of Counsel’s Fees under Article 74 CISG, in Zapata Hermanos Sucesores v. Hearthside Baking Co.” (2001), <http://cisgw3.law.pace.edu/cisg/biblio/felemegas1.html>; B. Zeller, “Interpretation of Article 74 - Zapata Hermanos v. Hearthside Baking - Where Next?,” 2004 *Nordic J. Com. L.* 1, <http://www.njcl.utu.fi>.

these gains.<sup>32</sup> Another is that CISG Article 74 does not address the extent to which the aggrieved party must prove that it suffered a loss in order to recover damages.<sup>33</sup> By contrast, the UNIDROIT Principles require that “compensation is due only for harm ... that is established with a reasonable degree of certainty.”<sup>34</sup> The CISG also contains no provision on the currency to use in calculating the loss.<sup>35</sup> The UNIDROIT Principles state that “[d]amages are to be assessed either in the currency in which the monetary obligation was expressed or in the currency in which the harm was suffered, whichever is more appropriate.”<sup>36</sup>

Perhaps the most litigated provision of the CISG is Article 78, which concerns the payment of interest.<sup>37</sup> Although Article 78 requires paying interest whenever a payment is in arrears, it does not specify how to calculate interest owed.<sup>38</sup>

In contrast, the UNIDROIT Principles contain a very detailed provision on interest. UNIDROIT Principles Article 7.4.9 provides that interest is payable from the

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<sup>32</sup> UNIDROIT Principles art. 7.4.2. *See also* CISG-AC Opinion No. 6, *op. cit.*

<sup>33</sup> CISG art. 74.

<sup>34</sup> UNIDROIT Principles art. 7.4.3.

<sup>35</sup> CISG-AC Opinion No. 6, *op. cit.*

<sup>36</sup> UNIDROIT Principles art. 7.4.12.

<sup>37</sup> *See generally* F. Mazzotta, “CISG Article 78: Endless Disagreement among Commentators, Much Less among the Courts” (2004), <http://www.cisg.law.pace.edu/cisg/biblio/mazzotta78.html>; A. Corterier, “A New Approach to Solving the Interest Rate Problem of Art 78 CISG,” 5 *Int’l Trade & Bus. L. Ann.* p. 33 (2000); Thiele, *op. cit.*, p. 3.

<sup>38</sup> CISG art. 78 (“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.”).

time when payment is due.<sup>39</sup> With respect to the applicable interest rate, the UNIDROIT Principles set forth a hierarchy for determining the appropriate rate, starting with “the average short-term lending rate to prime borrowers prevailing for the currency of payment at the place of payment.”<sup>40</sup> If no such rate exists, the Principles provide that interest accrues at the average prime rate in the State of the currency of payment, and, in the absence of such a rate, the rate of interest is to be fixed by the law of the State of the currency of payment.<sup>41</sup>

In short, in many instances, the damages articles of the UNIDROIT Principles address matters left open by the CISG and, as a result, the question arises as to what extent they can be used to fill gaps in the CISG.

### **III. Applying the UNIDROIT Principles to Interpret the CISG**

To date, courts and tribunals have used the UNIDROIT Principles in connection with the CISG in at least three ways. First, when the parties have specified using the UNIDROIT Principles to supplement the CISG, tribunals have typically respected the parties’ agreement.<sup>42</sup> Second, the UNIDROIT Principles have been used as support for

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<sup>39</sup> UNIDROIT Principles art. 7.4.9.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> See Bonell, *op. cit.* A study conducted by the Center for Transnational Law in 2000 found approximately 50 instances in which the UNIDROIT Principles were expressly chosen as the law governing the parties’ agreements. See K. Berger, H. Dubberstein, S. Lehmann & V. Petzold, “The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration: Background, Procedure and Selected Results,” in *The Practice of Transnational Law*, p. 91 (K. Berger ed. 2001). For a discussion of cases applying the UNIDROIT Principles, see C. Brower & J. Sharpe, “The Creeping Codification of Transnational Commercial Law: An

solutions that are reached by applying other sources of authority.<sup>43</sup> A third use of the Principles is to use them as a gap-filler for the CISG.<sup>44</sup> For example, some tribunals have applied UNIDROIT Principles Article 7.4.9 to resolve questions left open by CISG Article 78, particularly to fix the rate at which interest accrues.<sup>45</sup> This use has been controversial and, in my view, improper.

