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*Remarks on the Manner in Which the Unidroit Principles May be Used to Interpret or Supplement Article 76 of the CISG*

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REMARKS ON THE MANNER IN WHICH THE UNIDROIT PRINCIPLES  
MAY BE USED TO INTERPRET OR SUPPLEMENT  
ARTICLE 76 OF THE CISG  
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## 1. INTRODUCTION

It is true to say that both the UNIDROIT Principles and the Convention are instruments which can be used to assist in the interpretation of contracts if they address the same issues. Indeed the Principles in the preamble state that they may be used to interpret or supplement international uniform law instruments.<sup>1</sup> The ICC Court of Arbitration in Paris took advantage of this possibility in a case where no express choice of law clause was included in the contract. They referred to both article 76 CISG and article 7.4.6 of the UNIDROIT Principles as being relevant to assist in their deliberations.<sup>2</sup> Arguably the tribunal was guided by the Official Comments on the UNIDROIT Principles which included a direct reference to CISG article 76:

*“The purpose of this article, which corresponds in substance to Art. 76 CISG, is to facilitate proof of harm where no replacement transaction has been made ...”*<sup>3</sup>

However, it must also be remembered that the CISG is part of municipal law, that is, courts are obliged to use it when applicable. At best, the UNIDROIT Principles can be used by courts to assist where the provisions of the CISG are not clear. Furthermore, such assistance can only be considered if CISG articles 7 or 8 have not produced a solution. It can be argued that if there is a gap in the CISG then the UNIDROIT Principles should be consulted if possible to fill the gap before recourse to domestic law is taken.<sup>4</sup>

A set of rules and principles is placed in a fairly simple-looking formula.<sup>5</sup> The drafters of the Convention purposefully used earthy words devoid of municipal meaning and it must also be understood that articles within the CISG cannot be read in isolation. CISG Articles 7 and 8 clearly demand that all interpretation and application of any principle contained in the Convention must be undertaken within the four corners of the CISG.<sup>6</sup> All principles and therefore all articles are an interlocking construct regulating the interactions of international contracting parties with the aim to maintain business relations as long as possible and afford compensation to parties without unduly disadvantaging the breaching party.

## 2. AVOIDANCE

CISG Article 76 is no exception. The first criterion is that this article only applies if the contract has been avoided pursuant to CISG article 25 and hence CISG articles 49 or 64. This is confirmed by the District Court of München, where the court indicated that compensation

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<sup>1</sup> See Kritzer, A. “General observations on use of the UNIDROIT Principles to help interpret the CISG”, available at <<http://www.cisg.law.pace.edu/cisg/text/matchup/general-observations.html>>

<sup>2</sup> ICC Court of Arbitration, Case No. 8502, November 1996, available at <<http://cisgw3.law.pace.edu/cases/968502i1.html>>.

<sup>3</sup> See the Official Comments on Article 7.4.6 of the UNIDROIT Principles, Comment 1, available online at <<http://cisgw3.law.pace.edu/cisg/principles/uni76.html#official>>.

<sup>4</sup> For further elaboration see Kritzer, A., *supra* note 1.

<sup>5</sup> See Eiselen, S., “Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Article 74 of the CISG”, para. a.; available online at <<http://cisgw3.law.pace.edu/cisg/principles/uni74.html#editorial>>

<sup>6</sup> See Zeller, B., Four Corners – The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods, available online at <<http://cisgw3.law.pace.edu/cisg/biblio/4corners.html>>.

of damages for non-performance cannot be claimed if the contract has not been avoided.<sup>7</sup> The court added that otherwise the rules pertaining to the avoidance of contract would be superfluous.<sup>8</sup>

The UNIDROIT Principles do not use the word “avoidance” but “termination” when referring to such a situation. Arguably the different terminology of “avoidance” or “termination” is of little significance. In either case the parties do not intend to fulfil their contractual obligations. It can also be further argued that CISG article 76 as well as the counterpart UNIDROIT Principle is merely an addition to CISG article 74, namely, fully compensating<sup>9</sup> the innocent party for a loss suffered due to a breach of contract. It attempts to clarify situations where despite the avoidance of the contract the party seeks to demand damages if they purchased goods from another source.

### 3. CALCULATION OF DAMAGES

CISG Article 76 and the counterpart UNIDROIT Principle in essence establish a formula whereby the injured party can calculate damages where the contract has been avoided and no substitute transaction has been entered into.<sup>10</sup> It is established that CISG article 76 and hence UNIDROIT article 7.4.6 are only to be used if a concrete calculation of damages pursuant to CISG article 75 is not possible.<sup>11</sup>

The formula allows calculating damages “abstractly”, that is, without having made a clearly definable cover transaction. The purpose of both instruments is to prescribe a method by which the market price can be calculated. The ICC Court of Arbitration reached its conclusion by analyzing both instruments. As they yielded the same result, it can be argued that there is no significant difference between CISG article 76 and UNIDROIT article 7.4.6.

Nevertheless, differences between the two provisions are observable. The CISG distinguishes between situations where there was no substitute purchase or resale and situations where goods have been taken over. The Principles, on the other hand, merely point to the fact that no replacement transaction has taken place. It is true to say that the situation where goods have been taken over only applies to the buyer.<sup>12</sup> There are really only two situations which could reasonably be contemplated, namely, the buyer avoided the contract after taking over the goods, or in relation to subsection (2) of CISG article 76, by fixing an earlier time to prevent the buyer from speculating.<sup>13</sup> The Principles arguably may be lacking in taking these situations into consideration and the CISG would need to be used to clarify and help interpreting the Principles.

