

assignment¹⁵⁸, contributory negligence, *i. e.*, joint contributors to the harm¹⁵⁹, and set-off¹⁶⁰ but not if the claims are based on the CISG¹⁶¹:

aa) **General Principles embodied in the CISG.** Recourse to the general principles on which the CISG is based is an attempt to build a systematic interpretation of the CISG. These general principles are discovered and built up progressively by case law and scholars. However, recourse to the general principles adds further problems to the method of filling gaps within the Convention. There is no enumeration of the general principles in the CISG and as their content and effect are not established within the Convention, there remains the obvious risk that interpreters would derive from the Convention not only different principles but also divergence effects¹⁶²; furthermore some confusion is observed in several cases between application by analogy and the application of a general principle¹⁶³. There are several striking examples such the interest rate in Art. 78¹⁶⁴, the use of general terms and conditions or the battle of the forms problem under Part II, where scholars and case law are in disagreement as to whether they are issues governed by the Convention, and if governed, what general principles are to be applied¹⁶⁵.

¹⁵⁸ *Oberster Gerichtshof* (Austria) 7 September 2000 (tombstones), CISG-Online 642 (Pace); *Oberlandesgericht Hamburg* (Germany) 25 January 2008 (inventory for a café), CISG-Online 1681 (Pace).

¹⁵⁹ *Arbitral Award*, Bulgarian Chamber of Commerce and Industry, 24 April 1996 (coal), CISG-Online 435 (Pace).

¹⁶⁰ *Oberlandesgericht Dusseldorf* (Germany), 25 July 2003 (rubber sealing parts), CISG-Online 919 (Pace); *Oberlandesgericht Köln* (Germany) 19 May 2008 (pesticide), CISG-Online 1700 (Pace). Also: *Kantonsgericht Freiburg* (Switzerland) 23 January 1998 (laundry machine), T. Maschinenbau GmbH v T. Maschinenvertrieb AG, CISG-Online 423; *Tribunale di Padova* (Italy) 25 February 2004 (agricultural products), SO.M.AGRI s.a.s. di Ardina Alessandro & C. v Erzeugerorganisation Marchfeldgemüse GmbH & Co. KG, CISG-Online 819 (Pace); and Decision 43 945/2007 of the *Single-Member Court of First Instance of Thessalonika* (Greece) 2008 (clothes) (Pace).

A discussion among scholars: *Schwenzer/Hachem*, in: *Schlechtriem/Schwenzer, Commentary* (2016), Art. 7 para. 29; *Ferrari*, in: *Ferrari/Flechtner/Brand, Draft Digest and Beyond* (2003), pp. 167–168.

¹⁶¹ *Oberlandesgericht München* (Germany) 9 July 1997 (leather goods), CISG-Online 282 (Pace); *Hanseatisches Oberlandesgericht Hamburg* (Germany) 26 November 1999 (jeans), CISG-Online 515 (Pace); *Arrondissementsrechtbank Arnhem* (Netherlands) 25 February 1993 (clothes), P.R. Van den Heuvel v Santini Maglificio Sportivo de Santini P&C S.A.S., CISG-Online 98 (Pace); *Landesgericht Mönchengladbach* (Germany) 15 July 2003 (filter), CISG-Online 813 (Pace), in relation with Art. 84(2) CISG; *Landgericht Stuttgart* (Germany), 29 October 2009 (artificial turf), CISG-Online 2017 (Pace): “A set-off is at least admissible in the field of application of the CISG without an express provision as long as the counterclaim is based on the same legal relationship”; *Bundesgerichtshof* (Germany), 14 May 2014 (coffee products), CISG-Online 2493 (Pace). See also: *Bridge*, in: *Ferrari/Flechtner/Brand, Draft Digest and Beyond* (2003), pp. 251–252. It is also considered that set off is also derived from Art. 88.3 (CISG-AC Opinion no 9, para 3.24). Contrary: *Tribunale di Padova* (Italy) 25 February 2004 (agricultural products), SO.M.AGRI s.a.s. di Ardina Alessandro & C. v Erzeugerorganisation Marchfeldgemüse GmbH & Co. KG, CISG-Online 819 (Pace): set-off is not governed by CISG “even when considering counterbalancing credits arising from contracts subject to the Convention”.

