Taking the International Approach to the CISG: The Gap-Filling Role of the UNIDROIT Principles and the Principles of European Contract Law

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'One must be willing to put the rule of one's will into perspective with regard to the limits of communication. The main purpose of rules of interpretation is to overcome the gap between the will and communication.'

– M. Schmidt-Kessel[1]

[1] M. Schmidt-Kessel, in P. Schlechtriem and I. Schwenzer (eds.), *Kommentar zum einheitlichen UN-Kaufrecht*, 4th edition (C.H. Beck 2004) Art. 8 para. 9 (own translation).

1 Introduction

The success of the United Nations Convention on Contracts for the International Sale of Goods of 1980[2] (hereinafter, the 'CISG' or 'Vienna Convention'), as a landmark instrument in the unification process of sales law,[3] is a highly debated matter.[4] The framework envisaged by the Convention does not exhaustively deal with all issues that may arise[5]. Therefore, the CISG requires reliable rules of interpretation to determine the meaning and scope of its own provisions, as well as to adopt a uniform approach to filling the gaps in the law.[6] This can in turn notably be used to interpret the statements and conduct of parties to which its provisions apply.[7]

Achieving the *former* aim of a *uniform interpretation of the Convention* requires 'gap-filling'. This posits an 'international' approach to the CISG: using international sources of law, most notably the UNIDROIT Principles[8] and the Principles of European Contract Law[9] (PECL), to offer guidance to courts in 'reasoning through' those issues in the CISG that are not explicitly settled in it. These two soft-law instruments reflect the 'general principles' on which the Convention is based.[10] To establish the context of the approach, the importance of the Convention as a 'unifying' instrument, and the need (and challenges) for a consistent interpretation, must be noted. It is likewise important to note the scope and content of the UNIDROIT Principles and PECL. This leads to an investigation on the mutual impact between the CISG and the two sets of 'Principles'. The nature of the 'gaps' in the CISG must be explored, as well as how the 'gap-filling' remedy is provided by the Convention itself.

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[2] United Nations Conference on Contracts for the International Sale of Goods, *Official Records*, U.N. Document No. A/CONF. 97/19 (E.81.IV.3) (1980). The Convention entered into force 1 Jan. 1988.
[3] See, for instance: S. Gopalan, 'The Creation of International Commerical Law: Sovereignty Felled?', 5 *San Diego International Law Journal* (2004), p. 267 at 289; J. M. Lookofsky, 'Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules', 39 *American Journal of Comparative Law* (1991) p. 403.
[4] For instance, two opposing views are expressed by Arthur Rosett (A. Rosett, 'Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods', 45 *Ohio State Law Journal* (1984) p. 265), stating that the CISG will *not* be a successful harmonizing instrument, and Michael Bonell (M.J. Bonell, 'The CISG, European Contract Law and the Development of a World Contract Law', 56 *American Journal of Comparative Law* (2008) p. 1), who argues that it *is* successful in this respect.
[5] See, for instance: K. B. Giannuzzi, 'The Convention on Contracts for the International Sale of Goods: Temporarily Out of "Service"?', 28 *Law and Policy in International Business* (1997) p. 991 at 1016.
[6] Art. 7(1) and Art. 7(2) CISG, respectively.
[7] Art. 8 CISG.
[8] UNIDROIT (ed.), *UNIDROIT Principles of International Commercial Contracts* (2004). See generally here: U. Teichert, *Lückenfüllung im CISG mittels UNIDROIT-Prinzipien: Zugleich ein Beitrag zur Wählbarkeit nichtstaatlichen Rechts* [Gap-filling in the CISG using the UNIDROIT Principles: Article on the possibility of selecting non-domestic law] (Frankfurt, Lang 2007).
[9] O. Lando and H. Beale (eds.), *Principles of European Contract Law – Parts I and II*, prepared by the Commission on European Contract Law (The Hague 1999); O. Lando et al. (eds.), *Principles of European Contract Law – Part III* (The Hague, London and Boston 2003).
[10] J. Felemegas, 'Introduction', in J. Felemegas (ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (New York, Cambridge University Press 2007) p. 10.

It is also necessary to identify *reliable rules for interpreting statements and conduct*, as intended by the core provision in Article 8[11]. Since this article leaves certain matters unsettled, the UNIDROIT Principles and PECL can be brought in to fill the gaps. This illustrates that the 'gap-filling' mechanism can help facilitate a more comprehensive interpretation and uniform application of the CISG framework.

2 The Context of the Approach: The 'Quest' for a Uniform Sales Law

To establish the context in which the CISG operates and its wider ramifications (onto branches of economics, international relations, as well as law), the Convention's purpose of establishing a uniform sales law should be examined. Firstly, at the international level, the development of a unified sales law would further international trade (by helping to lower legal barriers, as well as trans-border costs, for instance[12]), which in turn would solidify friendly state relations – although many argue that, at least at present, this pragmatic aim is largely idealistic.[13] Secondly, a uniform law would increase legal certainty, by making it easier for parties under sales contracts to identify their potential rights and obligations. This search for uniformity, however, 'pushes the boundaries' of domestic law, because its success depends largely on whether courts interpret it uniformly. The importance of a uniform approach to 'gap-filling' in the CISG – a method that is well known to civil law countries[14] – is thus of crucial importance.

