General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions on International Factoring and Leasing and the UNIDROIT Principles

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A. Introduction

Despite the fact that in the last few years various works have been dedicated to the study of the general Principles[1] and their impact on domestic private law, in order to get a more global view of their influence on a private law system, one cannot omit to discuss, albeit briefly the influence that they exercise on private law, based upon supranational sources, in particular on the private law as created by international uniform commercial law conventions.

Amongst the most important Conventions on uniform commercial law in force, the ones that stand out, even if for diverse reasons, are: the 1980 United Nations Convention on Contracts for the International Sale of Goods[2] (CISG)[3] and the two

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1 *See*, among others, Guido Alpa, *Principi Generali* (1995).

2 For the English text of the United Nations Convention on Contracts for the International Sale of Goods, *see*, among others, (1980) 19 *International Legal Materials* 668. The text of the other official versions (namely the Arab, Chinese, French, Russian and Spanish ones) can be found in Cesare Massimo Bianca and Michael Joachim Bonell (eds.), *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* (1987), at pp. 681–806; Daniel Barstow Magraw and Reed R. Kathrein, *The Convention for the International Sale of Goods. A Handbook of the Basic Materials* (2nd ed., 1990), at pp. 169–246.

3 For an examination of the various abbreviations used in the various countries for the CISG, *see* Axel Flessner and Thomas Kadner, 'CISG? Zur Suche nach einer Abkürzung für das Wiener Übereinkommen über Verträge über den internationalen Warenkauf vom 11 April 1980' in (1995) *Zeitschrift für Europäisches Privatrecht*, at p. 347.

1988 Ottawa Conventions, on International Factoring[4] and International Financial Leasing[5] respectively. Whilst the Vienna Convention assumes importance due to its great success[6] – evidenced not only by the number of contracting states[7] but also by the attention it is has drawn from scholars[8] and practitioners (that is judges)[9] alike –

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4 For the English text of this Convention, *see* (1988) 27 *International Legal Materials* 943.

5 The English text of this Convention is reprinted in (1988) 27 *International Legal Materials 922.*

6 It has often been pointed out that the CISG is to be considered a great success; *see*, e.g., Frank Diedrich, 'Lückenfüllung im internationalen Einheitsrecht. Möglichkeiten und Grenzen richterlicher Rechtsfortbildung im Wiener Kaufrecht' in (1995) *Recht der Internationalen Wirtschaft* 353. According to the *Financial Times*, 21 September 1993, Business Section 1, the CISG even represents 'the biggest success so far achieved by inter-governmental attempts at unification of commercial laws'.

7 The CISG is in force in the following countries: Argentina (1 January 1988), Australia (1 April 1989), Austria (1 January 1989), Belarus (1 November 1990), Belgium (1 November 1997), Bosnia-Herzegovina (6 March 1992), Bulgaria (1 August 1991), Canada (1 May 1992), Chile (1 March 1991), China (1 January 1988), Cuba (1 December 1995), Czech Republic (1 April 1991), Denmark (1 March 1990), Ecuador (1 February 1993), Egypt (1 January 1988), Estonia (1 October 1994), Finland (1 January 1989), France (1 January 1988), Georgia (1 September 1995), Germany (1 January 1991), Guinea (1 February 1992), Hungary (1 January 1988), Iraq (1 April 1991), Italy (1 January 1988), Latvia (1 August 1998), Lesotho (1 January 1988), Lithuania (1 February 1996), Luxembourg (1 February 1998), Mexico (1 January 1989), Moldova (1 November 1995), the Netherlands (1 January 1992), New Zealand (1 October 1995), Norway (1 August 1989), Poland (1 June 1996), Romania (1 June 1992), Russian Federation (1 September 1991), Singapore (1 March 1996), Slovakia (1 January 1993), Slovenia (25 June 1991), Spain (1 August 1991), Sweden (1 January 1989), Switzerland (1 March 1991), Syrian Arab Republic (1 January 1988), Uganda (1 March 1993), Ukraine (1 February 1991), United States (1 January 1988), Uzbekistan (1 December 1997), Yugoslavia (1 January 1988), Zambia (1 January 1988). For a recent list of contracting states, *see* also (1996) *Uniform Law Review* 143.

8 More than 2,000 monographs and law review articles have been written on the CISG; numerous bibliographies have been published in paper form (*see*, e.g., Michael R. Will, *CISG. The UN Convention on Contracts for the International Sale of Goods. International Bibliography 1980–1995. The First 150 or so Decisions (1995); Peter Winship*, 'A Bibliography of Commentaries on the United Nations International Sales Convention' in (1987) 21 *The International Lawyer*, at p. 585; Peter Winship, 'The UN Sales Convention. A Bibliography of English-Language Publications' in (1994) 28 *The International Lawyer*, at p. 401). However, the most complete list of publications on the CISG can be found on the Internet under the following address: http://cisgw3.law.pace.edu, an Internet site created by the Institute of International Commercial Law of the Pace University School of Law, White Plains, NY. For a short discussion of how to use the Internet site, *see* Albert H. Kritzer, 'The Convention on Contracts for the International Sale of Goods: Scope, Interpretation and Resources' in (1995) 1 *Review of the Convention on Contracts for the International Sale of Goods (CISG)*, at p. 147.

9 The CISG's importance in practice is evidenced by its numerous applications; in 1996, the CISG had already been applied nearly 300 times; compare Michael R. Will, *CISG. The First 284 or so Decisions* (1996). Today, the CISG has been applied more than 350 times; *see* the cases presented under the following Internet site: http://cisgw3.law.pace.edu. For comments on these applications, *see*, e.g., Michael Joachim Bonell and Fabio Liguori, 'The

the Ottawa Conventions mainly stand out for the reason that they constitute the most recent uniform commercial law conventions to come into force (1 May 1995).[10] This article will examine the relationship between the general Principles and these Conventions.

At first sight, this does not appear to be a problematic task, considering that Article 7(2) of the Vienna Convention, Article 4(2) of the Convention on International Factoring and Article 6(2) of the Convention on International Financial Leasing make express reference (as do other conventions[11] and

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UN Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law (Part I)' in (1996) *Uniform Law Review*, at p. 147; '(Part II)', (1996) *Uniform Law Review*, at p. 359; James J. Callaghan, 'U.N. Convention on Contracts for the International Sale of Goods: Examining the Gap-Filling Role of the CISG in Two French Decisions' in (1995) 14 *Journal of Law and Commerce*, at p. 183; Louis Del Duca and Patrick Del Duca, 'Practice under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders' in (1995) 27 *Uniform Commercial Code Law Journal* at p. 331; Franco Ferrari, 'Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing' in (1995) 15 *Journal of Law and Commerce*, at p. 1; Franco Ferrari, *Law Vendita Internazionale. Applicabilità ed Applicazioni della Convenzione di Vienna del 1980* (1997); Harry M. Flechtner, 'More U.S. Decisions on the U.N. Sales Convention: Scope, Parole Evidence, "Validity", and Reduction of Price under Article 50' in (1995) 14 *Journal of Law and Commerce*, at p. 153; Martin Karollus, 'Judicial Interpretation and Application of the CISG in Germany 1988–1994' in (1995) 1 *Review of the Convention on Contracts for the International Sale of Goods (CISG)*, at p. 51; Martin Krollus, 'Rechtsprechung zum UN-Kaufrecht (II)' in (1992) *Recht der Wirtschaft*, at p. 168; Martin Karollus, 'UN-Kaufrecht: Erste Gerichtsentscheidungen' in (1991) *Recht der Wirtschaft*, at p. 319; Fabio Liguori, 'La convenzione di Vienna sulla vendita internazionale di beni nella pratica: un'analisi critica delle primo cento decisioni' in (1996) VI *Foro Italiano*, at p. 145; Ulrich Magnus, 'Stand und Entwicklungen des UN-Kaufrechts' in (1995) *Zeitschrift für Europäisches Privatrecht*, at p. 202; Ulrich Magnus, 'Aktuelle Fragen des UN-Kaufrechts' in (1993) *Zeitschrift für Europäisches Privatrecht*, at p. 79; Burghard Piltz, 'Neue Entwicklungen im UN-Kaufrecht' in (1994) *Neue Juristische Wochenschrift*, at p. 1101; Burghard Piltz, 'Neue Entwicklungen im Un-Kaufrecht' in (1996) *Neue Juristische Wochenschrift*, at p. 2768; Gert Reinhart, 'Zum Inkrafttreten des UN-Kaufrechts für die Bundesrepublik Deutschland: Erste Entscheidungen deutscher Gerichte' in (1990) *Praxis des Internationalen Privat- und Verfahrensrechts*, at p. 289.

[10] For comments on the UNIDROIT Conventions referred to in the text occasioned by their coming into force, *see* Jean-Paul Béraudo, 'Le nouveau droit du crédit-bail international et de l'affacturage international (1er mai 1995)' in (1995) *La Semaine Juridique*, at p. 185; Giorgio De Nova, 'Le convenzioni Unidroit sul leasing e sul factoring internazionali' in (1995) *Contratti*, at p. 418; Paola Mariani, 'L'entrata in vigore delle due convenzioni UNIDROIT sul leasing internazionale e sul factoring internazionale' in (1995) *Rivista di Diritto Internazionale Privato e Processuale*, at p. 562.

