# GENERAL PRINCIPLES AND INTERNATIONAL UNIFORM COMMERCIAL LAW CONVENTIONS: A STUDY OF THE 1980 VIENNA SALES CONVENTION AND THE 1988 UNIDROIT CONVENTIONS ON INTERNATIONAL FACTORING AND LEASING

**Franco Ferrari†**


I. Introduction .................................... 157
II. Praetor Legem and Intra Legem Gaps ............ 161
III. The General Principles of the Vienna Convention . 168
IV. The General Principles of the Ottawa Conventions .................................... 176
V. Conclusion ........................................ 181


## I. INTRODUCTION

In the last few years, various works have been dedicated to the study of the general principles and their impact on domestic private law.[1] But in order to obtain a more global view of the influence of the general principles, one cannot omit their impact as derived from supranational sources. It is particularly important to consider such influences on the private law as created by international uniform commercial law conventions.

Among the most important conventions on uniform commercial law in force are the 1980 United Nations Convention on

---

† Professor of Comparative Private Law, Katholieke Universiteit Brabant, the Netherlands; Visiting Professor of Law, University of Missouri at Kansas City School of Law, Kansas City; J.D. (Honors), Bologna University, Italy; LL.M., Augsburg University, Germany.

The author gratefully acknowledges the help of Ms. Elena Baccioli, J.D. Candidate, and Ms. Beatrice Smith, J.D. Candidate, in preparing the English version of this text.

[1] *See, e.g.*, GUIDO ALPA, PRINCIPI GENERALI (1995).



1

Contracts for the International Sale of Goods[2] and the two 1988 Ottawa Conventions: International Factoring[3] and International Financial Leasing.[4] The CISG assumes importance due to its great success.[5] This is evidenced by the number of contracting States[6] and by the attention it has drawn from schol-

---

[2] United Nations Convention on Contracts for the International Sale of Goods, 19 I.L.M. 668 (1980) [hereinafter CISG]. This Convention was held in Vienna and is often referred to as the Vienna Convention. The texts of the other official versions (namely the Arab, Chinese, French, Russian and Spanish ones) are also available. *See* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 681-806 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987); THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS. A HANDBOOK OF THE BASIC MATERIALS 169-246 (Daniel Barstow Magraw & Reed R. Kathrein eds., 2d ed. 1990). For an examination of the various abbreviations used in the numerous countries for the CISG, see Axel Flessner & Thomas Kadner, *CISG? Zur Suche nach einer Abkürzung für das Wiener öbereinkommen über Verträge über den internationalen Warenkauf vom 11. April 1980*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 347 (1995).

[3] Unidroit Convention on International Factoring, *opened for accession* May 28, 1988, 27 I.L.M. 943 (1988) [hereinafter Convention on International Factoring].

[4] Unidroit Convention on International Financial Leasing, *opened for accession* May 28, 1988, 27 I.L.M. 922 (1988) [hereinafter Convention on International Financial Leasing].

[5] It has often been pointed out that the CISG is to be considered a great success. *See e.g.*, Frank Diedrich, *Lückenfüllung im internationalen Einheitsrecht. Möglichkeiten und Grenzen richterlicher Rechtsfortbildung im Wiener Kaufrecht*, RECHT DER INTERNATIONALEN WIRTSCHAFT 353 (1995). Some commentators have suggested that the CISG even represents "the biggest success so far achieved by inter-governmental attempts at unification of commercial laws." A. H. Herman, *Business and the Law: Handle with Care - A.H. Hermann on some Pitfalls of Foreign Trade under the Vienna Convention*, FIN. TIMES, Sept. 21, 1993, at Business Section 1.

[6] The CISG is in force in the following countries: Argentina (January 1, 1988), Australia (April 1, 1989), Austria (January 1, 1989), Belarus (November 1, 1990), Belgium (November 1, 1997), Bosnia-Herzegovina (March 6, 1992), Bulgaria (August 1, 1991), Canada (May 1, 1992), Chile (March 1, 1991), China (January 1, 1988), Cuba (December 1, 1995), Czech Republic (January 1, 1993), Denmark (March 1, 1990), Ecuador (February 1, 1993), Egypt (January 1, 1988), Estonia (October 1, 1994), Finland (January 1, 1989), France (January 1, 1988), Georgia (September 1, 1995), Germany (January 1, 1991), Greece (February 1, 1999), Guinea (February 1, 1992), Hungary (January 1, 1988), Iraq (April 1, 1991), Italy (January 1, 1988), Latvia (August 1, 1998), Lesotho (January 1, 1988), Lithuania (February 1, 1996), Luxembourg (February 1, 1998), Mexico (January 1, 1989), Moldova (November 1, 1995), Mongolia (January 1, 1999), the Netherlands (January 1, 1992), New Zealand (October 1, 1995), Norway (August 1, 1989), Poland (June 1, 1996), Romania (June 1, 1992), Russian Federation (September 1, 1991), Singapore (March 1, 1996), Slovakia (January 1, 1993), Slovenia (June 25, 1991), Spain (August 1, 1991), Sweden (January 1, 1989), Switzerland (March 1, 1991), Syrian Arab Republic (January 1, 1988), Uganda (March 1, 1993), Ukraine (Febru-

ars[7] and judges[8] alike. The Ottawa Conventions are also of

ary 1, 1991), United States (January 1, 1988), Uzbekistan (December 1, 1997), Yugoslavia (January 1, 1988) and Zambia (January 1, 1988). For a recent list of Contracting States, see also UNIFORM L. REV. 143 (1996).

[7] More than 2,000 monographs and law review articles have been written on the CISG and numerous bibliographies have been published in paper-form. *See* MICHAEL R. WILL, CISG. THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS. INTERNATIONAL BIBLIOGRAPHY 1980-1995. THE FIRST 150 OR SO DECISIONS (1995); Peter Winship, *A Bibliography of Commentaries on the United Nations International Sales Convention*, 21 INT'L LAW. 585 (1987); Peter Winship, *The U.N. Sales Convention. A Bibliography of English-Language Publications*, 28 INT'L LAW. 401 (1994). However, the most complete list of publications on the CISG can be found on the Internet at a site created by the Institute of International Commercial Law of the Pace University School of Law, White Plains, New York. *See Pace University School of Law, Pace Law Library and the Institute of International Commercial Law* (last modified Feb. 9, 1998) <http://www.cisg.law.pace.edu>.

For a short discussion of how to use this internet site, see Albert H. Kritzer, *The Convention on Contracts for the International Sale of Goods: Scope, Interpretation and Resources*, 1 REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 147 (1995).

[8] The CISG's importance in practice is evidenced by its numerous applications. In 1996, the CISG had already been applied nearly 300 times. *See* MICHAEL R. WILL, CISG: THE FIRST 284 OR SO DECISIONS (1996). Today, the CISG has been applied more than 350 times. *See Pace University School of Law, Pace Law Library and the Institute of International Commercial Law* (last modified Feb. 9, 1998) <http://www.cisg.law.pace.edu>.

For comments on these applications, see, *e.g.*, Michael Joachim Bonell & Fabio Liguori, *The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law (Part I)*, UNIFORM L. REV. 147 (1996); *The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law (Part II)*, UNIFORM L. REV. 359 (1996); James J. Callaghan, *U.N. Convention on Contracts for the International Sale of Goods: Examining the Gap-Filling Role of the CISG in Two French Decisions*, 14 J.L. & COM. 183 (1995); Louis Del Duca & Patrick Del Duca, *Practice under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders*, 27 UCC L.J. 331 (1995); Franco Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing*, 15 J.L. & COM. 1 (1995); FRANCO FERRARI, LA VENDITA INTERNAZIONALE. APPLICABILITÀ ED APPLICAZIONI DELLA CONVENZIONE DI VIENNA DEL 1980 (1997); Harry M. Flechtner, *More U.S. Decisions on the U.N. Sales Convention: Scope, Parole Evidence, "Validity," and Reduction of Price under Article 50*, 14 J.L. & COM. 153 (1995); Martin Karollus, *Judicial Interpretation and Application of the CISG in Germany 1988-1994*, 1 REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 51 (1995); Martin Krollus, *Rechtsprechung zum UN-Kaufrecht (II)*, RECHT DER WIRTSCHAFT 168 (1992); Martin Karollus, *UN-Kaufrecht: Erste Gerichtsentscheidungen*, RECHT DER WIRTSCHAFT 319 (1991); Fabio Liguori, *La convenzione di Vienna sulla vendita internazionale di beni nella pratica: un'analisi critica delle primo cento decisioni*, FORO ITALIANO 145 (VI/1996); Ulrich Magnus, *Stand und Entwicklungen des UN-Kaufrechts*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 202 (1995); Ulrich Magnus, *Aktuelle Fragen des UN-Kaufrechts*, ZEITSCHRIFT FÜR EUROPÄISCHES

notable importance, as they constitute the most recent uniform commercial law conventions to come into force.[9]

This article examines the relationship between the general principles and these Conventions. Initially, this does not appear to be a problematic task, considering that Article 7(2) of the CISG, Article 4(2) of the Convention on International Factoring, and Article 6(2) of the Convention on International Financial Leasing make express reference to general principles.[10] These Articles affirm that "questions concerning matters governed [by these Conventions] which are not expressly settled in [them] are to [be] settled in conformity with the general principles on which [they are] based."[11] They also state that in the absence of these principles, such matters must be resolved in conformity with the law applicable by virtue of the rules of private international law. It appears, therefore, that the general

PRIVATRECHT 79 (1993); Burghard Piltz, *Neue Entwicklungen im UN-Kaufrecht*, NEUE JURISTISCHE WOCHENSCHRIFT 1101 (1994); Burghard Piltz, *Neue Entwicklungen im Un-Kaufrecht*, NEUE JURISTISCHE WOCHENSCHRIFT 2768 (1996); Gert Reinhart, *Zum Inkrafttreten des UN-Kaufrechts für die Bundesrepublik Deutschland: Erste Entscheidungen deutscher Gerichte*, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 289 (1990).