¹⁶² This is particularly so since according to some scholars Art. 7(2) rejects the common law approach to interpretation based upon a strict and literal reading: see *Bell*, *How the Fact of Accepting Good Faith as a General Principle of the CISG Will Bring More Uniformity*, *Review of the Convention on Contracts for the International Sale of Goods (CISG) (2005–2006)* 16.

¹⁶³ An example where general principles were applied in a case of application by analogy is the case decided by *Warsaw Court of Appeals* (Poland) 20 November 2008 (truck), CISG-Online 2539 (Pace) where the Court of Appeals stated that the Convention does not expressly govern the consequences of the termination of a contract as a result of the lapse of contractually established time limit. However, in light of Art. 7 CISG, which calls for the application of the general principles, Art. 81(2) CISG was applied.

¹⁶⁴ CISG-AC Opinion no 14.

¹⁶⁵ CISG-AC Opinion no 13. Other example is the burden of proof: *Ferrari*, *CISG and Private International Law*, in: *Ferrari, The 1980 Uniform Sales Law* (2003), p. 19 (40 *et seq.*), that choose it to illustrate the difficulties in distinguishing the internal and external gaps; and 2016 *UNCITRAL, Digest of Case Law on the CISG*, Art. 7 para. 20.

- 63 Since the Convention is neither a perfect model¹⁶⁶ nor an exhaustive text, some critical issues of divergent interpretation exist; transaction costs might be reduced through drafting contract clauses tailored for contracts under CISG. Far from being a disadvantage¹⁶⁷, the vagueness of the content and enumeration of the general principles is compensated by the flexibility and adaptability of the Convention provisions to permeate new general principles as the study and applicability of the Convention grows.
- 64 Apart from the clear principles embodied in Art. 7 (principles of internationality, uniformity and good faith), there are also several other principles easy to detect as embodied in the general dispositions of the Convention. These are found in Arts 1–13, particularly the reasonability principle (Arts 8, and *inter alia* 39, 43, 46, 70), freedom of form and evidence (Art. 11), freedom of contract or party autonomy (Art. 6), the rules in regard to the hierarchy of the norms, and the value of usages and practices established between the parties. In Part II (Formation of the Contract), principles include: the receipt or reception principle as a general principle for the effectiveness of declarations of will within Part II (Art. 24), the principle of exchange of information¹⁶⁸, the principle to preserve the contract (Arts 19(2) and 21(2)), estoppel and *venire contra factum proprium* (Arts 16(2)(b)) and 29(2)). In Part III principles include: the duty to cooperate (Arts 32(3), 48(2) and 60)¹⁶⁹, *pacta sunt servanda*, *favor executionis*¹⁷⁰, full compensation (Art. 74)¹⁷¹, the duty to mitigate (Art. 77)¹⁷², the right to withhold performance (Arts 58 and 71¹⁷³, 81(2), 85(2), and 86(1)), the synallagmatic principle (Arts 58, 71¹⁷⁴ and 81(2)), the avoidance of business disruption and economic waste (Arts 25 and 77)¹⁷⁵, etc¹⁷⁶.

¹⁶⁶ Tallon, Damages, Exemption Clauses and Penalties, 40 American Journal of Comparative Law (1992) 675 (675 seq.).

¹⁶⁷ But see a negative view: Andersen, General Principles of the CISG—Generally Impenetrable?, FS Kritzer (2008), p. 13 (13 *et seq.*).

¹⁶⁸ Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce (Serbia) 9 December 2002 (Aluminium), CISG-Online 2123 (Pace).

¹⁶⁹ Honnold, Uniform Law (2009), para. 100; Beraudo, The United Nations Convention on Contracts for the International Sale of Goods and arbitration, 5 ICC International Court of Arbitration Bulletin (1994) 63. See: Art. 5.3 PICC. Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce (Serbia) 9 December 2002 (aluminium), CISG-Online 2123 (Pace).