#### **IV. Properly Interpreting the CISG**

Article 7 of the CISG sets forth how to interpret the Convention. It 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.<sup>46</sup>

To justify using the UNIDROIT Principles to fill gaps in the CISG, proponents

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Arbitrator's Perspective," 45 *Va. J. Int'l L.*, p. 199 (2004).

<sup>43</sup> See CISG-AC Opinion No. 6, *op. cit.*

<sup>44</sup> See Bianca & Bonell, *op. cit.*, pp. 558, 73-75; Brower & Shape, *op. cit.*, pp. 219-20.

<sup>45</sup> See ICC Award No. 8128 of 1995, <http://cisgw3.law.pace.edu/cases/958128i1.html>; Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft [Arbitral Tribunal] Vienna, Jun. 15, 1994, docket No. SCH-4318 (Austria), <http://cisgw3.law.pace.edu/cases/940615a.3.html>; see also ICC Award No. 8769 of Dec. 1996, <http://cisgw3.law.pace.edu/cases/968769i1.html>.

have offered three interpretations of this article. First, the UNIDROIT Principles can be used to fill gaps in the CISG because the UNIDROIT Principles are viewed as setting forth general principles of international contract law upon which the Convention is based.<sup>47</sup> Second, the UNIDROIT Principles can be used to fill gaps only when the relevant article of the UNIDROIT Principles and the relevant provision of the CISG are similar in text and context so that the UNIDROIT Principles are essentially providing “meat on the bare bones” of the principles of the CISG.<sup>48</sup> Third, the UNIDROIT Principles can be applied to fill gaps even if the general principles upon which they are based cannot be derived directly from the Convention.<sup>49</sup> Proponents of this approach

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<sup>46</sup> CISG art. 7.

<sup>47</sup> See M.J. Bonell, “General Report,” in *A New Approach to International Commercial Contracts: The UNIDROIT Principles of International Commercial Contracts, XVth International Congress of Comparative Law, Bristol, 26 July-1 August 1998*, pp. 12-13 (1999) (noting that “there are those who, perhaps too enthusiastically, justify the use of the UNIDROIT Principles for this purpose on the mere ground that they are ‘general principles of international contracts.’”) [citations omitted].

<sup>48</sup> This approach has been advocated by Al Kritzer. According to this theory: “[T]he CISG is in some respects a minimalist document; furthermore, it lacks an official commentary that would help lawyers interpret the meaning of its provisions. In contrast, both the UNIDROIT Principles and the PECL have official commentaries with examples that further understanding of the texts; by looking at the UNIDROIT Principles and the PECL along with the CISG, in cases where the texts are similar or identical, one is able to put ‘flesh’ on the CISG’s bones and fill in the gaps in the text.”

See C. Liu, *Remedies in International Sales: Perspectives from CISG, UNIDROIT Principles and PECL* Preface (2007).

<sup>49</sup> See Magnus, *op. cit.*, pp. 492-93 (“The UNIDROIT working group[’s] . . . results, to the extent that they formulate general principles which cannot be derived directly from the CISG, can be utilized for filling gaps in the Convention.”); see also S. Salama, “Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, An Inter-American Application,” 28 *U. Miami Inter-Am. L. Rev.*, pp. 225, 241 (2006) (“Interpreting ‘general principles’ as only those derived from the Convention is too narrow of a construction. The clause ‘on which [the Convention] is



assert that the phrase “general principles” in CISG Article 7 should be interpreted as “evolving with and following changes and transitions in international commerce.”<sup>50</sup>

Thus, they argue that the UNIDROIT Principles are particularly well suited to fill gaps in the CISG, because they set forth general principles of international commercial contracts and their application would further CISG Article 7(1) by helping unify international contract law.<sup>51</sup>

In my view, it goes too far to apply the UNIDROIT Principles as the primary source of authority for filling a gap in the CISG.<sup>52</sup> While articles in the UNIDROIT Principles often correspond to provisions of the CISG, the Principles are not merely a restatement of general principles of international contract law.<sup>53</sup> As the Governing Council of UNIDROIT explained in the Introduction, the Principles not only “reflect concepts found in many ... legal systems, ... they also embody what are perceived to be best solutions, even if not yet generally adopted.”<sup>54</sup> Thus, it cannot be said that the

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based’ does not preclude principles that are not expressly or even implicitly stated in the text of the Convention.”).

<sup>50</sup> Salama, *op. cit.*, p. 241.

<sup>51</sup> *Ibid.*, p. 242.