[9] For comments on these conventions referred to in the text occasioned by their coming into force, see Jean-Paul Béraudo, *Le nouveau droit du crédit-bail international et de l'affacturage international (1er mai 1995)*, LA SEMAINE JURIDIQUE 185 (1995); Giorgio De Nova, *Le convenzioni Unidroit sul leasing e sul factoring internazionali*, CONTRATTI 418 (1995); Paola Mariani, *L'entrata in vigore delle due convenzioni UNIDROIT sul leasing internazionale e sul factoring internazionale*, RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 562 (1995).

[10] Other conventions also make express reference to general principles. *See e.g.*, Geneva Convention on Agency (1983) art. 6(2), *reprinted in* UNIFORM L. REV. 133 (1983). For comments on this convention, see Michael Joachim Bonell, *Una nuova disciplina in materia di rappresentanza: la Convenzione di Ginevra del 1983 sulla rappresentanza nella compravendita internazionale di merci*, RIVISTA DI DIRITTO COMMERCIALE 289 (1/1983); Michael Joachim Bonell, *The 1983 Geneva Convention on Agency in the International Sale of Goods*, 32 AM. J. COMP. L. 717 (1984); Paolo Maria Vecchi, *La Convenzione di Ginevra sulla rappresentanza nella vendita internazionale di merci*, *in* 2/2 I CONTRATTI IN GENERALE 889 (Guido Alpa & Mario Bessone eds., 1991).

For a list of uniform law conventions containing similar provisions, see Ernst A. Kramer, *Uniforme Interpretation von Einheitsprivatrecht - mit besonderer Berücksichtigung von Art. 7 UNKR*, JURISTISCHE BLÄTTER 140 (1996); Robert Hillman, *Cross-Reference and Editorial Analysis of Article 7* (Sept. 1997) <http://cisg.law.pace.edu/cisg/text/hillman.html>.

In addition, other conventional drafts also make express reference to general principles. See, *e.g.*, UNCITRAL Draft Uniform Rules on Assignment in Receivables Financing, art. 4(2) *reprinted in* UNCITRAL Doc. A/CN.9/432 (1996).

[11] CISG, *supra* note 2, art. 7(2).

principles, at least within the context of these Conventions, have the function of filling gaps.[12] These gaps are inevitable, as such Conventions are not meant to be exhaustive;[13] they govern only a limited number of matters. This inevitability derives from the fact that these conventions constitute a compromise between the different ideas expressed by national representatives of diverse economic, political, and legal systems, all promoting their own national interests.[14]

By limiting oneself to the observation that general principles are to be used to fill these gaps, it is impossible to clarify some of the more important issues that the Articles raise. On the one hand, the specific identification of the general principles is referred to *in abstracto*. On the other hand, it must be determined in which instances recourse must be derived from general principles (*i.e.* the type of gaps to be filled by having recourse to such principles must be identified). Thus, the assertion that the general principles constitute the means to fill the gaps can only be a starting point and not the result of a study of the relationship between the uniform commercial law conventions and general principles.

## II. PRAETOR LEGEM AND INTRA LEGEM GAPS

No convention can, nor wants to, pose itself as an exhaustive body of rules.[15] As such, the drafters of these Conventions included gap filling provisions.[16] According to these rules, gaps are to be filled by having recourse to the general principles upon which each Convention is based. However, a more in depth inspection of the Articles which articulate this rule show that not

---

[12] For a similar statement referring solely to Article 7(2) of the CISG, see PETER SCHLECHTRIEM, INTERNATIONALES UN-KAUFRECHT 31 (1996).

[13] *See* Giuseppe Benedetti, *Commento all'art. 4 della Convenzione di Vienna*, NUOVE LEGGI CIVILI COMMENTATE 9, (1989).

[14] *See, e.g.*, Gargiulo & Giancoli, *La cessione del credito sotto la lente Unidroit*, COMMERCIO INTERNAZIONALE 1305 (1993).

[15] *See* Benedetti, *supra* note 14, at 9.

[16] One commentator has stated in regard to Article 7(2) of the CISG that "the justification of such a provision can be derived from the fact that it is hardly possible for an international group to draft a voluminous and complicated piece of legislation without leaving gaps behind." Gyula Eörsi, *General Provisions*, *in* INTERNATIONAL SALES. THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS II-1, II-11 (Hans Smit and Nina Galston eds., 1984).

all the gaps are to be filled by resorting to general principles. In fact, the relevant Articles provide for recourse to general principles only with respect to matters that are governed by, but not expressly settled in, the Conventions. It follows that the gaps to which the rule is to be applied are not *intra legem* gaps[17] (*i.e.* those relating to matters which are outside the ambit of application of the Conventions).[18] Among these matters are those contemplated by Article 4(a) and (b) of the Vienna Convention. Such issues include "the validity of the contract or of any . . . usage,"[19] "the effect which the contract may have on the property in the goods sold,"[20] and those contemplated by Article 5 of the Vienna Convention, whereby it "does not apply to the liability of the seller for death or personal injury caused by the goods to any person."[21]

The general principles are only contemplated for the purpose of filling *praetor legem* gaps.[22] *Praetor legem* gaps are those

---

[17] *See* Franco Ferrari, *Interprétation uniforme de la Convention de Vienne de 1980 sur la vente internationale*, REVUE INTERNATIONALE DE DROIT COMPARÉ 813, 842-43 (1996) (providing an explanation of this terminology).

[18] Note, however, that according to some authors, the issues falling outside the scope of a Convention should not all be labeled gaps. *See* Michael Joachim Bonell, *Art. 7*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 75-76 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987).

[19] CISG, *supra note* 2, art. 4(a).

[20] CISG, *supra note* 2, art. 4(b).

[21] CISG, *supra note* 2, art. 5. It goes without mentioning that gaps can be found in respect to the UNIDROIT Conventions as well. The Ottawa Convention does not deal with the issue of formalities as to the validity of the execution of the factoring contract. *See* Albert Reisman, *The Uniform Commercial Code and the Convention on International Factoring*, 22 UCC L.J. 320, 323-24 (1990). The Convention also doesn't deal with third party effectiveness of assignments of receivables. *See* BARBARA A. DIEHL-LEISTNER, INTERNATIONALES FACTORING. EINE RECHTSVERGLEICHENDE DARSTELLUNG ZUM RECHT DER BUNDESREPUBLIK DEUTSCHLAND, FRANKREICHS UND DER USA UNTER EINSCHLUß DER UNIDROIT-KONVENTION ÜBER DAS INTERNATIONALE FACTORING 136 (1992). In addition, the Convention doesn't deal with priority among conflicting claimants as to the accounts receivable. *See* Mary Rose Alexander, Note, *Towards Unification and Predictability: The International Factoring Convention*, 27 COLUM. J. TRANSNAT'L L. 353, 366 (1989). *See also* William C. Philbrick, *The Use of Factoring in International Commercial Transactions and the Need for Legal Uniformity as Applied to Factoring Transactions between the United States and Japan*, 99 COM. L.J. 141, 155 (1994).

[22] The use of the terminology *praetor legem* and *intra legem* gaps has recently been criticized. *See* Kramer, *supra* note 10, at 147 n.90.

relating to matters governed by the Conventions,[23] but which they do not expressly resolve. In order to fill these gaps, which are sometimes referred to as internal gaps as opposed to external gaps,[24] three different methods exist. The first method is based on the application of one of the Convention's general principles. This method is comparable to that used in *civil law* countries to fill gaps in their codes and has been labeled as a "true code" approach.[25] The second method involves the application of the applicable "external" legal rules.[26] This method

---

23 The "first condition for the existence of a gap in the sense of Article 7(2) is that the case at hand relates to 'matters governed by the Convention.'" Bonell, *supra* note 18, at 75.

24 For the use of these expressions, see BETTINA FRIGGE, EXTERNE LÜCKEN UND INTERNATIONALES PRIVATRECHT IM UN-KAUFRECHT (1994); ERIK JAYME, LA COMPRAVENDITA INTERNAZIONALE DI BENI MOBILI NEI RAPPORTI TRA ITALIA E GERMANIA 27 (1990); SCHLECHTRIEM, *supra* note 11, at 21; Peter Schlechtriem, *Das Wiener Kaufrechtsübereinkommen von 1980 (Convention on Contracts for the International Sales of Goods)*, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 280 (1990).

25 William D. Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L. F. 291, 292 (1962). The "true code" approach corresponds to the so-called "internal analogy approach". *See* ALBERT H. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 117 (1989). "[A] court should look no further than the code [or any kind of legislation] itself for solution to disputes governed by it - its purposes and policies should dictate the result even where there is no express language on point." Robert A. Hillman, *Construction of the Uniform Commercial Code: UCC Section 1-103 and "Code" Methodology*, 18 BRIT. COLUM. INDUS. & COM. L. REV. 655, 657 (1977). In other words, a true code "is comprehensive in that it is sufficiently inclusive and independent to enable it to be administered in accordance with its own basic policies." Hawkland, *supra*, at 292.