[11] *See*, for instance, Art. 6(2) of the 1983 Geneva Convention on Agency, reprinted in (1983) *Uniform Law Review*, at p. 133; for comments on this Convention, compare Michael Joachim Bonell, 'Una nuova disciplina in materia di rappresentanza: la Convenzione di Ginevra del 1983 sulla rappresentanza nella compravendita internazionale di merci' in (1983) 1 *Rivista di Diritto Commerciale*, at p. 289; Michael Joachim Bonell, 'The 1983

conventional drafts[12]) to general Principles. The said provisions affirm that 'questions concerning matters governed [by these Conventions] which are not expressly settled in [them] are to be settled in conformity with the general Principles on which [they are] based'. They also state that in the absence of these Principles, such matters must be resolved in conformity with the law applicable by virtue of the rules of private international law. It appears, therefore, that the general Principles have, at least within the ambit of the aforementioned Conventions, the function of filling gaps.[13] These gaps are indeed inevitable as such Conventions are not intended to be exhaustive[14] but, rather, govern only a limited number of matters. This inevitability derives, above all, from the fact that these Conventions constitute a compromise between the different ideas expressed by national representatives of diverse economical, political and legal systems, all promoting their own national interests.[15]

However, if one limits oneself to the observation that the general Principles are to be used to fill these inevitable gaps, it is not possible to clarify some of the more important issues which the aforementioned provisions raise: on the one hand, the specific identification of the general Principles referred to *in abstracto*; and, on the other hand, the determination of the instances where recourse must be had to these general Principles, i.e. the identification of the type of gaps to be filled by having recourse to such Principles. Thus, the affirmation whereby the general Principles constitute the means to fill the gaps can only be a starting point, not the result of a study of the relationship between the Uniform Commercial Law Conventions and the general Principles.

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Geneva Convention on Agency in the International Sale of Goods' in (1984) 32 *American Journal of Comparative Law*, at p. 717; Paolo Maria Vecchi, 'La Convenzione di Ginevra sulla rappresentanza nella vendita internazionale di merci', in 2/2 I *Contratti in Generale* (Guido Alpa and Mario Bessone (eds.)), (1991), at p. 889.

For a list of uniform law conventions containing similar provisions, *see* most recently Ernst A. Kramer, 'Uniforme Interpretation von Einheitsprivatrecht – mit besonderer Berücksichtigung von Art. 7 UNKR' in (1996) *Juristische Blätter*, at p. 140; *see* also Robert Hillman, 'Editorial Analysis of Article 7', published on the Internet under the following site: http://cisgw3.law.pace.edu/cisg/text/hillman.html.

[12] *See* e.g., Art. 4(2) of the UNCITRAL Draft Uniform Rules on Assignment in Receivables Financing reprinted in UNCITRAL document A/CN 9/432 of 25 July 1996.

[13] *See* for a similar statement, referred, however, solely to Art. 7(2) of the CISG, Peter Schlechtriem, *Internationales UN-Kaufrecht* (1996), at p. 31.

[14] For this affirmation, *see* Giuseppe Benedetti, 'Commento all'art. 4 della Convenzione di Vienna' in (1989) 9 *Nuove Leggi Civili Commentate*, at p. 9.

[15] In this respect, *see*, although with reference to the sole Factoring Convention, Gargiulo and Giancoli, 'La cessione del credito sotto la lente Unidroit' in (1993) *Commercio Internazionale*, at p. 1305.

B. *Praeter Legem* and *Intra Legem* gaps

Conscious of the fact that no convention can (nor wants to) pose itself as an exhaustive body of rules,[16] the drafters of the Conventions provided for a rule to be followed in filling the (inevitable) gaps.[17] According to this rule, the gaps are to be filled by having recourse to the general principles upon which each convention is based. However, a more in-depth inspection of the provisions laying down this rule shows that not all the gaps are to be filled by resorting to the general principles. In fact, the relevant Articles provide for recourse to the general Principles only with respects to matters which are governed by, but not expressly settled in, the Conventions. It follows that the gaps to which the rule is to be applied are not *intra legem* gaps,[18] i.e. those relating to matters that are outside the ambit of application of the Conventions.[19] Such (excluded) matters are, for example, those contemplated by Article 4(a) and (b) of the Vienna Convention, i.e. 'the validity of the contract or of any usage' and 'the effect which the contract may have on the property of the goods sold', or those contemplated by Article 5 of the said Convention, whereby 'it does not apply to the liability of the seller for death or personal injury caused by the goods to any person'.[20] Having recourse to the general Principles is, in fact, only

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[16] *See supra* the text accompanying note 14.

[17] Compare the remarks made in respect to Art. 7(2) of the CISG by Gyula Eörsi, 'General Provisions', in *International Sales. The United Nations Convention on Contracts for the International Sale of Goods* (Hans Smit and Nina Galston (eds.)) (1984), at pp. II-1, II-11, where it is stated that 'the justification of such a provision can be derived from the fact that it is hardly possible for an international group to draft a voluminous and complicated piece of legislation without leaving gaps behind'.

[18] For the use of this terminology, *see* Franco Ferrari, 'Interprétation uniforme de la Convention de Vienne de 1980 sur la vente internationale' in (1996) *Revue Internationale de Droit Compare*, at pp. 813, 842–843.

[19] Note, however, that according to some authors, the issues falling outside the scope of a Convention should not all be labelled gaps; *see* Michael Joachim Bonell, 'Art. 7', *supra* note 2 at pp. 75–76.

[20] It goes without saying that gaps can be found regarding the UNIDROIT Conventions as well. The Ottawa Convention, for instance, does not deal with the issue of formalities as to the validity of the execution of the factoring contract (as pointed out by Albert Reisman, 'The Uniform Commercial Code and the Convention on International Factoring' in (1990) 22 *Uniform Commercial Code Law Journal*, at pp. 320, 323–324), nor does it deal with third-party-effectiveness of assignments of receivables (as noted by Beate A. Diehl-Leistner, *Internationales Factoring. Eine Rechtsvergleichende Darstellung Zum Recht der Bundesrepublik Deutschland, Frankreichs und der USA unter Einschluss der Unidroit-Konvention über das Internationale Factoring* (1992), at p. 136), nor with priority among conflicting claimants as to the accounts receivable (*see* Mary Rose Alexander, Note, 'Towards Unification and Predictability: The International Factoring Convention' in (1989) 27 *Columbia Journal Transnational Law*, at pp. 353, 366; *see* also William C. Philbrick, 'The Use of Factoring in International Commercial Transactions and the Need for Legal Uniformity as Applied to Factoring Transactions between the United States and Japan' in (1994) 99 *Commercial Law Journal*, at pp. 141, 155).

contemplated for filling the so-called *praeter legem* gaps,[21] i.e. those relating to matters governed by the Conventions[22] but which they do not expressly resolve.

In order to fill these gaps (*praeter legem*) – which are sometimes referred to as internal gaps as opposed to external gaps[23] – three different methods exist. These are based respectively on:

(a) the application of a Convention's general principles, i.e. on a method comparable to that used in *civil law* countries to fill gaps in their codes and which therefore has been labelled as a 'true code approach';[24]

(b) the application of the applicable 'external' legal rules,[25] i.e. on what has been

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[21] For a recent criticism regarding the use of this terminology (*prater legem* and *intra legem* gaps), *see* Kramer, *supra* note 11 at p. 147, note 90.

[22] In this respect *see* also Bonell, *supra* note 19, at p. 75, where the author stresses that the 'first condition for the existence of a gap in the sense of Art. 7(2) is that the case at hand relates to "matters goverend by the Convention" '.

[23] For the use of these expressions, *see* Bettina Frigge, *Externe Lücken und Internationales Privatrecht im UN-Kaufrecht* (1994); Erik Jayme, *La Compravendita Internazionale di Beni Mobili Nei Rapporti Tra Italia e Germaina* (1990), at p. 27; Schlechtriem, *supra* note 13, at p. 21; Peter Schlechtriem, 'Das Wiener Kaufrechtsübereinkommen von 1980 (Convention on Contracts for the International Sales of Goods)' in (1990) *Praxis des Internationalen Privat-und Verfahrensrechts*, at p. 280.

[24] According to this 'true code approach' (the wording is borrowed from William D. Hawkland, 'Uniform Commercial "Code" Methodology' in (1992) 1962 *University of Illinois Law Forum*, at pp. 291, 292), which corresponds to the so-called 'internal analogy approach' (*see*, as for the use of the latter expression, Albert H. Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (1989), at p. 117), 'a court should look no further than the code [or any kind of legislation] itself for solution to disputes governed by it – its purposes and policies should dictate the result even where there is no express language on point' (Robert A. Hillman, 'Construction of the Uniform Commercial Code: UCC Section 1-103 and "Code" Methodology' in (1977) 18 *British Columbia Industrial and Commercial Law Review*, at pp. 655, 657). In other words, a true code 'is comprehensive in that it is sufficiently inclusive and independent to enable it to be administered in accordance with its own basic policies', Hawkland, *supra* this note at p. 292 (footnote omitted).

[25] This approach seems to be favoured in common law; *see*, for instance, Issak I. Dore and James E. Defranco, 'A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commerical Code' in (1982) 23 *Harvard International Law Journal* 49, at p. 63, where the authors also assert that UCC, s. 1-103, which provides that '[u]nless displaced by particular provisions of the Act, the principles of law and equity ... shall supplement its provisions', 'appears to support [the thesis of the UCC being based upon] the common law approach'. Ibid. at p. 64. However, other commentators, basing their views on UCC, s. 1-102(1) (which states that '[t]his Act shall be liberally construed and applied to promote its underlying purposes and policies') affirm that '[t]he effect of this language [that is UCC, s. 1-102(1)] is that the Code not only has the force of law, but is itself a source of law' (Mitchell Franklin, 'On the Legal Method of the Uniform Commercial Code' in (1951) 16 *Law and Contemporary Problems*, at pp. 330, 333), i.e., that the UCC is based upon a *civil law* approach. The solution to the problem concerning the methodology adopted by the UCC depends on the approach one takes to solve '[t]he tension that exists between s. 1-103, which directs the courts to

defined as a 'meta-code' approach;[26] and

(c) the connection between (a) and (b), so that one is supposed first to have recourse to the general principles of the Conventions, in the absence of which, however, one will have to apply specific rules of the applicable law to be determined by resorting to the rules of private international law of the forum.[27]

As can easily be deduced from the text of Articles 2 and 17 of the 1964 Uniform Law on the International Sale of Goods, the predecessor of the CISG, its drafters chose the first approach.[28] Indeed, 'Article 2 of the ULIS excludes the application of rules of private international law except in a few instances'[29] and Article 17 of the ULIS provides that 'the general Principles underlying the [1964] Uniform Law are to be used to fill the law's gaps. This has the intended negative implication that courts may not refer to the domestic law of the country whose law would otherwise apply under the rules of private international law.'[30]

The drafters of the CISG, however, have rejected this approach – often criticized –

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supplement the Code with outside law, and the true code methodology s. 1-102(1), in which courts find answers *within* the Code framework' (Hillman, *supra* note 24 at p. 659) (emphasis in original).