¹⁷⁰ National Commercial Court of Appeals, Division “A”, Buenos Aires (Argentina) 31 May 2007 (almonds), Sr. Carlos Manuel del Corazón de Jesús Bravo Barros v Salvador Martínez Gares (Pace) referring to specific performance.

¹⁷¹ Recognized as a gap filler in regard to the interest rate in Art. 78, Arbitral-Awards, *Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft – Wien* (Austria), 15 June 1994 (rolled metal sheets), No. SCH 4318/SCH-4366, CISG-Online 120/121 and also considering that the same result would be derived from Art. 7.4.9 PICC; Foreign Trade Court attached to the Serbian Chamber of Commerce (Serbia), 19 October 2009 (mineral water), CISG-Online 2265 (Pace); Foreign Trade Court attached to the Serbian Chamber of Commerce (Serbia), 6 May 2010 (agricultural products and grains), CISG-Online 2358 (Pace). Or the principle of full restitution derived from Arts 74 and 84(1) CISG to determine the *dies a quo* for the interest rate: *Audiencia Provincial de Girona* (Spain), 21 January 2016 (live molluscs), Alexandridis G. & CO. OESC v Treatment Servimant, SL, CISG-Online 2729.

¹⁷² *Inter alia*: Bundesgerichtshof (Germany), 26 September 2012 (clay), CISG-Online 2348 (Pace).

¹⁷³ The principle of simultaneous exchange of performances derives from Arts 58 and 71. Or *exceptio non adimpleti contractus* (Arbitral Award, ICC/11849, 2003 (fashion products) (Unilex)). From this principle it is derived that the buyer has the right to withhold payment of the price when the performance rendered is not in conformity with the contract: *Oberstergerichtshof* (Austria) 8 November 2005 (machine for recycling glass), CISG-Online 1156 (Pace).

¹⁷⁴ *Oberlandesgericht Köln* (Germany), 19 May 2008 (pesticide), CISG-Online 1700 (Pace).

¹⁷⁵ CISG-AC Opinion no 9, paras 3.11 and 3.23.

¹⁷⁶ Scholars have drawn up several lists of general principles which might be considered ambitious and are not always coincident. See: *Magnus*, General Principles of UN-Sales Law, International Trade and Business Law Annual (1997) 33 (33 *et seq.*) (Pace); Honnold, Uniform Law (2009), paras 99 *et seq.*; Bonell,

Further, other general principles apply to the whole Convention: the *favor contractus* principle¹⁷⁷ or *favor negotii* that might influence the interpretation¹⁷⁸ and conclusion of the contract and the pro-Convention principle. The pro-Convention principle, on the one hand, dictates an interpretation in favour of the applicability of the CISG¹⁷⁹, and as a consequence an international and uniform interpretation (Art. 7) would decrease transaction costs, and forum shopping as well as an exclusion of conflicts of law rules¹⁸⁰. On the other hand, this principle claims an extensive and broad interpretation of the gap-filling rule, attaching to the CISG several matters that otherwise might fall outside the scope of the Convention. To this regard, a high portion of the CISG is to be considered general contract law rules and the fact that there is not a general contract law treaty justifies a broader application of the Convention. Other general principles include the principle of *in dubio pro Conventione*¹⁸¹, which considers the preference in the applicability of the CISG before domestic law and the applicability of the CISG over the purely domestic or national public order¹⁸²; and the principle of equality between buyers and sellers that was considered decisive to the interpretation of Art. 74 and to conclude that attorney's fees were not to be covered within that provision¹⁸³.