2.1 The Need for a Uniform Interpretation of the CISG

The success of the CISG, as argued by some, could be owed to the fact that it contains 'few provisions that annoy any particular interest group'[15] – certainly some issues, which touch upon sensitive differences in the socio-economic structures of the States that negotiated the Convention, had to be excluded. For instance, issues such as consumer sales or the sales of shares in general, as well as issues concerning ordinary commercial contracts, including the validity of the contract, the effect of the contract on the property rights in the goods or the prescriptive period for bringing claims, have been excluded from the scope of the Convention.[16] Similarly, other issues on which full agreement could not be reached represent a compromise between conflicting views.[17] Although the CISG clearly constitutes a non-exhaustive body of rules[18], it does not only deal with the

[11] F. Lautenschlager, 'Current Problems regarding the Interpretation of Statements and Party Conduct under the CISG – The Reasonable Third Person, Language Problems and Standard Terms and Conditions', 11 *Vindobona Journal of International Commercial Law & Arbitration* (2007) p. 259.
[12] E.E. Bergsten, in J. Felemegas (ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (New York, Cambridge University Press 2007) p. ix.
[13] Ibid.
[14] F. Ferrari, 'Gap-Filling and Interpretation of the CISG: Overview of International Case Law', 7 *Vindobona Journal of International Commercial Law & Arbitration* (2003) p. 63 at 80.
[15] Bonell, n. 4, p. 4. In fact, it has even been stated that 'the [entire] text of the CISG consists of unique, supranational collective terms formed out of compromises between state delegates based on several systems of laws.' – F. Diedrich, 'Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts under the CISG', 8 *Pace International Law Review* (1996) p. 303 at 310, cited in Ferrari, n. 14, p. 66.
[16] Bonell, n. 4, p. 2.
[17] For instance, Article 28 CISG is one example of a provision that demonstrates the compromise between common and civil law traditions.
[18] Giannuzzi, n. 5, p. 1016; Felemegas, n. 10.

rights and obligations of parties under a sales contract, but also with the features of general contract law, such as the formation of contracts, damages and, as already mentioned, contract interpretation.

The question is whether the discretion of domestic courts is unbounded in interpreting the CISG. In this regard, the 'ethnocentric' approach, of deferring to *domestic* interpretation criteria, should be avoided. The uniform interpretation of the CISG[19] is necessary, because 'even when outward uniformity is achieved […], uniform application of the agreed rules is by no means guaranteed, as in practice [domestic courts in] different countries almost inevitably come to put different interpretations upon the same enacted words.'[20] In fact, J.S. Hobhouse points out that, if not applied uniformly, the CISG only raises uncertainty, in light of its problems regarding scope and lack of coherence and consistency[21] – however, this remark is itself based on an 'ethnocentric' approach, since uncertainty under the Convention emerges only when no uniform interpretation of the CISG has been achieved.[22]

Although the success of the CISG, as pointed out earlier, has been questioned,[23] the increasing body of worldwide case law[24] and databases[25] relating to the Convention help facilitate its uniform interpretation and application by national courts: 'the much feared danger of sharp differences in its interpretation by the various domestic courts seems to have been avoided to a large extent.'[26] These resources have been set up in recognition of the fact that, in order to apply the Convention uniformly (in accordance with Article 7(1) CISG, as will be discussed), courts and arbitrators must have comparative knowledge of how it is interpreted in other states: thus, courts seem to finally have

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[19] As expressly provided in Article 7(1) of the Convention (to be considered in more detail later on).

[20] R.J.C. Munday, 'Comment: The Uniform Interpretation of International Conventions', 27 *International and Comparative Law Quarterly* (1978) p. 450. See also e.g. U.G. Schroeter, 'Global Uniform Sales Law – with a European Twist? CISG Interaction with EU Law' 13 *Vindabona Journal of International Commercial Law* (2009) p. 179 (in favour of a uniform, 'internationalised' interpretation of the CISG); U.G. Schroeter, *UN-Kaufrecht und Europäisches Gemeinschaftsrecht – Verhältnis und Wechselwirkungen* (Munich, Sellier European Law Publishers 2005); and, C.B. Andersen and U.G. Schroeter (eds.), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer* (London, Wildy, Simmonds & Hill 2008).

[21] J.S. Hobhouse, 'International Conventions and Commercial Law: The Pursuit of Uniformity' 106 *The Law Quarterly Review* (1990) p. 532.

[22] B. Zeller, *CISG and the Unification of Internationl Trade Law* (Oxon, Routledge-Cavendish 2007) p. 19.

[23] The main reasons put forward in this respect include: criticism on account of the fact that the CISG is applied only to a relatively small amount of sales contracts in the Contracting States in practice, that its application can be contractually excluded, that it contains ambiguous provisions that may lead to situations of legal uncertainty, in regard to the rights and duties of the parties concerned, and, notably, that it can be interpreted differently by courts in different jurisdictions, leading to a non-uniform application of the Convention's provisions.

[24] For a detailed explanation, see Ferrari, n. 14, p. 70.

[25] Notably, for instance, UNCITRAL itself has set up databases to assist courts in accessing interpretations on the CISG through its database 'Case Law on Uncitral Texts' (CLOUT), as well as through its 'Digest of Case Law on the United Nations Convention on the International Sale of Goods', both accessible at <http://www.uncitral.org>. Further, the Pace Law School website on the CISG contains an important collection of case law, scholarly writings and opinions on the CISG, as well as links to further websites, available at <http://cisgw3.law.pace.edu>. See: C. Baasch Andersen, 'Furthering the Uniform Application of the CISG: Sources of Law on the Internet', 10 *Pace International Law Review* (1998) p. 403.

