

UNIFORM APPLICATION AND INTEREST RATES UNDER THE 1980 VIENNA SALES CONVENTION

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I. UNIFORM LAW AND UNIFORM APPLICATION

While the trend toward world-wide harmonization of trade law is one hundred years old,¹ this tendency is still characteristic of the twentieth century.² Indeed, it is in this century that “[t]he globalization of most national economies has resulted in a dramatic increase in transnational commerce”³ and, consequently, in the increasing necessity of a corresponding legislative policy designed to regulate such transnational commerce.⁴ The need has arisen for a body of law to govern business transactions⁵ linked to a plurality of legal systems.⁶ Since “[i]nternational trade has been

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¹ This is confirmed by the Hague Conference on Private International Law celebrating in 1993 the one hundredth anniversary of its first session. See Peter H. Pfund, *Overview of the Codification Process*, 15 BROOK. J. INT’L L. 7 (1989) (stating that “[c]ontrary to the impression of many in this country, the international codification process is almost one hundred years old.”).

For a short historical overview of the efforts towards harmonization made by the Hague Conference on Private International Law, see Kurt Lipstein, *One Hundred Years of Hague Conferences on Private International Law*, 42 INT’L & COMP. L.Q. 553 (1993); Peter H. Pfund, *The Hague Conference Celebrates its 100th Anniversary*, 28 TEXAS INT’L L.J. 531 (1993).

² See RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 31 (5th ed., 1988) (stating that at the beginning of this century “there arose a strong movement favoring . . . the total or at least substantial unification of all civilized legal systems.”).

³ Saul Perloff, *The Ties that Bind: The Limits of Autonomy and Uniformity in International Commercial Arbitration*, 13 U. PA. J. INT’L BUS. L. 323, 323-24 (1992).

⁴ See, e.g., FRANCESCO GALGANO, *IL DIRITTO PRIVATO FRA CODICE E COSTITUZIONE* 47 (2d ed. 1980).

⁵ MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 23 (1982).

⁶ See also Sergio Carbone & Marco Lopez de Gonzalo, *Art. 1, NUOVE LEGGI CIVILI COMMENTATE* 2 (1989).

hindered by a myriad of distinct domestic laws,"⁷ this body of law has had to reduce the obstacles to international trade caused by the differences in municipal laws.⁸ In other words, it had to "reduce the impact of national boundaries,"⁹ the worst enemy for the international merchants and traders.¹⁰

Consequently, "[e]fforts have long been underway to promote international trade by unifying and harmonizing international commercial law."¹¹ In order to achieve this goal, two techniques¹² in particular have been adopted:¹³ the unification of rules of private international law, *i.e.*, conflict-of-law rules,¹⁴ and the unification or harmonization of substantive rules.¹⁵

⁷ Michael Kabik, *Through the Looking-Glass: International Trade in the "Wonderland" of the United Nations Convention on Contracts for the International Sales of Goods*, 9 INT'L TAX & BUS. LAW. 408, 409 (1992). See also James E. Joseph, *Contract Formation Under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code*, 3 DICK. J. INT'L L. 107 (1984) (stating that "[o]ne of the greatest impediments to development of international trade is the plethora of national laws.").

⁸ Petar Šarčević, *Foreword to INTERNATIONAL CONTRACTS AND CONFLICTS OF LAWS: A COLLECTION OF ESSAYS*, at vii (Petar Šarčević ed., 1990) [hereinafter INTERNATIONAL CONTRACTS].

⁹ Roy Goode, *Reflections on the Harmonization of Commercial Law*, in COMMERCIAL LAW AND CONSUMER LAW: NATIONAL AND INTERNATIONAL DIMENSIONS 3 (Ross Cranston & Roy Goode eds., 1993).

¹⁰ Errol P. Mendes, *The U.N. Sales Convention & U.S.-Canada Transactions; Enticing the World's Largest Trading Bloc to Do Business Under a Global Sales Law*, 8 J.L. & COM. 109, 112 (1988).

¹¹ Kabik, *supra* note 7, at 409.

¹² *But see, Unification of the Law of International Trade: Note by the Secretariat*, U.N. GAOR, 20th Sess., Agenda Item 92, U.N. Doc. A/C.6/L.572 (1965), reprinted in 1 UNCITRAL Y.B. 13, 14 (1968-1970) (listing three principal methods used in the efforts for harmonizing international trade law: "(a) uniform or 'model' national laws, (b) international conventions, (c) unification of practices in international trade, particularly standard contract provisions and general conditions of sale.").

