The UNIDROIT Principles on International Commercial Contracts as a tool to interpret and supplement the UN Convention on Contracts for the International Sale of Goods

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Abstract

This thesis analyzes the availability of the employment of UNIDROIT Principles of International Commercial Contracts (UPICC) as a tool to interpret and supplement the UN Convention on Contracts for the International Sale of Goods (CISG). This suggested role of UPICC is particularly interesting for the theory of international unification of commercial law, since, speaking in general terms, it suggests the normative interplay between an international soft law and an international hard law, however, the practical consequences would not be insignificant, too. The analysis is carried out from the twofold perspective: on the one hand, from the point of view of the formal legal admissibility and, on the other hand, from the perspective of the desirability of such use. This distinction reflects the usual lines of the argumentation of its proponents and opponents and since this thesis addresses both of them, and it confronts the theoretical arguments and counterarguments from both camps, this paper could be deemed as the relatively comprehensive and coherent legal theory of an interpretive/supplementary assistance of UPICC within application of CISG. This thesis takes, in this respect, the favorable position and identifies the possible methodology of the use – the systematic interpretation with UPICC as the systematic context and the facilitated process of gap-filling. The paper, emphasizing teleological and dynamic approach to CISG, rejects the traditional objections against the legal admissibility of an interpretive/supplementary reference to UPICC and it also finds the legitimacy and the functional contribution of such utilization to the fulfillment of the CISG's purpose. The generally optimistic approach is demonstrated on the selected problematic interpretive/supplementary questions of CISG, where UPICC proves the benefits of their usability, but the demonstrations also show some practical methodological dangers, the adjudicators should be aware of.

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Introduction

The history of 20th century shows the significant change of the paradigm of international relationships among the states. Fortunately, the hostility and the national sentiment, which led to the attempts to anyhow prevail over the enemy often also using the military power, have been (usually) abandoned after the people (and politicians) realized that the technological progress brings such effectivity of a warfare, that the war, in effect, ceased to be a legitimate and acceptable mean of an international policy. The sad fact about this process is, that this experience cost the world two world wars with millions of casualties.

The *peace* has become the fundamental value, at least in those parts of the world affected by the horrible experience of the wars. The idea of a cooperation among states, including the mutually beneficial *economic integration*, gained an attractivity, firstly, however, within the camps of nations divided in the new rivalry of the Cold War. The accelerating development resulting to the phenomenon of *globalization* finally quashed also the ideological differences and contributed to melting of international relationship on the line East-West. The politicians realized the factual necessity of international trade for a peaceful fulfillment of their own interests and the world became "smaller" for international traders, when no physical barriers were a real issue for communication and trade itself anymore. However legal barriers of domestic laws, often of distinguishable content that was not suitable for governing of international transactions, made international trade risky and costly, what could have jeopardized the desirable increase of amount of international trade among the states. The ideas of a harmonization or even of a unification generally, but more concretely also of substantive commercial legal framework for international trade, were revived.

The pressure to facilitate the international trade was strong enough, *inter alia*[1], to successfully bring into the life the United Nations Convention on Contracts for the International Sale of Goods (CISG) as the uniform international instrument setting the partial legal regime for sale transactions in an international environment. CISG is generally praised as the most successful achievement of the international substantive unification efforts and this is definitely true from the perspective of the number of signing states.[2] Despite its extensive ambitions, it is still the relatively brief international convention and the legislative and political compromise, what implies its vague language and its gapfulness of its provided legal framework. The existence of the consequent interpretive and supplementary problems is evident and also anticipated by Art. 7 CISG containing the specific interpretive guidelines and prescribed methodology of gap-filling. Nevertheless, this provision itself and hence the issue of an interpretation and a supplementation of CISG stays to be the main controversial neuralgic point of CISG.

The unification of international commercial law via international convention (hard law) proved to be relatively efficient, but, on the other hand, hardly, in the greater extent, feasible way, that has, in addition, inherent drawbacks, concretely the shortcoming of a normative rigidity that is the particularly undesirable quality for the set of rules regulating so dynamically changing environment as an international business. The unifying approach has been changed. Flexible soft law initiatives have arisen. The UNIDROIT Principles of International Commercial

[1] Probably the greatest achievements in this respect (in the field of international public law) is the system of treaties under the World Trade Organization (WTO) and regional projects of the economic integration, e.g. European Union, NAFTA, MERCOSUR, ASEAN and many others.

[2] For the analysis of the ambiguous acceptance of CISG by international practitioners see e.g. Harry M. Flechtner, *Changing the Opt-Out Tradition in the United States* (2010), https://papers.ssrn.com/abstract=1571281 (last visited Feb 26, 2017); Peter L. Fitzgerald, *The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nation's Convention on the International Sale of Goods (CISG) and the Unidroit Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States* (2008), http://papers.ssrn.com/abstract=1127382 (last visited Oct 4, 2016); Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods* (1984), http://hdl.handle.net/1811/64227 (last visited Mar 28, 2017); Christopher Sheaffer, *The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law Note*, 15 CARDOZO J. INT. COMP. LAW 461–496 (2007).

Contracts (UPICC or Principles) with the substantive scope of a general contract law are one of such initiatives that has resulted into the soft law instrument with manifold purposes suggested by their knowledgeable drafters. One of these expressly suggested purposes (but also the purpose suggesting itself) is to provide the assistance for an interpretation/supplementation of international uniform law instrument, presumably of CISG, too. Taking into account the problems occurred in this respect considering the Art. 7 CISG, the novel, potentially contributive mean could not have stayed without reaction.

The doctrine has reflected such suggestion in both ways – negatively, but also positively. Camps of proponents and opponents of such use of UPICC have raised their arguments, but mostly build them on different grounds – one side argues by strict legalist (interpretive) arguments, while other side orientates their reasoning to the practical aspect of the interpretive/supplementary assistance of UPICC. The final doctrinal assessment has not been achieved yet and even the practice of adjudicators is not conclusive – while the cases, where such role of UPICC had been recognized, were reported, their number is not high enough.

This thesis is, therefore, intended to depict the whole picture of the usability of UPICC as a tool to interpret and supplement CISG from the perspective of the legal admissibility as well as the desirability. The outcome should be the final assessment in the form of the recommendation for adjudicators, because the success of Principles in such role depends primarily on their awareness and willingness to employ them. The grounds for the analysis consist in the actual state of knowledge captured in extensive literature and not so extensive caselaw.

The comprehensive legal analysis of the usability of UPICC as a tool to interpret and supplement CISG is challenging task, but also unique possibility to penetrate the theoretically fascinating problem of the normative interplay of the hard law and the soft law instrument in the international private law with potentially far-reaching practical consequences.

Following the preexistent opinions of the jurisprudence, to provide the complete answer to the question whether UPICC may be utilized within a process of an interpretation and supplementation of CISG, the following interdependent questions, or rather the following hypotheses (as potential answers to raised research questions) come to the mind of mine as a lawyer:

I. Is such use of UPICC legally admissible? *The use of UPICC as the tool for CISG's interpretation and supplementation is not excluded and it is admissible.*

II. If yes, is such use of UPICC desirable? *The use of UPICC as an interpretation/supplementation tool of CISG is functionally and substantively desirable*.

