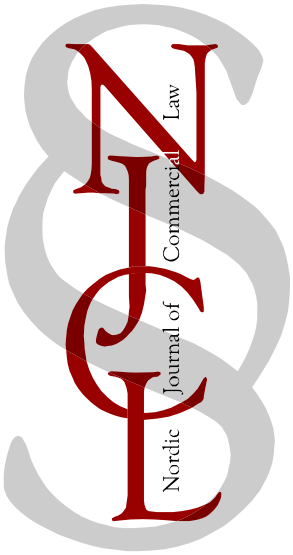

GAP-FILLING IN THE CISG: MAY THE UNIDROIT PRINCIPLES SUPPLEMENT THE GAPS IN THE CONVENTION?

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I. INTRODUCTION

It seems evident that an international body of law such as the United Nations Convention on Contracts for the International Sales of Goods (hereinafter "CISG" or "Convention")[1] cannot be exhaustive[2]. As it is difficult to cover all necessary matters, there must be provisions to fill gaps when one faces issues which are not dealt with by an instrument of law such as the Convention.

Thus, it is essential that all treaties have a provision regarding gap-filling to guide in cases where there is an omission or lack of specific rules. The CISG, as other similar Conventions[3], refers to general principles regarding gap-filling in its article 7(2). As shall be further discussed in this paper, recourse to general principles will be made whenever there is a gap, and, as *ultima ratio* one will reach to domestic law rules to fill gaps. On the other hand, if there are no gaps, there shall not be recourse to general principles, but solely to the specific provisions and rules set forth in the Convention.

Under the CISG, due to the party autonomy principle, parties can stipulate in the contract which rules and/or principles will be taken into consideration to fill in any gaps. In fact, in practice, it is common that the parties do not specify how to fill gaps, notwithstanding their ability to do so under the party autonomy principle. This paper will, therefore, disregard parties' provisions regarding gap-filling and consider possibilities as if there were no agreement in this respect.

In cases that the parties of a contract under the CISG do not provide for filling of gaps, there is a discussion whether external principles, such as the UNIDROIT Principles of International Commercial Contracts[4] ("UNIDROIT Principles") are able to fill those. The UNIDROIT Principles were first enacted in 1994 and stated in their preamble the idea of supplementing other international uniform law instruments. Hence, the main issue that will be analyzed in this paper is the possibility of filling CISG gaps with the UNIDROIT Principles.

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[1] Final Act of the United Nations Conference on Contracts for the International Sale of Goods, April 10, 1980, U.N. Doc. A/CONF.97/18 (1980), reprinted in S.Treaty Doc. 98-9, (1983) and *available at* <http://www.unilex.info>.

[2] Franco Ferrari, *Gap-filling and Interpretation of the CISG: Overview of International Case Law*, 7 VJ 63, 79 (2003).

[3] See, for example, article 4(2) of the Convention on International Factoring and article 6(2) of the Convention on International Financial Leasing.

[4] In this paper, reference will be made to the current version of the UNIDROIT Principles of 2004, *available at* <http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf> (last visited April 17, 2005).

II. FROM THE CISG TO THE UNIDROIT PRINCIPLES

1. Gap-Filling Under the CISG

1.1. Intra Legem and Praeter Legem Gaps

It is important to understand the notion of *intra legem*[5] and *praeter legem*[6] gaps before discussing gap-filling. The general principles of the CISG are only considered for the purpose of filling *praeter legem* gaps[7]. The difference of the concepts is highly relevant and this paper will address solely *praeter legem* gaps, because *intra legem* gaps are, under Article 7(2) of the CISG, filled in by domestic law applicable by virtue of the conflict of laws rules of the forum State; the focus here is only on gap-filling within the context of the Convention. On the other hand, with respect to *praeter legem* gaps, according to the same Article 7(2) of the CISG, one will primarily resort to the general principles on which the Convention is based or, only in the absence of such principles, by having recourse to the law applicable by virtue of the rules of private international law[8].

Intra legem gaps refer to those issues not dealt with by the Convention, such as matters that are excluded from the scope of application[9] of the CISG. If an issue is expressly excluded from the scope of the CISG, it is not governed by the Convention, article 7(2) does not apply, CISG general principles do not come into play, and the court must apply the conflict of laws rules[10]. Whereas articles 2[11] and 3(2)[12] expressly exclude some contracts from the Convention's sphere of application, Articles 4[13] and 5[14] expressly exclude some matters of the CISG's scope of application.

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[5] Also called external gaps.
[6] Also called internal gaps.
[7] Franco Ferrari, *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,* 10 Pace Int'l L. Rev. 157, 162 (Summer, 1998).
[8] *See* Franco Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing*, 15 J.L. & COM. 1, 120 (Fall, 1995).
[9] For a detailed discussion of the Convention's scope of application, *see* Franco Ferrari, *Scope of Application: Articles 4-5*, *in* DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 96 (Franco Ferrari et al. eds., Munich, Sellier 2004).
[10] Henry Mather, *Choice of Law for International Sales Issues not Resolved by the CISG*, 20 J. L. & COM. 155, 159 (Spring, 2001).
[11] Article 2 of the CISG excludes from its application the sales: "(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; (b) by auction; (c) on execution or otherwise by authority of law; (d) of stocks, shares, investment securities, negotiable instruments or money; (e) of ships, vessels, hovercraft or aircraft; (f) of electricity."
[12] According to this provision, the CISG does not apply to contracts in which "the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services."
[13] Issues of validity and the effect on property being sold are also expressly excluded by the CISG.
[14] "The Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person."

These contracts and issues will be dealt with by the appropriate body of law; in most cases domestic law, applicable pursuant to the rules of private international law[15].

On the other hand, there are topics that are intended to be governed by the CISG, but, for some reason, its provisions contain gaps. These are the so called *praeter legem* gaps, which will be the object of concern in this paper. Once such a gap has been identified, one must know how to overcome it in accordance with the Convention. In other words, when a dispute arises regarding a *praeter legem* gap and the parties did not state in the agreement how to fill gaps, one must look at the Convention's provisions regarding gap-filling, which will lead to the use of the general principles and only as a last resort to the conflict of laws rules.

At this point, it may be convenient to give an example of an issue governed by the CISG, but not completely regulated by it. One of them is the way of assessing the interest rate that a party has the right to receive in accordance with articles 78 and 84 of the CISG. The absence of a formula to calculate the rate of interest has been interpreted in divergent ways; some understand it as a *prater legem* gap and others, as an *intra legem* gap[16]. These different interpretations necessarily lead to diverging solutions, since under the CISG, the aforementioned kinds of gaps have to be dealt with differently[17]. If considered an internal gap, interpretation will first fall back on the general principles and, lastly, to private international law rules, whereas external gaps will be directly resolved by recourse to the latter. Supposing this issue is a *praeter legem* gap, one would have to verify which general principles of the Convention apply. In this specific case, it has been acknowledged[18] that the principle of full compensation should be taken into consideration.

1.2. Gap-filling Methods

There are basically three gap-filling methods. The so-called "true code approach" is the one that limits the interpreter to the text of the Convention itself, considering that the legal document is comprehensive enough[19]. When explaining this method, Grant Gilmore[20] states that a code "is a legislative enactment which entirely pre-empts the field and which is assumed to carry within the

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[15] To a contrary opinion, *see* Alejandro M. Garro, *The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG*, 69 TUL. L. REV. 1149, 1159 (1994-1995) (stating that in issues concerning validity, even though the UNIDROIT Principles are not a binding instrument, in the absence of any other indication by the parties, the judge or arbitrator may resort to them, sticking to international standards instead of falling back on the domestic grounds).

[16] Franco Ferrari, *supra* note 8, at 120-122 (citing authority to both positions).

[17] *Id,* at 120; Franco Ferrari, *Uniform Application and Interest Rates under the 1980 Vienna Sales Convention*, 24 GA. J. INT'L & COMP. L. 467, 472 (Winter, 1995).

[18] Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 MINN. J. GLOBAL TRADE 105, 129 (Winter, 1997) (the author also mentions the principle of unjust enrichment. However, it is argued that the broader and primary goal of the Convention is to compensate the aggrieved party fully. According to the same scholar, once this goal is accomplished, if there is still unjust enrichment on the part of the breacher, such unjust enrichment should be disgorged depending on the facts.). *See* also Karin L. Kizer, *Minding the Gap: Determining Interest Rates Under the UN Convention for the International Sale of Goods*, 65 U. CHI. L. REV. 1279, 1295-1296 (Fall, 1998) (making reference to the principle of full compensation and, as an alternative, to the principle of unjust enrichment).