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<sup>7</sup> Germany, *Landgericht* [District Court] München 12 HKO 4174/99; case presentation including English translation available online at <<http://cisgw3.law.pace.edu/cases/000406g1.html>>.

<sup>8</sup> *Ibid.*

<sup>9</sup> For a treatment of article 74 and the concept of full compensation see also Sieg Eiselen on <<http://cisgw3.law.pace.edu/cisg/text/anno-art-74.html>>.

<sup>10</sup> The Secretarial Commentary is the closest counterpart to an Official Commentary on the CISG; see <<http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-76.html>>.

<sup>11</sup> Germany, *Oberlandesgericht* [Appellate Court] Hamm, 19. Zivilsenat, 22 September 1992, 19 U 97/91, <<http://cisgw3.law.pace.edu/cases/920922g1.html>>.

<sup>12</sup> Enderlein, F., and Maskow, D., *International Sales Law*, Oceana 1992, at 307, also available online at <<http://cisgw3.law.pace.edu/cisg/biblio/enderlein.html>>.

<sup>13</sup> Enderlein, *op. cit.*, at 307.

#### 4. CURRENT PRICE

CISG Article 76(2) and UNIDROIT Principle 7.4.6 (2) attempt to clarify the current price by tying it to the prevailing place where delivery of the goods should have been made. In general, UNIDROIT article 7.4.6 uses simpler language and condenses parts of CISG article 76 into a more readable form. It can be argued therefore that it would be advantageous if the Principle were read before the counterpart provision of the CISG is applied. It would allow the court or arbitral tribunal to get a “feeling” of what the CISG attempts to achieve.

CISG article 76 and UNIDROIT article 7.4.6 attempt to give solutions to two problems, namely, the determining of the date when the contract has been declared avoided and, secondly, the place where the current price has to be determined.

The problem of timing has been addressed and clarified at the 10<sup>th</sup> plenary meeting of the Diplomatic Conference at which the CISG was promulgated.<sup>14</sup> The meeting minutes clearly state that the time is not the time when the party who “declared the contract avoided had for the first time the right to do so.”<sup>15</sup> Instead the crucial time is the “time of avoidance”. This phrase was taken over by the CISG as well as the UNIDROIT Principles. Both instruments use the same phraseology and therefore the clarification has been provided and the time is definitely not when a “*Nachfrist*” was granted pursuant to CISG articles 49 or 64.

#### 5. TIMING OF CALCULATION OF DAMAGES

CISG article 76 also adds to the timing the “taking over of goods”. UNIDROIT article 7.4.6 does not do so, as mentioned above. Arguably the promoters of the Principles took note of Schlechtriem who argues that the “taking over of goods” as a trigger point is difficult to justify. Schlechtriem notes:

*“In the event of a delayed or non-conforming performance, the buyer who can neither undertake nor prove a definite cover transaction under article 75 uses the reasonable<sup>16</sup> time period permitted by article 49(2) at his own risk. In the case of article 49(2)(b)(i), the reference point actually precedes the moment when the buyer could avoid the contract because the buyer, at the that time, still did not know of the breach.”<sup>17</sup>*

In this situation, as pointed out above, the UNIDROIT Principles are of little help to overcome this problem. It appears though that Schlechtriem foresaw a problem which technically can cause problems but jurisprudence on this point has not revealed any disputes.

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<sup>14</sup> Legislative History, 1980 Vienna Diplomatic Conference, Summary Records of Meetings of the Plenary Meetings, para. 38 et seq. (A/CONF.97/C.L.245).

<sup>15</sup> Ibid, para. 40.

<sup>16</sup> Reasonableness is a general principle of the CISG and is directly mentioned in 37 provisions of the Convention. For further comments on the definition and operation of this concept see A.H. Kritzer, “Reasonableness: Overview Comments”, available at <<http://cisgw3.law.pace.edu/cisg/text/reason>>.

<sup>17</sup> Schlechtriem, P. “Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods (1986), at 98, also available online at <<http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem.html>>

## 6. CONCLUSION

The question of how to determine the “current price” does not appear to pose any problems. That is the case as CISG article 76 and UNIDROIT Principles article 7.4.6 are essentially identical and the ICC Court also in its determination did not distinguish between the two counterpart provisions. The court’s decision simply confirmed that the market price is to be determined pursuant to the place of delivery of goods.<sup>18</sup> Arguably, if the promoters of the Principles had seen or anticipated problems in the application of CISG article 76 they would have worded UNIDROIT article 7.4.5 differently to overcome the perceived problem. This has been done on other occasions such as UNIDROIT article 7.3.1, which can be used for a better understanding of CISG article 25.

The time of avoidance or the time the contract is terminated is not always an uncontroversial point of reference. The problem still remains that a party can delay avoidance in order to gain an advantage, However the problem is that the party may be held to have violated the duty to mitigate as well as being in breach of CISG article 7, namely disregarding the principle of good faith.<sup>19</sup>

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<sup>18</sup> ICC Court of Arbitration, Case No. 8502, see *supra* note 2.

<sup>19</sup> The concept of good faith has generated a lively debate. Felemegas in his editorial on CISG Art. 7, available online at <http://cisgw3.law.pace.edu/cisg/text/peclcomp7.html#er> states that it is “circumscribed to the interpretation of the law and should not be allowed to impose additional duties of a positive nature to the parties.” The present writer is of the opinion that good faith in addition also imposes a duty on the behavior of the parties (see “Four Corners - the Methodology for the Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods, *supra* note 6) See also the remarks by Ulrich Magnus, available online at <http://cisgw3.law.pace.edu/cisg/principles/uni7.html#um>.