Other principles need to be inferred from a process of abstraction and deduction on specific provisions of the Convention¹⁸⁴, e. g., case law has considered that the place of payment of damages is the creditors place of business as derived from Art. 57(1)(a) which deals with the place of payment of the purchase price¹⁸⁵.

in: Bianca/Bonell, Commentary (1987), Art. 7 CISG para. 2.3.2.1 (Pace); Ferrari, in: Ferrari/Flechtner/Brand, Draft Digest and Beyond (2003), pp. 160–170; Martínez Cañellas, La interpretación y la integración de la Convención de Viena sobre compraventa internacional de mercaderías de 11 de abril de 1980 (2004), pp. 322–337, considering the principles derived from scholarly work as well as for judicial or arbitral decisions; Rosenberg, The Vienna Convention: Uniformity in Interpretation for Gap-Filling- An Analysis and Application, 20 Australian Business Law Review (1992) 442 (449 *et seq.*); Janssen/Kiene, The CISG and Its General Principles, in: Janssen/Meyer (eds), CISG Methodology (2009), 270–285; and González Painemal, Interpretación e integración de la Convención de Viena de 1980 sobre los contratos de compraventa internacional de mercaderías, Santiago de Chile (2013), pp. 178–195. See also 2016 UNCITRAL, Digest of Case Law on the CISG, Art. 7 paras 12 *et seq.*

¹⁷⁷ See Keller, *Favor contractus: Reading the CISG in favor of the contract*, FS Kritzer (2008), p. 247 (247 *et seq.*).

¹⁷⁸ See Zuppi, Art. 8, para. 31 in this commentary; Schmidt-Kessel, in: Schlechtriem/Schwenzer, Commentary (2016), Art. 9 para. 51.

¹⁷⁹ See CISG-AC Opinion no 4, para. 4.4; CISG-AC Opinion no 16, comment 3.5 Or the principle *favor conventionis*: Martínez Cañellas, La interpretación y la integración de la Convención de Viena sobre compraventa internacional de mercaderías de 11 de abril de 1980 (2004), p. 316; and Moreno Rodríguez, Derecho aplicable y arbitraje internacional, Thomson/Aranzadi (2014), pp. 246–247.

¹⁸⁰ See De Ly, Uniform interpretation: What is being done? Official efforts, in: Ferrari, The 1980 Uniform Sales Law (2003), p. 335 (341). See advocating that CISG would reduce transaction costs: Lehn, in: Flechtner/Brand/Walter, Drafting Contracts (2007), pp. 263–265.

¹⁸¹ As considered by several authors: Lookofsky, In dubio pro conventione? Some thoughts about opt-outs, computer programs and pre-emption under the 1980 Vienna Sales Convention (CISG), 13 Duke Journal of Comparative and International Law (Summer 2003) 263 (263 *et seq.*) (Pace); and Martínez Cañellas, La interpretación y la integración de la Convención de Viena sobre compraventa internacional de mercaderías de 11 de abril de 1980 (2004) pp. 130–131.

¹⁸² Martínez Cañellas, La interpretación y la integración de la Convención de Viena sobre compraventa internacional de mercaderías de 11 de abril de 1980 (2004) p. 131.

¹⁸³ CISG-AC Opinion no 6, para. 5.4.

¹⁸⁴ Maskow, The Convention on the International Sale of Goods from the Perspective of the Socialist Countries, in: la Vendita Internazionale (1981), pp. 57 *et seq.*; Adame Goodard, Reglas de Interpretación de la Convención sobre compraventa internacional de mercaderías, Diritto del Commercio Internazionale (1990) 103 (112); following Bonell, in: Bianca/Bonell, Commentary (1987), Art. 7 para. 2.3.2.2. (Pace).