III. If yes, how UPICC should be used in such role? Could some application test or procedure be established? *Under the conditions of legal admissibility and desirability of the use of UPICC as the tool for CISG's interpretation and supplementation the specific methodology of an interpretive and supplementary employment of Principles vis-à-vis CISG should be followed.*

The affirmation or the rebuttal of the presented hypotheses favorable to a utilization of UPICC in order to answer the presented questions is the focal point of this thesis and simultaneously, in my opinion, the proper way to provide the complete picture of the topic, more concretely to assess whether UPICC can provide the interpretive/supplementary assistance to CISG, whether they should be used in such way and how.

My analysis, unlike usual thematically similar works (I am aware of), covering the issues of a legal admissibility, a desirability and a methodology and also as much as possible evaluating the current doctrinal arguments in favor and against, could be valuable contribution to the present knowledge and, as I maybe too ambitiously hope, also the trigger of a restarted

theoretical interest in this issue leading to the final, generally accepted conclusion (whichever it would be).

The abovementioned aim of this paper and the set hypotheses determine its structure and employed research methodology. In the first chapter I start with the admissibility issue, since in the case of legal inadmissibility of a use of UPICC, the following research would be redundant from the perspective of *de lege lata* and its only value would be as considerations *de lege ferenda*, for the future legal development. This part of the thesis is dedicated to the analysis of the normative text of the relevant parts of UPICC and CISG. In respect of Principles I focus on its Preamble and particularly purposes suggested there, analyzing mostly how the text of Principles themselves and their formal recognition contribute to the justification of an admissibility of their engagement.

The other part of the chapter dealing with the analysis of CISG and its crucial provision on the interpretation and supplementation of its substantive legal framework (Art. 7 CISG) deals with the matter of an interpretation and therefore it requires the use of proper interpretive techniques and methods. The international conventional character of CISG makes this preliminary methodological issue more difficult, nevertheless, in my opinion (in greater detail explained below), providing that meaning of Art. 7 CISG is not clear on the basis of its plain text and context, the *teleological method* is sufficient interpretive approach helping to examine the potential availability of reference to Principles under Art. 7 CISG. This chapter is further structured into two analytical lines focused on the issue of an interpretive use and a supplementary use separately. The conclusions on the admissibility within every line are not black-and-white but provide enough information to model the concrete *methodology* of the use of UPICC as an interpretive tool as well as a supplementary tool vis-à-vis CISG.

The second chapter is divided to two parts as well. Firstly, my interest is devoted to another theoretical question of a *derivative normative legitimacy* (a substantive desirability) of use of Principles formally soft law instrument. Basically, the nature and the relationship of UPICC with some independent, formally binding set of rules is evaluated mostly on the background of developed doctrine opinions on this matter using the traditional method of a logical analysis and synthesis.

The second part of the second chapter of my thesis draws attention to different, more practical aspect of a desirability. The *functional desirability* is the category, which expresses the methodologically facilitating contribution and also the potential contribution of Principles to an achievement of the purpose of CISG. The method adopted in this part resembles the risk-benefit analysis with the outcome of the identification of the Principles' functional specific qualities and drawbacks and their weighing, too.

In the last part of the thesis, the theoretical conclusions on the admissibility and the desirability of the use of Principles as a tool to interpret/supplement CISG as well as on the methodology of such utilization are practically tested in selected legal issues that were widely recognized as CISG's interpretive/supplementary conundrums by the doctrine and the caselaw. In this last chapter, Principles shows their beneficial helpfulness, but also some tricky aspects of their application with CISG.

Finally, the terminological caveat should be given in this introduction. Since UNIDROIT has published Principles in three versions (1994, 2004, 2010)[3], which are substantively different, it needs to be clarified for the sake of scientific accuracy, that in this thesis, when I refer to

[3] During writing of this thesis, the new edition of UPICC has been announced (2016 UNIDROIT Principles of International Commercial Contracts), however it has not been published till its submission. See UNIDROIT Principles 2016 - UNIDROIT - International Institute for the Unification of Private Law - Institut International pour l'Unification du droit privè, http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016 (last visited Mar 31, 2017).

Principles without any further specification of the version, the recently published UPICC in 2010 edition are meant.

1. The UPICC as the tool for interpretation and supplementation of the CISG: The legal admissibility

As it was already presented in the introductory part of this thesis, the possibility of an employment of UPICC as an interpretive and supplementary tool in relation to CISG is a highly controversial and hotly discussed issue of international private law, with diverging assessment of interested scholars as well as adjudicators as will be clearly demonstrated in the following parts of this paper.

Focusing on the doctrinal divergence in assessment of this issue we may deduce some general characteristic of the argumentation of each group advocating the opinions in extremes of possible scale – total refusal of an operability of UPICC within an application of CISG or, on the other side, proponents of such use, moreover as the primary interpretation and supplementation tool. While proponents of extensive applicability of UPICC rely on the arguments, why UPICC *should be used* – emphasizing mostly the substantial features of UPICC, their *persuasiveness* and desirability of their use[4], they very rarely address the issue, whether UPICC *can be or even must be referred within the procedure of interpretation and supplementation of CISG*.

On the opposite side of the discussion, the more skeptical camp of scholars dealing with this issue usually grounds their rejection on the most compelling argumentation on a legal admissibility of a method of an interpretation and a supplementation, carrying out the strict interpretation of, in the respect of its interpretation and supplementation relevant[5] provisions of

[4] See e.g. Alejandro M. Garro, *Gap-Filling Role of the Unidroit Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG*, 69 TULANE LAW REV. 1149–1190 (1994). P. 1154; Michael J. Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG - Alternatives or Complementary Instruments*, 1 UNIF. LAW REV. 26–39 (1996). Pp. 34-37.

[5] Meaning by this designation namely Art. 7(1) and 7(2) CISG.

CISG itself with unfavorable outcome[6], and therefore making any arguments on desirability irrelevant[7] and non-worthy any substantial analysis.

While I may have, and as will be shown I have, some reservations to the correctness of the opponents' interpretation of Art. 7 CISG, it is appropriate to admit that there is a clear rationale behind a suggestion of beginning to answer the ultimate question of usability of UPICC as the interpretive and supplementary tool with analysis of *legal admissibility* of such use.

Accordingly, this first chapter of this thesis deals mostly with issues of an interpretation – after an analysis of the Preamble of UPICC, which explicitly suggests usability of UPICC as an interpretive and supplementary tool in relation to international conventions and therefore may be considered the original source of discussed controversy, primary attention is given to the interpretation of Art. 7 CISG addressing the matters of an interpretation (para. 1) and distinguished matter of a supplementation (para. 2) of provisions of CISG[8], as the rules decisive for the evaluation of the first hypothesis of this thesis[9]. Because of an interconnection between an admissibility and a formal procedural way of a Principles' application, the subchapters about an interpretation and a gap-filling are complemented with observations on methodological issues of a potential engagement of Principles, concretely indicating their contribution to a methodological facilitation.

[6] See, e.g. Bruno Zeller, *Four-Corners - The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods*, http://cisgw3.law.pace.edu/cisg/biblio/4corners.html (last visited Dec 19, 2016).

[7] The appropriateness of a presented theoretical entire separability of the issue of admissibility and desirability of UPICC employment is, in fact, put into a question, if the Art. 7 CISG is interpreted properly (as demonstrated in subchapter 1.4.) and to address the relationship more accurately we should talk about interdependency between admissibility and desirability of use of Principles.