<sup>52</sup> See J. Fawcett, J. Harris & M. Bridge, *International Sale of Goods in the Conflict of Laws*, p. 933 (stating “it should not be forgotten that the UNIDROIT Principles are not the work of UNCITRAL but rather the work of the International Institute for the Unification of Private Law, a quite separate body and not a United Nations agency” and, “[i]n consequence, they cannot represent a formal source of law for the purpose of supplementing the Vienna Convention”); *see also* M. Van Alstine, “Dynamic Treaty Interpretation,” 146 *U. Pa. L. Rev.*, pp. 687, 784-85 (1998) (“[T]he UNIDROIT Principles . . . will take on relevance only to the extent that they can inform the contemporary understanding of general principles . . . first articulated through an analysis of the relevant convention itself.”).

<sup>53</sup> UNIDROIT Principles pmbl.

<sup>54</sup> *Ibid.*

Principles as a whole reflect general principles on which the Convention is based.

I am also wary of an overly expansive reading of Article 7(2) to justify using the UNIDROIT Principles to fill gaps in the CISG. The text of that article clearly states that “[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the *general principles on which it is based*.”<sup>55</sup> As John Honnold pointed out, the text of CISG Article 7(2) requires that a “particular general principle must be moored to premises that underlie specific provisions of the Convention.”<sup>56</sup> In my view, if the drafters of the CISG wanted the Convention to be interpreted according to general principles of international commercial contract law, they could easily have said so. It seems inappropriate to reach that result through a strained reading of CISG Article 7(2).<sup>57</sup>

The subject of interest illustrates my point. The provisions of the UNIDROIT Principles on the rate at which interest should accrue do not reflect the general practice,

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<sup>55</sup> CISG art. 7(2) (emphasis added).

<sup>56</sup> Honnold, *op. cit.*, pp. 667-91.

<sup>57</sup> I am similarly wary of an overly expansive reading of CISG Article 7(1) to justify using the UNIDROIT Principles to fill gaps in the CISG. By its terms, CISG Article 7(1) deals with the interpretation of the provisions of the Convention. By contrast, CISG Article 7(2) provides the basis for gap-filling. To be sure, there is some overlap between the two. *See, e.g.*, Schlechtriem & Schwenger, *op. cit.*, p. 103. Still, it seems inappropriate to disregard the gap-filling rules of CISG Article 7(2) and apply a rule of decision from the UNIDROIT Principles to resolve a matter not expressly settled by the Convention simply because the rule laid down by the UNIDROIT Principles was international in character and its application would promote uniformity under CISG Article 7(1). Such a practice would eviscerate and render meaningless CISG Article 7(2).

which is to use applicable national law to determine the appropriate interest rate.<sup>58</sup> In addition, one could argue that it does not reflect the CISG's general principle of full compensation for the loss resulting from the breach of contract; the UNIDROIT Principles provide for interest to be paid at a lending rate.<sup>59</sup> The problem with using a lending rate is that CISG Article 74 awards the aggrieved party actual damages, including any loss from borrowing money to continue operations upon the debtor's default.<sup>60</sup> Thus, an aggrieved party that incurs financing charges because of the breach can be made whole through CISG Article 74.<sup>61</sup> CISG Article 78 provides for interest in alternative cases when the aggrieved party does not borrow money to continue operating after the

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<sup>58</sup> See, e.g., Case Law on UNCITRAL Texts (CLOUT) Case No. 132, Aug. 16, 1996, [http://www.uncitral.org/uncitral/en/case\\_law/abstracts.html](http://www.uncitral.org/uncitral/en/case_law/abstracts.html); CLOUT, Case No. 97, July 12, 1995, [http://www.uncitral.org/pdf/english/clout/abstracts/A\\_CN.9\\_SER.C\\_ABSTRACTS\\_7.pdf](http://www.uncitral.org/pdf/english/clout/abstracts/A_CN.9_SER.C_ABSTRACTS_7.pdf); see also Landgericht Hamburg [LG] [Hamburg District Court] Sept. 26, 1990, Case No. 5 0 543/88 (F.R.G.), <http://cisgw3.law.pace.edu/cases/900926g1.html>; Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft [Arbital Tribunal] Vienna, Jun. 15, 1994, docket No. SCH-4318 (Austria), <http://www.unilex.info/case.cfm?pid=1&do=case&id=56&step=Abstract>. In fact, it seems that in light of the general practice to rely on national law to set the rate and that there exist a number of other approaches, see Mazzotta, *op. cit.*, "there is not enough of a springboard to create the kind of uniformity that the Convention was designed to produce. It's an area that is too amorphous to think that [this view] would produce a basis for the kind of uniform rule that a world-wide body of people ... would be obliged to follow." Cf. Transcript of a Workshop on the Sales Convention: Leading CISG scholars discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and much more, in 18 *J. L. & Com.*, pp. 191, 235-36 (Remarks of John Honnold on filling gaps under the CISG with approaches that are not yet widely adopted).