¹⁸⁵ Oberlandesgericht Düsseldorf (Germany) 2 July 1993 (vener cutting machine), CISG-Online 74 (Pace). The better rule derived from Arts 57(1) and 7 is that such payment is to be made at the obligee's place of business. Therefore, one might go even further and infer that the place of payment of any

- 67 **bb) General Principles external to the CISG: *Lex Mercatoria* and the PICC.** The autonomous interpretation of the Convention is defined by some scholars through a negative definition – no external concepts to interpret the CISG – and a positive one – interpretation of the Convention within its system and objectives¹⁸⁶. However, it is rather controversial¹⁸⁷ whether external principles may play a role in the interpretation and gap-filling of the CISG absent an agreement of the parties¹⁸⁸; from those that deny any role of the external principles, and particularly PICC¹⁸⁹, to those that identify the PICC as the general principles on which the Convention is based (Art. 7(2) CISG)¹⁹⁰. The common understanding is that the PICC are generally not considered to be the general principles of the CISG, but rather that it might be a tool to interpret the CISG¹⁹¹ or to fill its gaps, particularly where there is no collision between them¹⁹², or even applied as an expression of the good faith principle (Art. 7(1) CISG)¹⁹³. The answer also depends upon the applicable law to the contract as well as the dispute resolution method. In any case, modern trends in the interpretation of the CISG allow considering the *lex mercatoria* and

monetary obligation under CISG is determined by the creditor's place of business (see: CISG-AC Opinion no 14, at 9). However, there are opposite views, see *Ferrari*, CISG and Private International Law, in: Ferrari, The 1980 Uniform Sales Law (2003), p. 19 (43) and 2016 *UNCITRAL*, Digest of Case Law on the CISG, Art. 7 para. 18, *inter alia*: *Cour d'Appel de Paris* (France) 14 January 1998 (elephants), *Sté Productions SCAP v Faggioni*, CISG-Online 347 (Pace), unable to derive a general principle and thus the Court held that Art. 57(1)(a) does not express a general principle on the place of payment, because in the cases it governs the seller and the creditor coincide.

¹⁸⁶ *Torsello*, The CISG's impact on Legislators: The Drafting of International Contract Law Conventions, in: Ferrari, The 1980 Uniform Sales Law (2003), p. 230 (235 *et seq.*, note 229); *Gebauer*, Uniform Law, General Principles and Autonomous Interpretation, *Uniform Law Review* (2000), p. 686 (686 *et seq.*); *Zeller*, Four-Corners – The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods, 2003, Chapter 6 (Pace); *Schwenzer/Hachem*, in: *Schlechtriem/Schwenzer*, Commentary (2016), Art. 7 para. 26.

¹⁸⁷ Cf. *Perales Viscasillas*, The Role of the UNIDROIT Principles and the PECL in the interpretation and gap-filling of CISG, in: *Janssen/Meyer* (eds), *CISG Methodology* (2009), pp. 287 *et seq.*

¹⁸⁸ See UNIDROIT Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts (2013) which provides a model clause for the use of PICC and CISG to be included in the contract and a model clause for use after a dispute has arisen (Models 3 and 4). As pointed out in comment 3 to Model Clause 4 by using it there would be an implied derogation of Art. 7.2 CISG.

¹⁸⁹ Among the most recent ones: *Flehtner*, Uniformity and Politics: Interpreting and filling gaps in the CISG. *Festschrift für Ulrich Magnus zum 70 Geburtstag*. Sellier (2014), pp. 196–198 discussing the “aggressive approach” v “more cautious approach”, critical to PICC considering that Art. 7.1 CISG principles might conflict with those of PICC; and *Fogt*, Private International Law in the process of harmonization of International Commercial Law: “The Ugly Duckling?”. *Unification and Harmonization of International Commercial Law. Interaction of Deharmonization?*. Edited by Morten M. Fogt. *Walters Kluwer*, (2012), pp. 97–98.

¹⁹⁰ Curiously enough Comment 3 to Model clause 4 of the UNIDROIT Model Clauses (*supra* footnote 188) recognizes that the general principles under Art. 7.2 CISG “are as such not identical with the UNIDROIT Principles”.

¹⁹¹ *Magnus*, *Harmonization and Unification of Law by means of general principles. Unification and Harmonization of International Commercial Law. Interaction of Deharmonization?*. Edited by Morten M. Fogt. *Walters Kluwer* (2012), p. 173 referring also to other principles but with more emphasis on PICC.