[8] The subchapter analyzing the interpretive engagement of UPICC is necessarily extensive because of an inherent complexity and concluding theoretical uncertainty in respect of the interpretive regime of CISG's provisions.

[9] First hypothesis says that UPICC are legally admissible as the interpretive and supplementary tool in relation to CISG – there is legal *possibility* to employ UPICC in these roles.

1.1. The analysis of Principles' Preamble: The use to interpret and supplement international uniform law instruments as their suggested purpose

The issue of the use of UPICC as ancillary tool in relation to an interpretation and a supplementation of CISG did not arise accidentally as a concept developed by theory or practice, but UPICC themselves in their Preamble addressing the variety of their purposes offers such mode of their usage as *a possibility*.[10] This proposed use of UPICC was contained already in the first version of Principles in 1994 and stayed there also in the following editions of 2004 and 2010 of UPICC, while preparatory works show us that a substantially same provision was included in the draft of UPICC already in 1991[11].

The straight position of UPICC on their own applicability as a supplementary and interpretive tool for *"international uniform law instruments"*[12] including namely CISG is confirmed in the corresponding commentary to Preamble, expressly referring to Art. 7 CISG as illustrative example of new interpretive approach of modern international conventions on international uniform commercial law. The commentary, basically in compliance with the underlying idea of Art. 7 CISG, stressing the need of a uniform and autonomous interpretation and supplementation of international uniform instruments, as well as their shortcomings of fragmentariness and gapfulness, promotes the UPICC as the tool for adjudicators, which *"could*

[10] While the second sentence of Preamble of UPICC, referring to the suggested purpose of Principles as the rules of law chosen by parties to govern their contract, uses the term "*shall"*, the other suggested modes of use of UPICC including the use as the interpretive/supplementary tool are introduced by the modal verb *"may"*. For the 2010 version of UPICC see UNIDROIT - Principles 2010, http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010 (last visited Feb 16, 2017).

[11] See Art 1.1(5) of a Draft and corresponding commentary of UPICC in Working Group for the Preparation of Principles for International Commercial Contracts. Chapter 1: General Provisions (Draft and Comment prepared by Professor Michael J. Bonell, University of Rome I, "La Sapienza") – Rome, December 1991, http://www.unidroit.org/work-in-progress-studies/studies/contracts-in-general/1363-study-l-principles-of-international-commercial-contracts (last visited Feb 16, 2017).

[12] UNIDROIT - Principles 2010, *supra* note 10.

considerably facilitate their task in this respect."[13]. It is noteworthy in this respect, that the commentary answering natural question, why UPICC should be contributive and helpful for adjudicators, stays rather indicative than explicit, when it mentions as the problematic aspect of an interpretive/supplementary task of adjudicator its comparative aspect.[14]

Professor Bonell, the Chairman of the Working Group, Rapporteur on Preamble, in the subsequent work advocated the contribution of UPICC to international unification efforts with clearer language. Understandably because of his authorship, he optimistically saw the UPICC, as the soft law quasi-codification of general international commercial law, a panacea for the inherent drawbacks of the international uniform instruments. Excluding those shortcomings mentioned by the commentary on the Preamble of Principles, he pointed out as a significant flaw of hard law international uniform instruments, their unchangeability as well.[15]

It is not necessary to particularly highlight that UPICC Preamble does not constitute the sufficient legal ground for their engagement within the application of a law (namely CISG). Opposite conclusions would, be in fact, logically absurd[16]. The drafters of UPICC were fully aware of the non-binding nature of introduced Principles:

[13] Commentary to Preamble of Unidroit Principles: UNIDROIT - Principles 1994 - UNIDROIT - International Institute for the Unification of Private Law - Institut International pour l'Unification du droit privè, http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-1994 (last visited Feb 16, 2017).

[14] *Id*.

The commentary perhaps establishes the contribution of Principles on the basis of their partially comparative character, however whether this quality is relevant from the point of view of interpretation and supplementation of international uniform instruments is questionable issue.

[15] The particular attributability of this Bonell's criticism specifically to CISG can be illustrated on his references to works of A. Rosett, which were critically concepted exactly in relation to CISG. See Michael J. Bonell, *Unidroit Principles of International Commercial Contracts: Why What How*, 69 TULANE LAW REV. 1121–1148, (1994). P. 1124.

[16] Self-justification of legal applicability of non-binding soft law instrument from its own non-binding provisions would negate the elementary bases of the theory of sources of law. Accordingly see: Michael Bridge, *The CISG and the Unidroit Principles of International Commercial Contracts*, 19 UNIF. LAW REV. - REV. DROIT UNIF. 623–642 (2014). P. 625.

> In offering the UNIDROIT Principles to the international legal and business communities, the Governing Council is fully conscious of the fact that the Principles, which do not involve the endorsement of Governments, are not a binding instrument and that in consequence their acceptance will depend upon their persuasive authority.[17]

The *persuasiveness* of Principles is, therefore, the only anticipated practical basis for justification of their usability as an interpretive and supplementary tool[18], and the UPICC at their own accordingly resigned to provide any legal analysis of questionable legal admissibility of such suggested use, *inter alia*, in relation to CISG, concretely, to its mentioned Art. 7.

Considering the time connotation of the introduction of the first edition of UPICC[19] and opening CISG for signing[20], respectively its coming into effect[21], one could wonder, whether the drafters of Principles were led to attribute them also this specific purpose by specific concerns about particular legal insufficiencies of CISG, which should be addressed by Principles, besides those generally known, abovementioned inherent shortcomings of international uniform instruments. Despite such incentives are not anyhow expressly specified in the text of Principles and therefore, there is no direct evidence, the admitted extensive inspiration by CISG throughout UPICC[22] signaling full awareness of Principles' drafters of potentially problematic practice in respect of CISG indicates possibility that Principles were deliberately adapted also specifically for the purposes of their interpretive/supplementary role within pursuing their desired *persuasiveness*. In this respect, the early scholarly writing of Professor Bonell, who listed such

[17] See Introduction to 1994 UNIDROIT Principles: UNIDROIT - Principles 1994 - UNIDROIT - International Institute for the Unification of Private Law - Institut International pour l'Unification du droit privè, *supra* note 13 at viii.

[18] This issue is addressed in chapter 2.

[19] May of 1994.

[20] 11th April of 1980.

[21] 1st January of 1988.