[26] For this expression, *see* Steve H. Nickles, 'Problems of Sources of Law under the Uniform Commercial Code. Part I: The Methodological Problem and the Civil Law Approach' in (1977) 31 *Arkansas Law Review* 1, at p. 1.

[27] For a reference to these three approaches, *see* also Franco Ferrari, *Vendita Internazional. Art. 1-13. Ambito di Applicazione. Disposizioni Generali* (1994), at pp. 153–154; Kritzer, *supra* note 24, at p. 117; Jan Kropholler, 'Der Ausschluß des IPR bim Einheitlichen Kaufrecht', *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* (1974), at pp. 372, 382.

[28] For a similar affirmation, *see* also Ferrari, *supra* note 27, at p. 154; Eduard Wahl, 'Art. 17', in *Kommentar zum Einheitlichen Kaufrecht* (Hans Dölle (ed.)), at pp. 121, 126. Note that The Hague Conventions' approach had already been promoted on the occasion of the elaboration of earlier drafts, such as the one discussed during a Diplomatic Conference held in 1951 in the Hague; in this respect *see* Ernst Rabel, 'The Hague Conference on the Unification of Sales Law' in (1952) 1 *American Journal of Comparative Law*, at pp. 58, 60, where the author states that '[w]ithin its concerns, however, the text must be self-sufficient. Where a case is not expressly covered the text is not to be supplemented by the national laws – which would destroy unity – but be construed according to the principle consonant with its spirit'.

[29] Harold J. Berman, 'The Uniform Law on International Sale of Goods: A Constructive Critique' in (1965) 20 *Law and Contemporary Problems*, at pp. 354, 359 (footnote omitted). For a similar affirmation, *see* also Wahl, *supra* note 28 at p. 126, where the author, after having listed the three different approaches to filling gaps *praeter legem*, states that 'the ULIS has adopted the first method. The text of Art. 17, its legislative history as well as the provision contemplated in Art. 2 show that the application of the rules of private international law had to be limited.'

[30] Peter Winship, 'Private International Law and the UN Sales Convention' in (1988) 21 *Cornell International Law Journal*, at pp. 487, 492.

as being 'hardly acceptable'[31] and adopted the approach which combines the recourse to general principles with the eventual appeal to the relevant 'external' provisions[32] to be determined by having recourse to the private international law of the forum, a choice which is based upon the consideration that 'the absolute independence from domestic law that the ULIS had pursued was considered as being unreachable'.[33]

As far as resorting to general principles in filling internal gaps are concerned, this constitutes a method well known in *civil law* countries.[34] Indeed, this method 'finds precedent in many codes of the Roman-German legal systems, even though among such codes there are differences'.[35] In this respect it is sufficient to recall, by way of example, Article 12(2) of the Italian Civil Code's Preliminary Provisions which states that 'if a controversy cannot be decided on the ground of a specific provision, one can resort to similar provisions or analogous matters; if the question remains doubtful, it shall be settled in conformity with the general principles of the legal system of the [Italian] State'. Analogous provisions have also been introduced into

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[31] According to Dore and Defranco, *supra* note 25 at p. 63, that approach was not only unacceptable, but it also was one of the reasons for The Hague Conventions' failure.

[32] For similar statements, *see* Kritzer, *supra* note 24 at p. 117, stating that '[w]hen a matter is governed by the Convention but not expressly settled in it, the Convention's solution is (i) internal analogy where the Convention contains an applicable general principle; and (ii) reference to external legal principles (the rules of private international law) where the Convention does not contain an applicable general principle'. In this respect, *see* also Michael Joachim Bonell, 'La nouvelle Convention des Nations Unies sur les contrats de vente internationale de marchandises' in (1981) *Droit et Pratique du Commerce International* 7, at p. 15.

[33] Aldo Frignani, *Il Contratto Internazionale* (1990), at p. 308.

[34] *See*, apart from the authors quoted *supra* note 24, John O. Honnold, *Uniform Law for International Sales under the 1980 United Nation Convention* (2nd ed., 1989), where the author stresses that the CISG provision contemplating the settlement of questions governed by, but not expressly settled in, it by resorting to its general principles 'reflects an approach established for civil law codes'. For similar affirmations, *see* also Alejandro Garro and Alberto Zuppi, *Compraventa Internacional de Mercaderias* (1990), at p. 58.

[35] Frignani, *supra* note 33 at p. 308.

other civil law systems, such as that of Austria,[36] Czechoslovakia,[37] Egypt,[38] Spain,[39] and others.[40]

In common law, the concept of 'general principles' is different to that of civil law.[41] This is due, in part, to the 'diverse notions and functions of the general principles'[42] and, in part, to the diverse source from which general principles are derived.[43] In fact, in civil law the source is the *legislation*, whereas in common law, the source is represented by case law.[44] It follows that in common law, 'statutory law is seen as only fixing rules for defined situations, not as a possible source of general principles. As such, not only are the statutes traditionally interpreted in a very strict sense, but if there is no provision specifically regulating the case at hand, the gap will immediately be filled by principles and rules of the judge-made common law'.[45]

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[36] *See* Art. 7 of the Austrian Civil Code: 'Where a case cannot be decided either according to the literal text or the plain meaning of a statute, regard shall be had to the statutory provisions concerning similar cases.... If the case still remains doubtful, it shall be decided on the ground of principles of natural law.'

[37] *See*, for a similar affirmation, John O. Honnold, 'Uniform Words and Uniform Application. The 1980 Sales Convention and International Juridial Practice', in *Einheitliches Kaufrecht und Nationales Obligationrecht* Peter Schlechtriem (ed.) (1987), at pp. 115, 139, where the author states that '[t]he Czechoslovak International Trade Code, drafted under the influence of the 1964 Hague Convention, calls for the use of the "principles governing" the Trade Code in dealing with gaps'. For a comment on the aforementioned Czechoslovak International Trade Code, *see*, among others, Kalensky, 'Die Grundzüge des tschechoslowakischen Gesetzes über den internationalen Handel' in (1996) *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht*, at p. 296.

[38] *See* Art. 1(2) of the Egyptian Civil Code (1948); for a reference to this provision, *see* also Bonell, *supra* note 19 at p. 77.

[39] In this respect, *see* Franco Ferrari, 'Uniform Interpretation of the 1980 Uniform Sales Law' in (1994) *Georgia Journal of International and Comparative Law*, at p. 220.

[40] In this respect, one must note that even 'in countries such as France or the Federal Republic of Germany, where the approach is not formally imposed by statute, it is taken for granted that a code or any other legislation of a more general character must be considered as more than the mere sum of its individual provisions. In fact, it must be interpreted and, if necessary, supplemented on the basis of the general principles which underlie its specific provisions', Bonell, *supra* note 19, at p. 77. For a similar statement, *see* also Konrad Zweigert and Hein Kötz, *Einführung in Die Rechtsvergleichung auf dem Gebiete des Privatrechts* (2nd ed., 1982), at p. 103.

[41] Indeed, it has been pointed out that 'the term [general principles] sounds alien to English lawyers'. Neville Brown, 'General Principles of Law and the English Legal System', in *New Perspectives for a Common Law of Europe* (Mauro Cappelletti (ed.) (1978), at p. 174.

[42] Frignani, *supra* note 33 at p. 308.

[43] *See* Ferrari, *supra* note 18 at p. 846.

[44] For a similar statement, *see* Otto Kahn-Freund, 'Common Law and Civil Law – Imaginary and Real Obstacles to Assimilation', in *New Perspectives for a Common Law of Europe*, *supra* note 41 at p. 154, stating that 'in the common law world, the lawyer looks for his principles in the "cases", and the statutes merely fill in details, the "case law" playing the role of Codes on the Continent'.

[45] Bonell, *supra* note 19 at pp. 77–78; for this statement, *see* also Michael Joachim Bonell, 'L'interpretazione del diritto uniforme alla luce dell'art. 7 della Convenzione di Vienna sulla vendita internazionale' in (1986) *Rivista di Diritto Civile*, at pp. 221, 233.

As has already been pointed out, the method adopted by the aforementioned Vienna and Ottawa Conventions is a 'mixed' one, which obliges the judge to find, as far as possible, a solution *within the single convention*[46] by resorting to its general principles; only where this is unsatisfactory may he take 'external' rules into account. The adoption of this method is undoubtedly to be welcomed, since it utlimately promotes the goal of every uniform commercial law convention, i.e. uniformity. In fact, uniformity would be compromised if the different judges always had to employ different domestic laws in order to fill the (inevitable) gaps.[47]

It must be noted, however, that to close *praeter legem* gaps from within a convention, one can resort to various types of logical reasoning. In this respect, recourse to general principles constitutes merely one method.[48] This is why one must determine whether Article 7(2) of the CISG, Article 4(2) of the Factoring Convention and Article 6(2) of the Leasing Convention must be interpreted broadly, that is, whether they must be construed to allow the use of other methods of legal reasoning – more specifically analogy[49] – as well, or whether it is to be interpreted restrictively.