[26] Bonell, n. 4, p. 5.

understood[27] that where 'the rules on interpretation or those on gap-filling are disregarded, there will be no way to reach uniformity in the CISG's application'[28].

It is relevant here to keep in mind the distinction between specific CISG provisions and the *general principles* of comparative law on which the Convention as a whole is founded.[29] It is from the latter that the theoretical framework for the Principles of European Contract Law and the UNIDROIT Principles is derived (however, these two sets of 'Principles' are broader in scope than the CISG, each in different ways, as will be examined later on).

2.2 The UNIDROIT Principles: A 'Global' Instrument

'Prompted', as M. J. Bonell adequately puts it, 'both by the merits and by the shortcomings of the CISG'[30], the *UNIDROIT Principles of International Commercial Contracts* came into existence, with the CISG as an obligatory point of reference in the preparation: to the extent that the Principles and the Convention address the same issues, provisions in the UNIDROIT Principles have been taken either literally or at least in substance from the corresponding CISG provisions, with few exceptions.'[31] The Principles represent a further development of the CISG itself, as a 'restatement' of the law of international commercial contracts in general.[32] It is also important to note that the Principles emanate from an international organization (UNCITRAL). The UNIDROIT Principles contain provisions on contract formation, as does the CISG, as well as on other issues, such as limitation periods and the substantive validity of contracts. This difference in scope between the Principles and the CISG may partly relate to the fact that the Principles did not aim to have a binding character (they constitute soft-law[33]), and so they were less restricted by having to take into account differences among legal systems. Moreover, the scope of the Principles, as opposed to the Vienna Convention, is not solely limited to sales transactions, though it is limited to commercial contracts. This key difference enables the former instrument to deal with a wider range of issues (such as service contracts) than the CISG.[34]

Most importantly, the *UNIDROIT Principles* are a reflection of the CISG's 'general principles'[35] and of its aim to unify international contract law. They are also said to

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[27] Ferrari, n. 14, p. 91.
[28] Ibid.
[29] Felemegas, n. 10, p. 30.
[30] Bonell, n. 4, p. 15.
[31] M. J. Bonell, *An International Restatement of Contract Law – The UNIDROIT Principles of International Commercial Contracts*, 2nd edition (Irvington, NY: Transnational 1997).
[32] Bonell, n. 4, p. 2. See also: Introduction, UNIDROIT Principles of International Commercial Contracts (1994).
[33] However, they have taken on somewhat of a 'positive law' nature by the fact that so many courts and arbitral tribunals have cited them. – Bergsten, n. 12.
[34] Despite its comparatively limited scope, Franco Ferrari argues that 'what has been said does not diminish the CISG's success: in respect of the contracts the drafters intended the CISG to govern, as well as the issues they wanted the CISG to deal with, it certainly is a success.' – F. Ferrari, 'What Sources of Law for Contracts for the International Sale of Goods? Why One Has to Look Beyond the CISG', 25 *International Review of Law and Economics* (2005), p. 314 at 340, 341.
[35] See, e.g.: Chamber of National and International Arbitration of Milan, 1 December 1996, Final award in Case No. 1795, *Uniform Law Review* (1997) p. 602.

represent 'a significant step towards the globalization of legal thinking'.[36] The worldwide case law of domestic courts and arbitral tribunals indeed reflects the fact that the UNIDROIT Principles are increasingly used to 'reason through' the CISG.[37]

2.3 Principles of European Contract Law: A Project Geared to Europe

The project on the *Principles of European Contract Law* (PECL), initiated with a view to the harmonization of European contract law, was launched in the 1980s by the so-called 'Lando Commission'.[38] The sources used for PECL were not solely the domestic laws of the Member States – they also drew a considerable portion of their content from the CISG.[39]

The origins, preparation and presentation of PECL are largely similar to those of the UNIDROIT Principles.[40] The PECL address largely the same issues relating to general contract law, although they differ in regard to certain provisions – for instance, the 'merger clause' provision, where the UNIDROIT Principles are more liberal (in the sense that they give the parties greater freedom). It is important to note that there are also marked *differences* between the UNIDROIT Principles and PECL, which must be highlighted in order to understand, in turn, how the two 'Principles' relate to the CISG.

In this respect, it is relevant to note that the PECL have a different purpose than the UNIDROIT Principles: the aim, at that time, was for the European Principles to form a starting point for the drafting of a European Civil Code.[41] Therefore, they have somewhat more of a 'preliminary' character.[42] Another difference, in terms of scope, is that the UNIDROIT Principles, like the CISG, apply only to international contracts, whereas the PECL *also* apply to purely domestic ones. Furthermore, the UNIDROIT Principles apply only to international commercial contracts. By contrast, Article 1.101(1) of the PECL states that they are 'intended to be applied as general rules of contract law in the European Union', and so they also cover, for instance, consumer contracts. This points to another distinction between the two sets of 'Principles': the territorial scope of the PECL is formally limited to the EU States, whilst the UNIDROIT Principles are meant to apply universally. However, although the European Principles do not purport to have 'universal' significance, because they apply across both civil and common law

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[36] J. M. Perillo, 'UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review', 43 *Fordham Law Review* (1994) p. 281 at 282.