[22] See commentary on Art. 2.3, 2.4, 2.6, 2.7, 2.8, 2.9, 2.10, 3.2, 4.2, 5.7, 6.1.1, 7.1.4, 7.2.2, 7.4.2, 7.4.4, 7.4.5 and 7.4.6 of 1994 UNIDROIT Principles: UNIDROIT - Principles 1994 - UNIDROIT - International Institute for the Unification of Private Law - Institut International pour l'Unification du droit privè, *supra* note 13.

a role of Principles on the first and therefore privileged position among the purposes of Principles, emphasizing the importance of by Principles addressed the problem of autonomous and uniform interpretation (referring directly to Art. 7 CISG)[23] citing in this respect Prof. René David: *" (...) there must be a system of international law alongside the national systems, and this international system of law must be elaborated by international community"*[24], could be quite strong affirmation of the fact stated by Prof. Bonell also *ex post*: "*It was both the merits and the shortcomings of CISG which prompted UNIDROIT to embark upon a project as ambitious as the Principles."*[25]

Leaving the evaluation of an extent of a recognition of the persuasive quality of Principles for the following chapters, it is noteworthy at this point to mention the efforts of UNIDROIT to achieve the UNCITRAL's official recognition of applicability of UPICC for their anticipated purposes, which would, despite that it would not establish, strictly legally speaking, legal grounds of their applicability *per se*, consequently enhance their world-wide use and silence the criticism of the part of jurisprudence[26]. As the other (but more field-specific) soft-law instruments like INCOTERMS or UCP drafted under auspices of ICC, UPICC in their edition from 2004 were endorsed by decision of UNCTRAL adopted at its 851st meeting on 4th July 2007 in relation to all their purposes expressed in their Preamble: "[UNCITRAL] *Commends*

[23] The special relevance of Bonell's perception of fundamental importance of proper interpretation of international uniform law instruments is supported also by the fact of his direct participation on discussions on the formulation of Art. 7 CISG at Vienna conference in 1980, advocating autonomous regime as was finally (in adjusted form) adopted. See United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980. Official records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees, A/CONF.97/19, https://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf (last visited Mar 14, 2017). Pp. 255-256.

[24] René David, *The International Unification of Private Law* in René David, *International Encyclopedia of Comparative Law (1971)*, cited in Michael J. Bonell, *A Restatement of Principles for International Commercial Contracts: An Academic Exercise or a Practical Need*, 1988 INT. BUS. LAW J. 873–888 (1988). P. 873.

[25] Michael J. Bonell, *An International Restatement of Contract Law: The Unidroit Principles of International Commercial Contracts* (2009). P. 305.

[26] Michael J. Bonell, *Symposium Paper: The UNIDROIT Principles of International Commercial Contracts: Achievements in Practice and Prospects for the Future*, 17 AUST. INT. LAW J. 177–184 (2010). P.182.

the use of the Unidroit Principles 2004, as appropriate, for their intended purposes."[27] In contrast to *prima facie* UNCITRAL's recognition of applicability of Principles as an interpretive/supplementary tool also in relation to CISG, the corresponding report shows certain hesitations in this respect: *"Thus, the optional use of the Principles was subordinate to the rules governing the applicability of the United Nations Sales Convention."*[28] The promoters represented by Bonell still perceived the endorsement as the confirmation of the Principles' relevance and called for the official recommendation of UNCITRAL to use UPICC as a mean of interpreting and supplementing CISG, which would grant the Principles certain formal legal status and enhance their legitimacy as such.[29]

The optimistic expectations of Principles' promoters, however, showed to be premature. Recently, UNCITRAL asked by UNIDROIT to comment on the proposal of Model Clauses for use of UPICC in compliance with their intended purposes[30] including their purpose of an interpretive/supplementary tool, this time referring to the report to its decision about endorsement of use of UPICC, expressly rejected to recognize the use of the UPICC under Art. 7 CISG and consequently recommended substantial reformulation of corresponding Model Clause drafted by UNIDROIT:

> In this regard, the UNCITRAL secretariat is concerned that suggested model clauses No. 9 and No. 10, in their current form, in effect 'elevate' the Unidroit Principles so that the CISG is "interpreted… by the Unidroit Principles". Accordingly, pursuant to this formulation, the

[27] See Report of the United Nations Commission on International Trade Law, 40th session, A/62/17 Part I (2007) para 213.

[28] *Id*. para 211.

[29] See Bonell, *supra* note 26. P.180. Reference to efforts to achieve UNCITRAL's official recommendation in favor UPICC see also Stefan Kröll, Loukas A. Mistelis, Pilar Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)* (2011). P. 140.

[30] Model Clauses for Use of the UNIDROIT Principles of International Commercial Contracts in Transnational Contracts and Dispute Resolution Practice. See UNIDROIT - UPICC Model Clauses - UNIDROIT - International Institute for the Unification of Private Law - Institut International pour l'Unification du droit privè, http://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses (last visited Feb 16, 2017).

> Unidroit Principles are not subordinate to the CISG. This construction is contrary to the Commission's views on this issue.[31]

The UPICC themselves, naturally, are not capable pursuant to their nature of soft-law to ground the legal admissibility of their use within application of CISG[32]. While suitability and practicality, jointly also referable as their *persuasiveness* in this respect were only arguments invoked by Principles' promoters and drafters to justify such application, another avenue to gain the legitimacy for use of Principles via UNCITRAL recommendations apparently failed (on the grounds of a legal admissibility argument of UNCITRAL) and the change of the negative position of UNCITRAL is not expectable in the close future. However, is this defeat and in this respect unfavorable opinion of UNCITRAL the unsurpassable obstruction to conclude the legal admissibility of application if UPICC as an interpretive/supplementary tool? I think, that it is not, since UNCITRAL, despite its authority in the field of an international commercial law, does not formally possess any legal power to authoritatively interpret the CISG's provisions[33]. Its opinion on inapplicability of UPICC under Art. 7 CISG may be taken into account by the adjudicator facing this particular issue, however the final assessment is up to him. The issue, whether this adjudicator may rely on the reasonable legal argumentation in relation to CISG, opposing the UNCITRAL's one, is addressed below, in following subchapter.

[31] Model Clauses for Use of the UNIDROIT Principles of International Commercial Contracts in Transnational Contract and Dispute Resolution Practice (Comments submitted by UNCITRAL), UNIDROIT 2013 - Study L - MC Doc. 2 Add. 4, http://www.unidroit.org/english/documents/2013/study50/mc/s-50-mc-02add-04-e.pdf. (last visited Feb 16, 2017). See also Report of the United Nations Commission on International Trade Law, 46th session, A/68/17 Part I (2013) para 253.

[32] See, e.g. J. J. Fawcett, Jonathan Harris, Michael G. Bridge, *International Sale of Goods in the Conflict of Laws* (2005). P. 933.

[33] While CISG was drafted under auspices of UNCITRAL, it is adopted by contracting states. UNCITRAL, despite its role of repository in relation to CISG, does not possess under CISG or any other provision of international law the power to authoritative interpret the provisions of CISG. The efforts of UNCITRAL in this respect (UNCITRAL Advisory Council etc.) are, therefore, informal and legally non-binding.

1.2. The interpretation of Art. 7(1) CISG: The regime of an interpretation of provisions of CISG allowing employment of UPICC?

An analysis of the specific problem of a possibility of the Principles' assistance while interpreting provisions of CISG is conditioned by assessment of the interpretive regime of provisions of CISG generally. As one could expect, this issue is neither ultimately assessed and even 37 years after the adoption of CISG, the scholarly discussion is still pending without a chance to be satisfactorily concluded soon. The determination of the proper interpretation regime is the task requiring highly abstract thinking, while considering the very grounds of CISG and the unification of international private law generally. Simultaneously, it is only and therefore inevitable way to address the legal admissibility of interpretive method employing UPICC, hence, a reader will hopefully excuse me for dealing with *prima facie* too general, and with remote considerations, as they turn out to be essential for the purpose of this thesis, concretely the assessment of the issue of a legal admissibility of an interpretive role of UPICC.