26 This approach seems to be favored in common law. *See* Issak I. Dore & James E. Defranco, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23 HARV. INT'L L. J. 49, 63 (1982). The authors also assert that U.C.C. § 1-103, which provides that "[u]nless displaced by particular provisions of the Act, the principles of law and equity . . . shall supplement its provisions, . . . appears to support [the thesis of the U.C.C. being based upon] the common law approach." *Id.* at 64.

However, other commentators base their views on U.C.C. § 1-102(1) which states that "[t]his Act shall be liberally construed and applied to promote its underlying purposes and policies." U.C.C. § 1-102(1) affirms that "[t]he effect of this language [that is U.C.C. § 1-102(1)] is that the code not only has the force of law, but is itself a source of law." Mitchell Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 330, 333 (1951). This means that the U.C.C. is based upon a *civil law* approach. *See id.* The solution to the problem concerning the methodology adopted by the U.C.C. depends on the approach one takes to solve "[t]he tension that exists between section 1-103, which directs the courts to supplement the Code with outside law, and the true code

has been defined as a "meta-code" approach.[27] The final method is based on the combination of the first and second methods. This approach requires recourse to the general principles of the Conventions, in the absence of which the specific rules of the applicable law as determined by private international law of the forum controls.[28]

As can easily be deduced from the text of Articles 2 and 17 of the 1964 Uniform Law on International Sale of Goods (ULIS), the predecessor of the CISG, its drafters chose the "true code" approach.[29] Indeed, "Article 2 of the ULIS excludes the application of rules of private international law except in a few instances"[30] and Article 17 of the ULIS provides that "the general principles underlying the [1964] Uniform Law are to be used to fill the law's gaps. This has the intended negative implication that courts may not refer to the domestic law of the country whose law would otherwise apply under the rules of private international law."[31]

---

methodology section 1-102(1), in which courts find answers *within* the Code framework." Hillman, *supra* note 25, at 659.

[27] *See* Steve H. Nickles, *Problems of Sources of LawRelationships under the Uniform Commercial Code. Part I: The Methodological Problem and the Civil Law Approach*, 31 ARK. L. REV. 1, 1 (1977).

[28] *See* FRANCO FERRARI, VENDITA INTERNAZIONALE. ART. 1-13. AMBITO DI APPLICAZIONE. DISPOSIZIONI GENERALI 153-54 (1994); KRITZER, *supra* note 23, at 117; Jan Kropholler, *Der Ausschluß des IPR bim Einheitlichen Kaufrecht*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 372, 382 (1974).

[29] *See* FERRARI, *supra* note 28, at 154; Eduard Wahl, *Art. 17*, *in* KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT 121, 126 (Hans Dölle ed., 1976).

Note that the Hague Convention's approach had already been promoted on the occasion of the elaboration of earlier drafts, such as the one discussed during a diplomatic conference held in 1951 in the Hague. *See* Ernst Rabel, *The Hague Conference on the Unification of Sales Law*, 1 AM. J. COMP. L. 58, 60 (1952). Rabel states that "[w]ithin its corners, however, the text must be self-sufficient. Where a case is not expressly covered the text is not to be supplemented by the national laws - which would destroy unity - but be construed according to the principle consonant with its spirit." *Id.*

[30] Harold J. Berman, *The Uniform Law on International Sale of Goods: A Constructive Critique*, 30 LAW & CONTEMP. PROBS. 354, 359 (1965) (footnote omitted). *See also* Wahl, *supra* note 29, at 126 (listing the three different approaches to filling *praetor legem* gaps). Wahl states that "the ULIS has adopted the first method. The text of Article 17, its legislative history as well as the provision contemplated in Article 2 show that the application of the rules of private international law had to be limited." Wahl, *supra* note 29, at 126.

[31] Peter Winship, *Private International Law and the U.N. Sales Convention*, 21 CORNELL INT'L L.J. 487, 492 (1988).

The drafters of the CISG, however, rejected this approach. The ULIS approach was often criticized as being "hardly acceptable."[32] The CISG drafters adopted the approach which combines recourse to general principles with the eventual appeal to the relevant "external" provisions.[33] This is to be determined by having recourse to the private international law of the forum, a choice that is based upon the consideration that "the absolute independence from domestic law that the ULIS had pursued was considered as being unreachable."[34]

Resorting to general principles to fill internal gaps is a well-known method in *civil law* countries.[35] This method "finds precedent in many codes of the Roman-German legal systems, even though among such codes there are differences."[36] For example, the Preliminary Provisions of Article 12(2) of the Italian Civil Code provides that "if a controversy cannot be decided on the ground of a specific provision, one can resort to similar provisions or analogous matters; if the question remains doubtful, it shall be settled in conformity with the general principles of the legal system of the [Italian] State."[37] Analogous provisions have also been introduced into other *civil law* systems, such as

---

[32] That approach was unacceptable and was one of the reasons for the Hague Convention's failure. *See* Dore & Defranco, *supra* note 26, at 63.

[33] *See* KRITZER, *supra* note 25, at 117. Kritzer states that "[w]hen a matter is governed by the Convention but not expressly settled in it, the Convention's solution is (i) internal analogy where the Convention contains an applicable general principle; and (ii) reference to external legal principles (the rules of private international law) where the Convention does not contain an applicable general principle." KRITZER, *supra* note 25, at 117. *See also* Michael Joachim Bonell, *La nouvelle Convention des Nations Unies sur les contrats de vente internationale de marchandises*, DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL 7, 15 (1981).

[34] ALDO FRIGNANI, IL CONTRATTO INTERNAZIONALE 308 (1990).

[35] *See supra* note 25 and accompanying text. *See also* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATION CONVENTION (2nd ed., 1989). The CISG provision contemplating the settlement of questions governed by, but not expressly settled in it by resorting to its general principles "reflects an approach established for civil law codes." *Id.* *See also* ALEJANDRO GARRO and ALBERTO ZUPPI, COMPRAVENTA INTERNACIONAL DE MERCADERIAS 58 (1990).

[36] FRIGNANI, *supra* note 34, at 308.

[37] Codice civile, art. 12(2)

that of Austria,[38] Czechoslovakia,[39] Egypt,[40] Spain,[41] and others.[42]

In *common law*, the concept of "general principles" differs from that of civil law.[43] This is due, in part, to the "diverse notions and functions of the general principles"[44] and, in part, to the diverse source from which general principles are derived.[45] In fact, in *civil law* the source is the *legislation*, whereas in *common law*, the source is represented by *case law*.[46] It follows that in *common law*,

---

[38] *See* Art. 7 Allgemeines Bürgerliches Gesetzbuch [ABGD] (Aus. Civil Code). "Where a case cannot be decided either according to the literal text or the plain meaning of a statute, regard shall be had to the statutory provisions concerning similar cases . . . . If the case still remains doubtful, it shall be decided [ ] on the ground of principles of natural law." *Id.*

[39] *See* John O. Honnold, *Uniform Words and Uniform Application. The 1980 Sales Convention and International Juridical Practice*, in EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT 115, 139 (Peter Schlechtriem ed., 1987). Honnold states that "[t]he Czechoslovak International Trade Code, drafted under the influence of the 1964 Hague Convention, calls for the use of the 'principles governing' the Trade Code in dealing with gaps." *Id* at 139. *See also* Pavel Kalensky, *Die Grundzüge des tschechoslowakischen Gesetzes über den internationalen Handel*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 296 (1966) (commenting on the aforementioned Czechoslovak International Trade Code).

[40] *See* CIVIL. CODE art. 1(2) (1948) (Egypt). *See also* Bonell, *supra* note 18, at 77 (citing this provision).

[41] *See* Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GEO. J. INT'L & COMP. L. 183, 220 (1994).

[42] In this respect, one must note that even "in countries such as France or the Federal Republic of Germany, where the approach is not formally imposed by statute, it is taken for granted that a Code or any other legislation of a more general character must be considered as more than the mere sum of its individual provisions. In fact, it must be interpreted and, if necessary, supplemented on the basis of the general principles which underlie its specific provisions," Bonell, *supra* note 18, at 77. *See also* 1 KONRAD ZWEIGERT & HEIN KÖTZ, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG AUF DEM GEBIETE DES PRIVATRECHTS 103 (2nd ed., 1982).

[43] Indeed, it has been pointed out that "the term [general principles] sounds alien to English lawyers." Neville Brown, *General Principles of Law and the English Legal System*, *in* NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE 174 (Mauro Cappelletti ed., 1978).

[44] FRIGNANI, *supra* note 34, at 308.

[45] *See* Ferrari, *supra* note 17, at 846.

[46] *See* Otto Kahn-Freund, *Common Law and Civil Law - Imaginary and Real Obstacles to Assimilation*, *in* NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE 154 (Mauro Cappelletti ed., 1978). The author states that "in the common law world, the lawyer looks for his principles in the 'cases', and the statutes merely fill in details, the 'case law' playing the role of Codes on the Continent." Id.

Statutory law is seen as only fixing rules for defined situations, not as a possible source of general principles. As such, not only are the statutes traditionally interpreted in a very strict sense, but if there is no provision specifically regulating the case at hand, the gap will immediately be filled by principles and rules of the judge-made common law.[47]

The method adopted by the Vienna and Ottawa Conventions is a "mixed" one, obligating the judge to find a solution *within the single convention*[48] by resorting to its general principles. Only where this is unsatisfactory may the judge take "external" rules into account. The adoption of this method is undoubtedly to be welcomed, since it ultimately promotes uniformity, which is the goal of every uniform commercial law convention. In fact, uniformity would be compromised if the different judges always had to employ different domestic laws in order to fill the inevitable gaps.[49]

It must be noted that to close *praetor legem* gaps from within a Convention, one can resort to various types of logical reasoning. In this respect, application of the general principles constitutes merely one method.[50] This is why one must determine whether Article 7(2) of the CISG, Article 4(2) of the Factoring Convention, and Article 6(2) of the Leasing Convention must be interpreted broadly, or whether the Articles must be interpreted restrictively. A broad interpretation allows the use of other methods of legal reasoning, specifically that of analogy.[51]

---

[47] Bonell, *supra* note 18, at 77-78. *See also* Michael Joachim Bonell, *L'interpretazione del diritto uniforme alla luce dellé art. 7 della Convenzione di Vienna sulla vendita internazionale*, RIVISTA DI DIRITTO CIVILE 221, 233 (1986).