[19] Robert A. Hillman, *Construction of the Uniform Commercial Code: UCC Section 1-103 and "Code" Methodology,* 18 B.C. IND. & COMM. L. REV. 655, 657 (1977) (when using this approach, one should look only to the code itself, but no further).

[20] Grant Gilmore, *Legal Realism: Its Cause and Cure,* 70 YALE L. J. 1037, 1043 (1961). Also cited, among others, by James W. Bowers, *Incomplete Law,* 62 LA. L. REV. 1229, 1232 (Summer, 2002); Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 526 (Summer, 2000).

answers to all possible questions: thus when a court comes to a gap or an unforeseen situation, its duty is to find, by extrapolation and analogy, a solution consistent with the policy of the codifying law (...)". The "meta-code approach"[21], in contrast, relies on the use of external legal principles. Finally, the last approach is a combination of the first two methods.

It has been said that the drafters of the Convention compromised after some debate regarding the above mentioned methods[22]. Legislators from civil law traditions believed in the "true-code approach", alleging that "the courts could fill gaps by applying both the Convention's general principles and, either directly or by analogy, the more specific principles embedded in particular provisions"[23]. Although the meta-code approach "seems to be favored in *common law*", other commentators demonstrate that the United States Uniform Commercial Code (UCC) is based on the civil law approach[24].

In the end, the drafters of the CISG opted for a compromise including both methodologies[25], choosing the method that combines both the true-code and the meta-code approaches. In the Convention's system, however, when principles are available, they trump domestic rules.[26] Domestic rules will only be applied as a last resort, when there are no general principles underlying the Convention[27].

1.3. Article 7(2)

From a theoretical point of view, Article 7 of the CISG has been considered one of the most important provisions of the Convention[28]. Article 7(2) tries to solve the issue of gaps in the Convention, stating that "questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law". Gyula Eörsi[29] points out that, notwithstanding the absence of the word "gap" in this article, it serves to fill gaps and corresponds to Article 17 of ULIS (Uniform Law on the International Sale of Goods[30], adopted at a Hague Conference in 1964)[31], one of CISG antecedents. In spite of the fact that both articles refer to gaps, it must be said that ULIS

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[21] Regarding "meta-code" concepts, *see generally,* Steve H. Nickles, *Problems of Sources of Law Relationships Under the Uniform Commercial Code, Part I: The Methodological Problem and the Civil Law Approach,* 31 Ark. L. Rev. 1 (1977-1978).
[22] Robert A. Hillman, *Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity, available at* <http://www.cisg.law.pace.edu/cisg/biblio/hillman_1.html> (last visited March 6, 2005) (Citing Bianca and Bonell).
[23] *Id.* at n. 24.
[24] Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183, 218 (1994-1995) (citing other commentators).
[25] Robert A. Hillman, *supra* note 22.
[26] *Id.*
[27] Alejandro M. Garro, *supra* note 15, at 1159.
[28] Phanesh Koneru, *supra* note 18, at 106.
[29] Gyula Eörsi, *General Provisions*, *in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 2-1, 2-9 (Matthew Bender ed. 1984), *available at* <http://cisg.law.pace.edu/cisg/biblio/eorsi1.html> (last visited Feb. 26, 2005) (citing H. Dölle).
[30] Annex 834 UN Treaty Ser 109 (1964), reprinted in 13 AM. J. COMP. L. 453.
[31] *See* also Jacob S. Ziegel, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods, available at* <http://www.cisg.law.pace.edu/cisg/text/ziegel7.html> (last visited Feb 26, 2005) (stating that article 7(2) is not an innovation as it has a counterpart in article 17 of ULIS).

relied on the "true code" approach, while the drafters of the CISG, as mentioned above, rejected this approach[32] in favor a combination of the "true-code" and "meta-code" techniques.

One must keep in mind that article 7(2) is applicable whenever a gap is deemed to exist. For that reason, the general principles will come into place solely when there is a gap in the text of the Convention. In other words, if there are specific provisions regarding any issue, they should be applied, without resort to the general principles.

Furthermore, Gyula Eörsi[33] reads Article 7(2) of the Convention as containing two devices pointing to different solutions: i) conformity with the general principles on which the Convention is based, which serves to exclude the homeward trend, and ii) rules of private international law, that seeks a solution outside the Convention. Regarding the second part of the article or the second device therein established, there does not seem to be much controversy, different from the first part[34], which, as shall be further discussed, has been interpreted in more than one way. As mentioned above, it has been understood that recourse to domestic laws should be a last resort, solely when there are no principles underlying the Convention. The controversies arise regarding the first half of the provision, particularly to determine what are the principles on which the Convention is based.

In summary, article 7(2) prescribes the policy to fill gaps and, in doing so describes the boundary between the CISG and domestic law[35]. The use of rules of private international law, thus, should be the second option. That is to say, Article 7(2) of CISG requires courts to rely on the general principles of the Convention before applying domestic law as a last resort[36]. This rule is appropriate to the rationale underlying the Convention: achieve uniformity in international sales transactions. In addition, it has been affirmed that this article's main virtue is to avoid any premature recourse to domestic laws, creating an auto-sufficient[37] system which obviously has no aspiration of governing all issues that may be involved in a sales contract[38]. At the same time, the general principle provision can have the narrow effect of guarding against the use of local (and divergent) legal concepts of domestic laws in construing the specific provisions and the broader effect of authorizing tribunals to create new rules not directly based on the textual provisions, but relying on principles, which are broad concepts[39].

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[32] Franco Ferrari, *supra* note 7, at 164-165 and Franco Ferrari, *General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions*, 3 UNIFORM L. REV. 451, 456 (1997).

[33] Gyula Eörsi, *supra* note 29, at 2-3 and 2-4.

[34] Joseph Lookofsky, *In Dubio pro Conventione? Some Thoughts about Opt-Outs, Computer Programs and Preemption under the 1980 Vienna Sales Convention (CISG)*, 13 DUKE J. COMP. & INT'L L. 263, 282 (Summer, 2003).

[35] Bruno Zeller, *Four-Corners – The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods*, *available at* <http://cisg.law.pace.edu/cisg/biblio/4corners.html> (last visited Feb. 26, 2005).

[36] In this respect, see Phanesh Koneru, *supra* note 18, at 115.

[37] Gert Brandner, *Admissibility of Analogy in gap-filling under the CISG*, *available at* <http://www.cisg.law.pace.edu/cisg/biblio/brandner.html> (last visited April 9, 2005) (also concluding that Article 7(2) prefers autonomous gap-filling in the form of recourse to general principles to making resort to the law applicable by virtue of the rules of private international law and stating that autonomous gap-filling preserves the advantages of uniform law.)

[38] María del Pilar Perales Viscasillas, *El Contrato de Compraventa Internacional de Mercancias (Convención de Viena de 1980)*, 10 (2001), *available at* <http://www.cisg.law.pace.edu/cisg/biblio/perales1-07.html> (last visited Feb. 26, 2005).

[39] Phanesh Koneru, *supra* note 18, at 116. (making reference to the Convention's preamble).

As a result, first of all, it is important to understand what was meant by the drafters of the CISG when they referred to "the general principles on which it is based". Commentators[40] point out that the CISG fails to indicate which provisions contain the "general principles" on which it is based. Although the Convention does not expressly state the principles, legal writers[41] and court decisions[42] have inferred them from the text. Indeed, despite the fact that some of the principles are expressly stated in the Convention, most principles must be derived or extracted from its specific provisions[43].

2. Key Distinctions for the Comparison between CISG and UNIDROIT Principles

2.1. Distinction between Principles and Rules

When discussing gap-filling with recourse to principles, it is crucial to avoid confusion between the notions of rules and principles[44]. Once the two concepts are distinguished, it is possible to clarify that some general rules stated both in the CISG and in the UNIDROIT Principles are of no relevance to the gap-filling structure of article 7(2) of the Convention, and to establish what are the principles to fill gaps.

The UNIDROIT Principles have a structure similar to the American Restatement of Contracts; they contain both basic rules and legal principles formulated as black letter law[45]. Therefore, one must note that, albeit the name of the instrument refers to the word "principles", many of its provisions are simply rules. Moreover, it is critical to understand this distinction in order to correctly determine the principles that underlie the CISG.