¹⁹² *Michaels*, Preamble, Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC). Edited by Stefan Vogenauer, 2nd edition, Oxford University Press, 2015, No 110, in so far as PICC reinstate the CISG's general principles. But PICC cannot automatically and without exception be used to supplement the CISG (*id.*, No 124). Similarly: *Monberg*, The UNIDROIT Principles – The Ugly Duckling of Gap-Filling Instruments under the CISG (2012) (Pace).

¹⁹³ *Gerechthof's Hertogenbosch* (The Netherlands), 16 October 2002 (plants), CISG-Online 816 (Pace) analysing an international sales of goods contacts under the CISG that, in order to achieve a uniform and international solution, it should be interpreted in light of PICC (also PECL). The Tribunal considered the comments to Arts 2.20 PICC and 2.104 PECL in the interpretation of the CISG.

the PICC¹⁹⁴, as a means of interpreting and supplementing the CISG when no general principles within the Convention are found¹⁹⁵ or as to be applied for matters excluded from CISG such as limitation periods¹⁹⁶ or to validity issues in a direct application of chapter 3 PICC¹⁹⁷ - a solution that is based upon the uniformity principle (Art. 7(1))¹⁹⁸. Furthermore, after the UNCITRAL endorsement of the PICC, the legitimacy behind the Principles to play an interpretative and supplementary role towards the CISG has increased (Art. 7)¹⁹⁹. This is particularly so since the endorsement is not restricted to the use by the parties, as happens to be the case with other international instruments endorsed by UNCITRAL²⁰⁰.

¹⁹⁴ And to a lesser extent the PECL, since international instruments ought to prevail over regional instruments: CISG-AC Declaration no 1, The CISG and Regional Harmonization, Rapporteur: Professor Michael Bridge, London School of Economics, London, United Kingdom, 3 August 2012 (at <http://cisg-ac.org>).

¹⁹⁵ Cf. *Perales Viscasillas*, The Role of the UNIDROIT Principles and the PECL in the interpretation and gap-filling of CISG, in: Janssen/Meyer, CISG Methodology (2009), pp. 287 *et seq.* Several courts and arbitral awards have considered PICC as the general principles on which the CISG is based. See *Arbitral Award*, ICC 8817/1997, 1 December 1997 (food products), CISG-Online 776 (Pace) (YCA, XXV, 2000), in relation with an exclusive distribution contract in Spain and Portugal, where the sole arbitrator declared that the CISG was applicable to the case as well as its general principles as embodied in the UNIDROIT Principles mentioning Arts 9(1), 25, 64, 74 and 78 CISG. Particularly in relation with the rate of interests (Art. 78 CISG): *Arbitral Award*, ICC 8128/1995 (PICC and PECL), 1 January 1995 (chemical fertilizer), CISG-Online 526 (Pace); *Arbitral Award*, ICC 8769/1996 (PICC), 1 December 1996 (electrical appliances plus tooling), CISG-Online 775 (Pace); *Supreme Economic Court of the Republic of Belarus*, 20 May 2003 (fish flour), Holzimpex, Inc. v Sozh State farm complex, CISG-Online 1040, directly applying PICC to fill the rate of interest. Also in relation with *hardship* as an impediment under Art. 79 and so that under Art. 7(2) the general principles “as incorporated *inter alia* in the Unidroit Principles of International Commercial Contracts, the party who invokes changed circumstances that fundamentally disturb the contractual balance, as mentioned in paragraph 1, is also entitled to claim the renegotiation of the contract”: *Court of Cassation* (Belgium) 19 June 2009 (steel tubes), CISG-Online 1963 (Pace). Or as in *Arbitral Award*, ICC 12 460/2004 (Unilex): “CISG, as per its article 7, may be supplemented by those general principles which have inspired its provisions and particularly those which have been substantiated and codified in the UNIDROIT Principles of International Commercial Contracts and actually used in relation with the CISG implementation. This can be observed in arbitral jurisprudence (see ICC Publication No. 642.2002) and in various ICC precedents. At the hearing, the Tribunal raised the issue with the parties whether they might be relevant. The Tribunal has accordingly concluded that the UNIDROIT Principles should provide guidance”. See also: *Arbitral Award*, ICC 12 097/2003 (fashion products) (Unilex); *Arbitral Award*, ICC 11 638/2002 (unidentified goods). For a more detailed discussion, *infra*, *Atamer*, Art. 79, paras 78–86. Finally as usages of trade in relation to CISG, considering Art. 6.1.9 PICC as a confirmation also of the general principles embodied CISG: *Corte Cubana de Arbitraje Comercial Internacional* (Cuba), 30 September 2013 (lifting platform), CISG-Online 2579 (Pace).