¹³ For a very detailed discussion of the methods used to achieve uniformity, see René David, *The International Unification of Private Law*, in 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, ch. 5 (1974); René David, *The Methods of Unification*, 16 AM. J. COMP. L. 13 (1968); Mario Matteucci, *The Methods of the Unification of Law*, UNIDROIT 3 (1956).

¹⁴ In this paper, the expressions "private international law" and "conflict-of-law" rules are synonymous. For a complete discussion of the scope of these expressions, see, e.g., EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* 1-2 (1982).

¹⁵ See, *Report of the Secretary-General: Progressive Development of the Law of International Trade*, U.N. GAOR, 21st Sess., Annexes, U.N. Doc. A/6396 (1966): "In order to reduce such conflicts and divergencies [deriving from the existence of different national laws] two basic techniques have been followed, which are different but complementary: the

“The uniform choice-of-law rules assure a party entering into a contract with a foreign enterprise that no matter which forum a dispute is brought before, the chosen country’s substantive law will apply. When the substantive legal rules are made uniform, the party is assured further that courts will apply the same legal rules no matter where the parties litigate the dispute.”¹⁶

There has long been a disagreement among legal scholars as to which technique is preferable. But more recently, there appears to be a tendency favoring the uniform substantive rules over the uniform conflict-of-law rules,¹⁷ even though the unification of these rules may prove advantageous from certain points of view.¹⁸

Aside from the technique chosen, the efforts toward unification have usually taken only one form: “the form of binding instruments, be it supranational legislation, international conventions or model laws,”¹⁹ although other forms are conceivable as well.²⁰ The 1980 United Nations

first relates to the choice of law rules within the framework of private international law, and the second relates to the progressive unification and harmonization of substantive rules.”

¹⁶ Peter Winship, *Private International Law and the U.N. Sales Convention*, 21 CORNELL INT’L L.J. 487 (1988).

¹⁷ See, Covey T. Oliver, *Standardization of Choice-of-Law Rules for International Contracts: Should There be a New Beginning?*, 53 AM. J. INT’L L. 385, 386 (1959) (stating that “[t]he improvement of predictability with respect to legal relationships under international contracts takes . . . two major lines of approach: (1) the unification of the applicable substantive law, and (2) the improvement of conflict of law rules. The latter is here admitted to be only the ‘second best’ solution”). See also Gyula Eörsi, *The Hague Conventions of 1964 and the International Sale of Goods*, 11 ACTA JURIDICA ACADEMIAE SCIENTIARUM HUNGARICAE 321, 324 (stating that the “unification of substantive [rules] is a unification of a higher level”).

¹⁸ For a detailed discussion of the advantages in which the unification of the conflict-of-law rules may result, see Ole Lando, *European Contract Law*, in INTERNATIONAL CONTRACTS, *supra* note 8, at 1, 3 (stating that “[c]ompared to the unification of substantive law, the unification of choice-of-law rules has certain advantages. First, reforming conflict rules disturbs the national legal environment to a relatively small extent Second, the unification of choice-of-law rules is also a much simpler process than the unification of substantive rules. . . . [Furthermore], [u]niform conflict-of-law rules promote predictability. The uniformization of jurisdiction rules reduces the number of available fora. . .”).

¹⁹ Michael J. Bonell, *Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts*, 40 AM. J. COMP. L. 617 (1992).

²⁰ The most recent attempt to unify the international commercial law by resorting to a form different than that of a binding instrument is represented by the 1994 “Principles of International Commercial Contracts” approved in May, 1994, by the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT).

Convention on Contracts for the International Sale of Goods (CISG)²¹ elaborated by the United Nations Commission on International Trade Law (Uncitral)²² does not constitute an exception to the aforementioned rule. On the contrary, it is one of the most successful binding instruments drafted on an international level.