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[40] *See*, for example, Alejandro M. Garro, *supra* note 15, at 1156; Phanesh Koneru, *supra* note 18, at 116; Robert A. Hillman, *supra* note 23.

[41] *See*, among others, Franco Ferrari, *supra* note 7, at 168-177; Ulrich Magnus, *General Principles of UN-Sales Law*, *available at* <http://www.cisg.law.pace.edu/cisg/biblio/magnus.html> (last visited March 6, 2005); Henry Mather, *supra* note 10, at 157-158.

[42] *See*, among others, Rheinland Versicherungen v. Atlarex S.r.l, *Tribunale* [District Court] *di Vigevano*, Italy, 12 July 2000, Case Number 405, translation to English *available at* <http://cisgw3.law.pace.edu/cases/000712i3.html (last visited Mar. 20, 2005)>; Al Palazzo S.r.l. v. Bernardaud S.A., *Tribunale* [District Court] *di Rimini*, Italy, 26 November 2002, 3095, *available at* <http://cisgw3.law.pace.edu/cases/021126i3.html> (last visited Apr. 9, 2005); Scatolificio La Perla S.n.c. di Aldrigo Stefano e Giuliano v. Martin Frischdienst GmbH, *Tribunale* [District Court] *di Padova*, Italy, 31 March 2004, Case number 40466, translation to English *available at* <http://cisg3.law.pac.edu/cisg/wais/db/cases2/04033li3.html> (last visited Jan. 13, 2005) (all mentioning the identification of the general principle regarding the allocation of the burden of proof); BV BA G-2 v. AS C.B., *Rechtbank van Koophandel* [District Court] *Veurne*, Belgium, 25 April 2001, *available at* <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010425b1.html> (last visited April 12, 2005); Landgericht [District Court] *Stendal*, Germany, 12 October 2000, *available at* <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/001012g1.html> (last visited April 12, 2005) (both stating that the principle of party autonomy underlies the Convention); Conservas La Costeña S.A. de C.V. v. Lanín San Luis S.A. & Agroindustrial Santa Adela S.A., *Compromex - Comisión para la Protección del Comercio Exterior de México* [Mexican Commission for the Protection of Foreign Trade], Mexico, 29 April 1996, *available at* < http://cisgw3.law.pace.edu/cases/960429m1.html> (last visited May 2, 2005) (mentioning the principle of iformality); SO. M. AGRI s.a.s di Ardina Alessandro & C. v. Erzeugerorganisation Marchfeldgemüse GmbH & Co. KG, *Tribunale* [District Court] *di Padova*, Italy, 25 February 2004, 40552, *available at* <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040225i3.html> (last visited Jan. 13, 2005) (mentioning various principles).

[43] Franco Ferrari, *supra* note 24, at 222-226.

[44] For a complete discussion and description of evolution of theories distinguishing rules and principles, *see* Humberto Ávila, *A Distinção entre Princípios e Regras e a Redefinição do Dever de Proporcionalidade*, REVISTA DIÁLOGO JURÍDICO V. 1, N. 4 (July 2001) *available at* <http://www.direitopublico.com.br/pdf_4/DIALOGO-JURIDICO-04-JULHO-2001-HUMBERTO-AVILA.pdf> (last visited April 16, 2005).

[45] Klaus Peter Berger, *The Lex Mercatoria Doctrine and the UNIDROIT Principles of International Commercial Contracts*, 28 LAW & POL'Y INT'L BUS. 943, 946 (Summer, 1997).

Ronald Dworkin has established some guidelines to differentiate rules and principles. He calls "a principle a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality"[46]. Furthermore, stating that the difference is logic, he clarifies that both of them "point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give"; indeed, "[r]ules are applicable in an all-or-nothing fashion": "[i]f the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision."[47]

While principles can be in some way conflicting, but with different values attached to them, the rules cannot be contradicting and applied to a same situation. Luís Afonso Heck[48], in stating that the rules are definitive (absolute) commands, explains that a conflict between rules could be solved in two different manners: (i) by creating an exception in one of the rules that will eliminate the conflict, or (ii) by declaring one of the rules invalid.

"A general principle stands at a higher level of abstraction than a rule, or might be said to underpin more than one such rule" [49]. In this sense, John Felemegas has mentioned some rules in the CISG that, although referred to as principles, should not be treated as such[50]. He refers to: (a) The principle that widely known and largely observed usages must be taken into account; (b) The principle 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; (c) The principle that, unless otherwise expressly provided (in Part III of the CISG), any notice or other kind of communication made or given after the conclusion of the contract becomes effective on dispatch (article 27); and (d) The principle that the agreement between parties is not subject to any formal requirement. Regarding the last issue, it seems that, contrary to the commentator's view, a principle of informality can be derived from the Convention's provisions.

2.2. UNIDROIT Principles and CISG: differences in sphere of application, nature and time

Before establishing similarities and conflicts between the UNIDROIT Principles and the CISG Principles, it is necessary to compare the instruments themselves.

2.2.1. Difference in sphere of application

Both the Convention and the UNIDROIT Principles deal with international contracts. The internationality of contracts under the CISG is defined in accordance to a subjective criterion, depending on the parties having their places of business (or habitual residences) in different

[46] Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 23 (1967-1968).
[47] *Id*, at 25.
[48] Luís Afonso Heck, *O Modelo das Regras e o Modelo dos Princípios na Colisão de Direitos Fundamentais*, 781 REVISTA DOS TRIBUNAIS 71, 75 (November 2000).
[49] John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation, available at* <http://cisg.law.pace.edu/cisg/biblio/felemegas.html> (last visited Feb. 26, 2005).
[50] *Id.* (citing several authors).

contracting States[51]. The UNIDROIT Principles, in contrast, do not prescribe their own rules to fulfill the internationality requirement[52]. Franco Ferrari argues that this lack of definition does not matter, due to the fact that the UNIDROIT Principles application is conditioned to the parties' adopting it, since it does not have a binding character[53].

In addition, among contracts deemed international, the first substantial difference between the CISG and the UNIDROIT Principles refers to their *substantive* sphere of application. As the Convention's name already states, its applicability is limited solely to the sale of goods (under Article 1[54]) and similar contracts (under article 3(1)[55]). On the other hand, the UNIDROIT Principles include not only sales of goods, but any kind of international commercial contracts. Here, also, the UNIDROIT Principles do not furnish any guidance in determining what constitutes a commercial contract[56]. Regarding this omission, Franco Ferrari also argues that "as long as the UNIDROIT Principles are not binding, their direct applicability by virtue of party autonomy prevents an exact definition from becoming relevant"[57].

Furthermore, regarding consumer contracts, the CISG sets forth in article 2(a) that it "does not apply to sales of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew or ought to have known that the goods were bought for any such use". Since the CISG only excludes consumer contracts, "the CISG is also applicable where the goods were bought for professional use"[58].

2.2.2. Difference in nature

Additionally, there is a great difference in the nature of these two sets of rules. While the UNIDROIT Principles do not constitute law, the Convention is applicable law for contracts and issues within the scope of the CISG where the parties have not opted out[59]. The UNIDROIT Principles have been considered, as it was suggested in their Introduction, an international

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[51] Franco Ferrari, *The CISG's Sphere of Application: Articles 1-3 and 10*, *in* DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 21, 24 (Franco Ferrari et al. eds., Munich, Sellier 2004) (citing court decisions that state this criterion). *See* article 1.1(a) and 10(b) of the CISG.

[52] Franco Ferrari, *Defining the Sphere of Application of the 1994 "UNIDROIT Principles of International Commercial Contracts"*, 69 TUL. L. REV. 1225, 1236 (1994-1995) (citing Georges R. Delaume for a discussion in general on how to determine what is an international contract).

[53] *Id.*, at 1236 (stating that "if the UNIDROIT Principles had binding character, it would be necessary to define the concept of international contract in order both to define their sphere of application and to promote uniformity in their application").

[54] "This Convention applies to contracts of *sale of goods* between parties whose places of business are in different States:

when the States are Contracting States; or

when the rules of private international law lead to the application of the law of a Contracting State."

[55] "Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production".

[56] *Id.*, at 1237.

[57] *Id.*, at 1237.