With reference to this question, one can share the view – generally expressed in respect to the CISG, but which is also valid in respect to the other conventions referred to in this article – of those legal scholars who not only assert that the conventions permit both methods (recourse to general principles *and* to analogy),[50] but also that '[i]n the case of a gap in [a] Convention the first attempt to be made is to settle the unsolved question by means of an analogical application of specific provisions'.[51] When, however, the matter expressly settled in a convention and the matter to be decided on are not so closely related that it would not be unjustified to adopt a different solution, one should resort to the general Principles as

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[46] Compare also Fritz Enderlein and Dietrich Maskow, International Sales Law (1992), at p. 58, stating, albeit with reference to the sole CISG, but this is true for the Ottawa Conventions as well, that the gap filling rule's major concern is indeed that the gaps are '*closed ... from within the Convention*. This is in line with the aspiration to unify the law which ... is established in the Convention itself.'

[47] For similar statements, *see* also Bonell, *supra* note 19 at p. 75.

[48] *See* Franco Ferrari, 'Uniform Interpretation of the 1980 Uniform Sales Law', in *Essays on European Law and Israel* (Alfredo Mordechai Rabello (ed.)) (1996), at pp. 511, 547.

[49] For comments on the difference between analogy and recourse to general principles, *see*, e.g., Jan Kropholler, *Internationales Einheitsrecht. Allgemeine Lehren*, (1975), at p. 292.

[50] *See*, e.g., Rolf Herber, 'Art. 7', *supra* note 28 at p. 93; Schlechtriem, *supra* note 13 at pp. 31–32.

[51] Bonell, *supra* note 19 at p. 78. The analogical application as a method of gap filling has been admitted by other commentators of the gap-filling rule *de quo* as well; *see*, e.g., Enderlein and Maskow, *supra* note 46 at p. 58, where the authors state that 'gap-filling can be done, as we believe, by applying such interpretation methods as extensive interpretation and analogy. The admissibility of analogy is directly addressed in the wording contained in the CISG [as well as in the Unidroit Conventions] because it is aimed at obtaining, from several comparable rules, one rule for a not expressly covered fact and/or a general rule under which the fact can be subsumed.'

contemplated in Article 7(2) of the CISG, Article 4(2) of the Factoring Convention and Article 6(2) of the Leasing Convention.[52] In such instances, therefore, one should resort to a procedure which differs from analogy in that it does not resolve the case solely by extending specific provisions dealing with analogous matters, 'but on the basis of principles and rules which, because of their general character, may be applied on a much wider scale'.[53]

C. General Principles of the Vienna Convention

What has been said so far in relation to the identification of the *prater legem* gaps to which the rule laid down in Article 7(2) of the CISG, Article 4(2) of the Factoring Convention and Article 6(2) of the Leasing Conventionis applies, is indiscriminately valid for the Vienna and Ottawa Conventions.[54] However, in order to identify such general principles, the said conventions require individual consideration, in that each of them stipulates that the (*praeter legem*) gaps are to be filled by resorting 'to the general principles upon which *this Convention* is based'.

From this wording it follows, however, not only that each convention has to be looked at individually in order to determine its general principles, but also that no recourse can be had to 'external' general principles, such as the 'Principles of International Commercial Contracts',[55] drafted by UNIDROIT[56] – one of the bodies

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[52] For this solution, referred, however, to the sole CISG, *see*, e.g., Ferrari, *supra* note 48 at p. 548.

[53] Bonell, *supra* note 19 at p. 80.

[54] For a similar statement, *see* also Ulrich Magnus, 'Die allgemeinen Grundsätze im UN-Kaufrecht' in (1995) *Rabels Zeitschrift Für Ausländisches und Internationales Privatrecht*, at pp. 469, 475.

[55] For the history, goals, sphere of application and specific contents of the UNIDROIT Princples of International Commercial Contracts, published in 1994, *see*, most recently, 'The UNIDROIT Principles of International Commercial Contracts: Why? What? How?', (1995) 69 *Tulane Law Review*, at p. 1121; Bonell, 'Unification by Non-Legislative Means: The Unidroit Draft Principles for International Commercial Contracts' in (1992) *American Journal of Comparative Law*, at p. 617; 'The Unidroit Principles of International Commercial Contracts and the Vienna Sales Convention (CISG) – Alternatives or Complementary Instruments?', (1996) *Uniform Law Review*, at p. 26; Franco Ferrari, 'Defining the Sphere of Application of the 1994 "Unidroit Principles of International Commercial Contracts"' in (1995) 69 *Tulane Law Review*, at p. 1225; Alexander S. Kamarov, 'The Unidroit Principles of International Commercial Contracts: A Russian View' in (1996) *Uniform Law Review*, at p. 247.

[56] For an overview on the recent activities of the International Institute for the Unification of Private Law, *see* Malcolm Evans, 'Unidroit in 1995' in (1996) *Uniform Law Review*, at p. 72.

that promotes uniformity in the law of international commerce[57] – in order to fill the gaps to be found in these conventions.[58] In fact, having regard to Article 7(2) of the Vienna Convention, Article 4(2) of the Convention on International Factoring and Article 6(2) of the International Leasing Convention, it can be clearly inferred that the general principles to which one may have recourse are necessarily principles upon which *these conventions (considered individually)* are based.[59] These principles may correspond to 'external' general principles of international commerce (as, for example, the aforementioned UNIDROIT Principles);[60] but also in this instance, the principles to be applied to fill a gap are always, unless otherwise agreed by the parties,[61] those upon which the convention is based. Other 'general principles', independent of their form,[62] may, if necessary, serve to corroborate a solution based on the Convention's general Principles or to interpret the latter.[63] They cannot, however, be used as an independent source of gap-filling.

At this point, it appears appropriate to specify the general principles upon which

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[57] For an overview of the existing international bodies promoting the unification of law, *see* Rudolf Dolzer, 'International Agencies for the Formulation of Transnational Economic Law', in 2 *The Transnational Law of International Commercial Transactions* (Norbert Horn and Clive M. Schmitthoff (eds.)) (1982), at pp. 61, 6575.

[58] Note, however, that some legal writers have argued the contrary, that is, that the UNIDROIT Principles should be used to fill gaps of international uniform law convention in general and those of the CISG in particular; *see*, e.g., Bonell, *supra* note 55, at pp. 34–35; Magnus, *supra* note 54 at p. 492 (albeit with some doubts); Alejandro Garro, 'The Gap-Filling Role of the Unidroit Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG' in (1995) 69 *Tulane Law Review*, at pp. 1149, 1156 and 1159; for an overview on this issue, see, most recently, Albert H. Kritzer, 'General Observations on Use of the Unidroit Principles to Help Interpret the CISG', published on the Internet under the following site: http://www.cisg.law.pace.edu/cisg/text/matchup/general-observations.html.

[59] For a similar conclusion, *see* also Ulrich Drobnig, 'The Use of Unidroit Principles by National and Supranational Courts', speech delivered on the occasion of a colloquium on International Commercial Contracts and the New Unidroit Principles: A New Law Merchant?, held in Paris, 20–21 October 1994, where the author states that 'Art. 7 para. 2 [of the CISG] refers for matters governed by the Convention to the general principles on which the Convention is based.... And if there are no such principles, the provision refers to the law applicable by virtue of the rules of private international law.... Thus there does not seem to be any room for recourse to the UNIDROIT Principles.'

[60] It has been pointed out, for instance, by Magnus, *supra* note 54 at p. 492, that the general principles of the CISG largely correspond to those elaborated by UNIDROIT.

[61] The importance of party autonomy for the application of the UNIDROIT Principles of International Commercial Contracts has been stressed, for instance, by Franco Ferrari, '"Principi per i contratti commerciali internazionali" dell'Unidroit ed i loro ambito di applicazione' in (1996) I *Contratto e Impresa*, at pp. 300, 304–306.

[62] For a discussion of this issue, *see* most recently Klaus Peter Berger, *Formalisierte und 'Schleichende' Kodifizierung des Transnationalen Wirtschaftsrechts* (1996).

[63] A similar view is held by Christian Wichard, 'Die Anwendung der Unidroit-Prinzipien für internationale Handelsverträge durch Schiedsgerichte und staatliche Gerichte' in (1996) *Rabels Zeitschrift fur Ausländisches und Internationales Privatrecht*, at p. 298.

the various conventions are based. As far as the CISG is concerned, some of these can easily be identified since they are expressly provided for.[64] It has been argued by many legal scholars, albeit not all,[65] that the principle of good faith, which had already been considered a general principle under the regime of the ULIS,[66]

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[64] For a similar affirmation, *see* Ferrari, *supra* note 39 at p. 223; Ulrich Magnus, *Wiener UN-Kaufrecht (CISG)* (1995), at p. 125.