1.2.1. Vienna Convention on the law of treaties and CISG: Its applicability vis-à-vis Art. 7(1) CISG

The preliminary and also controversial matter related to interpretation of CISG is the scope of rules applicable to its interpretation, taking into consideration, on the one hand, the character of CISG as international multilateral convention and, on the other hand, the existence of the special interpretive guidelines contained in Art. 7(1) CISG. Formulating the issue more clearly, the one focal point of dispute is found in question, whether methods of interpretation of Section 3 (Art. 31-33) of the Vienna Convention on the law of treaties[34] are applicable to CISG, and

[34] Vienna Convention on the law of treaties (with annex) concluded at Vienna on 23 May 1969. The Vienna Convention as such stepped into force in 1989, after CISG, nevertheless, its substance had been recognized as customary international law already before its codification in the form of international convention. See e.g. Karl Zemanek, *Vienna Convention on the Law of Treaties Vienna, 23 May 1969. Introductory note,* http://legal.un.org/avl/ha/vclt/vclt.html (last visited Apr 8, 2017).

respectively what is their relationship with Art. 7(1) CISG. The commentators, including the most reputable ones, state, that the Vienna Convention is inapplicable in relation to substantive rules of CISG (except of its Part IV), which contains its own interpretive regime under Art. 7(1) CISG as *lex specialis*[35], pointing out the specific nature of CISG as a uniform international *private* law instrument and consequential ill-suitability of rules of Vienna Convention[36], that addresses the interpretation of treaties (especially bilateral) establishing rights and duties between states, to prescribe the regime of an interpretation of in nature private law regulating the relationships among the international traders. The argued substantive unsuitability of a canon of interpretation established by the Vienna Convention was more deeply specified by Prof. Schwenzer, who shows a disfavor to excessive *"emphasis on the intentions of the Contracting States"*[37], arguably meaning the unpracticality of a teleological method of

[35] Many scholars interpret Art. 7(1) CISG in the way, that this anticipate the CISG-specific interpretive method, respectively specific combination of methods. A part of a doctrine designed the elaborated interpretive methodologies in respect of CISG under designations as *"autonomous interpretation"* (Gebauer) or "interpretation-ladder" (Diedrich). For developed CISG's interpretive methodologies see: Martin Gebauer, *Uniform Law, General Principles and Autonomous Interpretation*, http://www.cisg.law.pace.edu/cisg/biblio/gebauer.html (last visited Oct 28, 2016). Pp. 685-686; Frank Diedrich, *Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG*, http://cisgw3.law.pace.edu/cisg/biblio/Diedrich.html (last visited Mar 13, 2017). Pp. 311-313; Peter Schlechtriem. Ingeborg H. Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2010). Pp. 129-132.

[36] Against an applicability of Vienna Convention see e.g. Schlechtriem and Schwenzer, *supra* note 35. P. 130; Fritz Enderlein, Dietrich Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods : Convention on the Limitation Period in the International Sale of Goods : Commentary* (1992). P. 54; Paul Volken, *The Vienna Convention: Scope, Interpretation, and Gap-filling*, http://www.cisg.law.pace.edu/cisg/biblio/volken.html (last visited Feb 21, 2017); Zeller, *supra* note 6. Contrary, e.g. Jurgen Basedow, *Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts Internatioanl Uniform Law Conventions, Lex Mercatoria and UNIDROIT Principles*, 5 UNIF. LAW REV. 129–140 (2000). P. 133.

Nevertheless, the Vienna Convention itself does not contain any similar limitation of its scope (see its Art. 1(a), Art. 3 and Art. 5) and the recent discussions in this respect concluded that canon of interpretation of Vienna Convention has been applied regardless of the nature of an international treaty. See: ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties 2013, ILC Report 2013 UN Doc A/68/10, http://legal.un.org/ilc/reports/2013/english/chp4.pdf (last visited Oct 28, 2016). Pp. 19-20. Accordingly see: Eirik Bjørge, *The Evolutionary Interpretation of Treaties* (2014). P. 31. Moreover, in a practice the rules of Section 3 of Vienna Convention (and particularly teleological interpretation) were effectively invoked in international investment disputes (e.g. SGS Société Générale de Surveillance S.A. v. Republic of Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction) in regard of interpretation of rules regulating relationships between investors and host states (so not between states).

[37] For similar comments see Schlechtriem and Schwenzer, *supra* note 35. P. 130. For the opinion about a teleological interpretation of CISG as the most *"obscure tool"* entailed with a dangerous *"homeward trend"* see Andre Janssen & Larry A. DiMatteo, *Interpretive Uncertainty: Methodological Solutions for Interpreting the*

interpretation under Art. 31(1) Vienna Convention, since he does not put this traditional method into his suggested interpretation canon.[38] The scholars often argue in favor of historical interpretation of CISG instead, stressing the importance of *travaux préparatiores* in the process of ascertaining the intended meaning of provision in question, what is however an approach with potentially destructive impact on the effectiveness of CISG, sentencing it to inevitable obsolescence.[39]

It would be incorrect to deny some rationale behind these arguments against the full usability of the Vienna Convention for interpretation of CISG, but I would suggest less harsh consequence than a total denial. It is doubtless, that CISG as the international instrument unifying the rules of private commercial law, concretely the sales law, differs from traditional international treaty binding primarily states as addressees of its provisions. The category the CISG falls under may be characterized as a law-making treaty (*traits-loi*)[40], a hybrid source of law in a form of an international convention, functionally similar to national legislation –

CISG (2012), https://papers.ssrn.com/abstract=2051499 (last visited Jan 29, 2017). P. 60. Other authors, while agreeing with inapplicability of Vienna Convention interpretation rules and referring to conclusion of Prof. Schwenzer apparently do not share the negative sentiment against teleological method of interpretation and their suggestions on the usable methods of CISG's interpretation includes. See Kröll, Mistelis, and Viscasillas, *supra* note 29. Pp. 114, 125-132. Also see Gebauer, *supra* note 35. Contrary see Diedrich, *supra* note 35.

[38] Schlechtriem and Schwenzer, *supra* note 35. Pp. 129-132.

[39] The appropriateness of the interpretive reference to preparatory works has been analyzed on the background of caselaw and doctrine of a public international law, resulting to the emphasis of possible misleading consequences of *"conservative approach"* based on them in confrontation with a need of evolutionary interpretation and the carefulness and critical assessment of their employment has been recommended. See: Bjørge, *supra* note 36. Pp. 83-86. Vienna Convention normatively illustrates such approach, when it places a recourse to preparatory works amongst supplementary means of interpretation (Art. 32 Vienna Convention). As Felemegas pointed out, with reference to Bonell's statement that CISG *"has life of its own"*, that preparatory works documents on CISG may cause interpretive problems, since they reveal the differences of opinions of drafters or uncertainties whether certain argumentation was decisive element affecting intention of contracting states to adopt the provision. He also pointed out frequent political rather than legal nature of raised arguments. John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and uniform interpretation* (2000), http://eprints.nottingham.ac.uk/11055/ (last visited Nov 30, 2016). Pp. 136-137 and there cited Cesare M. Bianca, Michael J. Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987). P. 90. Accordingly see also Jacob S. Ziegel, *The UNIDROIT Contract Principles, CISG and National Law*, http://www.cisg.law.pace.edu/cisg/biblio/ziegel2.html (last visited Dec 19, 2016).