[58] Franco Ferrari, *supra* note 51, at 84 (stating that a contract does not need to be concluded for either commercial or industrial purposes in order to be governed by the CISG).

[59] Harry M. Flechtner, *The CISG Impact on International Unification Efforts: the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law*, *in* The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences 169, 194 (Franco Ferrari ed., Milan, Giuffrè Editore, 2003).

restatement of general principles of contract law. Due to the fact that this text does not carry the legal force of an international treaty, its application is not mandatory in any nation[60]. The CISG, in contrast, is binding law if all its applicability requirements are met.

2.2.3. Difference in time

Also, it is pertinent to mention the point in time in which the documents were drafted and enacted. The CISG went into effect on January 1, 1988[61], while the first version of the UNIDROIT Principles was promulgated only in 1994. As the UNIDROIT Principles were elaborated after the CISG, it is obvious that the latter did not make reference to the former regarding gap-filing or any other issue.

Among other codifications and compilations, the CISG was one of the sources of inspiration to the UNIDROIT Principles, due to the fact that the former was recently enacted at the time the latter was drafted[62].

Despite the aforementioned diverging points, this paper intends to compare the principles and analyze the possibility of applying the UNIDROIT Principles to fill CISG gaps. Scott Slater[63] has claimed that these would be reasons for a court to "justifiably refuse to apply the Principles as a gap-filling aid". These differences, however, do not by themselves preclude the use of the UNIDROIT Principles to fill CISG gaps. Whether or not this is possible requires a comparative analysis of the principles underlying both instruments, which shall be endeavored in the next part of the paper.

[60] Scott D. Slater, *Overcome by Hardship: The Inapplicability of the UNIDROIT Principles' Hardship Provisions to CISG,* 12 FLA. J. INT'L L. 231, 239 (Summer, 1998).
[61] The draft was submitted to a Diplomatic Conference held in Vienna in 1980; after necessary ratifications pursuant to article 99, the CISG entered into force in January 1, 1998.
[62] Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts: Why? What? How?,* 69 TUL. L. REV. 1121, 1129 (1994-1995).
[63] Scott D. Slater, *supra* note 60, at 245.

III. UNIDROIT PRINCIPLES AND GAP-FILLING IN THE CISG

As many commentators[64] and court decisions[65] have identified the principles underlying the CISG, we shall mention some of them. This paper will, first, analyze the principles the Convention shares in common with the UNIDROIT Principles and, second, the principles that might contradict with each other.

1. Common Principles

1.1. Principle of Good Faith

The UNIDROIT Principles explicitly provide that "each party must act in accordance with good faith and fair dealing in international trade"[66]. In addition, in supplying an omitted term, it is set forth that, among other factors, good faith and fair dealing should be considered in determining the appropriate term[67]. Furthermore, Bonell[68] lists a number of provisions which constitute a direct or indirect application of the principle of good faith and fair dealing[69].

Paul J. Powers[70] demonstrates that there is a contrast in the concept of good faith in civil law and common law. According to his explanation, "civil law states tend to use a more expansive approach to the good faith obligation, applying it to both contract formation and performance", while "common law states prefer a [*narrower*] good faith duty applicable to contract performance". Furthermore, the different approaches around the globe led to debate regarding the drafting of the good faith provision in the Convention. In the end, a working group was formed and it proposed a compromise article which protected the CISG's international character while promoting uniformity and good faith[71].

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[64] *See*, *supra* note 41.
[65] *See*, *supra* note 42.
[66] Article 1.7(1).
[67] Article 4.8(2)(c).
[68] Michael Joachim Bonell, *The UNIDROIT Principles in Practice – Caselaw and Bibliography on the Principles of Commercial Contracts* 58 and 61 (Transnational Publishers, Inc. 2002).
[69] Articles 2.1.4(2)(b), 2.1.15, 2.1.16, 2.1.18, 2.1.20, 3.5, 3.8, 3.10, 4.1(2), 4.6, 4.8, 5.1.2, 5.1.3, 6.1.3, 6.1.5, 6.1.16(2), 6.1.1(1), 6.2.3(3)(4), 7.1.2, 7.1.6, 7.17, 7.2.2(b)(c), 7.4.8 and 7.4.13.
[70] Paul J. Powers, *Defining the Undefinable: Good Faith and the United Nations Convention on the Contracts for the International Sale of Goods*, 18 J. L. & COM. 333, 335-342 (Spring, 1999).
[71] *Id.*, at 343.

Indeed, the good faith principle has been recognized as one of the principles expressly set forth by the Convention[72]. However, there has been doctrinal discussion regarding the reach of the good faith principle in the CISG[73]. The CISG does not contain an express provision that the parties should deal with each other in accordance with the principle of good faith[74]. Therefore, the issue raised is whether the principle of good faith is only applicable to the interpretation of the Convention or to the dealings of the parties and their rights and obligations.

Bonell[75], one of the drafters of the UNIDROIT Principles, states that both instruments depart from each other regarding this principle, due to the fact that "the Principles impose upon the parties a duty to act in good faith throughout the life of the contract, including the negotiation process, while the CISG, in contrast, expressly refers to good faith only in the context and for the purpose of the interpretation of the Convention as such". Professor Honnold[76], for instance, in the same line of thought of Professor Bonell's interpretation, argues that good faith in the CISG acts only as a principle for the interpretation of the Convention itself.

Nonetheless, it seems correct to declare that if we have to apply Article 7 within the context of the CISG, good faith would have to be considered a general principle on which the Convention is based[77]. In fact, the Secretariat Commentary to the CISG states that "there are numerous applications of this principle in the particular provisions of the Convention" [78], supporting this argument.

In this same sense, Ulrich Magnus[79] concludes his editorial remarks on Article 7 stating that the differences in wording of both texts do not matter in essence. In fact, to reach this conclusion, the commentator makes an excellent analysis of the contents of the good faith principle, comparing

[72] John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation, available at* <http://cisg.law.pace.edu/cisg/biblio/felemegas.html> (last visited Feb. 26, 2005) and Franco Ferrari, *supra* note 24, at 223 (both citing Audit, Enderlein & Maskow and Rolf Herber & Beate Czerwenka).

[73] *See,* among others, Bruno Zeller, *The UN Convention on Contracts for the International Sale of Goods (CISG) – A Leap Forward Towards Unified International Sales Laws*, 12 PACE INT'L L. REV. 79, 92 *et seq.* (Spring, 2000); Ulrich Magnus, *Remarks on Good Faith*, 1, *available at* <http://www.cisg.law.pace.edu/cisg/principles/uni7.html#um> (last visited Feb. 26, 2005); Paul J. Powers, *supra* note 70, at 342-353.

[74] John Felemegas, *Comparative Editorial Remarks on the Concept of Good Faith in the CISG and the PECL*, 13 PACE INT'L L. REV. 399, 400-401 (Fall, 2001).

[75] Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments?*, 1 UNIFORM L. REV. 26, 30-31 (1996).

[76] John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention 146-147 (2d ed. 1991).

[77] Bruno Zeller, *supra* note 73, at 93.

[78] *Secretariat Commentary* [on Article 7 of the 1978 Draft], *United Nations Conference on Contracts for the International Sale of Goods*, OFFICIAL RECORDS: DOCUMENTS OF THE CONFERENCE AND SUMMARY RECORDS OF THE PLENARY MEETINGS AND OF THE MEETINGS OF THE MAIN COMMITTEES (VIENNA, 10 MARCH – 11 APRIL 1980) 17-18, (1981), *available at* <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-07.html> (last visited Apr. 17, 2005) (citing various provisions of the Convention).

[79] Ulrich Magnus, *supra* note 73, at 5. *See* also Ulrich Magnus, *Remarks on Good Faith: The United Nations Convention on Contracts do the International Sale of Goods and the International Institute for the Unification of Private Law, Principles of International Commercial Contracts*, 10 PACE INT'L L. REV. 89 (Summer 1998).

the UNIDROIT Principles and the CISG in the following different aspects: (i) the international good faith[80]; (ii) the object of good faith[81]; and (iii) the specific good faith rules[82].

In favor of Magnus' position, Bruno Zeller[83] states that good faith applies to the parties' rights and obligations besides being applicable to the interpretation of the Convention. In addition, case law[84] has also demonstrated courts' acknowledgment of good faith as a general principle. Peter Schlechtriem[85] also argues that the good faith mentioned in the CISG should amount to a general principle. Moreover, some scholarly writings[86] have cited many of the Convention's provisions from which the good faith principle can be inferred.