In order to achieve uniformity in international trade law, however, it is not sufficient to enact uniform law conventions.²³ "It is equally important that

²¹ The United Nations Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, S. Treaty Doc. No. 9, 98th Cong., 1st Sess. (1983), 19 I.L.M. 668 [hereinafter CISG or Vienna Sales Convention]. The CISG went into effect on January 1, 1988. As of October, 1994, it was in effect in thirty-eight states: Argentina (Jan. 1, 1988); Australia (Apr. 1, 1989); Austria (Jan. 1, 1989); Belarus (Nov. 1, 1989); Bosnia-Herzegovina (Mar. 6, 1992); Bulgaria (Aug. 1, 1991); Canada (May 1, 1992); Chile (Mar. 1, 1990); China (Jan. 1, 1993); Czech Republic (Jan. 1, 1993); Denmark (Mar. 1, 1990); Ecuador (Feb. 1, 1993); Egypt (Jan. 1, 1988); Estonia (Oct. 1, 1994); Finland (Jan. 1, 1989); France (Jan. 1, 1988); Germany (Jan. 1, 1988); Guinea (Feb. 1, 1992); Hungary (Jan. 1, 1988); Iran (Apr. 1, 1991); Italy (Jan. 1, 1988); Lesotho (Jan. 1, 1988); Mexico (Jan. 1, 1989); the Netherlands (Jan. 1, 1992); Norway (Aug. 1, 1989); Romania (Jun. 1, 1992); Russian Federation (Sept. 1, 1991); Slovakia (Jan. 1, 1993); Slovenia (Jun. 25, 1991); Spain (Aug. 1, 1991); Sweden (Jan. 1, 1989); Switzerland (Mar. 1, 1991); Syria (Jan. 1, 1988); Uganda (Mar. 1, 1993); Ukraine (Feb. 1, 1991); United States (Jan. 1, 1988); Yugoslavia (Jan. 1, 1988); Zambia (Jan. 1, 1988).

Hundreds of commentaries, monographs and articles have been written on the Vienna Sales Convention. For a detailed bibliography of those in English, see, most recently, Peter Winship, *The U.N. Sales Convention. A Bibliography of English-Language Publications* 28 INT. LAW. 401-23 (1994).

²² For UNCITRAL's history, its structure, and its goals, see René David, *La Commission des Nations Unies pour le Droit Commercial International*, ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 433 (1970); E. Allan Farnsworth, *UNCITRAL: Why? What? How? When?*, 20 AM. J. COMP. L. 314 (1972); Berthold Goldman, *Les Travaux de la Commission des Nations Unies pour le Droit Commercial International*, 106 JOURNAL DU DROIT INTERNATIONAL 747 (1979); Rolf Herber, *Die Arbeiten des Ausschusses der Vereinten Nationen für Internationales Handelsrecht (Uncitral)*, RECHT DER INTERNATIONALEN WIRTSCHAFT 577 (1974); Gerold Herrmann, *The Contribution of UNCITRAL to the Development of International Trade Law*, in 2 THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 35 (Norbert Horn & Clive M. Schmitthoff eds., 1982); John O. Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, 27 AM. J. COMP. L. 201 (1979).

²³ See, Comment, *The Uniform Interpretation of International Conventions*, 27 INT'L & COMP. L. Q. 450 (1978) (stating that "[t]he principal objective of an international convention is to achieve uniformity of legal rules within various States party to it. However, even when outward uniformity is achieved following the adoption of a single authoritative text, uniform application of the agreed rules is by no means guaranteed, as in practice different countries almost inevitably come to put different interpretations upon the same enacted words.").

its provisions . . . be interpreted in the same way in various countries.”²⁴ Although this necessity may arise in relation to any international convention drafted by an international group of lawyers coming from different legal backgrounds,²⁵ it is most accentuated in the Vienna Sales Convention, since this necessity generally arises in proportion to the number of legal systems represented by the various Contracting States.²⁶

This is why the drafters of the Vienna Sales Convention introduced a provision designed to limit the perils of its diverging application. According to this provision, “in the interpretation of [the] Convention, regards is to be had to its international character and to the need to promote uniformity in its application”²⁷ The Convention also sets forth a rule to be applied in cases of gaps: “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.”²⁸

However, the peril of diverging applications of the Vienna Sales Convention is not totally cured by the introduction of those provisions because they do not identify a method of interpretation or gap-filling, but only a goal—the promotion of uniformity.²⁹ The rule to be applied in cases of gaps, for example, does not identify any helpful criterion to determine *in concreto* when a gap is considered a *lacuna intra legem*, i.e., when the matter is outside the scope of the Convention, as opposed to a *lacuna praeter legem*, i.e., when the Convention applies to the issue but does not

²⁴ Michael J. Bonell, *Article 7: Interpretation of Convention*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 74 (C.M. Bianca & Michael J. Bonell eds., 1987) [hereinafter COMMENTARY].