[37] See, for instance: ICC Arbitral Award No. 8128 of 1995, *Chemical Fertilizer Case*, CISG-online 526; Cour d'Appel de Grenoble, 23 October 1996, Decision no. 94/3859, *Scea. Gaec des Beauches B. Bruno v. Société Teso ten Elsen*, CLOUT Case No. 205; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 6 June 2003, Case No. 97/2002, available in English at <http://cisgw3.law.pace.edu/cases/030606r1.html>.

[38] The Principles were released in three successive volumes, in 1995, 2000 and 2003, respectively.

[39] Bonell, n. 4, p. 9.

[40] M. J. Bonell, 'The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?', 26 *Uniform Law Review* (1996) p. 229 at 234, 238.

[41] O. Lando, 'Principles of European Contract Law in the Third Millenium', in Center for Transnational Law (ed.), *Transnational Law and Legal Practice* (Münster, Quadis Publishing 1999) p. 76.

[42] It is relevant to point out that this may have to some extent prompted a 'reserved' approach by courts and experts to PECL, seeing it as having a 'temporary' status to be reinforced by the envisaged framework of the European Civil Code. See, for instance: ICC Arbitral Award No. 12111 of 6 January 2003, available at <http://www.unilex.info>, in which the Arbitral Tribunal deemed the Principles as more of an 'academic' exercise than of a tool frequently applied by the European business community.

systems in Europe, this does not undermine their value in interpreting the CISG.[43] This is especially true in light of the fact that the PECL are more extensive, comprising a broader comparative range than the CISG.

3 A 'Threefold' Investigation: CISG, PECL and the UNIDROIT Principles

3.1 Comparing the Provisions and their Intentions

In comparing the provisions of the three instruments, a significant affinity between them can be observed, which is not surprising in light of their common purpose (the achievement of a uniform sales law). Thus, the PECL and the UNIDROIT Principles can be used to make the CISG a more comprehensive framework.

In terms of the actual substance of the provisions, three scenarios can be detected in 'matching up' the corresponding provisions of the three instruments: firstly, in some cases, counterpart provisions are virtually identical, secondly, in others, either of the 'Principles' are more expansive although the underlying intent is the same, and thirdly, in still others, the comparative 'match-up's' only partly track one another.[44] The influence of the CISG on the UNIDROIT Principles and on PECL can easily be observed, as reflected by provisions such as that on the concept of 'fundamental breach' (as incorporated in Article 7.3.1 of the UNIDROIT Principles, and Article 9:301 PECL, respectively).

This 'impact' works both ways: the PECL and the UNIDROIT Principles, in turn, serve a supplementary, gap-filling role in the CISG. They shed light on the meaning of vague or insufficiently qualified CISG provisions. This 'gap-filling' function of the two sets of 'Principles ' is reflected in the case law.[45] Thus, a mutual impact can be observed between the CISG on the one hand, and PECL and the UNIDROIT Principles on the other.

3.2 'Gap-Filling' under the Convention: A Closer Look at Article 7 CISG

Article 7 of the CISG is, in many ways, its most important provision, not only due to the fact that it requires detailed consideration by the interpreters of the Convention, but also because the success or failure of its application may determine that of the CISG as a uniform law.[46]

Article 7(1) of the CISG contains the broad principles for the Convention's application. Thus, it entails that, when interpreting the CISG, regard must be had to its *'international character'*, to the need to promote *uniformity*, and to *good faith* in international trade.

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[43] Bergsten, n. 12, p. xi.
[44] As noted in: Felemegas, n. 10, p. 38.
[45] See, for instance: ICC Arbitral Award No. 8128, n. 37; ICC Arbitral Award No. 9117 of March 1998, available at <http://cisgw3.law.pace.edu/cases/989117i1.html>; ICC Arbitral Award No. 8817 of December 1997, available at <http://cisgw3.law.pace.edu/cases/978817i1.html>; Cour d'Appel Grenoble, n. 37; Rechtbank Zwolle [District Court Zwolle], 5 March 1997, HA ZA 95-640, *Cooperative Maritime Etaploise v. Bos Fishproducts*, available at <http://cisgw3.law.pace.edu/cases/970305n1.html>. For further arguments, see: Zeller, n. 22, p. 38.
[46] Felemegas, n. 10, p. 9.

Identifying the principles for interpreting the CISG under this provision is a task left up to the judges and arbitrators in each case.

However, most important for present purposes is the CISG Article 7(2), which provides the 'doorway' to filling the gaps in the Convention. Its aim ties in with that of Article 7(1), namely to ensure the uniform application of the Convention.[47] Article 7(2) of the CISG states:

> '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 absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.'

Thus, in each specific case, the judge or arbitrator must identify the 'general principles' applicable, to derive a solution in accordance with the Convention. To fulfil this task, recourse can be made to either of the 'Principles'[48], which embody these underlying general principles of the CISG.[49] In this sense, the word 'based' in Article 7(2) CISG should be given a broader meaning than the strict temporal correlation it initially seems to imply between the CISG and the two 'Principles'.[50]

It is important here also to note what Article 7(2) does *not* say, namely that it does *not* encourage courts to refer to domestic law (so it is against the ethnocentric approach mentioned earlier).[51] This links to the emphasis on the Convention's 'international character' in the first paragraph of Article 7, and it entails that the text should not be read through the 'lens' of domestic law.[52] This is a view reflected by the CISG case law.[53] Thus, the Convention must and will remain a self-contained body of rules independent from different domestic laws.[54]

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[47] Ferrari, n. 14, p. 80.