[48] *See* FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW 58 (1992) (stating, albeit with reference solely to the CISG, but which is equally true for the Ottawa Conventions as well, that the gap filling rule's major concern is indeed that the gaps are "*closed . . . from within the Convention*"). "This is in line with the aspiration to unify the law which . . . is established in the Convention itself." *Id.*

[49] *See* Bonell, *supra* note 18, at 75.

[50] *See* Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, *in* ESSAYS ON EUROPEAN LAW AND ISRAEL 511, 547 (Alfredo Mordechai Rabello ed., 1996).

[51] *See* JAN KROPHOLLER, INTERNATIONALES EINHEITSRECHT. ALLGEMEINE LEHREN 292 (1975) (commenting on the difference between analogy and recourse to general principles).

With reference to this question, one can not only share the view of those legal scholars who expressed, in respect to the CISG and the other Conventions, that these Conventions permit both methods (recourse to general principles *and* to analogy),[52] but also that "[i]n the case of a gap in [a] Convention the first attempt to be made is to settle the unsolved question by means of an analogical application of specific provisions."[53] When the matter expressly settled in a Convention and the matter to be decided on are not so closely related that it would be justified to adopt a different solution, one should resort to the general principles as contemplated in Article 7(2) of the CISG, Article 4(2) of the Factoring Convention and Article 6(2) of the Leasing Convention.[54] In such instances, one should resort to a procedure which differs from analogy in that it does not resolve the case solely by extending specific provisions dealing with analogous matters, "but on the basis of principles and rules which, because of their general character, may be applied on a much wider scale."[55]

## III. The General Principles of the Vienna Convention

The rule previously laid down for Article 7(2) of the CISG, as it relates to the identification of the *praetor legem* gaps, is also valid for Article 4(2) of the Factoring Convention and Article 6(2) of the Leasing Convention.[56] However, in order to identify the general principles, these conventions require individual consideration. Each Convention stipulates that *praetor legem*

[52] *See, e.g.*, Rolf Herber, *Art. 7*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT 93 (Peter Schlechtriem ed., 1st ed., 1990); SCHLECHTRIEM, *supra* note 12, at 31-32.

[53] Bonell, *supra* note 18, at 78. The analogical application as a method of gap filling has been admitted by other commentators of the gap-filling rule *de quo* as well. *See, e.g.*, ENDERLEIN & MASKOW, *supra* note 46, at 58. The authors state that "gap-filling can be done, as we believe, by applying such interpretation methods as extensive interpretation and analogy. The admissibility of analogy is directly addressed in the wording contained in the CISG [as well as in the UNIDROIT Conventions] because it is aimed at obtaining, from several comparable rules, one rule for a not expressly covered fact and/or a general rule under which the fact can be subsumed." ENDERLEIN & MASKOW, *supra* note 48, at 58.

[54] *See, e.g.*, Ferrari, *supra* note 50, at 548 (referring solely to the CISG).

[55] Bonell, *supra* note 18, at 80.

[56] *See* Ulrich Magnus, *Die allgemeinen Grundsätze im UN-Kaufrecht*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 469, 475 (1995).

gaps are to be filled by resorting to the general principles upon which each Convention is based.

From this wording it follows, not only that each Convention has to be looked at separately, but also that no recourse can be given to "external" general principles, such as the "Principles of International Commercial Contracts,"[57] drafted by the International Institute for the Unification of Private Law (UNIDROIT),[58] in order to fill the gaps to be found in these Conventions.[59] In regard to Article 7(2) of the Vienna Convention, Article 4(2) of the Convention on International Factoring and Article 6(2) of the International Leasing Convention, it can be inferred that the general principles to which one may have recourse are necessarily principles upon which *these Conventions*

---

[57] For the history, goals, sphere of application and specific contents of the UNIDROIT Principles of International Commercial Contracts, published in 1994, see generally, Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts: Why? What? How?*, 69 TUL. L. REV. 1121 (1995); Michael Joachim Bonell, *Unification by Non-Legislative Means: The Unidroit Draft Principles for International Commercial Contracts*, 40 AM. J. COMP. L. 617 (1992); Michael Joachim Bonell, *The Unidroit Principles of International Commercial Contracts and the Vienna Sales Convention (CISG) - Alternatives or Complementary Instruments?*, UNIFORM L. REV. 26 (1996); Franco Ferrari, *Defining the Sphere of Application of the 1994 "Unidroit Principles of International Commercial Contracts,"* 69 TUL. L. REV. 1225 (1995); Alexander S. Kamarov, *The Unidroit Principles of International Commercial Contracts: A Russian View*, UNIFORM L. REV. 247 (1996).

[58] UNIDROIT is an international body that promotes uniformity in the law of international commerce. For an overview on the recent activities of UNIDROIT, see Malcolm Evans, *Unidroit in 1995*, UNIFORM L. REV. 72 (1996). For an overview of the existing international bodies promoting the unification of law, see Rudolf Dolzer, *International Agencies for the Formulation of Transnational Economic Law*, *in* 2 THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 61, 65-75 (Norbert Horn & Clive M. Schmitthoff eds., 1982).

[59] Some legal writers have argued to the contrary, that is, that the UNIDROIT Principles should be used to fill gaps of international uniform law convention in general and those of the CISG in particular. *See, e.g.*, Michael Joachim Bonell, *The Unidroit Principles of International Commercial Contracts and the Vienna Sales Convention (CISG) - Alternatives or Complementary Instruments?*, UNIFORM L. REV. 34-35 (1996); Magnus, *supra* note 54, at 492 (albeit with some doubts); Alejandro 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. 1149, 1156, 1159 (1995). For an overview on this issue, see Albert H. Kritzer, *General Observations on Use of the Unidroit Principles to Help Interpret the CISG* (last modified Mar. 11, 1998) <http://www.cisg.law.pace.edu/cisg/text/matchup/general-observations.html>.

*considered individually,* are based.[60] Additionally, these principles may correspond to "external" general principles of international commerce.[61] In this instance, the principles to be applied to fill gaps are always, unless otherwise agreed by the parties,[62] those upon which the Convention is based. Other "general principles," independent of their form,[63] may, if necessary, serve to corroborate a solution based on the Convention's general principles or to interpret the latter.[64] They cannot, however, be used as an independent source of gap filling.

It is appropriate at this point to specify the general principles upon which these Conventions are based. With respect to the CISG, some of the general principles can easily be identified since they are expressly provided.[65] Many legal scholars argue, albeit not all,[66] that the principle of good faith, which had already been considered a general principle under the regime of

---

[60] *See* Ulrich Drobnig, *The Use of Unidroit Principles by National and Supranational Courts,* Speech delivered on the occasion of the colloquium, "International Commercial Contracts and the New Unidroit Principles: A New Law Merchant," held in Paris (October 20-21, 1994). Drobnig stated that "Art. 7 para. 2 [of the CISG] refers for matters governed by the Convention to the general principles on which the Convention is based . . . [a]nd if there are no such principles, the provision refers to the law applicable by virtue of the rules of private international law . . . . Thus there does not seem to be any room for recourse to the Unidroit Principles." *Id.*

[61] It has been pointed out, for instance, that the general principles of the CISG largely correspond to those elaborated by UNIDROIT. *See* Magnus, *supra* note 56, at 492.

[62] The importance of party autonomy for the application of the Unidroit Principles of International Commercial Contracts has been stressed by some. *See* Franco Ferrari, *I "Principi per i contratti commerciali internazionali" delléUnidroit ed i loro ambito di applicazione,* CONTRATTO E IMPRESA 300, 304-06 (1996).

[63] *See* KLAUS PETER BERGER, FORMALISIERTE UND "SCHLEICHENDE" KODIFIZIERUNG DES TRANSNATIONALEN WIRTSCHAFTSRECHTS (1996) (discussing this issue).

[64] *See* Johannes Christian Wichard, *Die Anwendung der Unidroit-Prinzipien für internationale Handelsverträge durch Schiedsgerichte und staatliche Gerichte,* RABELS ZEITSCHRFIT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 298 (1996).

[65] *See* Ferrari, *supra* note 41, at 223; ULRICH MAGNUS, WIENER UN-KAUFRECHT (CISG) 125 (1995).

[66] There are legal scholars who consider "good faith" as being a mere instrument of interpretation. *See* Ferrari, *supra* note 41, at 210-12. This view is based upon the fact that "good faith" is *only* mentioned in Article 7(1) of the CISG, that, is, in the provision dealing with the interpretation of the CISG which stipulates that "[i]n the application of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the obser-

the ULIS,[67] constitutes a general principle under the CISG.[68]

---

vance of *good faith* in international trade." Ferrari, *supra* note 41, at 210-12 (emphasis added).