[40] Distinction between contractual and law-making treaties and possible consequences for an interpretive regime of treaty, see e.g. Volken, *supra* note 36. P. 19.

constituting substantive rules of law regulating legal relationships of an undefined group of individual addressees, in this case, of international traders, moreover without single authority empowered to provide an authoritative interpretation of these rules of law. The distinguishable character of CISG apparently justifies the cautious approach in respect of applicability of general rules of the Vienna Convention, nevertheless, it does not *per se* cause their inapplicability, in particular, it does not rule out the relevance of teleological method of interpretation, rather it forces to elaborate the analysis of object and purpose of these provisions of CISG regulating directly the international trade of goods.

1.2.2. A teleological interpretation: The explicit and *implied purpose* of CISG

Let's for now presume, that methods listed in Art. 31 of Vienna Convention are applicable and focus on the aspect of this list which is apparently most controversial – the interpretation of CISG *"in the light of its object and purpose"*[41], which is expressly stated in the Preamble. This explicitly reveals the ultimate geopolitical aspirations of this convention to contribute *"to friendly relations among States"* through *"the development of international trade"*, which should be fulfilled by CISG in the field of law via an introduction of uniform rules governing the international sales of goods removing *"legal barriers in international trade"* caused by differences in the otherwise governing legal framework.

This generally and explicitly formulated purpose of CISG apparently depicts the political purpose of CISG merely as the purpose of the *international* uniform law instrument, that could be met by mere adoption of CISG as the mandatory source of international sales law, however, considering the context of Art. 6 CISG and, there guaranteed, freedom of international traders

[41] Art. 31(1) Vienna Convention *in fine*.

– addressees of CISG to opt-out the applicability of rules of CISG within the teleological considerations, the purpose of CISG as substantive international sales law should be further elaborated accordingly. An effectiveness of CISG in pursuing its purpose, doubtlessly the intention of the drafters, therefore requires from substantive provisions of CISG their persuasiveness in relation to their addressees – the substantive legal framework provided by CISG should be as far as possible the framework which international traders would choose considering the specific context and conditions of international trade.[42] For the sake of clarification, my idea about a proper application of the teleological interpretation of CISG, based on its abovementioned hybrid nature, could be expressed as following: the political purpose of CISG as international instrument (convention) explicitly stated in its Preamble is determining for the *implied purpose* of contained substantive rules of law – to provide the attractive legal framework for the international trade.[43] Naturally, such formulated *implied purpose* of substantive legal framework contained in CISG has some interpretively helpful connotations in respect of requirements put on concrete substantive rules, what is actually the outcome, that makes previous abstract interpretation constructions relevant for the aims of this thesis: only teleological interpretation of CISG leads us to knowledge, that the substantive rules of CISG should constitute *persuasive* law – the quality, in my opinion consisting of three prongs

[42] As Monica Kilian noted aptly about effectiveness of CISG: *"Essentially, the success of CISG depends largely on the goodwill of the parties to the contract to remain within the confines of an international legally valid framework."* Monica Kilian, *CISG and the Problem with Common Law Jurisdictions*, J. TRANSNAT L. LAW POLICY 217–243 (2000). P. 225.

[43] The authors of CISG's Draft and subsequently the representatives of States on the international conference, led (maybe unconsciously) by presented deliberations in respect of substantive rules of CISG (employing a sophisticated comparative methods) paid great attention to their broad acceptability by practice. Factually, it would be expectable, that, albeit not direct addressees, they were guided in their related contemplations by hypothetical interests of reasonable international traders and by their consequential requirements on substantive sales law.

neutrality[44], *certainty*[45] and *substantive suitability*[46] of the sales law, while only simultaneous meeting of all these features without any preference would enhance the chance for effective fulfilment of the ultimate purpose of CISG.

The structure and content of Art. 7(1) CISG, properly interpreted as below, apparently confirms the correctness of my approach, since it, in fact, pursues the fulfillment of the above-mentioned requirements on CISG's substantive legal framework in its incorporated interpretive guidelines.

1.2.3. The interpretation of provision on an interpretation: The elements of Art. 7(1) CISG *in concreto*

Art. 7 CISG has been repeatedly designated as the most important provision of CISG[47], fundamental for effective fulfilment of its aims, since an interpretation (and related process of supplementation) is a determinative part of the procedure of an application of law. The

[44] A feature of neutrality may be seen in close relation with the a-nationality, or maybe more properly speaking, trans-nationality of legal framework, which would not advantage any party of the transaction because of its knowledge of particular national law, and at the same time, it would diminish the need of familiarizing with neutral third county's law potentially chosen as alternative to international uniform law. The pros of favoring trans-national legal framework over choice of neutral national law are theoretically clear – avoiding the problem of choice of suitable forum guaranteeing proper application of chosen national law, decreasing of entailed transaction costs etc. In contrast with this formal neutrality, different aspect of neutrality is connected rather with the suitability feature consisting in the substantive neutrality towards parties of transaction – the substantive balance between a seller and a buyer.

[45] Certainty of legal framework is one of the aspects highly valued by international traders facing the economic volatilities of the relevant markets and unwilling to calculate also with uncertainties of law. Certainty of rules of law could be characterized as predictability of their application, including the comprehensibility of their text, their stability, and the availability of interpretive outcomes.

[46] The substantive suitability is the quality expressing the degree of adaptation of legal framework to needs of the international trade and the promotion of its development, the reasonableness of the regulatory environment in the context of economic reality, that is of inherently dynamic nature, especially in contemporary era of economic globalization, what exposes the governing law to a pressure to be flexible and up-to-date.

Prof. Rosett expresses the idea of a CISG's need to offer the actual legal framework very illustratively:

> The only choice that does not appear open is to let the past rule the future. If the law is permitted to stand still and fail to respond to the needs of the business people who engage in trade transactions, these business "consumers" of the law will certainly find other, non-legal, ways to structure their commercial lives and the law as administered in the national courts will become increasingly irrelevant to their concerns.

Arthur Rosett, *UNIDROIT Principles and Harmonization of International Commercial Law: Focus on Chapter Seven*, 2 UNIF. LAW REV. 441 (1997). P. 442.

[47] Kröll, Mistelis, and Viscasillas, *supra* note 29. P.112. Felemegas, *supra* note 39. P.94

magnitude of attention devoted to interpretation of this provision was therefore understandably corresponding. Art. 7(1) CISG have been perceived by scholars as the *lex specialis* on the interpretation of CISG (except its Part IV) constituting the catalog of interpretive methods specific for CISG[48], however the reasoning about proper interpretation of Art. 7(1) itself was mostly neglected.[49] In my opinion, the methods listed in Vienna Convention and within them also the teleological interpretation with an emphasis on the purpose of CISG as presented above are fully applicable and, in effect, their application contributes to ascertain the intended meaning of, in this respect, the essential provision in a full compatibility with presented *implied purposes* of CISG, actually, accomplishing the fulfilment of these purposes.