[48] It has been suggested that another significant step would be a formal recommendation by UNCITRAL to use the UNIDROIT Principles to interpret and supplement the CISG on issues falling within its scope, as long as the individual provisions of the UNIDROIT Principles referred to can be considered an expression of an underlying 'general principle'. This would help to promote uniformity in the application of the CISG worldwide, while at the same time ensuring that in practice, recourse to the UNIDROIT Principles is made only within the limits and conditions provided by Article 7 CISG.' – Bonell, n. 4, p. 26.

[49] A strong stance in regard to the gap-filling function of the UNIDROIT Principles in the CISG is taken by A.M. Garro, 'The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and CISG', 69 *Tulane Law Review* (1995) p. 1149.

[50] Felemegas, n. 10, p. 33.

[51] Zeller, n. 22, p. 26.

[52] J.O. Honnold, *Uniform Law for International Sales under the United Nations Convention*, 3rd edition (Deventer, Kluwer 1999) p. 89.

[53] See, e.g.: *Medical Marketing International, Inc. v. Internazionale Medico Scientifica S.r.l.*, No. Civ. A. 99-0380, 1999 WL 311945 (E.D. La. May 17, 1999); Bundesgerichtshof [German Federal Supreme Court], 24 March 1999, BGH VIII ZR 121/98, *Vine Wax Case*, available at <http://cisgw3.law.pace.edu/cases/990324g1.html>.

[54] Felemegas, n. 10, p. 11.

3.3 The 'Gaps' in the CISG

There are two types of 'gaps' in the Convention: those of an 'internal' and those of an 'external' nature.[55]

The *external gaps* refer to matters *excluded* from the Convention (namely those mentioned in Articles 2, 3, 4 and 5 CISG – for instance, consumer contracts), as well as matters on which the CISG is *silent* (such as the choice of law). These constitute gaps *intra legem*[56], on matters falling outside of the scope of the Convention, for which Article 7 CISG cannot be invoked. Parties *could*, nonetheless, introduce a clause in the contract in which they state that for those matters not governed by the CISG, the UNIDROIT Principles, for instance, shall apply. This may allow the Principles to fill also external gaps in the Convention on matters that would otherwise fall directly within the sphere of the applicable domestic law.[57] The effectiveness of such a solution depends, however, on whether a case is taken up by a court, which is more likely to base its decision on its own domestic law and view the Principles merely as terms incorporated into the contract[58], or by an arbitration tribunal.

By contrast, *'internal'* gaps are those concerning matters that need settling in accordance with *general principles* – these refer to gaps *praeter legem*[59], to which the CISG applies, but does not expressly resolve. It should be noted that this approach to filling the gaps based on general principles, although it is the most common one used, can also be substituted by other approaches that have been put forward, such as the 'analogical approach'[60] (however, these will not be considered further in the present paper).[61] These general principles may include, *inter alia*, the principle of 'party autonomy', the notion of 'estoppel' and the '*favor contractus*' principle, as reflected by worldwide case law.[62] However, defining such 'general principles' can prove to be a difficult task: for instance, in regard to the aforementioned 'good faith' provision in Article 7(1), it is disputed whether this serves merely as an additional tool for interpreting the Convention[63], or whether it also generally embodies the need for each of the parties under the contract to observe good faith in international trade, thus serving as a 'general principle' itself.[64]

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[55] This distinction is also made by Bruno Zeller (Zeller, n. 22, p. 29).
[56] This term is used in: F. Ferrari, 'Uniform Interpretation of the 1980 Uniform Sales Law', 24 *Georgia Journal of International and Comparative Law* (1994) p. 183.
[57] For an elaboration on this option, see further: Bonell, n. 31.
[58] 'The UNIDROIT Principles [as a non-binding set of rules] cannot prevail over the mandatory rules of the (objectively) applicable law; they can, however, prevail over that law's dispositive rules.' – Ferrari, n. 34, p. 330.
[59] Ferrari, n. 56, p. 183.
[60] See, e.g.: J. Hellner, 'Gap-Filling by Analogy: Art. 7 of the U.N. Sales Convention in Its Historical Context', in J. Ramberg (ed.), *Studies in International Law: Festskrift till Lars Hjerner* (Stockholm, Norstedts 1990) p. 219.
[61] For an overview of possible approaches to filling gaps *praeter legem* in the CISG, see for instance: Felemegas, n. 10, p. 24-26.
[62] Ferrari, n. 14, p. 85.
[63] This is argued in: M. Schmidt-Kessel, 'Articles 8-9 CISG', in P. Schlechtriem and I. Schwenzer (eds.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd edition (Oxford, Oxford University Press 2005) p. 124, para. 30.
[64] This is argued in: P. Schlechtriem, *Uniform Law of Sales – The UN Convention on Contracts for the International Sale of Goods* (Vienna, Manz 1986) p. 39; Ferrari, n. 14, p. 76-77 (in contradiction to Schmidt-Kessel, n. 63).