In fact, there are various provisions in the CISG from which one can infer the principle of good faith. For instance, notice is to be made by means appropriate in the circumstances[87], seller must arrange appropriate means of transportation for carriage of the goods[88], buyer must examine the goods as practicable in the circumstances[89], seller's duty to disclose the risk of loss of the goods[90], duty to mitigate losses[91], duty to give notice of any impediment to perform the agreement[92].

In sum, according to a majority of the commentators, it could be affirmed that the principle of good faith underlies both instruments. It is true that as it is expressly mentioned solely as a means to interpretation in the CISG, it might not have as much strength as this principle usually is conferred in other instruments, such as the UNIDROIT Principles. However, as demonstrated above, it is clear that the good faith principle underlies many provisions of the CISG, and hence it should be used as a principle to fill gaps.

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[80] *Id.* (stating that in both texts "it is clear that no specific national good faith concept can be applied but only one which fits for international trade relations")

[81] *Id.* (stating that even though the object of good faith is less clear in the CISG, the "Convention also intends to secure that (sales) contracts between parties from different countries are governed by the good faith principle") (footnote omitted).

[82] *Id.* (stating that "both the CISG and the Principles provide for a number of rules specifying what good faith is designed to mean in certain situations" and citing examples)

[83] Bruno Zeller, *supra* note 35.

[84] For instance: Filanto, S.p.A. v. Chilewich Intern. Corp., 789 F.Supp. 1229, (S.D.N.Y. 1992), *available at* <http://cisgw3.law.pace.edu/cases/920414u1.html> (last visited Apr. 12, 2005); Dulces Luisi, S.A. de C.V. v. Seoul International Co. Ltd. y Seoulia Confectionery Co., Compromex - Comisión para la Protección del Comercio Exterior de México [Mexican Commission for the Protection of Foreign Trade], Mexico, 30 November 1998, *available at* <http://cisgw3.law.pace.edu/cases/981130m1.html> (last visited April 3, 2005); Budapest arbitration proceeding Vb 94124 (1995) *available at* <http://cisg3.law.pace.edu/cases/951117h1.html> (last visited April 3, 2005); SARL BRI Production "Bonaventure" v. Société Pan African Export, *Cour d'Appel* [Appeal Court] *Grenoble*, France, 22 February 1995, *available at* <http://cisgw3.law.pace.edu/cases/950222f1.html> (last visited April 3, 2005). For an analysis of these cases, see Bruno Zeller, *supra* note 35.

[85] Peter Schlechtriem, Commentary on the UN Convention on the International Sale of Goods (CISG) 61 (Geoffrey Thomas trans., Clarendon Press 2nd ed 1998).

[86] Bruno Zeller, *supra* note 35 (citing articles 29(2), 38, 39, 40 and 49(2)); Judith Martins Costa, *Os Princípios Informadores do Contrato de Compra e Venda Internacional na Convenção de Viena de 1980*, *available at* <http://www.uff.br/cisgbrasil/costa.html> (last visited April 16, 2005) (citing articles 27, 32(1), (2) and (3), 35(1),(2) and (3), 36(1) and (2), 38(1), 46(1), 54, 62, 68, 77 and 79).

[87] Article 27.

[88] Article 32(2).

[89] Article 38(1).

[90] Article 68.

[91] Article 77.

[92] Article 79(4).

1.2. Favor Contractus

Favor contractus is another basic idea underlying the UNIDROIT Principles, in accordance with Bonell[93], who points out some of the provisions inspired by this principle[94]. Similarly, the CISG "aims at preserving the parties' commitments and at favoring the performance of their agreement, thus relying on a general principle of *favor contractus*"[95].

Thus, it is accurate to suggest that both instruments "share the same policy of preserving the enforceability of the contract if at all feasible"[96]. "This common goal is reflected by offering the breaching party the possibility to cure, requiring the nonbreaching party to provide an additional period for performance, and, most importantly, by allowing the termination of the contract only when the breach or nonperformance qualifies as 'fundamental'"[97].

1.3. Mitigation Principle

The principle of mitigation can be extracted from the Convention's provisions, according to which "parties must take reasonable measures to limit damages resulting from the breach of the contract"[98]. There have also been court decisions regarding this issue[99]. This principle is also present in the UNIDROIT Principles, according to its article 7.4.8, which requires the parties to mitigate the harm resulting to them from the breach of contract. The mitigation principle, hence, seems to coincide in both instruments.

1.4. Principle of Reasonableness

The principle of reasonableness can be inferred from the Convention's provisions[100]. Judith Martins Costa enumerates various rules of the Convention which derive from this principle[101]. In the same sense, the UNIDROIT Principles also set forth some rules that embed this principle,

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[93] Michael Joachim Bonell, *supra* note 62, at 1137.
[94] Articles 2.1, 2.11, 2.12, 2.14, 2.22, 3.2, 3.3, 6.2.1 to 6.2.3, 7.3.1 to 7.3.6 and 7.1.4.
[95] Marco Torsello, *Remedies for Breach of Contract under the 1980 Convention on Contracts for the International Sale of Goods (CISG), in* QUO VADIS CISG? CELEBRATING THE 25TH ANNIVERSARY OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 43, 55 (Franco Ferrari ed, Munich, Sellier 2005) (stating that "the Convention does this by enhancing spontaneous cure of defective performance by the party in breach, but it also does this by favoring judicial claims leading to the same result over claims for the avoidance of the contract, which seem to be relegated to the role of *extrema ratio* remedies"); Franco Ferrari, *supra* note 24, at 225; Ulrich Magnus, *supra* note 41; Gert Brandner, *supra* note 37.
[96] Alejandro M. Garro, *supra* note 15, at 1185.
[97] *Id.* at 1185.
[98] Franco Ferrari, *supra* note 24, at 225 (referring to article 77 and citing Audit and Frignani for similar affirmations); Franco Ferrari, *supra* note 7, at 175.
[99] *See*, for example, SO. M. AGRI s.a.s di Ardina Alessandro & C. v. Erzeugerorganisation Marchfeldgemüse GmbH & Co. KG, *Tribunale* [District Court] *di Padova*, Italy, 25 February 2004, 40552, *available at* <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040225i3.html> (last visited Jan. 13, 2005); FCF S.A. v. Adriafil Commerciale S.r.l., Bundesgericht [Supreme Court], Switzerland, 15 September 2000, *available at* http://cisgw3.law.pace.edu/cases/000915s2.html (last visited May 2, 2005).
[100] Franco Ferrari, *supra* note 24, at 225; Franco Ferrari, *supra* note 7, at 174; Ulrich Magnus, *supra* note 41; Judith Martins Costa, *supra* note 86.
[101] Articles 8 (1),(2) and (3), 35(1), 38(3), 39(1), 43(1), 46(3), 48(1) and (2), 49(2)(a), 60(a), 65(1), 79(1).

such as reasonable usages[102], reasonableness in revocation of offers[103], reasonable time of acceptance[104], and reasonableness in supplying omitted terms[105]. The principle of reasonableness seems to be common in both the UNIDROIT Principles and the Convention, without any differences or limitations.

2. Different Principles

2.1. Principle of Party Autonomy

The principle of party autonomy is one of the principles underlying the CISG[106]. This principle seems to be implicit in some of the Convention's provisions, such as the article that allows parties to exclude application of the Convention itself or derogate some of its provisions[107] and the article that allows parties to bind themselves to any usages or practices they have established in their transactions[108]. It is necessary to mention that while the parties have autonomy to regulate their relationship, there are some limitations that should be observed[109], such as a reservation as to form requirements (article 12).

One of the most fundamental general principles stated by the UNIDROIT Principles is freedom of contract[110], according to which parties are free to enter into a contract and to determine its content[111] and may exclude the application of the Principles or vary their effect[112]. Similar to the CISG, the UNIDROIT Principles also have some mandatory provisions which it expressly provides that cannot be derogated, if the parties adopt the Principles in their agreement[113]. For instance, good faith and fair dealing, as set forth in article 1.7, cannot be excluded by the parties.