¹⁹⁶ *Audiencia Provincial de Madrid* (Spain), 17 February 2015 (Garments), CISG-Online 2620 (Pace) resorting to Art. 10.2 PICC. Contrary: *Michaels*, Preamble, Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC). Edited by Stefan Vogenauer, 2nd edition, Oxford University Press (2015) No 126.

¹⁹⁷ *Perales Viscasillas*, The Role of the UNIDROIT Principles, pp. 286 *et seq.*; *Tribunal de Justiça do Rio Grande do Sul* (Brasil) 30 March 2017 (electric motors) (cisgspanish.com) in relation with issues related to the nullity of the contract.

¹⁹⁸ *Perales Viscasillas*, The Role of the UNIDROIT Principles, pp. 286 *et seq.*

¹⁹⁹ Report of the United Nations Commission on International Trade Law on the work of its fortieth session Vienna, 25 June-12 July 2007 A/62/17 (Part I) General Assembly (<http://www.uncitral.org>), paras 210 *et seq.*: “Taking note that the Unidroit Principles 2004 complement a number of international trade law instruments, including the United Nations Convention on Contracts for the International Sale of Goods (1980)”, “Noting that the preamble of the Unidroit Principles 2004 states that (...)”, “Congratulating Unidroit on having made a further contribution to the facilitation of international trade by preparing general rules for international commercial contracts”, “Commends the use of the Unidroit Principles 2004, as appropriate, for their intended purposes”. See resorting to the UNCITRAL Recommendation on Incoterms 2000: *Audiencia Provincial de Valencia* (Spain) 7 June 2003 (concentrated grape juice), Cherubino Valsangiacomo, S.A. v American Juice Import, Inc., CISG-Online 948 (Pace) (www.cisgspanish.com).

²⁰⁰ Cf. UNCITRAL YB (2000), paras 432–434.

III. Comparable Rules

- 68 The majority of uniform international commercial law texts have a rule on interpretation and gap-filling following the model of Art. 7 CISG²⁰¹. In fact, UNCITRAL was the first organization to insert a specific interpretation provision in its uniform law instruments²⁰², and thus a systematic interpretation of uniform law instruments is to be followed²⁰³. According to this approach, a coherent interpretation among uniform law instruments should be considered as a general principle of interpretation of uniform law instruments; as a consequence the interpretation more favourable to coherence among uniform international texts is to be preferred.
- 69 The influence of Art. 7 is not only seen in the instruments of UNCITRAL²⁰⁴, but also of UNIDROIT²⁰⁵, as well as other regional texts, like the PECL and DCFR²⁰⁶. Usually the model is reproduced in its entirety, although sometimes with minor changes. In a minority number of the texts, substantive changes are considered due to the need to further develop the rules, or accommodate them to the specificities of the subject matter of the instrument.
- 70 Contrary to the CISG, the PICC do not mention subsidiary recourse the national law²⁰⁷. This omission is consistent with the creation of an autonomous self-sufficient system.
- 71 The recognition of the principle of good faith and fair dealing in Art. 1.7 PICC (also in Art. 1:106 PECL)²⁰⁸, not expressly as a principle of interpretation of the PICC but as a

²⁰¹ Before similar provisions with no reference to good faith: UN Convention on the Limitation Period in the International Sale of Goods (14 June 1974) and Art. 3 of the Convention on the Carriage of Goods by sea, 1978 (Hamburg Rules).