<sup>59</sup> UNIDROIT Principles art. 7.4.9; CISG art. 74; see also J. Gotanda, "Awarding Interest in International Arbitration," 90 *Am. J. Int'l L.*, pp. 40, 51 (1996).

<sup>60</sup> CISG art. 74.

<sup>61</sup> Of course, in order to recover interest paid as damages under Article 74, the aggrieved party must meet the various requirements for recovery under that article. See Schlechtriem & Schwenger, *op. cit.*, p. 754. By contrast, CISG Article 78 does not require, among other things,

debtor's breach.<sup>62</sup> When the aggrieved party does not obtain third party financing to replace the funds owed, the aggrieved party might hold the money, use some savings instrument, or reinvest the money in the company. Thus, the UNIDROIT Principles' approach may overly compensate an aggrieved party.<sup>63</sup>

So then how should the Convention be interpreted and how can the UNIDROIT Principles play a role?

In my view, gaps in the CISG are to be resolved first according to the literal text or the plain and natural reading of the applicable article.<sup>64</sup> If the result is not formally imposed by the relevant article, then it must be determined whether the issue was one that was deliberately left to national laws.<sup>65</sup> If not, then according to CISG Article 7(2), a court or tribunal must attempt to resolve the issue "in conformity with the general principles on which [the Convention] is based."<sup>66</sup> In this situation, the court or tribunal should try to resolve the unsettled question by liberally applying specific provisions of

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that the creditor prove it suffered a loss in order to recover interest. *See ibid.*, p. 797.

<sup>62</sup> CISG art. 78.

<sup>63</sup> It actually seems more in line with Article 78 to award interest at a market savings rate, because this method would put the aggrieved party in the same position as if it had invested the money. In fact, a number of tribunals deciding investment disputes have awarded compound interest at a savings rate under the principle of full compensation. *See* *Compañía del Desarrollo de Santa Elena S.A. v. Costa Rica*, ICSID Case No. ARB/96/1 (2000), <http://www.worldbank.org/icsid/cases/awards.htm>; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, 14 July 2006, <http://www.worldbank.org/icsid/cases/awards.htm>; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, 6 Feb. 2007, <http://www.worldbank.org/icsid/cases/awards.htm>.

<sup>64</sup> *See generally* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 31 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in light of its object and purpose.").

<sup>65</sup> *See* *Bianca & Bonell*, *op. cit.*, p. 75; *Honnold*, *op. cit.*, p. 108.

the CISG by analogy.<sup>67</sup> In the event that the issue cannot be resolved using this analysis, the court or tribunal should then turn to domestic law to settle the matter.<sup>68</sup> What role do the UNIDROIT Principles then play? I believe that while the UNIDROIT Principles should not exert influence of their own force in interpreting the CISG, they can facilitate an understanding of the general principles and help support a gap filling rule derived from general principles of the CISG.<sup>69</sup>

I would like to illustrate this approach by addressing the issue of whether the CISG imposes a certainty of loss requirement. An analogical interpretation of the Convention would impose on the aggrieved party the need to show with reasonable certainty that it has suffered damage as a result of the breach of contract, and the UNIDROIT Principles support this result.

As you may recall, CISG Article 74 does not address a certainty of loss requirement, and the CISG does not explicitly dispense with it. However, the language of CISG Article 74 states that damages for breach of contract consist of “a sum equal to the loss suffered, including lost profits, as a consequence of the breach.”<sup>70</sup> Thus, CISG

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<sup>66</sup> CISG art. 7(2).

<sup>67</sup> See J. Gotanda, “Awarding Damages under the United Nations Convention on the International Sale of Goods: A Matter of Interpretation,” 37 *Geo. J. Int’l L.*, pp. 95, 121 (2005).

<sup>68</sup> CISG art. 7(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.”).

<sup>69</sup> They are an interpretative tool as opposed to a primary legal authority. Cf. Van Alstine, *op. cit.*, pp. 784-85.

<sup>70</sup> CISG art. 74.