[65] Note that there are legal scholars who consider 'good faith' as being a mere instrument of interpretation (for a discussion of this view, *see* Ferrari, *supra* note 39 at pp. 210–212). This view is based upon the fact that 'good faith' is *only* mentioned in Art. 7(1) of the CISG, that, is, in the provision dealing with the interpretation of the CISG which stipulates that '[i]n the application of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of *good faith* in international trade' (emphasis added). For a discussion of this provision and the issues involved, *see*, e.g., Jorge Adame Goddard, 'Reglas de Interpretacion de la Convencion sobre Contratos de Compraventa Internacional de Mercaderias' in (1990) *Revista de Investigaciones Juridicas*, at p. 9; Bonell, 'Methodology in Applying Uniform Law for International Sales under the U.N. Convention (Wien 1980)', in *Italian National Reports to the XIIth International Congress of Comparative Law* (Sidney, 1986), at p. 43; Susanne V. Cook, Note, 'The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods' in (1988) 50 *University of Pittsburgh Law Review*, at p. 197; Frank Diedrich, *Autonome Auslegung von Internationalem Einheitsrecht: Computersoftware im Wiener Kaufrecht* (1994); John O. Honnld, 'The Sales Convention in Action – Uniform International Words: Uniform Application?' in (1988) 8 *Journal of Law and Commerce*, at p. 207; Dietrich Maskow, 'On the Interpretation of the Uniform Rules of the 1980 UN Convention on Contracts for the International Sale of Goods', in *National Reports for the XIIth International Congress of Comparative Law* (National Committee for Legal Science of the GDR (ed.)) (1986), at p. 5; Maria Pilar Perales Viscasillas, 'Una aproximancion al articulo 7 de la Convencion de Viena de 1980 sobre Compraventa Internacional de Mercaderias' in (1995) 4 *Cuadernos de Derecho y Comercio*; Mark N. Rosenberg, 'The Vienna Convention: Uniformity in Interpretation for Gap-Filling – An Analysis and Application' in (1992) 20 *Australian Business Law Review*, at p. 442; Frans J.A. van der Velden, 'Indications of the Interpretation by Dutch Courts of the United Nations Convention on Contracts for the International Sale of Goods 1980', in *Netherlands Reports to the Twelfth International Congress of Comparative Law* (Ewoud Hondius (ed.)) (1987), at p. 21; Paul Volken, 'The Vienna Convention: Scope, Interpretation and Gap-Filling', in *International Sale of Goods. Dubrovnik Lectures* (Petar Sarcevic and Paul Volken (eds.)) (1986) at p. 19.

[66] 'Good faith'has been considered a general principle of the ULIS for example by Hans Dölle, 'Bemerkungen zu Art. 17 des Einheitsgesetzes über den Internationalen Kauf beweglicher körperlicher Gegenstände', in *Festschrift für Hans G. Ficker* (1967), at p. 142; Wahl, *supra* note 28 at p. 135. Note, however, that this view was not necessarily unanimously held, although some court decisionscan be found which apply 'good faith' as a general principle of the ULIS (*see*, e.g., OLG Düsseldorf, 20 January 1983, reprinted in *Internationale Rechtsprechung zu EKG und EAG* (Peter Schlectriem and Ulrich Magnus (eds.)) (1987), at p. 100. Indeed, under the ULIS there was some opposition to the introduction of a 'good faith' provision and to considering 'good faith' as being a general principle; in this respect, *see*, e.g, Alejandro Garro, 'Reconciliation of Legal Traditions in the UN Convention on Contracts for the International Sale of Goods' in (1989) 23 *The International Lawyer*, at pp. 443, 466, where the author recalls that 'as early as the Hague

constitutes a general principle under the CISG.[67] Other principles expressly provided for are, *inter alia*, the principle of party autonomy,[68] which some commentators have even defined as the Convention's most important general principle.[69] Consequently, it appears that the Convention only has a subsidiary role,[70] that is, that it merely provides solutions to problems which are not dealt with by the parties.[71] If this affirmation is true, then it must be concluded that in the case of a conflict between the party autonomy principle and any other general principle, the former must

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Diplomatic Conference in 1964, explicit reference to good faith as a general principle was opposed by the French delegate [who] asserted that the principle of good faith might lead to divergent and even arbitrary interpretations by national courts, and thus would impair uniformity'.

67 The 'good faith principle' has been recognized as one of the general principles expressly laid down by the Convention, for example, by Bernard Audit, *La Vente International* (1990), at p. 51 (stating that good faith is one of the general principles, even though it must be considered an instrument of interpretation as well, considering that 'good faith' is expressly mentioned only in Art. 7(1) of the CISG, the provision dealing with its interpretation); Issak I. Dore and James E. Defranco, 'A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commerical Code' in (1982) 23 *Harvard International Law Journal*, at pp. 49, 60 (stating basically the same); Enderlein and Maskow, *supra* note 46 at p. 59 (where the authors list the 'good faith principle' among those general principles 'which do not necessarily have to be in individual rules'); Rolf Herber and Beate Czerwenka, *Internatinales Kaufrecht. Kommentar zu dem Ungereinkommen der Vereinten Nationen vom 11 April 1980 uber Vertrage uber den Internationalen Warenkauf* (1991), at p. 49 (affirming even that the 'good faith principle'represents the only general principle expressly provided for by the CISG).

68 Party autonomy is considered as being one of the CISG's general principles for instance by Bonell, 'Commento all'art. 7 della Convenzione di Vienna' in (1989) *Nuove Leggi Civili Commentate*, at pp. 20, 24; Enderlein and Maskow, *supra* note 46 at p. 59; Ferrari, *supra* note 27 at p. 159; Richard Hyland, 'Conformity of the Goods to the Contract under the United Nations Sales Convention and the Uniform Commercial Law', *supra* note 7, pp. 305, 329–330; Martin Karollus, *UN-Kaufrecht* (1991), at pp. 16–17; Schlechtriem, *supra* note 13, at p. 33.

69 *See* Honnold, *supra* note 34 at p. 47, where the author states that 'the dominant theme of the Convention is the role of the contract (i.e., the parties' autonomy) ... a theme of deeper significance than may be evident at first glance'.

70 For this affirmation, *see* e.g. Kritzer, *supra* note 24 at p. 114, stating that 'the Convention's rules play a supporting role, supplying answers to problems that the parties have failed to solve by contract'.
See also Kazuaki Sono, 'The Vienna Sales Convention: History and Perspectives', in *International Sale of Goods. Dubrovnik Lectures*, *supra* note 65 pp. 1, 14 (stating that 'the rules contained in the Convention are only supplementary for those cases where the parties did not provide otherwise in their contract').

71 *See*, for instance, Allan E. Farnsworth, 'Rights and Obligations of the Seller', in Wiener Ubereinkommen von 1980. Kolloquium Lausanne (1985), at pp. 83, 84 ('in case of a conflict between the contract and the Convention, it is the contract – not the Convention – that controls').

prevail,[72] 'a result contrary to [the one of] the Uniform Commercial Code where the principles of "good faith, diligence and reasonableness and care" prevail over party autonomy'.[73]

There are other expressly enunciated general principles as well: the principle of informality,[74] i.e. the principle according to which 'the agreement between the parties is not subject to any formal requirement (Arts. 11 and 29(1))',[75] with the exception of the hypothesis provided for by Article 12; the principle whereby widely known and largely observed usages must be taken into account (Art. 9);[76] the principle according to which 'where a party fails to pay an amount of money, the creditor is entitled to interest on that sum (Art. 78)';[77] the rule, derived from civil law,[78] that limits recoverable damages to those which were foreseen or could have been foreseen prior to or at the conclusion of the contract;[79] the principle of full compensation.[80] One also finds the 'principle according to which any notice or other kind of

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[72] For this solution, *see* also Kritzer, *supra* note 24 at p. 115. Note that the conclusion referred to in the text appears to be further sustained by the fact that on the occasion of the Vienna Diplomatic Conference where the CISG was adopted, a proposal to limit the principle of party autonomy through a reference to the 'good faith principle' was rejected (in this respect *see*, e.g., *United Nations Conference on Contracts for the International Sale of Goods*. Vienna, 10 March–11 April 1980. Official Records, (1981), at pp. 247–248.

[73] Kritzer, *supra* note 24 at p. 115.

[74] In this respect *see* also Ferrari, *supra* note 39, at p. 224; Rolf Herber, 'Art. 7', in *Kommentar zum Einheitlichen UN-Kaufrecht* (Peter Schlechtriem (ed.)) (1995, 2nd ed.), at pp. 91, 99; Magnus, *supra* note 54 at p. 483. Note, however, that according to Monique Jametti-Greiner, 'Der Vertragsabschluß', in *Das Einheitliche Wiener Kaufrecht* (Hans Hoyer and Willibald Posch (eds.)) (1992), at pp. 43, 46–47, the principle at hand cannot be considered a general principle of the CISG.

[75] Bonell, *supra* note 19 at p. 80.

[76] *See* Dore and Defranco, *supra* note 25 at p. 63; Ferrari, *supra* note 27 at p. 160; Karollus, *supra* note 68 at p. 17; Magnus, *supra* note 54 at pp. 482–483; Plantard, 'Un nouveau droit uniforme de la vente internationale: La Convention des Nations Unies du 11 avril 1980' in (1988) *Journal du Droit International*, at pp. 311, 332.

[77] Audit, *supra* note 67 at p. 51; Ferrari, *supra* note 27 at p. 160.

[78] For this affirmation, *see* Franco Ferrari, 'Comparative Ruminations on the Foreseeability of Damages in Contract Law' in (1993) *Louisiana Law Review*, at pp. 1257, 1266; Franco Ferrari, 'Prevedibilità del danno e contemplation rule' in (1993) *Contratto e Impresa*, at pp. 760, 764; Reinhard Zimmermann, 'Der Einfluß Pothiers auf das römische-holländische Recht in Südafrika' in (1985) *Zeitschrift der Savigny-Stiftung. Germanistische Abteilung*, at p. 178.

[79] *See* Frignani, *supra* note 33 at p. 308; Enderlein and Maskow, *supra* note 46 at p. 59; Dietrich Maskow, 'The Convention on the International Sale of Goods from the Perspective of the Socialist Countries', in *La Vendita Internazionale. La Convenzione di Vienna Dell' 11 Aprile 1980*. Atti Del Convegno di Studi di S. Margherita Ligure (26–28 Septembre 1980) (1981), at pp. 39, 57.