²⁵ See Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183, 198 (1994).

²⁶ See BERNARD AUDIT, *LA VENTE INTERNATIONALE DE MARCHANDISES* 47 (1990).

²⁷ CISG, *supra* note 21, art. 7(1).

²⁸ CISG, *supra* note 21, art. 7(2). Note that all the most recent conventions on uniform law provide for rules similar to those set forth in Article 7 of the 1980 Vienna Sales Convention. See, e.g., EEC Convention on the Law Applicable to Contractual Obligations, art. 18, 1980 O.J. (L 266) 1, 5, reprinted in 19 I.L.M. 1492, 1496 (1980); UNIDROIT Convention on International Financial Leasing, art. 4, reprinted in 27 I.L.M. 931, 933 (1988).

²⁹ See FRANCO FERRARI, *LA VENDITA INTERNAZIONALE: AMBITO DE APPLICAZIONE - DISPOSIZIONI GENERALI* 131 (1994).

expressly resolve it. This problem is most important in determining the exact sphere of application of the Convention.³⁰

II. GAP-FILLING AND INTEREST RATES

A. Article 78 and Its Antecedent

Undoubtedly, the setting forth of a criterion to be used to decide whether a gap must be considered a *lacuna intra legem* or a *praeter legem* would have favored the uniform application of the Vienna Sales Convention. Indeed, the solutions to the same problem can widely differ from each other depending on whether they were perceived as gaps *intra legem* or *lacunae praeter legem*. This will be evidenced by the different solutions proposed in relation to the issue of what formula should be used to calculate the interest rates in international sales contracts.

This issue did not cause any uncertainty under the 1964 Uniform Law on the International Sale of Goods (Ulis),³¹ the CISG's antecedent, since Article 83 of Ulis³² provided for "a rule for interest in arrears in the event of payment in arrears of the price which provided for one percent above the official discount rate in the creditor's country."³³ This formula has not

³⁰ See also, Bonell, *supra* note 24, at 75-76 (stressing the importance of the distinction between gaps under the meaning of Article 7(2) and issues which are not within the scope of the Vienna Sales Convention).

³¹ Convention Relating to a Uniform Law on International Sale of Goods [hereinafter Ulis], July 1, 1964, with Annex, Uniform Law on the International Sale of Goods, 834 U.N.T.S. 109 (1972) (entered into force Aug. 18, 1972), *reprinted in* 13 AM. J. COMP. L. 453 (1964). See COMMENTARY, *supra* note 24, at 843-50, for a list of articles discussing Ulis, as well as the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 171 (1972) (entered into force Aug. 23, 1972), *reprinted in* 13 AM. J. COMP. L. 472 (1964).

³² Ulis, *supra* note 31, art. 83: "Where the breach of contract consists of delay in the payment of the price, the seller shall in any event be entitled to interest on such sum as is in arrear at a rate equal to the official discount rate in the country where he has his place of business or, if he has no place of business, his habitual residence, plus 1%."

For a judicial application of this formula, see Judgment of January 5, 1989, Ober landes Gericht Frankfurt [Appeals Court], NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNGS-REPORT 636 (1990).

³³ FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION FOR THE INTERNATIONAL SALE OF GOODS: CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS 310 (1992).

been retained by the drafters of the Vienna Sales Convention, although there have been various attempts to do so.³⁴ Other attempts to set forth a formula for the rate of interest were also unsuccessful.³⁵ The German proposal for a fixed interest rate was rejected,³⁶ as was the Czechoslovakian proposal in favor of the prevailing interest rate in the country of the debtor.³⁷ Also rejected was the viewpoint held jointly by Denmark, Finland, Greece and Sweden, according to which interest should be calculated on the basis of the customary rate for commercial credits at the creditors place of business.³⁸

The differing political,³⁹ economic⁴⁰ and religious⁴¹ views made it

³⁴ See, Article 58 of the 1976 Draft Convention. See also the proposal made by the Czechoslovakian Delegation (A/CONF.97/C.1/L.218) during the Vienna Conference, *reprinted in UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS. VIENNA, 10 MARCH - 11 APRIL 1980, OFFICIAL RECORDS 137* (United Nations ed., 1981) [hereinafter OFFICIAL RECORDS].