For a discussion of this provision and the issues involved, see, *e.g.*, Jorge Adame Goddard, *Reglas de Interpretacion de la Convencion sobre Contratos de Compraventa Internacional de Mercaderias*, REVISTA DE INVESTIGACIONES JURIDICAS 9 (1990); Michael Joachim Bonell, *Methodology in Applying Uniform Law for International Sales under the U.N. Convention (Wien 1980)*, *in* ITALIAN NATIONAL REPORTS TO THE XIITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW (SIDNEY 1986) 43 (1986); Susanne V. Cook, Note, *The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 50 U. PITT. L. REV. 197 (1988); FRANK DIEDRICH, AUTONOME AUSLEGUNG VON INTERNATIONALEM EINHEITSRECHT: COMPUTERSOFTWARE IM WIENER KAUFRECHT (1994); John O. Honnold, *The Sales Convention in Action - Uniform International Words: Uniform Application?*, 8 J.L. & COM. 207 (1988); Dietrich Maskow, *On the Interpretation of the Uniform Rules of the 1980 UN Convention on Contracts for the International Sale of Goods*, *in* NATIONAL REPORTS FOR THE XIITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 5 (National Committee for Legal Science of the GDR ed., 1986); Maria Pilar Perales Viscasillas, *Una aproximancion al articulo 7 de la Convencion de Viena de 1980 sobre Compraventa Internacional de Mercaderias*, CUADERNOS DE DERECHO Y COMERCIO 5 (1995); Mark N. Rosenberg, *The Vienna Convention: Uniformity in Interpretation for Gap-Filling - An Analysis and Application*, 20 AUSTL. BUS. L. REV. 442 (1992); Frans J.A. van der Velden, *Indications of the Interpretation by Dutch Courts of the United Nations Convention on Contracts for the International Sale of Goods 1980*, *in* NETHERLANDS REPORTS TO THE TWELFTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 21 (Ewoud Hondius ed., 1987); Paul Volken, *The Vienna Convention: Scope, Interpretation and Gap-Filling*, *in* INTERNATIONAL SALE OF GOODS. DUBROVNIK LECTURES 19 (Petar Sarcevic & Paul Volken eds., 1986).

[67] "Good faith" has been considered a general principle of the ULIS. *See* Hans Dölle, *Bemerkungen zu Art. 17 des Einheitsgesetzes über den Internationalen Kauf beweglicher körperlicher Gegenstände*, *in* FESTSCHRIFT FÜR HANS G. FICKER 438 (1967); Wahl, *supra* note 29, at 135. Note, however, that this view was not necessarily unanimously held, although some court decisions can be found which apply "good faith" as a general principle of the ULIS. *See, e.g.*, OLG Düsseldorf, January 20 1983, *reprinted in* INTERNATIONALE RECHTSPRECHUNG ZU EKG UND EAG 100 (Peter Schlechtriem & Ulrich Magnus eds., 1987). Indeed, under the ULIS there was some opposition to the introduction of a "good faith" provision and to considering "good faith" as being a general principle. *See* Alejandro Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443, 466 (1989). Garro recalls that "as early as the Hague Diplomatic Conference in 1964, explicit reference to good faith as a general principle was opposed by the French delegate [who] asserted that the principle of good faith might lead to divergent and even arbitrary interpretations by national courts, and thus would impair uniformity." *Id.*

[68] The "good faith principle" has been recognized as one of the general principles expressly laid down by the Convention. *See* BERNARD AUDIT, LA VENTE INTERNATIONALE 51 (1990) (stating that good faith is one of the general principles, even though it must be considered an instrument of interpretation as well, considering that "good faith" is expressly mentioned only in Article 7(1) of the CISG, the provision dealing with its interpretation); Issak I. Dore & James E. Defranco, *A Com-*

Another principle, which is expressly provided for, is, *inter alia*, the principle of party autonomy,[69] which some commentators have even defined as the Convention's most important general principle.[70] Consequently, it appears that the Convention only has a subsidiary role,[71] that is, that it merely provides solutions to problems, which are not dealt with by the parties.[72] If this affirmation is true, then it must be concluded that in the case of a conflict between the party autonomy principle and any other general principle, the former must prevail.[73] This is "a result contrary to the Uniform Commercial Code where the principles

---

*parison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23 HARV. INT'L L.J. 49, 60 (1982) (stating basically the same); ENDERLEIN & MASKOW, *supra* note 48, at 59 (listing the "good faith principle" among those general principle "which do not necessarily have to be reflected in individual rules"); ROLF HERBER and BEATE CZERWENKA, INTERNATIONALES KAUFRECHT. KOMMENTAR ZU DEM ÜBEREINKOMMEN DER VEREINTEN NATIONEN VOM 11. APRIL 1980 ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF 49 (1991) (affirming even that the "good faith principle" represents the only general principle expressly provided for by the CISG).

69 Party autonomy is considered as being one of the CISG's general principles. *See* Michael Joachim Bonell, *Commento all'art. 7 della Convenzione di Vienna*, NUOVE LEGGI CIVILI COMMENTATE 20, 24 (1989); ENDERLEIN & MASKOW, *supra* note 48, at 59; FERRARI, *supra* note 28, at 159; Richard Hyland, *Conformity of the Goods to the Contract under the United Nations Sales Convention and the Uniform Commercial Law*, *in* EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT, 305, 329-30; MARTIN KAROLLUS, UN-KAUFRECHT 16-17 (1991); SCHLECHTRIEM, *supra* note 12, at 33.

70 *See* HONNOLD, *supra* note 35, at 47. Honnold states that "the dominant theme of the Convention is the role of the contract (*i.e.*, the parties' autonomy)[,] . . . a theme of deeper significance than may be evident at first glance." *Id.*

71 *See, e.g.*, KRITZER, *supra* note 25, at 114 (stating that "the Convention's rules play a supporting role, supplying answers to problems that the parties have failed to solve by contract."). *See also* Kazuaki Sono, *The Vienna Sales Convention: History and Perspectives*, *in* INTERNATIONAL SALE OF GOODS. DUBROVNIK LECTURES 1, 14 (stating that "the rules contained in the Convention are only supplementary for those cases where the parties did not provide otherwise in their contract").

72 *See, e.g.*, Allan E. Farnsworth, *Rights and Obligations of the Seller*, *in* WIENER ÜBEREINKOMMEN VON 1980. KOLLOQUIUM LAUSANNE 83, 84 (1985). Farnsworth states that "in case of a conflict between the contract and the Convention, it is the contract - not the Convention - that controls". *Id.*

73 For this solution, see KRITZER, *supra* note 25, at 115.

This conclusion referred to in the text appears to be further sustained by the fact that on the occasion of the Vienna Diplomatic Conference where the CISG was adopted, a proposal to limit the principle of party autonomy through a reference to the "good faith principle" was rejected. *See, e.g.*, UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS. VIENNA, 10 MARCH - 11 APRIL 1980. OFFICIAL RECORDS 247-248 (United Nations ed., 1981).

of 'good faith, diligence and reasonableness and care' prevail over party autonomy."[74]

There are other expressly enunciated general principles as well. These general principles include: the principle of informality,[75] according to which "the agreement between the parties is not subject to any formal requirement,"[76] with the exception of the hypothesis provided for by Article 12; the principle whereby widely known and largely observed usage's must be taken into account;[77] the principle which states, "where a party fails to pay an amount of money, the creditor is entitled to interest on that sum;"[78] the rule derived from *civil law*[79] which limits recoverable damages to those foreseen or foreseeable prior to or at the conclusion of the contract;[80] and the principle of full compensation.[81] Another principle is the one "according to which any notice or other kind of communication made or given after the conclusion of the contract becomes effective on dispatch."[82]

---

[74] KRITZER, *supra* note 25, at 115.

[75] *See* Ferrari, *supra* note 41, at 224; Rolf Herber, *Art. 7*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT 91, 99 (Peter Schlechtriem ed., 2nd ed., 1995); Magnus, *supra* note 56, at 483. *But see* Monique Jametti-Greiner, *Der Vertragsabschluß*, *in* DAS EINHEITLICHE WIENER KAUFRECHT 43, 46-47 (Hans Hoyer & Wilibald Posch eds., 1992) (stating that the principle at hand cannot be considered a general principle of the CISG).

[76] Bonell, *supra* note 18, at 80. *See also* CISG, *supra* note 2, art.11, 29(1).

[77] *See* Dore & Defranco, *supra* note 26, at 63; FERRARI, *supra* note 28, at 160; KAROLLUS, *supra* note 69, at 17; Magnus, *supra* note 54, at 482-83; Jean-Pierre Plantard, *Un nouveau droit uniforme de la vente internationale: La Convention des Nations Unies du 11 avril 1980*, JOURNAL DU DROIT INTERNATIONAL 311, 332 (1988). *See also* CISG, *supra* note 2, art. 9.

[78] AUDIT, *supra* note 68, at 51. *See* FERRARI, *supra* note 28, at 160. *See also* CISG *supra* note 2, art. 78.

[79] *See* Franco Ferrari, *Comparative Ruminations on the Foreseeability of Damages in Contract Law*, 53 LA. L. REV. 1257, 1266 (1993); Franco Ferrari, *Prevedibilità del danno e contemplation rule*, CONTRATTO E IMPRESA 760, 764 (1993); Reinhard Zimmermann, *Der Einfluß Pothiers auf das römische-holländische Recht in Südafrika*, ZEITSCHRIFT DER SAVIGNY-STIFTUNG. GERMANISTISCHE ABTEILUNG 178 (1985).

[80] *See* FRIGNANI, *supra* note 34, at 308; ENDERLEIN & MASKOW, *supra* note 48, at 59; Dietrich Maskow, *The Convention on the International Sale of Goods from the Perspective of the Socialist Countries*, *in* LA VENDITA INTERNAZIONALE. LA CONVENZIONE DI VIENNA DELL'11 APRILE 1980. ATTI DEL CONVEGNO DI STUDI DI S. MARGHERITA LIGURE (26-28 SETTEMBRE 1980) 39, 57 (1981).