[80] *See infra* note 154.

communication made or given after the conclusion of the contract becomes effective on dispatch (Art. 27)'.[81]

Most general principles of the CISG have, however, not been expressly provided for.[82] Therefore, many general principles must be deduced from the CISG's provisions by way of an analysis – however, not comparative[83] – of their contents.[84] This method is necessary 'in order to see whether [the provisions] can be considered as an expression of a more general principle, as such capable of being applied also to cases different from those specifically regulated'.[85] It has led to the extraction of several general principles, amongst which the following stand out: the principle of 'reasonableness',[86] by virtue of which 'the parties must conduct themselves according to the standard of the reasonable person',[87] a 'fundamental principle'[88] which the Convention refers to on several occasions, for example, where the parties are referred

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[81] Bonell, *supra* note 19 at p. 80; *see* also Enderlein and Maskow, *supra* note 46 at p. 59. Note that the 'UNIDROIT Principles', which some authors would like to have recourse to in order to fill gaps *praeter legem* (*see supra* note 58), provide for a principle contrary to the one mentioned in the text. Indeed, according to Art. 1.9 of the'UNIDROIT Principles'. From what has been said, it becomes apparent that it is dangerous to fill internal gaps of the CISG but this is also true in respect to the Ottawa Conventions on International Factoring and International Leasing – by resorting to the (external) 'UNIDROIT Principles', since they encompass, as just shown, principles which – at least partially – do not correspond to the 'internal' principles of the CISG (and may be even other international uniform law conventions).

[82] This is common understanding; in this respect, *see*, e.g., Audit, *supra* note 67 at p. 51; Ferrari, *supra* note 39 at p. 224.

[83] One cannot share the opinion (favoured, for instance, by Bonell, *supra* note 19 at p. 81) according to which the comparative method could be useful in identifying the general principles at hand; indeed, '[i]t is ... *not* possible to obtain the Convention's general principles from *an analysis prepared by comparisons of the laws* of the most important legal systems of the Contracting States ... as it was supported, in some cases, in regard to Article 17 ULIS.... The wording of the Convention does in no way support the application of this methods [sic]' (emphasis in orginal). Enderlein and Maskow, *supra* note 46, p. at 60. For similar affirmations rejecting the comparative method as one which can be helpful in identifying the general principles of an international uniform commercial law convention, *see Internationales Kaufrecht* (Fritz Enderlein et al.) (1991), at p. 65; Herber, *supra* note 74 at p. 99; Peter Schlechtriem, *Einheitliches UN-Kaufrecht* (1981), at p. 24.

[84] In respect to this method, Magnus, *supra* note 54 at p. 476, states that it should with no doubt be used, as long as it is not abused.

[85] Bonell, *supra* note 19 at p. 80.

[86] *See* Audit, *supra* note 67 at p. 51; Frignani, *supra* note 33 at p. 308; Karollus, *supra* note 68 at pp. 16–17; Kritzer, *supra* note 24 at p. 116; Magnus, *supra* note 54 at p. 482; Maskow, *supra* note 79 at p. 57; Gert Reinhart, *Internationales Kaufrecht* (1991), at p. 32. For a recent study of the concept of 'reasonableness' in international contracts, *see*, most recently, Fortier, 'Le contrat du commerce international à l'aune du raisonnable' in (1996) *Journal du Droit International*, at p. 315.

[87] Peter Schlechtriem, *Uniform Sales Law The UN Convention on Contracts for the International Sale of Goods* (1986), at p. 39.

[88] Schlechtriem, *supra* note 83 at p. 25.

to as 'reasonable'[89] or where it imposes upon the parties the duty to carry out a specific act or to make a specific communication within a 'reasonable' period of time.[90]

There are, however, other general principles which can be deduced from the Convention's provisions. It suffices to recall the 'mitigation' principle[91] by virtue of which the parties must undertake reasonable steps to limit the loss resulting from the breach of contract;[92] the principle whereby the parties must not *venire contra factum proprium*[93] which results in preventing 'a person from contradicting a representation on which another person has reasonably relied'.[94] Other general principles are: that of the *favor contractus*[95] 'which means that, whenever possible, a solution should be adopted in favour of the valid existence of the contract and against its premature termination on the initiative of one of the parties';[96] the principle whereby the parties must co-operate[97] 'in carrying out the interlocking steps of an international [sales] transaction'.[98] This comprises the duty to provide the other party with all necessary information,[99] i.e., the duty which calls for 'communication of information that is obviously needed by a trading partner'.[100] The latter can be derived from Article

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[89] Compare Arts. 8(2), 25, 35(1)(b), 60(a), 72(2), 79(1), 85, 86, 88(2).

[90] *See* Arts. 18(2), 33(3), 39(1), 43(1), 47(1), 49(2), 63, 64, 65, 72(2), 75. Note, however, that on several occasions the Convention refers to 'unreasonableness', instead of 'reasonableness', as pointed out for instance by Magnus, *supra* note 54 at p. 482, note 47; *see*, e.g., Arts. 86(2), 87 and 88(2).

[91] *See* Ferrari, *supra* note 39 at p. 225; Honnold, *supra* note 34 at p. 155.

[92] This principle is considered one of the CISG's general principles for instance by Audit, *supra* note 67 at p. 52; Bonell, *supra* note 68 at p. 25; Ferrari, *supra* note 27 at p. 161; Frignani, *supra* note 33 at p. 308; Karollus, *supra* note 68 at p. 17; Magnus, *supra* note 54 at p. 483.

[93] For similar affirmations, *see*, e.g., Enderlein et al. *supra* note 83 at p. 64; Eörsi, *supra* note 17 at p. II-12; Herber, *supra* note 74 at p. 99; Magnus, *supra* note 64 at pp. 122 and 125; Maskow, *supra* note 79 at p. 57; Reinhart, *supra* note 86 at p. 32.

[94] Honnold, *supra* note 34 at p. 153; for similar reasonings, *see* also Frignani, *supra* note 33 at p. 308; Magnus, *supra* note 54 at p. 481.

[95] *See* Ernst von Caemmerer, 'Die wesentliche Vertragsverletzung im internationalen Einheitlichen Kaufrecht' in (1982) 2 *Europäisches Rechtsdenken in Geschichte und Gegenwart. Festschrift für Coing*, at pp. 50–51; Ferrari, *supra* note 39 at p. 225; Vincent Heuzé, *La Vente Internationale de Marchandises. Droit Uniforme*, at p. 80; Honnold, *supra* note 37 at p. 140; Plantard, *supra* note 76 at p. 333.

[96] Bonell, *supra* note 19 at p. 81. For a very similar statement, *see* also Rosenberg, *supra* note 65 at p. 452, where the author states that 'where possible, solutions favouring the maintenance of the contract should be adopted in preference to solutions resulting in the premature termination of the contract on the initiative of one party'.

[97] Compare Enderlein and Maskow, *supra* note 46 at p. 60; Karollus, *supra* note 68 at p. 16, note 88; Ferrari, *supra* note 39 at p. 226.

[98] Kritzer, *supra* note 24 at p. 115.

[99] For similar statements, *see* also Audit, *supra* note 67 at p. 51; Hyland, *supra* note 68, at pp. 331–332.

[100] Honnold, *supra* note 34 at p. 155.

39(1), according to which a buyer is under the duty to give the seller notice of the non-conformity of the goods within a reasonable period of time so that the seller may 'examine the goods and formulate his response to the buyer's contentions'.[101]

D. The General Principles of the Ottawa Conventions

Whereas identifying the Vienna Sales Convention's general principles does not constitute too problematic a task, the same cannot be said in respect to the Ottawa Conventions' general principles. This is due to the fact that the latter succinctly regulate more specific matters than those dealt with by the Vienna Sales Convention, which some authors have even considered as laying down a general framework not only for international sales contracts, but for international commercial contracts.[102] This does not signify, however, that a brief list of general principles upon which the Ottawa Conventions are based cannot be drafted.

One of the general principles upon which the Factoring Convention is based appears to be, at least at first sight, that of party autonomy;[103] this view is based upon the text of Article 3(1) which establishes that the parties may exclude the application of the Convention at hand,[104] thus confirming its dispositive nature.

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[101] Franco Frattini, 'Commento all'art. 39 della Convenzione di Vienna' in (1989) *Nuove Leggi Civili Commentate*, at pp. 176, 177.

[102] In this respect *see* Aleksander Goldstaijn, 'Usages of Trade and other Autonomous Rules of International Trade according to the UN (1980) Sales Convention', in *International Sale of Goods. Dubrovnik Lectures*, *supra* note 7 at pp. 55, where the author states that 'the United Nations Convention on International Sale of Goods (1980), although formally confined to contracts for the international sale of goods, contains provisions which could be applied to all kinds of international commercial transactions'. For a similar statement, *see* also Magnus, *supra* note 54 at p. 491.

Contra, in the sense that he refuses to consider the CISG's rules as a basis for solving problems arising from international commercial transactions different than sales contracts, *see* Franz Bydlinski, 'Das allgemeine Vertragsrecht', in *Das Uncitral-Kaufrechtim Vergleich zum Osterreichischen Recht* (Peter Doralt (ed.)) (1985), at pp. 57, 89.

[103] For a reference in legal writing to this principle, *see* Gargiulo and Giancoli, *supra* note 15 at p. 1303, where the authors state that 'by virtue of the principle of party autonomy, the parties are allowed to exclude the [Factoring] Convention's application'.

[104] *See* Art. 3 of the Factoring Convention: '(1) The application of this Convention may be excluded

(a) by the parties to the factoring contract; or

(b) by the parties to the contract of sale of goods, as regards receivables arising at or after the time when the factor has been given notice in writing of such exclusion.'