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[102] Article 1.8(2).
[103] Article 2.4(2)(b).
[104] Article 2.7.
[105] Article 4.8(2)(d).
[106] Franco Ferrari, *supra* note 7, at 172; Franco Ferrari, *supra* note 24, at 223; Franco Ferrari, *CISG Rules on Exclusion and Derogation: Article 6, in* DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 114, 116 (Franco Ferrari et al. eds., Munich, Sellier 2004); Ulrich Magnus, *supra* 41 (stating that "all agree that the parties' agreements prevail over the provisions of the CISG" and citing other authors). This principle has also been mentioned by some court decisions, among others: BV BA G-2 v. AS C.B., *Rechtbank van Koophandel* [District Court] *Veurne*, Belgium, 25 April 2001, *available at* <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010425b1.html> (last visited April 12, 2005); *Landgericht* [District Court] *Stendal*, Germany, 12 October 2000, *available at* <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/001012g1.html> (last visited April 12, 2005); SO. M. AGRI s.a.s di Ardina Alessandro & C. v. Erzeugerorganisation Marchfeldgemüse GmbH & Co. KG, *Tribunale* [District Court] *di Padova*, Italy, 25 February 2004, 40552, *available at* <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040225i3.html> (last visited Jan. 13, 2005).
[107] Article 6.
[108] Article 9(1).
[109] Ulrich Magnus, *supra* note 41.
[110] E. Allan Farnsworth, *An International Restatement: The UNIDROIT Principles of International Commercial Contracts*, 26 U. BALT. L. REV. 1, 4 (Summer, 1997); Michael Joachim Bonell, *supra* note 62, at 1134; Ole Lando, *Comparative Law and Lawmaking*, 75 TUL. L. REV. 1015, 1028 (March, 2001).
[111] Article 1.1 of the UNIDROIT Principles.
[112] Article 1.5 of the UNIDROIT Principles.
[113] Indeed, the entire set of rules of the UNIDROIT Principles are not mandatory; the parties are of course free to choose not to apply them.

Some commentators[114] have treated the above mentioned provisions of each instrument as equivalent. However, notwithstanding that both the above mentioned principles rely on the same rationale, they are not essentially the same. In fact, the principle of party autonomy is greater than the freedom of contract; party autonomy "accommodates the fulfillment of the principle of freedom of contract"[115].

2.2. Pacta Sunt Servanda

Article 1.3 of the UNIDROIT Principles "lays down another basic principle of contract law, that of *pacta sunt servanda*"[116].

According to Article 6.2.1 of the UNIDROIT Principles, even if performance becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations. Here, referring to article 1.3, Professor Bonell[117] clarifies that "the purpose of this article is to make it clear that as a consequence of the general principle of the binding character of the contract performance must be rendered".

Ulrich Magnus[118] states that even though the basic rule that contracts are binding is not expressly mentioned in the CISG, it is implied in numerous provisions, such as article 30 and 53, which determine the duty to deliver and the duty to effect payment. Furthermore, he points out that articles 71-73 and 79 show that the binding effect of the contract cannot be avoided in cases such as a simple change of circumstances or frustration of contract, but only if the requirements listed in these provisions are met, and he concludes that without the binding nature of the contract these provisions would not make sense. However, it is true that all those provisions (Articles 30, 53, 71-73 and 79) can be derogated from by the parties under Article 6 of the Convention and, thus, are not binding. Nevertheless, it is still possible to say that the principle of *pacta sunt servanda* underlies the Convention. The fact that the parties can vary the effect of the provisions only *confirms* the argument: if the will of the parties prevail over the provisions of the CISG, logically, the will of the parties should be enforced to the maximum extent. It would not make any sense for the Convention to give the parties full autonomy and then remove the binding effect of their agreement.

At a first analysis, as the principle of *pacta sunt servanda* is derived from provisions of both instruments, no differences regarding this principle in both instruments seem evident. However, it must be noted that the UNIDROIT Principles have provisions regarding hardship (articles 6.2.1 to 6.2.3), which is an institute that limits the effects of the *pacta sunt servanda* principle.

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[114] Ulrich G. Schroeter, *Freedom of Contract: Comparison between Provisions of the CISG (Article 6) and Counterpart Provisions of the Principles of European Contract Law, available at* <http://www.cisg.law.pace.edu/cisg/biblio/schroeter2.html> (last visited April 14, 2005) (considering article 6 of the CISG as a provision from which the principle of freedom of contract is derived); Alejandro M. Garro, *supra* note 15, at 1165 and Harry M. Flechtner, *supra* note 59, at 176.

[115] Bojidara Borisova, *Remarks on the Manner in which the UNIDROIT Principles may be used to Interpret or Supplement Article 6 of the CISG*, 9 VJ 153, 153 (2005).

[116] *See* Michael Joachim Bonell, *supra* note 68, at 49.

[117] Michael Joachim Bonell, *supra* note 68, at 245.

[118] Ulrich Magnus, *supra* note 41.

The CISG, on the contrary, does not have any specific provision about hardship[119]. Regarding the inexistence of an express provision of hardship on the CISG and the discussion whether article 79 would extend so far as to encompass hardship, Scott D. Slater[120] states that "there is authority for the proposition that the concept of hardship is not within article 79's definition of impediment"[121]. Also, Alejandro Garro establishes differences[122] between hardship and *force majeure* and states that, "if this conceptual and functional distinction is accepted, one must conclude that the CISG's provisions on exemption of liability for nonperformance contemplate different factual situations and remedies than those envisioned by the hardship provisions incorporated into the UNIDROIT Principles"[123]. Particularly with regards to hardship and article 79 of the Convention, in a case decided in Italy[124], the court held that the seller could not rely on hardship as a ground for avoidance, since CISG did not contemplate such a remedy in Article 79 or elsewhere.

Accordingly, in spite of the fact of both instruments being under the *pacta sunt servanda* principle, as the CISG does not contemplate any provisions that limit the referred principle, such as hardship, it is not to be deemed equal. In other words, the same principle is actually treated differently in both instruments, with different levels of strength, due to the limitations imposed on this principle in the UNIDROIT Principles.

2.3. Principle of Full Compensation

It has been pointed out that the principle of full compensation underlies the CISG and is spelled out by article 74[125]. In the UNIDROIT Principles, this principle is expressly referred to in article 7.4.2.

In fact, Convention provides for damages for loss, including loss of profit, suffered as a consequence of a breach of contract (under Article 74), but does not define in more detail which are the losses for which compensation can be obtained. Therefore, in order to identify the losses for which compensation may be demanded, regard must be had to the principle of full compensation in the context of the particular contract concerned[126].

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[119] Ole Lando, *Salient Features of the Principles of European Contract Law: A Comparison with the UCC*, 13 PACE INT'L L. REV. 339, 367 (Fall, 2001).
[120] Scott D. Slater, *supra* note 60, at 254-255 (citing other authors).
[121] For a contrary opinion, *see*, for instance, Jennifer M. Bund, *Force Majeure Clauses: Drafting Advice for the CISG Practitioner*, 17 J.L. & COM. 381, 392 (Spring, 1998).
[122] Alejandro M. Garro, *supra* note 15, at 1184 (stating that *force majeure* comes into play when performance becomes impossible (at least temporarily), whereas a situation of hardship arises when the performance has become much more burdensome, but not impossible". Furthermore, he adds that, "more importantly, hardship is mainly directed at the adaptation of the contract, whereas *force majeure* is directed at settling the problems resulting from nonperformance") (footnote omitted).
[123] *Id.*, at 1184 (the commentator, however, argues that "in many circumstances in which a party cannot invoke *force majeure*, fair and adequate redress may be found under the hardship provisions of the UNIDROIT Principles")
[124] Nuova Fucinati S.p.A. v. Fondmetall International A.B., *Tribunale Civile* [District Court] *di Monza*, Italy, 14 January 1993, 4267/88, case report *available at* <http://cisg3.law.pace.edu/cases/930114i3.html> (last visited January 23, 2005).
[125] Marco Torsello, *supra* note 95, at 81; Franco Ferrari, *supra* note 32, at 463, Eric C. Schneider, *Measuring Damages Under the CISG*, 9 PACE INT'L L. REV. 223, 231 (Summer 1997).
[126] John Felemegas, *An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals*, 15 PACE INT'L L. REV. 91, 97 (Spring, 2003).

This principle, however, has to be interpreted with some limitations[127]. For instance, a party may not receive payment for damages and be unjustly enriched[128]. Regarding this aspect, the UNIDROIT Principles and the Convention seem to be interpreted in the same way. Comment number 3 to Article 7.4.2 of the UNIDROIT Principles states that damages must not enrich the aggrieved party.