[81] *See* Magnus, *supra* note 56, at 484-85.

[82] Bonell, *supra* note 18, at 80. *See also* ENDERLEIN & MASKOW, *supra* note 48, at 59; CISG, *supra* note 2, art. 27.

Most of the general principles of the CISG have not been expressly provided for.[83] Therefore, many of the general principles must be deduced from the CISG's provisions by way of a non-comparative analysis[84] of their contents.[85] This method is necessary "in order to see whether [the provisions] can be considered as an expression of a more general principle, as such capable of being applied also to cases different from those specifically regulated."[86] It has led to the extraction of several general principles. One general principle is the principle of "reasonableness,"[87] where "the parties must conduct themselves according to the standard of the reasonable person."[88]

---

The "UNIDROIT Principles," particularly Article 1.9, which some authors would like to have recourse to in order to fill *praetor legem* gaps, provides for a principle contrary to the one mentioned in the text. *See* discussion *supra* note 59.

From what has been said, it becomes apparent that it is dangerous to fill internal gaps of the CISG (but this is also true in respect to the Ottawa Conventions on International Factoring and International Leasing) by resorting to the external "UNIDROIT Principles," since they encompass, as just shown, principles which, at least partially, do not correspond to the "internal" principles of the CISG (and may be even other international uniform law conventions).

[83] This is a common understanding. *See, e.g.*, AUDIT, *supra* note 68, at 51; Ferrari, *supra* note 41, at 224.

[84] One cannot share the opinion (favored, for instance, by Bonell, *supra* note 18, at 81) according to which the comparative method could be useful in identifying the general principles at hand; indeed, "[i]t is . . . *not* possible to obtain the Convention's general principles from *an analysis prepared by comparisons of the laws* of the most important legal systems of the Contracting States . . . as it was supported, in some cases, in regard to Article 17 ULIS . . . . The wording of the Convention does in no way support the application of this methods [sic]." ENDERLEIN & MASKOW, *supra* note 48, at 60.

For similar affirmations rejecting the comparative method as one which can be helpful in identifying the general principles of an international uniform commercial law convention, see FRITZ ENDERLEIN ET AL., INTERNATIONALES KAUFRECHT 65 (1991); Herber, *supra* note 75, at 99; PETER SCHLECHTRIEM, EINHEITLICHES UN-KAUFRECHT 24 (1981).

[85] *See* Magnus, *supra* note 56, at 476 (stating that it should with no doubt be used, as long as it is not abused).

[86] Bonell, *supra* note 18, at 80.

[87] *See* AUDIT, *supra* note 68, at 51; FRIGNANI, *supra* note 35, at 308; KAROLLUS, *supra* note 69, at 16-17; KRITZER, *supra* note 25, at 116; Magnus, *supra* note 56, at 482; Maskow, *supra* note 80, at 57; GERT REINHART, INTERNATIONALES KAUFRECHT 32 (1991).

For a recent study of the concept of "reasonableness" in international contracts, see Vincente Fortier, *Le contrat du commerce international à l'aune du raisonnable*, JOURNAL DU DROIT INTERNATIONAL 315 (1996).

[88] PETER SCHLECHTRIEM, UNIFORM SALES LAW - THE U.N.-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 39 (1986).

Another is a "fundamental principle"[89] which the Convention refers to on several occasions. A "fundamental principle" may occur where the parties are referred to as "reasonable"[90] or where it imposes upon the parties the duty to carry out a specific act or to make a specific communication within a "reasonable" period of time.[91]

There are other general principles that can be deduced from the Convention's provisions. It is sufficient to recall the "mitigation" principle,[92] where the parties must undertake reasonable steps to limit the loss resulting from the breach of contract,[93] and the principle whereby the parties must not *venire contra factum proprium,*[94] which results in preventing "a person from contradicting a representation on which another person has reasonably relied."[95] Another general principles is *favor contractus*[96] "which means that, whenever possible, a solution should be adopted in favor of the valid existence of the contract and against its premature termination on the initiative of one of the parties."[97] Additionally, there is the principle

---

[89] SCHLECHTRIEM, *supra* note 84, at 25.

[90] *See* CISG, *supra* note 2, arts. 8(2), 25, 35(1)(b), 60(a), 72(2), 79(1), 85, 86, 88(2).

[91] *See* CISG, *supra* note 2, arts. 18(2), 33(3), 39(1), 43(1), 47(1), 49(2), 63, 64, 65, 72(2), 75.

Note, however, that on several occasions the Convention refers to "unreasonableness," instead of "reasonableness." *See* Magnus, *supra* note 56, at 482 n.47. *See, e.g.*, CISG *supra* note 2, arts. 86(2), 87, 88(2).

[92] *See* Ferrari, *supra* note 41, at 225; HONNOLD, *supra* note 35, at 155.

[93] This principle is considered one of the CISG's general principles. *See* AUDIT, *supra* note 68, at 52; Bonell, *supra* note 69, at 25; FERRARI, *supra* note 28, at 161; FRIGNANI, *supra* note 34, at 308; KAROLLUS, *supra* note 69, at 17; Magnus, *supra* note 56, at 483.

[94] *See, e.g.*, ENDERLEIN ET AL., *supra* note 84, at 64; Eörsi, *supra* note 16, at II-12; Herber, *supra* note 75, at 99; MAGNUS, *supra* note 65, at 122, 125; Maskow, *supra* note 80, at 57; REINHART, *supra* note 87, at 32.

[95] HONNOLD, *supra* note 35, at 153. *See also* FRIGNANI, *supra* note 34, at 308; Magnus, *supra* note 56, at 481.

[96] *See* Ernst von Caemmerer, *Die wesentliche Vertragsverletzung im internationalen Einheitlichen Kaufrecht, in* 2 EUROPÄISCHES RECHTSDENKEN IN GESCHICHTE UND GEGENWART. FESTSCHRIFT FÜR COING 50-51 (1982); Ferrari, *supra* note 41, at 225; VINCENT HEUZÉ, LA VENTE INTERNATIONALE DE MARCHANDISES. DROIT UNIFORME 80 (1992); Honnold, *supra* note 39, at 140; Plantard, *supra* note 77, at 333.

[97] Bonell, *supra* note 18, at 81. *See also* Rosenberg, *supra* note 66, at 452. Rosenberg states that "where possible, solutions favouring the maintenance of the contract should be adopted in preference to solutions resulting in the premature termination of the contract on the initiative of one party." *Id.*

whereby the parties must cooperate[98] "in carrying out the interlocking steps of an international [sales] transaction."[99] This comprises the duty to provide the other party with all necessary information,[100] and calls for "communication of information that is obviously needed by a trading partner."[101] The latter can be derived from Article 39(1), according to which a buyer is under a duty to give the seller notice of the non-conformity of the goods within a reasonable period of time so that the seller may "examine the goods and formulate his response to the buyer's contentions."[102]

## IV. The General Principles of the Ottawa Conventions

While identifying the Vienna Sales Convention's general principles does not constitute an overly problematic task, the same cannot be said of the Ottawa Conventions' general principles. This is due to the fact that the latter succinctly regulates more specific matters than those dealt with by the Vienna Sales Convention. Some authors have even considered the CISG as laying down a general framework not only for international sales contracts, but for international commercial contracts as well.[103]

This does not mean that a list of general principles upon which the Ottawa Conventions are based cannot be drafted. One of the general principles which forms the basis of the Fac-

[98] *See* Enderlein & Maskow, *supra* note 48, at 60; Karollus, *supra* note 69, at 16 n.88; Ferrari, *supra* note 41, at 226.

[99] Kritzer, *supra* note 25, at 115.

[100] *See* Audit, *supra* note 68, at 51; Hyland, *supra* note 69, at 331-32.

[101] Honnold, *supra* note 35, at 155.

[102] Franco Frattini, *Commento all'art. 39 della Convenzione di Vienna*, Nuove Leggi civili commentate 176-77 (1989).

[103] *See* Aleksander Goldstaijn, *Usages of Trade and other Autonomous Rules of International Trade according to the UN (1980) Sales Convention*, *in* International Sale of Goods. Dubrovnik Lectures 55. Goldstaijn states that "the United Nations Convention on International Sale of Goods (1980), although formally confined to contracts for the international sale of goods, contains provisions which could be applied to all kinds of international commercial transactions." *Id.* *See also* Magnus, *supra* note 56, at 491.

*But cf.* Franz Bydlinski, *Das allgemeine Vertragsrecht*, *in* Das UNCITRAL-Kaufrecht im Vergleich zum Österreichischen Recht 57, 89 (Peter Doralt ed., 1985) (in the sense that he refuses to consider the CISG's rules as a basis for solving problems arising from international commercial transactions different than sales contracts).

toring Convention appears to be that of party autonomy.[104] This view is based upon the text of Article 3(1), which establishes that the parties may exclude the application of the Convention at hand,[105] thus, confirming its dispositive nature. However, in light of Article 3, and its comparison with Article 6 of the CISG,[106] it is doubtful whether party autonomy must really be considered a general principle of the Factoring Convention. This is due to its somewhat limited scope compared to that of party autonomy under the CISG. According to the CISG, the parties may not only exclude the Convention's application *in toto* or even partially, but they may also derogate from its provisions with one exception or modify its effects.[107] Whereas according to Article 3(2) of the Factoring Convention,[108] the parties may only exclude its application *in toto*.[109]

A "true" general principle of the Factoring Convention appears under Article 6(1), where assignments of receivables are encouraged.[110] Accordingly, assignment of receivables is al-

---

[104] *See* Gargiulo & Giancoli, *supra* note 14, at 1303. The authors state that "by virtue of the principle of party autonomy, the parties are allowed to exclude the [Factoring] Convention's application." *Id.*

[105] *See* Convention on International Factoring, *supra* note 3, art. 3. Article 3 states that "[t]he application of this Convention may be excluded (a) by the parties to the factoring contract; or (b) by the parties to the contract of sale of goods, as regards receivables arising at or after the time when the factor has been given notice in writing of such exclusion." *Id.* .