Article 74 recognizes that for the aggrieved party to recover, it has to have sustained damage as a result of the breach of contract (“loss suffered”) or it must prove that damage is likely to occur (such as in the case of lost profits).<sup>71</sup> Another part of CISG Article 74 also aids in how to resolve this issue. Specifically, CISG Article 74 addresses the related issue of foreseeability (remoteness of loss), thus recognizing explicitly that there are limits to the principle of full compensation and that a breaching party is not liable for certain losses.<sup>72</sup> In addition, because the CISG explicitly addresses the issue of foreseeability, no one doubts that the requirement of causation of damage is implicitly required by the Convention. Thus, the principle that damage must be certain in order to be recoverable can be derived from the CISG.

Once we establish that certainty of loss is required, we can deduce the requisite standard by analyzing various articles of the CISG to see if a relevant standard exists.<sup>73</sup> This analysis leads to the conclusion that the aggrieved party must show with “reasonable certainty” that it has suffered damage as a result of the breach of contract. A “reasonableness” standard with regard to the certainty of loss can be inferred from other provisions and would be consistent with the CISG as a whole.<sup>74</sup> Indeed, Professor Michael Joachim Bonell writes that over two dozen provisions in the CISG provide for reasonableness, and that “[t]hese references demonstrate that under the Convention the

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<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> Gotanda, “Awarding Damages,” *op. cit.*, p. 127.

<sup>74</sup> *Ibid.* (citing Bianca & Bonell, *op. cit.*, pp. 80-81).

‘reasonableness’ test constitutes a general criterion for evaluating the parties’ behaviour to which one may resort in the absence of any specific regulation.”<sup>75</sup>

Here, the UNIDROIT Principles can inform an understanding of the CISG’s principles and support the conclusion derived from them. Article 7.4.3 states that “Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty.”<sup>76</sup> The comments explain that this article “reaffirms the well-known requirement of certainty of harm, since it is not possible to require the non-performing party to compensate harm which may not have occurred or which may never occur.”<sup>77</sup> Thus, Article 7.4.3 is based on the same principle underlying the CISG: full compensation is subject to limits, including this limit: one can recover only for harm that is actually suffered or is likely to occur. In this circumstance, the UNIDROIT Principles aid in understanding the doctrine of certainty of harm as well as supporting a requirement of “reasonable certainty” that can be articulated through the Convention itself. Importantly, the UNIDROIT Principles also show that a reasonable certainty requirement can be in accord with an internationally recognized principle.<sup>78</sup> Thus, the Principles

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<sup>75</sup> *Ibid.* A more exacting standard would be contrary to the purpose of Article 74, which is to provide full compensation to the injured party. Requiring a party to prove damages with mathematical precision would, in many instances, prevent a party from being fully compensated for its loss. In particular, it could preclude claims for lost profit, the only damage specifically mentioned as being recoverable in the CISG. In fact, Article 74 specifically included a reference to lost profit to ensure that it would be recoverable and an exacting certainty of loss requirement would thus be contrary to Article 74.

<sup>76</sup> UNIDROIT Principles art. 7.4.3.

<sup>77</sup> *Ibid.*, cmt. 1.

<sup>78</sup> *Cf.* Van Alstine, *op. cit.*, pp. 784-85.

reinforce ideals of maintaining the CISG's international character and promoting uniformity in the Convention's application.<sup>79</sup>

### **V. Applying the UNIDROIT Principles as Trade Usages**

Some have also argued that the UNIDROIT Principles can be made applicable to a contract governed by the CISG as trade usages pursuant to CISG Article 9(2).<sup>80</sup> I disagree with the broad application of the UNIDROIT Principles in this manner.

As noted, CISG Article 9(2) provides:

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.<sup>81</sup>

CISG Article 9 is not an appropriate vehicle to apply the UNIDROIT Principles in their entirety to fill gaps in the CISG's damages provisions for two reasons.<sup>82</sup> First, general contract rules typically do not qualify as trade usages, which are practices of commerce that are regularly observed by those involved in a particular industry or marketplace.<sup>83</sup> Second, the UNIDROIT Principles simply cannot represent a trade usage

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<sup>79</sup> CISG art. 7(1).

<sup>80</sup> See generally Fawcett, Harris & Bridge, *op. cit.*, p. 935-36 (discussing cases and authorities).

<sup>81</sup> CISG art. 9.

<sup>82</sup> Of course, as noted, the parties could expressly agree to apply the UNIDROIT Principles to fill gaps in or supplement the CISG.