Despite the similarities, pursuant to the second part of Article 74[129], in the CISG this principle is to be also limited by foreseeability of the damages[130]. This limitation could not be verified under the UNIDROIT Principles' provisions. In this sense, it must be noted that the principle of full compensation is not to be treated equally in contracts under the Convention and under the UNIDROIT Principles.

2.4. Principle of Informality

Freedom of form is a general principle embodied in the CISG Article 11 and UNIDROIT Principles article 1.2[131]. Although there is a possibility of making a reservation to Article 11 (and 29) under Articles 12 and 96, Ulrich Magnus[132] argues that lack of formality is a general principle from which one can infer that declarations of all kinds are not subject to any form requirement under the CISG. Court decisions, as well, have considered the principle of informality under the CISG[133].

The CISG does not define form nor writing[134] – the only form occasionally required – but it does contain a provision that constitutes an interpretative rule in article 13 that aids in defining

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[127] For an analysis of methods that limit damages, *see* Djakhongir Saidov, *Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods*, 14 PACE INT'L L. REV. 307 (Fall, 2000).
[128] Karin L. Kizer, *supra* note 18, at 1295-1296.
[129] "(...) Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as possible consequence of the breach of contract."
[130] Franco Ferrari, *Comparative Ruminations on the Foreseeability of Damages in Contract* Law, 53 LA. L. REV. 1257, 1261 (1992-1993); Franco Ferrari, *supra* note 24, at 226 (also citing Frignani and Maskow). *See* also SO. M. AGRI s.a.s di Ardina Alessandro & C. v. Erzeugerorganisation Marchfeldgemüse GmbH & Co. KG, *Tribunale* [District Court] *di Padova*, Italy, 25 February 2004, 40552, *available at* <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040225i3.html> (last visited Jan. 13, 2005).
[131] María del Pilar Perales Viscasillas, *The Formation of Contracts & the Principles of European Contract Law*, 13 PACE INT'L L. REV. 371, 374 (Fall, 2001); Franco Ferrari, *supra* note 24, at 224; Alejandro M. Garro, *supra* note 15, at 1165 (both Ferrari and Garro adding article 29(1) of the CISG).
[132] Ulrich Magnus, *supra* note 41.
[133] For instance, SO. M. AGRI s.a.s di Ardina Alessandro & C. v. Erzeugerorganisation Marchfeldgemüse GmbH & Co. KG, *Tribunale* [District Court] *di Padova*, Italy, 25 February 2004, 40552, *available at* <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040225i3.html> (last visited Jan. 13, 2005); Conservas La Costeña S.A. de C.V. v. Lanín San Luis S.A. & Agroindustrial Santa Adela S.A., Compromex [Mexican Commission for the Protection of Foreign Trade], Mexico, 29 April 1996, *available at* < http://cisgw3.law.pace.edu/cases/960429m1.html> (last visited May 2, 2005); FCF S.A. v. Adriafil Commerciale S.r.l., *Bundesgericht* [Supreme Court], Switzerland, 15 September 2000, *available at* http://cisgw3.law.pace.edu/cases/000915s2.html (last visited May 2, 2005); SA ED v. S.p.A. LP, *Cour d'appel* [Appellate Court] *Liège*, Belgium, 28 April 2003, *available at* < http://cisgw3.law.pace.edu/cases/030428b1.html> (last visited May 2, 2005).
[134] Regarding interpretation of the term writing, *see*, Ulrich G. Schroeter, *Interpretation of Writing: Comparison between Provisions of CISG (Article 13) and Counterpart Provisions of the Principles of European Contract Law*, *available at* <http://www.cisg.law.pace.edu/cisg/biblio/schroeter3.html> (last visited March 28, 2005).

writing[135]. Article 13 establishes that, "for the purposes of the Convention, writing includes telegram and telex". At the same time, the UNIDROIT Principles provide a definition of writing in article 1.11, according to which it means "any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form". It is clear that both instruments have different understandings regarding how the word writing should be interpreted: whereas Article 13 provides a few examples which may be of limited application, Article 1.11 contains a definition that can be extended to various different technologies.

2.5. Openness to Usages

It has already been noted that the CISG expressly enunciates a principle whereby widely known and largely observed usages must be taken into account[136]. In addition to the possibility of choosing to incorporate usages in a contract[137], according to the CISG, the parties who at least "knew or ought to have known" the relevant usages would be bound by them, pursuant to article 9(2). Also, some court decisions have mentioned this issue[138].

Openness to usages is also an essential element of the UNIDROIT Principles[139]. However, Michael Bonell[140] points out that, in accordance with article 1.8(2) of the UNIDROIT Principles, usages do not bind the parties whenever their application would be unreasonable. Therefore, there is significant difference between the Convention and the UNIDROIT Principles: under the CISG, there is no express requirement of reasonableness of the usages to which the contract is open. It is true that the principle of reasonableness is also a CISG principle, it does not seem that Article 9(2) contains a gap that would require that gap-filling action of this principle. In other words, Article 9(2) does not open the possibility of questioning usages on any grounds *within* the framework of the CISG; rather, if a usage is invalid or abusive, such matter is to be solved under domestic law applicable by virtue of the conflict of laws rules, as Article 4(a)[141] expressly provides[142].

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[135] Franco Ferrari, *Writing Requirements: Articles 11-13*, *in* DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 206, 209 (Franco Ferrari et al. eds., Munich, Sellier 2004).

[136] Franco Ferrari, *supra* note 24, at 224 (referring to Herber for a similar affirmation) and Ulrich Magnus, *supra* note 41 (listing prevalence of usage among the general principles of the Convention); Clayton P. Gillette, *The Law Merchant in Modern Age: Institutional Design and International Usages under the CISG*, 5 CHI. J. INT'L L., 157, 168 (Summer, 2004); Steven Walt, *For Specific Performance Under the United Nations Sales Convention*, 211, 229, *available at* < http://www.cisg.law.pace.edu/cisg/biblio/walt.html> (last visited May 1, 2005).

[137] Article 9(1).

[138] SO. M. AGRI s.a.s di Ardina Alessandro & C. v. Erzeugerorganisation Marchfeldgemüse GmbH & Co. KG, *Tribunale* [District Court] *di Padova*, Italy, 25 February 2004, 40552, *available at* <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040225i3.html> (last visited Jan. 13, 2005); Geneva Pharmaceuticas Tech. Corp. v. Barr Labs. Inc., U.S. District Court for the Southern District of New York, United States of America, 10 May 2002, *available at* <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020510u1.html#vi> (last visited May1, 2005); Oberster Gerichtshof, Austria, 21 March 2000, *available at* <http://www.cisg.at/10_34499g.htm>, CLOUT case n. 240, Austria, 1998.

[139] Michael Joachim Bonell, *supra* note 62, at 1135.

[140] Michael Joachim Bonell, *supra* note 75, 31.

[141] "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: the validity of the contract or of any of its provisions or of any usage; the effect which the contract may have on the property in the goods sold."

[142] *See* Franco Ferrari, *Trade Usages and Practices Established between the Parties: Article 9*, *in* DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 191, 202 (Franco Ferrari et al. eds., Munich, Sellier 2004). *See* also Oberster Gerichtshof, Austria, 21 March 2000, *available at* <http://www.cisg.at/10_34499g.htm>, CLOUT case

In fact, according to the concepts above mentioned, the issue of openness to usages is not exactly a principle; instead, each of the instruments bring among its provisions, rules regarding how usages should be dealt with. In this sense, one could conclude that if the rules of the UNIDROIT Principles and the CISG are in one aspect contradictory, namely the exception in respect to unreasonable usages under the UNIDROIT Principles, they could not coexist in one same situation or contract. Therefore, considering the difference pointed out, in this case, UNIDROIT Principles should not be used to fill gaps of the CISG.

2.6. Theory of Dispatch

Ulrich Magnus[143] lists theory of dispatch as one of the general principles of the CISG. Article 27[144] of the CISG sets forth that "unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication".

Conversely, the UNIDROIT Principles, pursuant to Article 1.10(2), "adopt the 'receipt' principle for every kind of notice, including the notice a party must give in order to preserve its rights in case of the other party's non-performance"[145].

In sum, the Convention places the risk of failed communication on the party in breach while the UNIDROIT Principles place the risk on the risk on the party who is to send the notice[146].