For the reasons which lead to the rejection of the formula laid down in Article 83 of the Uliis, see PETER SCHLECHTRIEM, *UNIFORM SALES LAW: THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 100* (1986).

³⁵ For a short historical account on the issue of the rate of interest raised during the drafting period of the Vienna Sales Convention, see Barry Nicholas, *Article 78: Interest, in COMMENTARY, supra note 24, at 568.*

³⁶ See, Summary Record of the Considerations of the German Delegation, *reprinted in OFFICIAL RECORDS, supra note 34, at 416* (stating that “[a]t all events, the innocent party should be entitled to interest on the sum due in amount based on interest rates fixed by law or by the Convention itself and which represented a minimum figure.”).

³⁷ See, Summary Records of the Czechoslovakian Delegation’s considerations made during the 29th meeting, *reprinted in OFFICIAL RECORDS, supra note 34, at 288.*

³⁸ See, Joint Proposal of Denmark, Finland, Greece, and Sweden (A/CONF.97/C.1/L.216), *reprinted in OFFICIAL RECORDS, supra note 34, at 137.*

³⁹ See GERT REINHART, *UN-KAUFRECHT: KOMMENTAR ZUM ÜBEREINKOMMEN DER VEREINTEN NATIONEN VOM 11. APRIL 1980 ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF 177-178* (1991).

⁴⁰ As previously stated, the differing economic views of the Western countries and Socialist countries led to contrasting opinions revolving around

“the question of whether the interest level in the *creditor’s country* or the one in the *debtor’s country* should be decisive. At the time of the diplomatic conference there were serious differences between the Western industrialized countries, where the amount of interest is formed in the market (naturally influenced by political measures) and had at that time reached considerable amounts, and most of the at that time called socialist countries where the interest was fixed by law and relatively low. It was against this background that the Western industrialized countries aimed

impossible to agree upon a formula for the rate of interest.⁴² Thus, the Vienna Sales Convention contains a provision, Article 78,⁴³ which limits itself to merely providing for "the *general entitlement* to interest"⁴⁴ in case of payments in arrears.⁴⁵ In other words, Article 78 only sets forth the obligation to pay interest as a general rule,⁴⁶ and it does so independently from the damage caused by the payment in arrears.⁴⁷ For this reason it has

towards interest to be set according to the level of the creditor's country. This would have meant that debtors from those countries would have had to pay low interest to creditors from Eastern countries, but by contrast, debtors from the latter countries high interest." ENDERLEIN & MASKOW, *supra* note 33, at 310.

For a reference to the discussion of this issue by different delegations during the Vienna Conference, see OFFICIAL RECORDS, *supra* note 34, at 388-93.

⁴¹ See SCHLECHTRIEM, *supra* note 34, at 99 (stating that the problems relating to interest payments arose partially out of religious beliefs). See also ROLF HERBER, WIENER UNCITRAL-ÜBEREINKOMMEN ÜBER INTERNATIONALE WARENKAUFVERTRÄGE VOM 11. APRIL 1980, 46 (2d ed. 1983); Nicholas, *supra* note 35, at 569; OFFICIAL RECORDS, *supra* note 34, at 416.

⁴² For this affirmation, see also REINHART, UN-KAUFRECHT, *supra* note 39, at 177-78.

⁴³ See CISG, *supra* note 21, art. 78. "If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74."

⁴⁴ ENDERLEIN & MASKOW, *supra* note 33, at 311.

⁴⁵ Note that in order for a payment to be in arrears, no formal notice of default is necessary, as it is in some national legal systems. See Denis Tallon, *The Buyer's Obligation under the Convention on Contracts for the International Sale of Goods*, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 7.1, 7.14 (Nina Galston & Hans Smit eds., 1984) (stating that "payment is due without any request or compliance with any formality on the part of the [creditor].").

⁴⁶ Note that since the obligation to pay interest is conceived as a general rule, "a debtor still remains liable for interest payments even if his default is due to an impediment beyond his control and he is, therefore, not liable for damages . . ." SCHLECHTRIEM, *supra* note 34, at 100. "If, for example, the price is payable in the seller's currency and the buyer is prevented from paying by a temporary ban imposed by his government on the export of currency, and if under Article 79 the seller is able to claim the price when the ban ends, Article 78 seems to entitle him to interest." Nicholas, *supra* note 35, at 571.