However, in the light of Article 3, and its comparison with Article 6 of the CISG,[105] it is doubtful whether party autonomy must really be considered a general principle of the Factoring Convention. This is due to its somewhat limited scope compared to that of party autonomy under the CISG: according to the CISG, the parties may not only exclude the Convention's application *in toto* or even partially, but they may also derogate from its provisions (with one exception) or modify its effects,[106] whereas according to Article 3(2) of the Factoring Convention,[107] the parties may only exclude its application *in toto*.[108]

A 'true' general principle of the Factoring Convention seems to be that whereby assignments of receivables are encouraged as much as possible, a principle which can be derived not only from Article 6(1),[109] according to which the assignment of receivables is allowed even in the presence of a *pactum de non cedendo*,[110] but also from Article 5,[111] which considers not only the assignment of single existing receivables valid but also the assignment of single future receivables as well as bulk assignments,[112] and from Article 10(1), which as a general rule bars the debtor from

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[105] *See* Art. 6 of the CISG: 'The parties may exclude the application of the Convention or, subject to article 12, derogate from or vary the effects of any of its provisions.'

[106] For a detailed discussion of the CISG's exclusion by the parties, *see*, among others, Franco Ferrari, 'Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing', in (1995) 10 *Preadviezen Uitgebracht voor Burgerlijk Recht* 81, at pp. 143–152; Rainer Holthausen, 'Vertraglicher Ausschluß des UN-Übereinkommens über internationale Warenkaufverträge' in (1989) *Recht der Internationalen Wirtschaft*, at p. 513; Claude Witz, 'L'exclusion de la Convention des Nations Unies sur les contrats de vente internationale de marchandises par volonté des parties(Convention de Vienne du 11 avril 1980)' in (1990) *Recueil Dalloz-Sirey Chronique*, at p. 107.

[107] *See* Art. 3(2) of the Factoring Convention: '(2) Where the application of this Convention is excluded in accordance with the previous paragraph, such exclusion may be made only as regards the Convention as a whole.'

[108] In this respect *see* Alexander, *supra* note 20 at p. 375, note 107.

[109] *See* Art. 6(1) of the Factoring Convention: 'The assignment of a receivable by the supplier to the factor shall be effective notwithstanding any agreement between the supplier and the debtor prohibiting such assignment.'

[110] Compare in this respect Alessio Zaccaria, 'Il factoring internazionale' in (1996) *Studium Iuris*, at p. 10, where the author points out, however, that the fact that the agreement of the parties as to the non-assignability of the receivables does not lead to the ineffectiveness of the assignement does not signify that it does not have any effect. Indeed, Art. 6(2) expressly stipulates that the breach of that agreement can lead to liability.

[111] *See* Art. 5 of the Factoring Convention: 'As between the parties to the factoring contract:
(a) a provision in the factoring contract for the assignment of existing or future receivables shall not be rendered invalid by the fact that the contract does not specify them individually, if at the time of conclusion of the contract or when they come into existence they can be identified to the contract;
(b) a provision in the factoring contract by which future receivables are assigned operates to transfer the receivables to the factor when they come into existence without the need for any new act or transfer.'

[112] That the aforementioned provisions aim at promoting the assignment of receivables has been pointed out, for instance, by Gargiulo and Giancoli, *supra* note 15 at pp. 1303–1304.

being allowed to recover a sum which he paid to the assignee if he is entitled to recover that sum from the supplier,[113] thus protecting the assignee's reliance[114] and, consequently, his willingness to purchase receivables.

Not unlike the CISG,[115] the Factoring Convention seems to be based upon the principle of good faith. Indeed, good faith is not only mentioned as an interpretative criterion provided for by Article 4(1) of the Factoring Convention,[116] but it is also mentioned in the provision (Art. 6) which validates the assignment of receivables despite the existence of a non-assignment clause; in effect, this provision places upon the supplier 'an indispensable general duty of good faith ... towards the debtor for breach of the non-assignability clause contained in the sales contract'.[117]

Another general principle upon which the Factoring Convention is based is the one whereby the assignment shall not place the debtor in a disadvantageous position compared to that which he would find himself in had the assignment not taken place.[118] This principle may easily be deduced from the Convention's provision which allows – in a claim by the assignee against the debtor – the latter to set up against the former all defences which he could have set up against the supplier if such claim had been made by the latter.[119] This principle may also be inferred from the provision which, even though it validates the assignment of receivables in the presence of a *pactum de non cedendo*, upholds the supplier's liability towards the debtor.[120]

Having identified the general principles upon which the Factoring Convention is

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[113] *See* Art. 10 of the Factoring Convention: '(1) Without prejudice to the debtor's rights under Article 9, non-performance or defective or late performance of the contract of sale of goods shall not by itself entitle the debtor to recover a sum paid by the debtor to the factor if the debtor has a right to recover that sum from the supplier.'

[114] For this statement, *see* also Gargiulo and Giancoli, *supra* note 15 at p. 1304.

[115] *See supra* the text accompanying notes 65–73.

[116] *See* Art. 4(1) of the Factoring Convention: '(1) In the interpretation of this Convention, regard is to be had to its object and purpose as set forth in the preamble, to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.'

[117] Gargiulo and Giancoli, *supra* note 15 at p. 1304.

[118] For this conclusion, *see* also Zaccaria, *supra* note 110 at p. 11.

[119] *See* Art. 9 of the Factoring Convention: '(1) In a claim by the factor against the debtor for payment of a receivable arising under a contract of sale of goods the debtor may set up against the factor all defences arising under that contract of which the debtor could have availed itself if such claim had been made by the supplier.

(2) The debtor may also assert against the factor any right of set off in respect of claims existing against the supplier in whose favour the receivables arose and which are available to the debtor at the time a notice in writing of the assignment conforming to Article 8(1) was given to the debtor.'

[120] *See* Art. 6(3) of the Factoring Convention: 'Nothing in paragraph 1 shall affect any obligation of good faith owed by the supplier to the debtor or any liability of the supplier to the debtor in respect of an assignment made in breach of the terms of the contract of sale of goods.' *See* also *supra* the text accompanying note 117.

based, all that remains is to determine the general principles upon which the Leasing Convention is grounded. One of these is that of party autonomy,[121] to be derived from Article 5 which, not unlike Articles 6 of the CISG and 3 of the Factoring Convention, allows the parties to exclude the Convention's application. Unlike the Factoring Convention, which accords party autonomy a limited role by allowing only a total exclusion of the Convention,[122] Article 5 of the Leasing Convention[123] also permits the parties to derogate from or modify the effect of any provision,[124] except for some specific ones protecting the lessee,[125] such as Article 8(2) by virtue of which the lessor must warrant that the lessee's quiet possession will not be disturbed.[126] It follows that even though it may be doubtful whether party autonomy constitutes one of the Factoring Convention's general principles, party autonomy certainly must be regarded as one of the general principles upon which the Leasing Convention is based.[127]

Another general principle is the protection of the lessee's interests. This can be deduced not only from the impossibility to derogate from specific provision designed for the protection of the lessee, as already mentioned,[128] but also from Article 13 of the Convention, according to which, in case of termination of the leasing agreement due to the lessee's substantial default, the lessor is allowed merely to 'recover such damages as will place [him] in the position in which [he] would have been had the lessee performed the leasing agreement in accordance with its terms'.[129] A further

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[121] For this affirmation, *see* also Schermi, 'Il leasing finanziario e la Convenzione internazionale di Ottawa 28 maggio' in (1994) *Giustizia Civile*, at p. 725, 727.

[122] *See supra* the text accompanying note 108.

[123] *See* Art. 5 of the Leasing Convention: '(1) The application of this Convention may be excluded only if each of the parties to thje supply agreement and each of the parties to the leasing agreement agree to exclude it.

(2) Where the application of this Convention has not been excluded in accordance with the previous paragraph, the parties may, in their relations with each other, derogate from or vary the effect of any of its provisions except as stated in Articles 8(3) and 13(3)(b) and (4).'

[124] In this respect *see* also Mariani, *supra* note 10 at p. 566.

[125] This has also been pointed out for instance by Renato Clarizia, 'La convenzione UNIDROIT sulla locazione finanziaria: analogie e differenze rispetto al modello italiano' in *Rivista italiana di leasing*, at p. 28.

[126] For further examples, *see* also De Nova, *supra* note 10 at p. 426; Levy, 'Financial Leasing under the Unidroit Convention and the Uniform Commercial Code: A Comparative Analysis' in (1995) *Indiana International and Comparative Law Review*, at pp. 274–275.

[127] For this conclusion, *see* also Friedrich Graf von Westphalen, 'Grenzüberschreitendes Finanzierungsleasing' in (1992) *Recht der Internationalen Wirtschaft*, at p. 257, where the author states that the impossibility of derogating from some specific provisons does not unduly limit party autonomy, which is why it must be considered a general principle upon the Leasing Convention is based.

[128] *See supra* the text accompanying note 125.

[129] Art. 13(2)(b). *See also* Renato Clarizia, 'Convenzione Unidroit sul leasing internazionale: ultimo atto' in (1993) *Corriere Giuridico*, at p. 1169; Graf von Westphalen, *supra* note 127 at p. 257.

general principle is the so-called *favor contractus*, according to which the contract may be terminated by the lessor only where the lessee's breach is substantial.

The principle which in German law goes by the name of *Zug-um-Zug-Leistung* must also be considered a general principle upon which the Convention is based.[130] This can be deduced from Article 12(3) which states that the 'lessee shall be entitled to withhold rentals payable under the leasing agreement until the lessor has remedied its failure to tender equipment in conformity with the supply agreement or the lessee has lost the right to reject the equipment'.[131]

According to some authors, another general principle can be found in Article 7, by virtue of which the lessor' rights in the equipment are valid against the trustee in bankruptcy of the lessee and his creditors.[132]

One last general principle upon which the Leasing Convention is based is the mitigation principle, a principle upon which the CISG, too, is grounded.[133] This may be easily deduced from Article 13(6) which states that '[t]he lessor shall not be entitled to recover damages to the extent that it has failed to take all reasonable steps to mitigate its loss'.