1.2.3.1. The interpretation with regard to *an international character* of CISG

This denomination used in Art. 7(1) CISG as the first specific interpretation guideline is usually considered in practice[50] as the order for autonomous interpretation – in another normative mode as the prohibition of an employment of a domestic interpretive methodology or even particular substantive law – in several occasions this prohibited approach was referred by adjudicators as *"ethnocentric"*[51]. In accordance with the purpose of CISG, such meaning of this interpretive rule calling for a-national approach[52] would correspond with requirement of the *neutrality* of

[48] See *supra* note 35.

[49] The Art. 7(1) CISG is obviously not self-regulatory, since its intended to govern the interpretation of substantive rules of CISG as it is demonstrable on the reference to international trade within god-faith guideline.

[50] UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, New York (2012), https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf (last visited Feb 16, 2017). P. 42.

[51] Critically on *"ethnocentric"* interpretation see e.g.: V. Susanne Cook, *The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity Recent Developments Relating to CISG*, 16 J. LAW COMMER. 257–264 (1996). See also critically: Bruno Zeller, *The Challenge of a Uniform Application of the CISG - Common Problems and Their Solutions*, 3 MACQUARIE J. BUS. LAW 309–322 (2006). P. 309.

[52] The a-national approach to an interpretation of CISG is not absolute, and CISG itself anticipates and requires in respect of several provision interpretation terms based on their domestic meaning, e.g. the concrete meaning of the term *"private international law"* in Art. 1(1)(b) and 7(2) CISG depends on its legal definition in *legis fori*. Accordingly see UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, *supra* note 50. P. 42.

substantive rules of law. This approach is established, widely respected and justified, however, as negative guideline is not practically helpful for adjudicators' interpretive efforts.

From the point of view of a potential applicability of UPICC as an interpretive assistance, it is necessary to note, that guideline to interpret CISG autonomously, with regards to its international character, was brought in its negative notion even further (and maybe too far beyond the limits set by the verbatim formulation) on the part of authors, who infers that such instruction prohibits any external interpretive assistances (including UPICC) and CISG should be interpreted within its *"four corners"*.[53] As Prof. Schwenzer clearly states: *"Again, it has to be emphasized; primarily, uniform solutions must be developed from inside the CISG itself without having recourse to any external sources."*[54]

A textual interpretation of the term *international character* of CISG is not, however, definitely so unambiguous to prevent conclusions about a plausible alternative, more liberal interpretation. The international character of CISG might refer not only to the formal character of CISG as an international convention with consequent requirement of its a-national interpretation, but the ordinary meaning of the used term may also be related to the material and personal scope of the CISG, what is, shortly, under Art. 1(1) CISG a sale of goods between international traders[55]. Adopting of this approach would lead to different additional

[53] Prof. Zeller uses this term in relation to opinion about need to interpret CISG exclusively internally: *"Methodologically speaking and taking the mandate of article 7 into consideration, the only permissible approach is to rely on the four corners of the CISG when interpreting any of its provisions."* Zeller, *supra* note 6.

[54] Ingeborg H. Schwenzer, *Interpretation and gap-filling under the CISG in Current issues in the CISG and arbitration* 109–118 (2014), http://edoc.unibas.ch/dok/A6146166 (last visited Mar 15, 2017). P.118. As Prof. Michaels points out, on the other hand, opponents of an interpretive use of UPICC arguing with a need to give a regard to international character of CISG in its most restrictive notion do not rule out as an interpretive assistance the caselaw and jurisprudence, that are actually also external sources. Ralf Michaels, *The UNIDROIT Principles as Global Background Law*, UNIF. LAW REV. 643–668 (2014). P. 665.

[55] Contrary to the first presented meaning, this alternative interpretation of interpretive requirement to consider the international character of CISG is not universally recognized by theory. Some correlating indications in this respect were proposed by Prof. Viscasillas: *"In order to take into account international character of the Convention, consideration is to be given to the international framework of the application and permanent development of uniform rules."* See: Kröll, Mistelis, and Viscasillas, *supra* note 29. P. 116. In accord see also: Felemegas, *supra* note 39. P. 109; Harry M. Flechtner, *The CISG's Impact on International Unification Efforts: The UNIDROIT*

requirements in regard to a proper interpretation of CISG, that would be, in contrast with *a-national* interpretation, referred as *trans-national* interpretation[56]. Unlike, rather the usual plain negative guideline describing how the interpretation should not look like, the emphasis put on the material international character would provide additional positive instruction, namely to observe the CISG on the broader background of international trade regarding all its specifics, needs, and aims, assuming existence of some backgrounding *trans-national* legal background of international commerce. Such positive interpretation could be deemed as a guideline towards, in fact, systematic interpretation of CISG[57] within the system of hypothetic substantive rules of international commercial law, what could be the opportunity of engagement of UPICC (dependent on their suitability and *persuasiveness* in this respect), at least partially.

1.2.3.2. The interpretation with regard to the need to *promote uniformity in application* of CISG

A second interpretive guideline mentioned in Art. 7(1) CISG provides rather an accentuation of unification purpose of CISG, fulfilment of which started by adoption of CISG itself should not be jeopardized by nonuniform interpretation of uniform international sales law, than an instructive hint, how to conduct the proper interpretation of substantive provisions of CISG.[58] The uniformity in interpretation is interrelated with and effectively dependent on the

Principles of International Commercial Contracts and the Principles of European Contract Law in Franco Ferrari, *The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences (2003)*. P. 191.

[56] Distinguishing between *a-national* and *trans-national* interpretation of CISG should highlight the different perspective expressed and negative and positive normative value of each of them. The terms are not entirely overlapping and interpretive outcome of a trans-national interpretation might be substantively same as interpretive recourse to a certain national interpretive concept.

[57] The existence of hierarchic system of uniform international sales law and the systematic approach to the issue of supplementation (closely linked with the issue of interpretation) is obviously assumed as it may be inferred from text of Art. 7(2) CISG referring to general principles underlying CISG. For more see subchapter 1.3.

[58] Prof. Ziegel notices the purposive, not handy nature of reference to the *international character of CISG* and the *need to promote uniformity* stating: *"These prescriptions do not take us very far."* Ziegel, *supra* note 39.

requirement of considering *international character* of CISG,[59] regardless of whether one favors its meaning as more restricted *a-national* interpretation or more liberal *trans-national* interpretation[60], and need of interpretive uniformity may be linked with a desired *certainty* (predictability) of international sales law under *implied purpose* of CISG as presented in the previous subchapter.

The majority of commentators[61], taking to this formulation functional approach, translates the *need to promote uniformity in application* primarily as an adjudicators' duty to take into account as the persuasive authority and ideally, in the case of their assessed correctness, to follow decisions rendered on the issue by any other court or arbitrators. The most radically one-sided authors see in the guideline the instruction to develop the international *stare decisis doctrine* within the application of CISG[62]. The interpretive assistance is suggested also from the side of jurisprudence. In this respect, scholars appreciate the contribution of numerous initiatives made in order to open the access to relevant caselaw and commentaries (CLOUT, UNILEX, issuance of Digest of case law, database of Pace university on CISG, constitution of CISG Advisory Council etc.).[63]

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[59] Kröll, Mistelis, and Viscasillas, *supra* note 29.. P. 116

[60] The *a-nationality* of interpretation is the prerequisite of uniformity the first step eliminating the very likely split of interpretation on certain provision of CISG based on different national domestic laws. However, itself this negative condition is not able to ensure the unity of interpretive results. *The trans-nationality* of interpretation, on the other side, relying on more comprehensive system in international commercial law, has better chance to achieve uniformity.