Contra, F.J.A. VAN DER VELDEN, HET WEENSE KOOPVERDRAG 1980 EN ZIJN RECHTSMIDDELEN 405 (1988) (assuming that interest is a part of the damages and therefore should be exempted on the grounds of impediments).

⁴⁷ See ENDERLEIN & MASKOW, *supra* note 33, at 311, which states that the amount of interest "is fixed *a priori* and irrespective of the damage which is caused by the arrears in payment." Therefore, "the creditor should not have to show that he actually incurred such a cost." Nicholas, *supra* note 35, at 570. For a similar statement, see ROLF HERBER &

been said that "Art. 78 is more conspicuous for the questions it fails to answer than the questions it answers. In particular, it does not stipulate the rate of interest or how the rate is to be determined by a tribunal in the absence of explicit guidance in the Convention."⁴⁸

B. Interest Rate: Scholarly Opinions and Judicial Applications

The absence of such guidance raises the question of whether the issue of determining the rate of interest has to be dealt with as a matter governed by the Convention, but not expressly settled in it (*lacuna praeter legem*), or as one excluded from the sphere of application of the Convention (*lacuna intra legem*).⁴⁹ Some authors believe that the issue of determining the interest rate is not dealt with by the Vienna Sales Convention and it is, therefore, governed by the applicable domestic law,⁵⁰ which is, "in general, the

BEATE CZERWENKA, INTERNATIONALES KAUFRECHT: KOMMENTAR ZU DEM UN-ÜBEREINKOMMEN ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF 348 (1991); Hans Stoll, *Internationalprivatrechtliche Fragen bei der Landesrechtlichen Ergänzung des Einheitlichen Kaufrechts*, in Festschrift für Murad Ferid 495, 509-10 (Andreas Heldrich ed., 1988).

⁴⁸ JACOB S. ZIEGEL, REPORT TO THE UNIFORM LAW CONFERENCE OF CANADA ON CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 149 (1981). For a similar statement, see Leif Sevón, *Obligations of the Buyer under the UN Convention on Contracts for the International Sale of Goods*, in INTERNATIONAL SALE OF GOODS: DUBROVNIK LECUTRES 203, 229-30 (Paul Volken & Petar Šarčević eds., 1986).

⁴⁹ See Gert Reinhart, *Fälligkeitszinsen und UN-Kaufrecht*, in PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 376, 377 (1991).

⁵⁰ For this conclusion, see also ENDERLEIN & MASKOW, *supra* note 33, at 312 (stating "[w]here the parties agreed nothing, the amount of interest will have to be calculated on the basis of the applicable domestic law" (emphasis in original)); HERBER & CZERWENKA, *supra* note 47, at 347 (stating the rate of interest is to be determined by the law chosen by the rules of private international law); Ulrich Magnus, *Währungsfragen im Einheitlichen Kaufrecht: Zugleich ein Beitrag zu Seiner Lückenfüllung und Auslegung*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 116, 140-41 (1989) (the law applicable to the rate of interest should be the domestic law referred to by the rules of private international law); BURGHARD PILTZ, INTERNATIONALES KAUFRECHT: DAS UN-KAUFRECHT (WIENER ÜBEREINKOMMEN VON 1980) IN PRAXISORIENTIERTER DARSTELLUNG 280 (1993) (the rate of interest is governed by the domestic law chosen by the rules of private international law); Peter Schlechtriem, *Recent Developments in International Sales Law*, 18 ISRAEL L. REV. 309, 324 (1983) ("there is an obligation to pay interest, but the details of this obligation are left up to the domestic law called upon by the rules of private international law"); SCHLECHTRIEM, *supra* note 34, at 100; Denis Tallon, *Article 84: Accounting for Benefits*, in COMMENTARY, *supra* note 24, at 611, 612 (stating that how interests are to be calculated is governed by applicable domestic law").

subsidiary law applicable to the sales contract," since "[n]o special connecting points seem to have developed for the entitlement to interest."⁵¹ Others suggest that the applicable domestic law should be the law of the creditor.⁵²

On the other hand, a few authors hold the contrasting view that the issue *de quo* has to be dealt with as a *lacuna praeter legem*, since "[t]he mandate of Article 7(1) to construe the Convention to promote 'uniformity in its application' requires us to seek a principle governing the scope of Article 78 that can be considered as a basis for uniform application of the Convention."⁵³ Thus, it has been suggested that "the interests to be paid are defined by the function of the assessment of damages, *i.e.*, to put the seller in the same position he would have been had the sum been paid in time."⁵⁴ However, this formula is criticized for leading to confusion of the line between damages and interests, which Article 78 was intended to draw.⁵⁵

This controversy was solved by the German courts which held that the interest rate should be calculated on the basis of the domestic law.⁵⁶

⁵¹ ENDERLEIN & MASKOW, *supra* note 33, at 312.