[106] *See* CISG, *supra* note 2, art. 6. Article 6 states that "[t]he parties may exclude the application of the Convention or, subject to article 12, derogate from or vary the effects of any of its provisions." *Id.*

[107] For a detailed discussion of the CISG's exclusion by the parties, see, e.g., Franco Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing*, *in* 10 PREADVIEZEN UITGEBRACHT VOOR DE VERENIGING VOOR BURGERLIJK RECHT 81, 143-52 (1995); Rainer Holthausen, *Vertraglicher Ausschluß des UN-öbereinkommens über internationale Warenkaufverträge*, RECHT DER INTERNATIONALEN WIRTSCHAFT 513 (1989); Claude Witz, *L'exclusion de la Convention des Nations Unies sur les contrats de vente internationale de marchandises par volonté des parties (Convention de Vienne du 11 avril 1980)*, RECUEIL DALLOZ-SIREY CHRONIQUE 107 (1990).

[108] *See* Convention on International Factoring, *supra* note 3, art. 3(2). Article 3(2) states that"[w]here the application of this Convention is excluded in accordance with the previous paragraph, such exclusion may be made only as regards the Convention as a whole." *Id.*

[109] *See* Alexander, *supra* note 21, at 375 n.107.

[110] *See* Convention on International Factoring, *supra* note 3, art. 6(1). Article 6(1) states that "[t]he assignment of a receivable by the supplier to the factor shall be effective notwithstanding any agreement between the supplier and the debtor prohibiting such assignment." *Id.*

lowed even in the presence of a *pactum de non-cedendo.*[111] Another general principle can be derived from Article 5,[112] which considers valid not only the assignment of single existing receivables but also the assignment of single future receivables as well as bulk assignments.[113] Finally, a general principle can be found in Article 10(1). As a general rule, this provision bars the debtor from recovering a sum paid to the assignee if he is entitled to recover that sum from the supplier,[114] thus protecting the assignee's reliance[115] and, consequently, his willingness to purchase receivables.

Similar to the CISG,[116] the Factoring Convention seems to be based upon the principle of good faith. Indeed, good faith is not only mentioned as an interpretative criterion provided for by Article 4(1) of the Factoring Convention,[117] but it is also

---

[111] *See* Alessio Zaccaria, *Il factoring internazionale*, STUDIUM IURIS 5, 10 (1996) (pointing out that the fact that the agreement of the parties as to the non-assignability of the receivables does not lead to the ineffectiveness of the assignment and does not signify that it does not have any effect. Indeed, Article 6(2) expressly stipulates that the breach of that agreement can lead to liability).

[112] *See* Convention on International Factoring, *supra* note 3, art. 5. Article 5 states that:

> As between the parties to the factoring contract:
> (a) a provision in the factoring contract for the assignment of existing or future receivables shall not be rendered invalid by the fact that the contract does not specify them individually, if at the time of conclusion of the contract or when they come into existence they can be identified to the contract;
> (b) a provision in the factoring contract by which future receivables are assigned operates to transfer the receivables to the factor when they come into existence without the need for any new act or transfer.

*Id.*

[113] The aforementioned provisions aim at promoting the assignment of receivables. *See* Gargiulo & Giancoli, *supra* note 14, at 1303-04.

[114] *See* Convention on International Factoring, *supra* note 3, art. 10. Article 10 states that:

> [w]ithout prejudice to the debtor's rights under Article 9, non-performance or defective or late performance of the contract of sale of goods shall not by itself entitle the debtor to recover a sum paid by the debtor to the factor if the debtor has a right to recover that sum from the supplier.

*Id.*

[115] *See* Gargiulo & Giancoli, *supra* note 14, at 1304.

[116] *See supra* text accompanying notes 66-75.

[117] *See* Convention on International Factoring, *supra* note 3, art. 4(1). Article 4(1) states that "in the interpretation of this Convention, regard is to be had to its object and purpose as set forth in the preamble, to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." *Id.*

mentioned in Article 6. Article 6 validates the assignment of receivables despite the existence of a non-assignment clause. In effect, this provision places upon the supplier "an indispensable general duty of good faith . . . towards the debtor for breach of the non-assignability clause contained in the sales contract."[118]

The Factoring Convention is also based on the general principle which prohibits an assignment from placing the debtor in a disadvantageous position compared to that which he would find himself had the assignment not taken place.[119] This principle may easily be deduced from Article 9, which allows the debtor to raise all defenses against the assignee which he could raise against the supplier if such claim had been made by the debtor. This is true when there is a claim by the assignee against the debtor.[120] This principle may also be inferred from Article 6(3), which, even though it validates the assignment of receivables in the presence of a *pactum de non-cedendo*, upholds the supplier's liability towards the debtor.[121]

Having identified the general principles which form the basis of the Factoring Convention, all that remains is to determine the formative general principles of Leasing Convention. One of these principles is that of party autonomy.[122] Party autonomy may be derived from Article 5, which, not unlike Article 6 of the CISG and Article 3 of the Factoring Convention, allows the par-

---

[118] Gargiulo & Giancoli, *supra* note 14, at 1304.

[119] *See* Zaccaria, *supra* note 111, at 11.

[120] *See* Convention on International Factoring, *supra* note 3, art. 9. Article 9 states that:

> (1) In a claim by the factor against the debtor for payment of a receivable arising under a contract of sale of goods the debtor may set up against the factor all defences arising under that contract of which the debtor could have availed itself if such claim had been made by the supplier.
> (2) The debtor may also assert against the factor any right of set off in respect of claims existing against the supplier in whose favour the receivables arose and which are available to the debtor at the time a notice in writing of the assignment conforming to Article 8(1) was given to the debtor.

*Id.*

[121] *See* Convention on International Factoring, *supra* note 3, art. 6(3). Article 6(3) states that "[n]othing in paragraph 1 shall affect any obligation of good faith owed by the supplier to the debtor or any liability of the supplier to the debtor in respect of an assignment made in breach of the terms of the contract of sale of goods." *Id. See also supra* text accompanying note 118.

[122] *See* Schermi, *Il leasing finanziario e la Convenzione internazionale di Ottawa 28 maggio*, GIUSTIZIA CIVILE 725, 727 (1994).

ties to exclude the Convention's application. Unlike the Factoring Convention, which accords party autonomy a limited role by allowing only a total exclusion of the Convention,[123] Article 5 of the Leasing Convention[124] also permits the parties to derogate from or modify the effect of any provision,[125] except for some specific ones protecting the lessee.[126] An example of this protection is Article 8(2), under which the lessor must warrant that the lessee's quiet possession will not be disturbed.[127] It follows that even though it may be doubtful whether party autonomy constitutes one of the Factoring Convention's general principles, this provision certainly must be regarded as one of the basic formative general principles of the Leasing Convention.[128]

Another general principle of the Leasing Convention is the protection of the lessee's interests. This can be deduced from the impossibility to derogate from specific provisions designed for the protection of the lessee,[129] but also from Article 13 of the Convention. According to Article 13, in case of termination of the leasing agreement due to the lessee's substantial default, the lessor may merely "recover such damages as will place [him] in the position in which [he] would have been had the lessee

---

[123] *See supra* text accompanying note 109.

[124] *See* Convention on International Factoring, *supra* note 3, art. 5. Article 5 states:

> (1) The application of this Convention may be excluded only if each of the parties to the supply agreement and each of the parties to the leasing agreement agree to exclude it.
>
> (2) Where the application of this Convention has not been excluded in accordance with the previous paragraph, the parties may, in their relations with each other, derogate from or vary the effect of any of its provisions except as stated in Articles 8(3) and 13(3)(b) and (4). *Id.*

[125] *See* Mariani, *supra* note 10, at 566.

[126] *See* Renato Clarizia, *La convenzione UNIDROIT sulla locazione finanziaria: analogie e differenze rispetto al modello italiano*, RIVISTA ITALIANA DI LEASING 28.

[127] *See* De Nova, *supra* note 10, at 426; David Levy, *Financial Leasing under the Unidroit Convention and the Uniform Commercial Code: A Comparative Analysis*, 5 IND. INT'L & COMP. L. REV. 274-75 (1995).

[128] *See* Friedrich Graf von Westphalen, *Grenzüberschreitendes Finanzierungsleasing*, RECHT DER INTERNATIONALEN WIRTSCHAFT 257, 257 (1992) (stating that the impossibility of derogating from some specific provisions does not unduly limit party autonomy, which is why it must be considered a general principle upon which the Leasing Convention is based).

[129] *See supra* text accompanying note 126.

performed the leasing agreement in accordance with its terms."[130]

There are several other general principles in the Leasing Convention. One of these general principles is the so-called *favor contractus*, according to which the lessor may terminate the contract only where the lessee's breach is substantial. Another principle, which in German law goes by the name of *Zug-um-Zug-Leistung*, must also be considered a general principle which helps form the basis of Convention.[131] This can be deduced from Article 12(3), which states that the "lessee shall be entitled to withhold rentals payable under the leasing agreement until the lessor has remedied its failure to tender equipment in conformity with the supply agreement or the lessee has lost the right to reject the equipment."[132] According to some authors, another general principle can be found in Article 7, by virtue of which the lessor's rights in the equipment are valid against the trustee in bankruptcy of the lessee and his creditors.[133]

One last general principle upon which the Leasing Convention is based is the mitigation principle. This also is a foundational principle of the CISG.[134] This may be easily deduced from Article 13(6), which states that "[t]he lessor shall not be entitled to recover damages to the extent that it has failed to take all reasonable steps to mitigate its loss."