Further, it is useful to note that it does not matter whether gaps are of a procedural or of a substantive nature.[65]

3.4 Illustrating the Gap-Filling Mechanism: Article 8 CISG

There are numerous examples of provisions to which the process of 'gap-filling' can be applied.[66] Given the limited scope of this paper, only one such example will be analysed: the Convention's Article 8, its core provision on the interpretation of statements and conduct of parties (thus, the CISG contains two provisions that relate to issues of interpretation, namely Articles 7 and 8). Even if it is less often referred to by commentators than Article 7, Article 8 has proven highly important in practice.[67] Although Article 8, which is a 'general provision' of the Convention, does not expressly mention it, the interpretation of the contract indisputably falls under the scope of the CISG.[68] Thus, Article 8 can be used, for instance, to interpret statements and conduct in relation to the performance[69], formation[70], or avoidance[71] of a contract, or to determine the correct parties to a contract through interpretation in general.[72]

Article 8 CISG discourages recourse by judges and arbitrators to domestic law – therefore, like Article 7 CISG, it helps ensure the uniform application of the Convention in setting out uniform rules that prevent interpreters from resorting to domestic criteria of interpretation.[73]

In accordance with Article 8(1) CISG, one has to first interpret a statement or conduct 'subjectively' by looking at the intent of the declaring party. For the 'subjective intent'

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[65] Zeller, n. 22, p. 60. This is also because what is considered a 'substantive' rule in some jurisdictions, is 'procedural' in others.

[66] For instance, the matter of a 'fundamental breach of contract' under the CISG is not clearly defined by the general criteria provided in its Article 25, in comparison to the criteria in Article 7.3.1 of the UNIDROIT Principles: Article 7.3.1(2) of the Principles provides additional factors, such as whether strict compliance with the non-fulfilled obligations is of the essence under the contract, or whether the failure to perform was intentional. To give another example, the UNIDROIT Principles can be used to settle questions regarding pre-contractual liability not mentioned in the CISG – these matters relate to the general principle of good faith underlying the Convention, and they can be settled by reference, for instance, to Article 2.15 of the Principles on 'negotiations in bad faith'.

[67] F. Ferrari, 'Interpretation of Statements: Article 8', in F. Ferrari et al., *The Draft UNCITRAL Digest and Beyond – Cases, Analysis and Unresolved Issues in the U.N. Sales Convention* (Munich, Sellier European Publishers 2004) p. 173

[68] See, e.g.: Schweizerisches Bundesgericht [Swiss Federal Supreme Court], 22 December 2000, 4C.296/2000/rnd, *Roland Schmidt GmbH v. Textil-Werke Blumenegg AG*, available at <http://cisgw3.law.pace.edu/cases/001222s1.html>.

[69] See, e.g.: Oberster Gerichtshof [Austrian Supreme Court], 24 April 1997, 2 Ob 109/97m, *Processing Plant Case*, available at <http://cisgw3.law.pace.edu/cases/970424a3.html>.

[70] See, e.g.: OLG Frankfurt a. M. [Appellate Court Frankfurt], 30 August 2000, 9 U 13/00, *Yarn Case*, available at <http://cisgw3.law.pace.edu/cases/000830g1.html>.

[71] See, e.g.: OLG Koblenz [Appellate Court Koblenz], 31 January 1997, 2 U 31/96, *Acrylic Blankets Case*, available at <http://cisgw3.law.pace.edu/cases/970131g1.html>.

[72] LG Hamburg [District Court Hamburg], 26 September 1990, 5 O 543/88, *Textiles Case*, CISG-online No. 21; OLG Stuttgart [Appellate Court Stuttgart], 28 February 2000, 5 U 118/99, *Floor Tiles Case*, CISG-online 583; OLG Frankfurt a. M., n. 70; OLG Kanton Thurgau [Swiss Appellate Court Thurgau], 19 December 1995, CISG-online No. 496.

[73] Ferrari, n. 67, p. 173.

of a party to be relevant, however, it must have been manifested in some way.[74] Next, where the subjective intent of the parties cannot be discerned (and this is in practice most often the case[75]), Article 8(2) CISG provides the 'objective' criteria of interpretation. Namely, it provides that statements and conduct of a party 'are to be interpreted according to the *understanding that a reasonable person of the same kind* as the other party would have had in the *same circumstances.*' This stipulation in Article 8(2) is the dominant means by which parties' statements and conduct are interpreted.[76] It is not meant to be applied in an abstract manner. Rather, a 'reasonable person' means a professional with the same technical skill and with the same business experience as the party concerned. Moreover, the 'reasonable person' can be assumed to have had the same background knowledge from negotiations and previous dealings between the parties.[77]

Further, as a key tool for applying the Article 8(2) criterion, Article 8(3) CISG states that 'due consideration' should be given to 'all relevant circumstances', such as negotiations, established practices and usages between the parties, and subsequent conduct. There is no formal restriction on the range of circumstances that can be taken into account here.[78]

3.4.1 Filling the Gaps in Article 8 CISG: A Look at the UNIDROIT Principles

Now that the meaning of the provision in Article 8 CISG has been discussed, it is necessary to evaluate how provisions in the UNIDROIT Principles, as a first point of reference here, can be used to supplement the interpreter's understanding of the Convention, and to fill the 'gaps' in interpreting a 'reasonable person's understanding' under the CISG.[79]

The overall scope of the corresponding provisions of the UNIDROIT Principles of International Commercial Contracts ('PICC') extends beyond that of Article 8 CISG, although some provisions are very similar. Firstly, Article 4.2 PICC, on the 'interpretation of statements and other conduct', accords fully with Articles 8(1) and 8(2) CISG, respectively: it first gives the 'subjective' criteria regarding the intent of the parties (Article 8(1) CISG), and secondly, if the latter is found inapplicable, the 'objective' criteria is given, in the form of the 'reasonable person's understanding' standard in Article 8(2) CISG.