Once again it seems that both CISG Article 27 and UNIDROIT Principles Article 1.10(2) are *rules*, not principles. Therefore, the different provisions should not be used to complement each other due to their impossibility to coexist.

2.7. Principle of Fairness

In addition to conflicting principles, there are some principles that are present in the UNIDROIT Principles and not mentioned in the CISG, such as the general principle of fairness[147]. In fact, this is a matter of substantial validity, dealt by the UNIDROIT Principles[148]. According to one of the

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n. 240, Austria, 1998.

[143] Ulrich Magnus, *supra* note 41.

[144] Regarding the dispatch principle set forth in article 27, *see* also Franco Ferrari, *supra* note 24, at 224 (also citing Audit) and Franco Ferrari *Interpretation of the Convention and Gap-filling: Article 7, in* DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 138, 166 (Franco Ferrari et al. eds., Munich, Sellier 2004) (stating that "the dispatch principle set forth in Article 27 appears to be the CISG's general principle concerning communications made after the parties have concluded their contract").

[145] Michael Joachim Bonell, *supra* note 140, at 31.

[146] Richard Hyland, *On Setting Forth the Law of Contract: A Foreword*, 40 AM. J. COMP. L. 541, 548 (1992).

[147] Regarding policing of unfairness in the UNIDROIT Principles, *see* Michael Joachim Bonell, *Policing the International Commercial Contract against Unfairness under the UNIDROIT Principles*, 3 TUL. J. INT'L & COMP. L. 73 (1995).

[148] Michael Joachim Bonell, *supra* note 62, at 1139 (stating that "the UNIDROIT Principles move toward a more realistic evaluation of international commercial bargains and provide a variety of means for policing the contract or its individual terms against both procedural and substantive unfairness").

members of the working group that drafted the UNIDROIT Principles, Professor Farnsworth[149], this principle can be inferred from two provisions of the Principles, one regarding gross disparity[150] and the other referring to surprising terms[151]. In addition to these provisions, Bonell includes the rules on fraud and threat, as well as the *contra proferentem rule*, which aims to protect the adhering party in cases of use of standard terms[152].

3. Applicability of the UNIDROIT Principles to Fill CISG Gaps

Michael G. Bridge[153] asserts that a reference to the principles can be a useful guide in the search for the immanent general principles in the CISG, so long as the Principles do not conflict with the provisions of the Convention. Moreover, he states that the Principles might also be invoked to assist in the international interpretation of the CISG under Article 7(1).

Regarding the first issue, Professor Garro[154] has the same point of view, assuming that the parties have not chosen any other supplementing source of law, and the application of the UNIDROIT Principles is not otherwise in conflict with the mandatory rules of law, the intention of the parties and the applicable trade usages. He sustains that, "as long as the UNIDROIT Principles provide a solution to issues that may conceivably fall under the scope of application of the CISG, they should be used to supplement all questions regarding formation, interpretation, content, performance and termination of contracts for the international sale of goods".

First of all, one cannot speak in such general terms. As the CISG has its own provision on how to fill gaps, it must be applied. This provision (Article 7(2)) determines the applicability of the principles on which the Convention is based, and, as a last resort, of domestic law. Therefore, to fill a gap, one must look into the Convention to determine the principles that underlie it. Considering that it is mandatory to seek the principles *on which the Convention is based*, external principles, such as the ones that underlie the UNIDROIT Principles, will never be applicable when they are conflicting or different to any extent. On the other hand, when they amount to the same principle, the issue is solved under Article 7(2).

Nonetheless, in this case, when one of the provisions is more specific, containing more details, it might be necessary to interpret the rule that lacks specificity. If that is so regarding one of the principles found in the CISG, those applying the law would have to interpret the principle in accordance with Article 7(1) providing that regard is to be had to the international character and to the need to promote uniformity. Hence, to interpret the principle, one would seek the answer among court decisions, scholarly writings and other instruments such as the UNIDROIT Principles. As Franco Ferrari points out[155], the "UNIDROIT Principles may serve as instruments for the interpretation and gap-filling of international uniform law, thus providing guidelines for an

[149] E. Allan Farnsworth, *supra* note 110, at 4.
[150] Article 3.10
[151] Article 2.1.20
[152] Michael Joachim Bonell, *supra* note 62, at 1140 (citing, respectively, articles 3.8, 3.9 and 4.6).
[153] Michael G. Bridge, *Uniformity and Diversity in the Law of International Sale*, 15 PACE INT'L L. REV. 55, 82 (Spring, 2003).
[154] Alejandro M. Garro, *supra* note 15, at 1156.
[155] Franco Ferrari, *supra* note 52, at 1233.

'autonomous' interpretation – an interpretation based upon the uniform law's international character".

It is a fact that "the gap-filling role of the UNIDROIT Principles is aimed at supplying those "international uniform law instruments" with a set of rules that the interpreter or decision-maker is unable to find, expressly or impliedly, in those instruments"[156].

Sunil R. Harjani[157], when speaking about interpretation in the CISG, says that the line between interpretation and gap-filling is not easy to draw. In fact, that is true and both are closely linked. Referring to article 7(2), Franco Ferrari also states that its aim "is not very different from that which the interpretation rules are pursuing, i.e. uniformity in the Convention's application"[158].

However, one cannot state that the UNIDROIT Principles are able to directly supplement the CISG gaps due to the fact that, as analyzed above, there are some conflicting principles. The principles used to fill gaps pursuant to article 7(2) cannot be external and conflicting principles; instead, they should be principles underlying the text of the provisions, extracted or derived from its rules.

On the other hand, considering the aim to achieve uniformity of Conventions such as the CISG, one can resort to instruments such as the UNIDROIT Principles as a means of interpretation and to make an analogy at the time of decision making. Also, the UNIDROIT Principles feature comments, elaborated by the drafters, that may be useful to the interpreter.

Finally, Michael Bonell also correctly considers the UNDROIT Principles as a source to fill gaps found in the CISG. He claims that "the only condition which needs to be satisfied is to show that the relevant provisions of the UNIDROIT Principles are the expression of a general principle underlying the CISG"[159].

[156] Alejandro M. Garro, *supra* note 15, at 1152.
[157] Sunil R. Harjani, *The Convention on Contracts for the International Sale of Goods in United States Courts*, 23 HOUS. J. INT'L L. 49, 56 (Fall, 2000).
[158] Franco Ferrari, *supra* note 24, at 216 (citing Gyula Eörsi).
[159] Michael Joachim Bonell, *supra* note 75, at 36.

IV. CONCLUSION

The CISG sets forth in its Article 7(2) the guidelines for gap-filling.. Whenever an issue is not dealt with in the Convention, this provision is not applicable. Conversely, when dealing with internal gaps, it must be applied. Indeed, it is only when there is such a gap that recourse should be made first to the Convention's general principles, and as a last resort, to the provisions of domestic law by means of the conflict of laws rules.

The question posed was whether the UNIDROIT Principles may supplement the gaps in the Convention. The conclusion here is that it is not possible. First, the analysys established that there are differences between the instruments of the Convention and the UNIDROIT Principles, such as in the sphere of application, in nature and in time. These differences, however, do not lead directly to the conclusion of this paper. In other words, it is not because of these differences that the UNIDROIT Principles are not supposed to supplement the Convention's principles.

In addition, the analysis demonstrates that each instrument has its own principles. Both the Convention and the UNIDROIT Principles contain principles on which theyare based, all that have been inferred and derived from their own provisions. Some of the principles embedded in the Convention are common to general principles set in the UNIDROIT Principles. Others, on the contrary, are different principles, having some contradicting aspects.

In this sense, the external conflicting principles of the UNIDROIT Principles should not be applied to a contract under the CISG, due to the fact that they are not "principles in which the Convention is based". The common principles, in contrast, are already applicable to contracts under the CISG, because they are "principles in which the Convention is based". Nevertheless, it is true that the common principles may not be described in the exact same words in each instrument. There might be cases in which a provision of one of the instruments is less specific and requires interpretation. Solely in this case, the UNIDROIT Principles may serve, as any other secondary authority, as a means to interpretation.

In sum, the UNIDROIT Principles may be able to supplement the CISG solely in terms of interpretation, allowing an "autonomous" interpretation of the CISG within its own principles. Therefore, to fill a gap with a general principle, one must never override the provision regarding gap-filling which states that the general principles to be used must be the general principles on which the Convention is based.

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