E. Conclusion

Before concluding this brief discussion of the relationship between general principles and the Vienna and Ottawa Conventions, it is necessary to show how *prater legem* gaps are to be filled where resorting to general principles is not possible.

All three Conventions respond to such an eventuality in the same way: in the absence of general principles upon which they are based, recourse is to be had to the 'law applicable by virtue of the rules of private international law',[134] a 'subsidiary method'[135] which – despite the lack of a specific reference to it – found support under

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[130] For this conclusion, *see* also Graf von Westphalen, *supra* note 127 at p. 260, Levy, *supra* note 126 at p. 281.

[131] *See* also Schermi, *supra* note 121 at p. 727.

[132] Compare De Nova, *supra* note 10 at p. 426, where the author even defines this principle as a 'fundamental' one.

[133] *See supra* the text accompanying notes 91–92.

[134] Arts. 7(2) of the CISG, 4(2) of the Factoring Convention and 6(2) of the Leasing Convention.

[135] For this qualification, *see* Audit, *supra* note 67 at p. 52; Heuzé, *supra* note 95 at p. 80; Rosenberg, *supra* note 65 at p. 450.

the ULIS as well,[136] even though the prevailing opinion was to the contrary.[137] In fact, most authors supported the view that, absent general principles of the ULIS with which to fill the gaps, these were to be filled not by resorting to the applicable domestic law (to be determined through the relevant rules of private international law), but by resorting to the general principles of law,[138] defined for the occasion as 'principles and rules which are most commonly adopted within the different Contracting States and/or particularly suited for the case at hand'.[139] However, even this approach was not exempt from criticism: it has rightly been pointed out that the identification of such principles placed a difficult, if not impossibe,[140] burden upon those having to fill the gaps, considering that not even specialists had been able to identify such principles.[141]

Nowadays, such a dispute is meaningless: all the conventions in question stipulate that, in the absence of general principles upon which they are based, recourse is to be had – albeit as *ultima ratio*[142] – to 'the law applicable by virtue of the rules of private international law' of the forum.[143] This on no accout means that recourse to the rules of private international law should be abused.[144] One has to be aware of the fact that recourse to these rules 'represents under the ... uniform law[s] a last resort to be used only if and to the extent that a solution cannot be found either by analogical application of specific provisions or by the application of general principles underlying the uniform law[s] as such'.[145]

In conclusion of this brief analysis, one last question must be posed: what is the practical value of the general principles or, in other words, is it possible to base a decision merely on these general principles? A ruling of the Vienna Court of Appeal

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[136] For an overview of the authors who supported the recourse to the general principles underlying the ULIS to fill its *praeter legem* gaps, *see* Rolf Herber, 'Art. 7', in *Kommentar zum Einheitlichen UN-Kaufrecht* (Peter Schlechtiem (ed.)) (1990, 1st ed.), at p. 93; Ulrich Magnus, 'Währungsfragen im Einheitlichen Kaufrecht. Zugleich ein Beitrag zu seiner Lückenfüllung und Auslegung' in (1989) *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht*, at pp. 116, 120.

[137] For this evaluation, *see* Bonell, *supra* note 19 at p. 82, where the author states that 'with respect to ULIS it was already questioned whether turning to domestic law should be permitted if a gap could not be filled by general principles which could be extracted from the uniform law itself. The prevailing view was opposed to this approach.'

[138] For a recent discussion of the general principles of law, *see*, most recently, Guido Alpa, 'General Principles of Law' in (1994) 1 *Annual Survey of International and Comparative Law*, at p. 1.

[139] Bonell, *supra* note 19 at p. 82.

[140] For this evaluation, *see,* e.g., Rosenberg, *supra* note 65 at p. 450.

[141] For a similar criticism, *see* Kropholler, *supra* note 27 at p. 380.

[142] *See*, e.g., albeit with reference solely to Art. 7(2) of the CISG, Bonell, *supra* note 68, at p. 25; Ferrari, *supra* note 39 at p. 228; Herber, *supra* note 74 at p. 98; Magnus, *supra* note 64 at p. 127.

[143] *See* Herber and Czerwenka, *supra* note 67 at p. 51.

[144] Compare in this respect Rosenberg, *supra* note 65 at p. 450.

[145] Bonell, *supra* note 19 at p. 83.

in 1982[146] seems to give a negative response to the latter question. On this occasion, the Court of Appeal annulled an arbitral award because the latter had settled a dispute *exclusively* on the basis of the 'general principle of good faith'. On this occasion, the Court of Appeal also affirmed that 'it is not possible to infer concrete solutions directly from general principles'.[147]

The problem, however, is not so much whether a decision concerning a *praeter legem* gap of a convention can be based *exclusively* upon one of the Convention's general principles. In fact, given the text of Article 7(2) of the CISG, Article 4(2) of the Factoring Convention and Article 6(2) of the Leasing Convention, where a judge is asked to solve a dispute concering an 'internal' gap, he *must* base his decision on the general principles, to the extent that these exist, and it is not at all relevant whether he grounds his decision *exclusively* on the latter. The problem is rather whether the general principles that have already been identified[148] (and which *per definitionem* are abstract) are always useful to solve concrete problems, a question to which the Vienna Court of Appeal gave a clearly negative response. This view cannot be shared since it is far too absolute.

Nowadays, the general principles are not quite so 'general' so as to exclude their immediate application in order to solve concrete problems,[149] a view which has recently been upheld in arbitral tribunals. In two cases brought before a single arbitrator at the Vienna Federal Chamber of Commerce,[150] the arbitrator was asked to settle a dispute concerning the interest rate on a sum in arrears owed on the basis of an international sales contract governed by the CISG.[151] Though providing in Article 78 a general rule according to which if a party fails to pay a sum of money, the other party is entitled to interest on it,[152] the CISG does not expressly determine

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[146] *See* the decision of the Vienna Court of Appeal of 26 January 1982, reprinted in *Die Aktiengesellschaft* (1982), at p. 166.

[147] Ibid.

[148] *See supra* the text accompanying notes 64–133.

[149] For this statement, *see* also Magnus, *supra* note 54 at p. 490.

[150] The two arbitral awards are reprinted in (1995) *Recht der Internationalen Wirtschaft*, at p. 590.

[151] For a discussion of the issue of interest rates under the CISG; *see*, among others, Herbert Asam und Peter Kindler, 'Ersatz des Zins- und Geldentwertungsschadens nach dem Wiener Kaufrechtsübereinkommen vom 11.4.1980 bei deutsch-italienischen Kaufverträgen' in (1989) *Recht der Internationalen Wirtschaft*, at p. 841; Franco Ferrari, 'Uniform Application and Interest Rates under the 1980 Vienna Sales Convention' in (1995) 1 *Review of the Convention on Contracts for the International Sale of Goods (CISG)*, at p. 3; Franco Ferrari, 'Tasso degli interessi ed applicazione uniforme della convenzione di Vienna sui contratti di vendita internazionale', (1995) II *Rivista di Diritto Civile*, at p. 277; Maria del Pilar Perales Viscasillas, 'La determinacion del tipo de interes en la compraventa internacional' in (1996) 43 *Cuadernos Juridicos*, at p. 5; Gert Reinhart, 'Fälligkeitszinsen und UN-Kaufrecht' in (1991) *Praxis des Internationalen Privat- und Verfahrensrechts*, at p. 376.

[152] *See* Art. 78 of the CISG: '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.'

what interest rate is applicable.[153] The single arbitrator resolved the matter brought before him by affirming that the issue of what interest rate should be applied constitutes a *praeter legem* gap, and that this gap is to be filled by having recourse to the CISG's general principle of full compensation, laid down in Article 74.[154] Consequently, given that it is to be presumed that the creditor operating in a commercial setting obtains bank financing for the period of payment delay, the applicable interest rate is that which is generally applied by banks located in the creditor's country.[155]

In the light of what has been said so far, one can conclude that it is not possible to maintain, as did the Vienna Court of Appeal, that specific solutions cannot be drawn from general principles. However, neither can it be affirmed that general principles always lead immediately to concrete solutions as in the two aforementioned Austrian (arbitral) cases. However, it is not at all necessary for a general principle to be always so concrete as to give a direct and concrete solution to particular cases in order to constitute the basis of a specific decision. This is due to the fact that where the general principle is too abstract to be applied directly, it is up to the judge to identifiy its specific contents so that it can be employed to fill the gaps, a task which also pertains to judges who have to apply general principles of domestic non-uniform law (such as codes). The only difference is that in giving general principles of international uniform law conventions, such as those referred to in Articles 7(2) of the CISG, 4(2) of the Factoring Convention and 6(2) of the Leasing Convention, a concrete content, their ultimate goal must be taken into account, that being international uniformity of the law.

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[153] For this affirmation, *see* also Ferrari, Uniform Application, *supra* note 151 at p. 6.

[154] In this respect, *see also* Magnus, *supra* note 54 at pp. 484–485.

[155] For a comment favourable to the solution adopted in the arbitral awards mentioned in the text, *see* Anna Veneziano, 'La convenzione sulla vendita internazionale e i principi Unidroit dei contratti commerciali internazionali in due recenti lodi della Camera arbitrale della Camera di Commercio di Vienna' in (1995) *Rivista dell'Arbitrato*, at p. 547. For a criticism, *see*, however, Franco Ferrari, 'Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing' in (1995) 15 *Journal of Law and Commerce* 1, at pp. 123–124.