<sup>83</sup> See Honnold, *op. cit.*, pp. 126-27 (noting the concept of customary law is "fundamentally



in their entirety. In order to qualify for incorporation *in toto* pursuant to CISG Article 9(2), all of the articles of the UNIDROIT Principles would have to be shown to be regularly observed and widely known.<sup>84</sup> This is not the case.

To be sure, there may be cases where an individual provision of the UNIDROIT Principles may be deemed a trade usage if the particular rule prescribed by the Principles is “a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.”<sup>85</sup> This determination, however, typically involves an individualized factual analysis.<sup>86</sup> Furthermore, in many cases, it would be difficult to show that a contract rule is a usage that is widely known to and regularly observed by parties to contracts of the type involved. For example, some have claimed that because the CISG is silent on the rate at which interest should accrue, the UNIDROIT Principles Article 7.4.9 providing, *inter alia*, that the rate of interest should be fixed at the average bank short-term lending rate to prime borrowers, could fill the

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different from the trade usages to which Article 9 refers”); Fawcett, Harris & Bridge, *op. cit.*, p. 936 (stating “general contract rules hardly qualify as usages, which are trade practices and understandings”).

<sup>84</sup> See Schlechtriem & Schwenger, *op. cit.*, pp. 147-53 (stating that, in the case of sets of rules, it is necessary to examine individually whether the requirements of CISG 9(2) are met for each rule concerned and noting that even the INCOTERMS, which contain standard trade definitions most commonly used in international sales contract, cannot be used to supplement the CISG in their entirety unless “secured through express and precise agreement”).

<sup>85</sup> CISG art. 9(2); see also ICC Award No. 8873 of 1997, *Journal de droit international* (1998) (ruling that the UNIDROIT Principles hardship provisions did not correspond to prevailing practice in international trade).

<sup>86</sup> See Schlechtriem & Schwenger, *op. cit.*, pp. 147-49.

void as a trade usage.<sup>87</sup> However, as noted, there exist differing views on how the rate of interest should be fixed under the CISG and most courts have applied national law to determine the applicable interest rate.<sup>88</sup> Thus, the approach advocated by the UNIDROIT Principles cannot be said to be a universal trade usage. In order to be applicable, proponents would have to show that the rule prescribed by UNIDROIT Principles Article 7.4.9 was regularly observed by and widely known to parties to contracts for the particular trade concerned.<sup>89</sup>

## VI. Conclusion

In summary, while the UNIDROIT Principles should not be used as the primary source of authority to fill gaps in the CISG, they can play a role in finding solutions to

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<sup>87</sup> See Thiele, *op. cit.* (citing cases and commentary); see also E. Diederichsen, “Commentary to Journal of Law & Commerce Case I; Oberlandesgericht, Frankfurt am Main,” 14 *J.L. & Com.*, pp. 177, 181 (1995).

<sup>88</sup> See generally Mazzotta, *op. cit.*

<sup>89</sup> Cf. Argentina 20 May 1991 National Commercial Court of First Instance (Elastar Sacifia v. Bettcher Industries), available at <http://cisgw3.law.pace.edu/cases/910520a1.html> (determining in a case governed by the CISG the amount of interest payable according to relevant trading custom).

Because the CISG is silent on the currency in which damages are to be assessed, one might be tempted to treat as a trade usage UNIDROIT Principles Article 7.4.12, providing that “[d]amages are to be assessed either in the currency in which the monetary obligation was expressed or in the currency in which the harm was suffered . . . .” UNIDROIT Principles art. 7.4.12. I simply cannot believe that such a rule of decision would qualify as a trade usage under CISG Article 9(2). Nevertheless, such an approach could be consistent with a solution reached through an analogical interpretation of the Convention as outlined above. See, e.g., M. Bonell, “The UNIDROIT Principles and CISG,” <http://cisgw3.law.pace.edu/cisg/biblio/bonell.html> (arguing “the principle of full compensation can be considered to be a general principle underlying CISG” and that this can provide the basis to fill the gap in the CISG with UNIDROIT Principles Article 7.4.12, which is also “inspired by the same principle”). See also Schlechtriem & Schwenger, *op. cit.*, pp. 761-62 (arguing in principle damages should be calculated in the currency in which the injured party suffered his loss or in which the profit would have been

questions unresolved by the text of the Convention. It is my hope that a proper dialogue between the two will ultimately lead to more uniform and equitable results under the Convention.

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