Next, Article 4.3 of the UNIDROIT Principles on 'relevant circumstances', mirrors Article 8(3) CISG in that 'all circumstances' must be taken into account in interpreting statements and conduct. However, Article 4.3 PICC provides a more *specific* list of

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[74] LG Hamburg, n. 72.
[75] *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino S.p.A.*, US Ct App (11th Cir), 29 June 1998, CISG-online 342,144 F.3d 1387.
[76] Ibid.
[77] E.A. Farnsworth, 'Article 8 CISG', in C.M. Bianca and M.J. Bonell (eds.), *Commentary on the International Sales Law: the 1980 Vienna Sales Convention* (Milan, Giuffrè 1987) p. 95.
[78] Schmidt-Kessel, n. 63, p. 117.
[79] J.M. Perillo, 'Interpretation of the contract: Editorial remarks on the manner in which the UNIDROIT Principles may be used to interpret or supplement CISG Article 8', in J. Felemegas (ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (New York, Cambridge University Press 2007) p. 49. See generally Teichert, n. 8.

circumstances than the CISG. This non-exclusive list consists of six types of circumstances, such as *preliminary negotiations* (contained in Article 4.3(a) PICC, corresponding to Article 5:102(a) PECL), *established practices* or 'course of dealing' (Article 4.3(b) PICC, corresponding to Article 5:102(d) PECL), established *usages* (Article 4.3(f) PICC, and Article 5:102(f) PECL), *subsequent conduct* or 'course of performance' (Article 4.3(c) PICC, and Article 5:102(b) PECL), and the *meaning commonly given to terms and expressions in the trade concerned* (Article 4.3(e), and Article 5:102(e) PECL). Some of these 'circumstances', namely the first four mentioned above, are also explicitly mentioned in Article 8(3) CISG, whilst the other elements listed in the Principles serve to fill the gaps in the CISG.

An important difference between Article 8 CISG and the corresponding provisions in the UNIDROIT Principles is that the Principles also elaborate upon a non-exclusive set of *rules of interpretation*, which are absent in the CISG. These rules can aid courts and arbitrators in interpreting statements and conduct under the Convention. Firstly, Article 4.4 PICC provides that terms and expressions should be interpreted in light of the contract as a whole. Secondly, Article 4.5 states that the terms of the contract must be interpreted in such a way as to give effect to all the terms ('rather than to deprive some of them of effect').

Next, Article 4.6 PICC contains the '*contra proferentem*' rule: 'if contract terms supplied by one party are unclear, an interpretation against that party is preferred'.[80] This important notion, which is frequently used by courts to soften the balance in favour of the 'weaker' party, is absent from the CISG, but it is nonetheless applicable under the Convention.[81]

Moreover, the UNIDROIT Principles contain an interesting provision that is also absent from the CISG: Article 4.7 PICC, on 'linguistic discrepancies', dictates that in the case of a discrepancy between the different language versions of a contract drawn up in multiple languages of equal authority, preference should be given to the interpretation 'according to a version in which the contract was originally drawn up'. In this respect, the UNIDROIT Principles promote certainty in international trade by providing a 'definite and logical rule'.[82]

Lastly, Article 4.8 PICC provides criteria for filling the gaps in the case of the difficult problem of an 'omitted term' (where none of the terms in the contract cover an event that has occurred). It is stated that a term that is 'appropriate in the circumstances' should be applied (Article 4.8(1)), in accordance with a set list of four conditions[83] in order to determine what an 'appropriate' term is (Article 4.8(2)).

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[80] It is worth mentioning that the extent to which this rule applies will depend on the circumstances of the case. Thus, the less the issue in question was negotiated, the greater the justification for interpreting it against the party who included it in the contract.

[81] Schmidt-Kessel, n. 63, p. 133 para. 47. See also: OLG Frankfurt a. M. [Frankfurt Court of Appeal], 31 March 1995, 25 U 185/94, *Test Tubes Case*, CISG-online 137.

[82] Perillo, n. 79, p. 51 para. j.

[83] Namely: the intention of the parties; the nature and purpose of the contract; good faith and fair dealing; and reasonableness.

Thus, the aforementioned provisions in the UNIDROIT Principles identify the 'raw material'[84] with which to fill gaps in the CISG.

3.4.2 Filling the Gaps in Article 8 CISG: A Look at the Principles of European Contract Law

A similar situation can be determined with the corresponding provisions of the Principles of European Contract Law, which are, like the UNIDROIT Principles, considerably more extensive than Article 8 of the CISG. It should be pointed out at the outset that the CISG Article 8 applies only to contracts for the international sale of goods, whereas the corresponding PECL provisions, as mentioned earlier, apply to a much wider range of contracts. It is also important to note that the PECL state *explicitly* that the contract is the subject matter of interpretation in Article 5:101(1), which the CISG does not expressly do – however, this is undoubtedly also the case under the CISG.[85] Further, the PECL provisions are more 'bilaterally' oriented than the CISG (for instance, they emphasize the 'common intention' of the parties, in Article 5:101(2) PECL, whereas the CISG puts emphasis more on the intention of each individual party). However, this difference between the two instruments is in 'expression and emphasis only'[86].