²⁰² *De Ly*, Uniform interpretation: What is being done? Official efforts, in: Ferrari, *The 1980 Uniform Sales Law* (2003), p. 335 (343).

²⁰³ See Ferrari, *The relationship between international uniform contract law Conventions*, *Uniform Law Review* (2000) 76–78, who refers to the Conventions and justifying this approach on the basis that the different Conventions have the same goal and in the existence of identical interpretation rules.

²⁰⁴ Follow Art. 7(1) CISG, e.g.: Art. 4 United Nations Convention on International Bills of Exchange and International Promissory Notes of 1988; Art. 5 of the UNCITRAL Convention on Independent Guarantee and Stand By Letters of Credit of 1995 that refers to good faith; Art. 8 UNCITRAL Model Law on Cross Border Insolvency; Art. 5 UN Convention on independent guarantees and stand-by letters of credit; Art. 5(1) of the UN Convention on the Use of Electronic Communications in international contracts (2005); Art. 2 UN Convention on the contracts for the international carriage of goods wholly or partly by sea (2008); Art. 6.1 UNIDROIT Convention on Agency in the International Sale of Goods (Geneva, 17 February 1983); and Art. 4.1 UNIDROIT Model Law on Leasing (13 November 2008).

²⁰⁵ Art. 6 UNIDROIT Convention on Agency in the International Sale of Goods (Geneva, 17 February 1983) is a copy of Art. 7 CISG. Art. 5 of the UNIDROIT Convention on International Interests in Mobile Equipment (Cape Town, 2001) follows Art. 7 CISG but it considers also the Preamble and there is no reference to the good faith principle. Similar approach is seen in Art. 4 of the UNIDROIT Convention on Substantive Rules for Intermediated Securities (2009) where also the principle of predictability in its application is considered.

²⁰⁶ Art. 1:106 and Art. 1:201 PECL; Art. I.-1:102(3) and (4) DCFR are similar to Art. 7 CISG with some departures do to the different scope of application.

²⁰⁷ The same approach is found in Art. 3(2) UNCITRAL Model Law on Electronic Commerce (1996); Art. 4(2) UNCITRAL Model Law on Electronic Signature (2001); Art. 2(2) UNCITRAL Model Law on International Commercial Conciliation (2002); Art. 2A UNCITRAL Model Law on International Commercial Arbitration (1985 as amended in 2006); and Art. 4.2 UNIDROIT Model Law on Leasing (13 November 2008).

²⁰⁸ More details: *Magnus*, Comparative editorial remarks on the provisions regarding good faith in CISG Art. 7(1) and the UNIDROIT Principles Art. 1.7., in: Felemegas (ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods* (1980) as *Uniform Sales Law* (2007), pp. 45 *et seq.*; and Felemegas, Comparison between the provision regarding the concept of good faith in CISG Art. 7 and the counterpart provisions of the PECL, in: Felemegas (ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods* (1980) as *Uniform Sales Law* (2007), pp. 268 *et seq.*

mandatory standard of behaviour of the parties, is one of the greatest and most correct innovations of the PICC. The drafters of the PICC were aware of the compromise that embodied good faith during the discussions of the Vienna Sales Convention. They have extracted good faith from the interpretative principles and have relocated it in an independent disposition with a mandatory character (“The parties may not exclude or limit this duty” Art. 1.7 (2) PICC). At the same time they have given to good faith its natural content (“Each party must act in accordance with good faith and fair dealing in international trade”). Art. 1.7 PICC is complemented by Art. 2.1.15 (Negotiations in bad faith) and 2.1.16 (Duty of confidentiality).

Article 8

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

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Outline

I. Importance and Role of Provision	1
1. Introduction	1
2. Legislative history	6
II. Detailed Commentary	7
1. First Paragraph	7
a) The statement	7
b) The meaning of “intent”	15
c) Objective and subjective intent	19
2. The second paragraph: The reasonable understanding	23
3. The third paragraph	29
III. Comparable Rules	34