⁵² See Hans Stoll, *Inhalt und Grenzen der Schadensersatzpflicht Sowie Befreiung von der Haftung im UN-Kaufrecht im Vergleich zu EKG und BGB*, in EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT 257, 279-80 (Peter Schlechtriem ed., 1987).

⁵³ JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 526 (2d ed., 1991) (emphasis in original). For a similar reasoning, see VINCENT HEUZE, LA VENTE INTERNATIONALE DE MARCHANDISES: DROIT UNIFORME 341 (1992).

⁵⁴ Giulio Ponzanelli, *Art. 78*, in CONVENZIONE DI VIENNA SUI CONTRATTI DI VENDITA INTERNAZIONALE DI BENI MOBILI 308, 309 (Massimo C. Bianca ed., 1992).

⁵⁵ Indeed, "the text speaks of interest as something distinct from damages." Nicholas, *supra* note 35, at 570. The formula mentioned in the text, however, would result in "the fact that the interest claim would . . . move very near a claim of damages." ENDERLEIN & MASKOW, *supra* note 33, at 313.

⁵⁶ For decisions dealing with the calculation of the rate of interest by applying domestic law, see, e.g., Judgment of Mar. 3, 1994, Oberlandesgericht (OLG) München [Appeals Court], NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNGS-REPORT 1075 (1994); Judgment of Sept. 19, 1991, Landgericht (LG) Frankfurt, RECHT DER INTERNATIONALEN WIRTSCHAFT 952 (1991); Judgment of June 13, 1991, OLG Frankfurt, RECHT DER INTERNATIONALEN WIRTSCHAFT 591 (1991); Judgment of Sept. 26, 1990, LG Hamburg, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 188 (1991); Judgment of Apr. 24, 1990, Amtsgericht (AG) Oldenburg, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 336 (1990); Judgment of Sept. 6, 1989, LG Stuttgart, RECHT DER INTERNATIONALEN WIRTSCHAFT 984 (1990); Judgment of Aug. 31, 1989, LG Stuttgart, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 317 (1990).

Despite some initial doubts as to which domestic law should be applied,⁵⁷ currently there seems to be a tendency to apply the law which would be applicable to the sales contract if it were not subject to the Vienna Sales Convention.⁵⁸

III. CONCLUSION

From what has been discussed thus far, one conclusion can be drawn: the formula to calculate the interest rate is determined by the law of the country of the seller,⁵⁹ at least where the rules of private international law of the forum are based upon the criteria comparable to those set forth by the 1980 EEC Convention on the Law Applicable to Contractual Obligations.⁶⁰

⁵⁷ For two early German court decisions referring to the domestic law of the creditor as the applicable law, see Judgment of Aug. 31, 1989, LG Stuttgart, *PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS* 317 (1991); Judgment of Sept. 16, 1991, OLG Frankfurt, *NEUE JURISTISCHE WOCHENSCHRIFT* 3102 (1991).

⁵⁸ See, Ulrich Magnus, *Aktuelle Fragen des UN-Kaufrechts*, *ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT* 79, 90 (1993); for judicial applications of this rule, see the court decisions listed in note 56, except for those listed in note 57. Note, however, that the rule mentioned in the text has been applied in international arbitration as well; see, e.g., ICC Arbitration Case No. 7153/1992, *JOURNAL DU DROIT INTERNATIONAL* 1005, 1007 (1992).

⁵⁹ For a similar conclusion, see PILTZ, *supra* note 50, at 281; Reinhart, *supra* note 49, at 378.