Article 8(1), on the *'subjective' standard* of interpretation of statements and conduct, can be contrasted to the first two subparagraphs of Article 5:101 PECL, on 'general rules of interpretation'. Here, the PECL provision not only makes a distinction between the 'common' and 'individual' intention of the parties (Article 5:101(1) and Article 5:101(2) PECL, respectively), but it also, for instance, precisely defines the moment at which the other party's awareness of the intent can be assessed ('at the time of the conclusion of the contract'), under Article 5:101(2) PECL. The CISG lacks such precise qualifications in its Article 8(1).

Next, Article 8(2) CISG accords with Article 5:101(3) PECL, regarding the *'objective' standard* of interpretation, based on the 'reasonable person' criteria explained earlier. These provisions are almost identical, with the possible qualification that the PECL provision is slightly more precise in delineating the 'switch' from the 'subjective' to the 'objective' standard (Article 8(2) CISG merely states that the interpreter should look at the reasonable person criteria 'if the preceding paragraph is not applicable').

Furthermore, Article 5:102 PECL can be compared to Article 8(3) CISG, which lists the non-exhaustive list of circumstances that can be taken into consideration in interpreting statements and conduct. Once again, the PECL provision is more comprehensive. In this respect, Article 5:102 PECL is highly similar to Article 4.3 of the UNIDROIT Principles. It provides an even broader non-exhaustive list of 'circumstances', because it not only includes the aforementioned elements in the UNIDROIT Principles, it also includes that of 'good faith and fair dealing' (Article 5:102(g) PECL). This latter provision can be used to fill the

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[84] Perillo, n. 79, p. 51 para. k.
[85] See Schweizerisches Bundesgericht, n. 68.
[86] M. Stanivukovic, 'Interpretation of the contract: Editorial remarks on the manner in which the PECL may be used to interpret or supplement CISG Article 8', in J. Felemegas (ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (New York, Cambridge University Press 2007) p. 273 para. b.

gaps in the CISG only to the extent, as previously discussed, that the principle of 'good faith' is regarded as a tool for interpretation.[87]

Finally, Article 5:106 PECL lists five specific *rules of interpretation*, mirroring Articles 4.4-4.8 of the UNIDROIT Principles. Such rules are entirely absent from Article 8 CISG. Thus, PECL contains the *contra proferentem* rule (Article 5:103), the rule on giving preference to negotiated terms (Article 5:104), the rule on interpreting individual provisions in light of the contract as a whole (Article 5:105), the rule on giving preference to interpretation that renders the terms of the contract effective (Article 5:106) and, lastly, the rule on linguistic discrepancies (Article 5:107). These specific rules not only accord with the intent of Article 8 CISG, they are in fact often described as the origin of solutions adopted under the CISG article.[88] Therefore, they fulfil an important gap-filling role in the CISG.

4 Conclusion: A Note of Optimism for the Future

The CISG has not only influenced the formation of other international instruments, such as the UNCITRAL Principles and the PECL, it has *also* had significant impact on domestic law, where it has been taken as a model for reform.[89] PECL and UNIDROIT Principles represent proof of this impact of the CISG on domestic law – by influencing such international sources of Law, the Convention has indirectly also triggered developments at the national level. Thus, instruments such as PECL and the UNIDROIT Principles are conducive to creating a uniform sales law through the CISG framework. Furthermore, the two sets of 'Principles' should reduce the need to resort to rules of private international law for 'gap-filling'. This helps preserve the integrity of the CISG as an instrument autonomous from the domestic sphere.

However, these expectations must not be overestimated: 'to expect a full unification would be a utopian exercise.'[90] It should not be thought, in respect of the CISG, that 'one single uniform sales law should be provided on a "one size fits all" basis.'[91] This assertion therefore makes the process of gap-filling and interpretation all the more crucial: it is vital that the CISG be interpreted in a manner that allows the uniform law to develop in a *uniform* fashion, consistent with its 'general principles' (especially since, as noted earlier, the Convention does indeed have its problems).

Most importantly, 'the CISG must be read in a way that permits it to grow and adapt to novel circumstances and changing times.'[92] The process of gap-filling enables adaptation to new needs, recognition of emerging rules, and an increased awareness of the reality of the global legal system and the dynamics of the world economy.[93] It is these goals that should be held closely in sight when striving for progress and harmonization, in order to ensure certainty and open relations, not only in the domestic sphere, but also at the global level.

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[87] Ibid., p. 276 para. h.
[88] Ibid., p. 277 para. j.
[89] Zeller, n. 22, p. 95.
[90] Zeller, n. 22, p. 36.
[91] M.G. Bridge, 'Uniformity and Diversity in the Law of International Sale', 15 *Pace International Law Review* (2003), p. 55 at 56.
[92] J.O. Honnold, n. 52, p. 16.
[93] A. Charters, 'Fitting the "Situation" – The CISG and the Regulated Market', 4 *Washington University Global Studies Law Review* (2005) p. 42.

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