## V. Conclusion

One final comment must be addressed to the relationship between general principles and the Vienna and Ottawa Conventions. It is necessary to show how *praetor legem* gaps are to be filled when resorting to general principles is not possible. All three Conventions respond to such an eventuality in the same

130 Convention on International Financial Leasing, *supra* note 4, art. 13(2)(b). *See also* Renato Clarizia, *Convenzione Unidroit sul leasing internazionale: ultimo atto*, Corriere Giuridico 1169 (1993); Graf von Westphalen, *supra* note 128, at 257.

131 *See* Graf von Westphalen, *supra* note 128, at 260, Levy, *supra* note 127, at 281.

132 *See* Schermi, *supra* note 122, at 727.

133 *Compare* CISG, *supra* note 2, art. 7 *with* De Nova, *supra* note 9, at 426 (where the author even defines this principle as a "fundamental" one).

134 *See supra* text accompanying notes 92-93.

way. In the absence of general principles, recourse should be made to the "law applicable by virtue of the rules of private international law."[135] This is a "subsidiary method"[136] which despite the lack of a specific reference to it, found support under the ULIS as well,[137] even though the prevailing opinion was to the contrary.[138] In fact, most authors supported the view that, absent general principles of the ULIS, these gaps were not to be filled by resorting to the applicable domestic law to be determined through the relevant rules of private international law, but by resorting to the general principles of law.[139] These general principles of law are defined as "principles and rules which are most commonly adopted within the different Contracting States and/or particularly suited for the case at hand."[140] However, even this approach was not exempt from criticism. It has been correctly observed that the identification of such principles placed a difficult, if not impossible,[141] burden upon those having to fill the gaps, considering that not even specialists had been able to identify such principles.[142]

At this time, such a dispute is meaningless. All the Conventions in question stipulate that, in the absence of general principles upon which they are based, recourse is to be had -

---

[135] CISG, *supra* note 2, art. 7(2); Convention on International Factoring, *supra* note 3, art. 4(2); Convention on International Financial Leasing, *supra* note 4, art. 6(2).

[136] *See* AUDIT, *supra* note 68, at 52; HEUZÉ, *supra* note 96, at 80; Rosenberg, *supra* note 64, at 450.

[137] For an overview of the authors who supported the recourse to the general principles underlying the ULIS to fill its *praetor legem* gaps, see Rolf Herber, *Art. 7*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT 93 (Peter Schlechtriem ed., 1st ed., 1990); Ulrich Magnus, *Währungsfragen im Einheitlichen Kaufrecht. Zugleich ein Beitrag zu seiner Lückenfüllung und Auslegung*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 116, 120 (1989).

[138] *See* Bonell, *supra* note 18, at 82. Bonell states that "with respect to ULIS it was already questioned whether turning to domestic law should be permitted if a gap could not be filled by general principles which cold be extracted from the uniform law itself. The prevailing view was opposed to this approach." *Id.*

[139] For a recent discussion of the general principles of law, see Guido Alpa, *General Principles of Law*, 1 ANNUAL SURVEY OF INTERNATIONAL AND COMPARATIVE LAW 1 (1994).

[140] Bonell, *supra* note 18, at 82.

[141] *See, e.g.*, Rosenberg, *supra* note 66, at 450.

[142] *See* Kropholler, *supra* note 28, at 380.

albeit as *ultima ratio*[143] - to "the law applicable by virtue of the rules of private international law" of the forum.[144] This does not mean that recourse to the rules of private international law should be abused.[145] One has to be aware of the fact that recourse to these rules "represents under the . . . uniform law[s] a last resort to be used only if and to the extent that a solution cannot be found either by analogical application of specific provisions or by the application of general principles underlying the uniform law[s] as such."[146]

In conclusion of this brief analysis, one last question must be posed. What is the practical value of the general principles or, in other words, is it possible to base a decision merely on these general principles? A ruling of the Vienna Court of Appeal in 1982[147] seems to give a negative response to that question. On this occasion, the Court of Appeal annulled an arbitral award because the dispute had been settled *exclusively* on the basis of the "general principle of good faith." The Court of Appeal also affirmed that "it is not possible to infer concrete solutions directly from general principles."[148]

The problem, however, is not so much whether a decision concerning a *praetor legem* gap of a convention can be based *exclusively* upon one of the Convention's general principles. In fact, given the text of Article 7(2) of the CISG, Article 4(2) of the Factoring Convention, and Article 6(2) of the Leasing Convention, where a judge is asked to solve a dispute concerning an "internal" gap, the judge *must* base the decision on the general principles, to the extent that these exist. It is not at all relevant whether the judge grounds his decision *exclusively* on the general principles. The problem instead is whether the general principles that have already been identified,[149] and which *per defitionem* are abstract, are always useful to solve concrete

---

[143] *See, e.g.*, albeit with reference solely to Article 7(2) of the CISG, Bonell, *supra* note 70, at 25; Ferrari, *supra* note 41, at 228; Herber, *supra* note 75, at 98; MAGNUS, *supra* note 65, at 127.

[144] *See* HERBER & CZERWENKA, *supra* note 68, at 51.

[145] *But see* Rosenberg, *supra* note 66, at 450.

[146] Bonell, *supra* note 18, at 83.

[147] *See* Decision of the Vienna Court of Appeal of 26 Jan. 1982, *reprinted in* DIE AKTIENGESELLSCHAFT 166 (1982).

[148] *Id.*

[149] *See supra* text accompanying notes 65-134.

problems, a question to which the Vienna Court of Appeals gave a clearly negative response. This view cannot be shared since it is far too absolute.

Presently, the general principles are not quite so "general" so as to exclude their immediate application in order to solve concrete problems,[150] a view which has recently been upheld in arbitral tribunals. In two cases brought before a single arbitrator at the Vienna Federal Chamber of Commerce,[151] the arbitrator was asked to settle a dispute concerning the interest rate on a sum in arrears owed on the basis of an international sales contract governed by the CISG.[152] Though Article 78 provides a general rule that the failure of a party to pay a sum of money entitles the other party to interest on the same sum,[153] the CISG does not expressly determine what interest rate is applicable.[154] The single arbitrator resolved the matter brought before him by affirming that the determination of a specific interest rate constitutes a *praetor legem* gap. This gap is to be filled by having recourse to the CISG's general principle of full compensation, laid down in Article 74.[155] Consequently, given that it is to be presumed that the creditor operating in a commercial setting obtains bank financing for the period of pay-

---

[150] *See* Magnus, *supra* note 56, at 490.

[151] The two arbitral awards are *reprinted in* RECHT DER INTERNATIONALEN WIRTSCHAFT 590 (1995).

[152] For a discussion of the issue of interest rates under the CISG; see, e.g., Herbert Asam & Peter Kindler, *Ersatz des Zins- und Geldentwertungsschadens nach dem Wiener Kaufrechtsübereinkommen vom 11.4.1980 bei deutsch-italienischen Kaufverträgen*, RECHT DER INTERNATIONALEN WIRTSCHAFT 841 (1989); Franco Ferrari, *Uniform Application and Interest Rates under the 1980 Vienna Sales Convention*, 1 REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 3 (1995); Franco Ferrari, *Tasso degli interessi ed applicazione uniforme della convenzione di Vienna sui contratti di vendita internazionale*, RIVISTA DI DIRITTO CIVILE 277 (II/1995); Maria del Pilar Perales Viscasillas, *La determinacion del tipo de interes en la compraventa internacional*, CUADERNOS JURIDICOS 5 (43/1996); Gert Reinhart, *Fälligkeitszinsen und UN-Kaufrecht*, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 376 (1991).

[153] *See* CISG, supra note 2, art. 78. Article 78 states 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." *Id.*

[154] *See* Franco Ferrari, *Uniform Application and Interest Rates under the 1980 Vienna Sales Convention*, 1 REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 6 (1995).

[155] *See* Magnus, *supra* note 56, at 484-85.

ment delay, the applicable interest rate is that which is generally applied by banks located in the creditor's country.[156]

In light of what has been discussed, one can conclude that it is not possible to maintain, as did the Vienna Court of Appeals, that specific solutions cannot be drawn from general principles. However, it cannot be affirmed that general principles always lead immediately to concrete solutions, as in the two Austrian arbitral cases. Additionally, it is not necessary for a general principle to always be so concrete as to give a direct and absolute solution to particular cases in order to constitute the basis of a specific decision. This is due to the fact that where the general principle is too abstract to be applied directly, it is up to the judge to identify its specific contents so that it can be employed to fill the gaps. This task also pertains to judges who must apply general principles of domestic non-uniform law such as codes. The only difference is that in giving general principles of international uniform law conventions a definite meaning - their ultimate goal must be taken into account - that being international uniformity of the law.

---

[156] For a comment favorable to the solution adopted in the arbitral awards mentioned in the text, see Anna Veneziano, *La convenzione sulla vendita internazionale e i principi Unidroit dei contratti commerciali internazionali in due recenti lodi della Camera arbitrale della Camera di Commercio di Vienna*, RIVISTA DELL'ARBITRATO 547 (1995).

For a criticism, see Franco Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing*, 15 J.L. & COM. 1, 123-24 (1995).