⁶⁰ Several writings have been published on the 1980 EEC Convention on the Law Applicable to Contractual Obligations, *supra* note 28; see, e.g., Georges R. Delaume, *The European Convention on the Law Applicable to Contractual Obligations: Why a Convention?*, 22 *VA. J. INT'L L.* 105 (1981); Erik Jayme, *The Rome Convention on the Law Applicable to Contractual Obligations (1980)*, in *INTERNATIONAL CONTRACTS*, *supra* note 8, at 36; Friedrich K. Juenger, *The European Convention on the Law Applicable to Contractual Obligations: Some Critical Observations*, 22 *VA. J. INT'L L.* 123 (1981); LA CONVENZIONE DI ROMA SULLA LEGGE APPLICABILE ALLE OBBLIGAZIONI CONTRATTUALI (Consiglio Nazionale del Notariato ed., 1983); Paul Lagarde, *The European Convention on the Law Applicable to Contractual Obligations: An Apologia*, 22 *VA. J. INT'L L.* 91 (1981); Ole Lando, *The EEC Convention on the Law Applicable to Contractual Obligations*, 24 *COMMON MKT. L. REV.* 159 (1987); H. Matthew Horlacher, Note, *The Rome Convention and the German Paradigm: Forecasting the Demise of the European Convention on the Law Applicable to Contractual Obligations*, 27 *CORNELL INT'L L.J.* 173 (1994); RICHARD PLENDER, *THE EUROPEAN CONTRACTS CONVENTION: THE ROME CONVENTION ON THE CHOICE OF LAW FOR CONTRACTS* (1991).

For a comparative study of the EEC Convention and American rules of private international law, see Samuel Cohen, *The EEC Convention and U.S. Law Governing Choice of Law for Contracts, with Particular Emphasis on the Restatement Second: A Comparative Study*, 13

Absent a choice of law, the Rome Convention makes applicable the law with which the contract has the closest connection: this is presumed to be the law where the party who is to effect the "characteristic performance"⁶¹ has its place of business or habitual residence. As one author states, "[A]s a rule, the characteristic performance of a contract is not the payment of money. However, in the case of a sales contract, it is the delivery of the goods . . . which characterizes the contract. It is, therefore, the seller's law which applies."⁶²

What if the seller's law does not allow interest? In this line of cases, the claim does not become unenforceable as several authors suggest.⁶³ On the contrary, there should be recourse to the level of interest generally applied in international commerce in the particular trade concerned.⁶⁴

MD. J. INT'L L. & TRADE 223 (1989).

⁶¹ For a more detailed discussion of the concept of "characteristic performance" under the EEC Convention, see Hans Ulrich Jessurun D'Oliveira, "*Characteristic Obligation*" in the *Draft EEC Obligation Convention*, 25 AM. J. COMP. L. 303 (1977); Kurt Lipstein, *Characteristic Performance - A New Concept in the Conflict of Laws in Matters of Contract for the EEC*, 3 NW. J. INT'L L. & BUS. 402 (1981).

⁶² Jayme, *supra* note 60, at 43. See also FERRARI, *supra* note 29, at 37; PILTZ, *supra* note 50, at 43. For a judicial application of this presumption, see Judgment of Apr. 24, 1990, AG Oldenburg, PRAXIS DES INTERNATIONALEN PRIVAT UND VERFAHRENSRECHTS 337 (1991).

⁶³ See Joseph M. Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, in INTERNATIONAL ENCYCLOPEDIA OF LAWS 1, 128 (Blanpain gen. ed., 1993) (stating "the validity of a contractual claim to interest . . . remains a national concern In those countries where interest is forbidden, the mere mention of interest in the agreement will render it invalid"); Peter Schlechtriem, *From Hague to Vienna - Progress in Unification of the Law of International Sales Contracts?*, in THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS, *supra* note 22, at 125, 132 n.21 (stating "[i]nsofar as a national law does not allow interest - for religious reasons, for example - [Article 78] has no effect"); SCHLECHTRIEM, *supra* note 34, at 100 n.414 (stating "[t]o the extent applicable domestic law prohibits interest payments, Article 78 would, of course, be unenforceable").

⁶⁴ Some have criticized the view expressed by Nicholas, *supra* note 35, at 570, who states that if the domestic law "provides no relevant formula for calculating interest, it would seem that the court should look to the cost of credit at the creditor's place of business." It has been said that this solution "does not seem practicable because the solution aspired to by the Western industrialized countries, which was not adopted at the diplomatic conference, would in part be introduced by way of interpretation. Other countries would then be inclined to interpret into the Convention their own rejected proposals." ENDERLEIN & MASKOW, *supra* note 33, at 312-13.