The concept of *trans-nationality* of interpretation goes one step further offering to some extent an interpretive background helping to ascertain the coherent meaning of the provision in question.

[61] Peter Schlechtreim, *Interpretation, Gap-Filling and Further Development of the U.N. Sales Convention*, 16 PACE INT. LAW REV. 279–306 (2004). P. 290; Schwenzer, *supra* note 54. P. 111.

[62] See for example interpretation of Art. 7(1) CISG as *"supranational stare decisis"* in early Bonell's commentary on CISG: Bianca and Bonell, *supra* note 39. P. 91

[63] See, e.g. Schlechtriem and Schwenzer, *supra* note 35. Pp. 124-125; Filip De Ly, *Uniform Interpretation: What Is Being Done? Official Efforts* in Franco Ferrari, *The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences (2003)*. Pp. 342-356. It deserves the note, that even appreciated opinions of CISG Advisory Council looks for corroboration in provisions of Principles. See *supra* note 356 in Stefan Vogenauer, Jan Kleinheisterkamp, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2009). P. 84.

It is obvious, that presented ways of ensuring the uniformity of interpretation are not the interpretive methods *in stricto sensu*, giving any substantive clue for interpretation. The reference to a caselaw and a doctrine, moreover the reference which should be ad hoc critically assessed[64] on its merits by adjudicators, does not prescribe any applicable interpretive perspective in relation to a concrete rule of law, albeit it would be a mistake to absolutely disregard the possible inspiration taken from well-reasoned (also in regard interpretive methods). The criticism gains relevance, if one realizes the fact, that even after almost 30 years after CISG stepped into force caselaw as well as jurisprudence is very divided in interpretive conclusions, what may be demonstrated on references contained in this thesis. The critical assessment of multiple conflicting, but often reasonable opinions may be a too complex task for the general domestic courts and the guideline could be shown to be of little use in efforts pursuing the main aim of CISG.

Nevertheless, the underlying rationale of doctrinal reasoning is valid – the effective fulfilment of the requirement of interpretive uniformity of substantive rules of CISG the employment of some common, suitable benchmark, which, avoiding the obstacles and potential lack of an effectivity, should provide substantive interpretive assistance, is what brought me back to the idea of a feasibility of *systematic interpretation*. The qualification for this benchmark, like in the case of traditionally suggested caselaw and doctrine without any closer specification, should be its *persuasiveness*, in this case, however, the *substantive persuasiveness* in meaning of its substantive legitimacy and coherence with the CISG, its purposes and the other interpretive aims contained in Art. 7(1) CISG. Principles, themselves offered to carry out such a role, might be *prima facie* the eligible candidate.[65]

[64] Since "supranational stare decisis" in respect of caselaw on CISG has been denied, the decisions of foreign courts do not possess legally binding authority over adjudicators, therefore their *persuasive* value is decisive to have an effect of quasi-precedent.

[65] My evaluation of the UPICC's eligibility is offered in Chapter 2.

1.2.3.3. The interpretation with regard to the need to *promote the observance of good faith in international trade*

The reference to good faith as the last element of specific interpretive provision of Art. 7(1) CISG raises the controversy from the very beginning, when the concrete meaning was subject of the discussions at an international conference in 1980.[66] The different perception of the content as well as scope of application of this concept, mainly in civil law domestic jurisdictions as Germany, Italy and France, where the concept (*Treu und Glauben, buona fede, bonne foi*) was traditional and broadly applied, and, on the other side, in common law jurisdiction, especially United Kingdom, which does not recognize it as consistent concept. The solution adopted in Art. 7(1) CISG was a result of politic compromise ensuring the explicit reference to good faith, while this reference was not originally intended to affect the extent and content of rights and duties of contracting parties.[67] Unfortunately, the exact normative effect of prescribed necessity to *promote the observance of good faith in international trade* stays unclear and this part is still subjected to attacks as one of Achilleas heels of CISG jeopardizing it very effectivity, because of danger of application of different national notion of this principle, respectively the problematic application by adjudicators coming from a common law jurisdictions.[68]

The general analysis of the role of good faith in the regime of CISG's application is an issue, that is beyond the ambition of this paper, nevertheless, the consequence of use of formulation invoking this legal principle as the interpretive guideline should be clarified. Our analysis is grounded on the premise that good faith may have a different meaning according the context it

[66] United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980. Official records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees, A/CONF.97/19, *supra* note 23, Pp. 255-259.

[67] The discussion on Vienna conference reveals the disagreement between representatives of civil law and common law jurisdictions. While Italy, represented by Prof. Bonell, proposed the amendment of Art. 7 (at that time Art. 6 of draft) in order to separate the principle of good faith from interpretive guidelines and to draft a new article in which this principle would be linked with an interpretation and performance of sale contract itself, the representative of U.S., Prof. Farnsworth, opposed Italian proposal pointing out uncertainty of the principle in international environment. See *Id.* Pp. 255-258.

[68] Sheaffer, *supra* note 2. P .471.

is used in, concretely, at least for my purposes two modes[69] of its application should have been distinguished: firstly, the good faith as the general implied contractual duty affecting the *concrete* contractual conduct of contract parties[70] and, as a second mode, the good faith as *abstract* interpretive principle having an effect vis-à-vis substantive rules incorporated in CISG[71], what is minimal generally accepted scope of good faith under Art. 7(1) CISG, however rarely deeply analyzed[72], and the subject of the following analysis for purposes of this thesis.

The first observation in respect of interpretation in compliance with good faith is connected with the Vienna Convention on the law of treaties, that imposes in its Art. 31(1) the duty to interpret international treaties in good faith as the first and fundamental interpretive rule and the interpretive effect in context of public international law could be stated as following: "(…) *it would be contrary to good faith to frustrate the legitimate expectations created by treaty obligations, and this applies with no less force to evolutionary interpretation too."*[73] The aim to provide interpretation protecting legitimate expectations of treaty parties can be reformulated to the requirement of interpretation guaranteeing a (actual) *reasonableness* of an application.[74]

[69] According to some commentators, the concept of good faith has another meaning as the principle underlying the CISG and therefore the general principle on which is CISG based under Art. 7(2) CISG, which is, after all, recognized by scholars as well as caselaw. See in this respect: Digests and there referred decisions + authors

[70] The textual interpretation of Art. 7(1) CISG *in fine* would support such general scope of principle of good faith, referring to objective need to promote its observance among international traders – addressees of CISG, parties of sale contracts. The part of doctrine accordingly sees in Art. 7(1) CISG a basis of general duty to act in good faith. See e.g. Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 MINN. J. GLOB. TRADE 105–152 (1997). Pp. 138-141; Bianca and Bonell, *supra* note 39. Pp. 82-87; Kröll, Mistelis, and Viscasillas, *supra* note 29. P. 121. Contrary: E. Allan Farnsworth, *Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions and National Laws*, 3 TUL.J.INT.COMP.L. 47-63 (1995). Pp. 56-57.

[71] Schlechtriem and Schwenzer, *supra* note 35. P. 126; Kröll, Mistelis, and Viscasillas, *supra* note 29., P. 120.

[72] See an example of laconic characterization: *"Under this approach, good faith is merely a tool of interpretation at the disposal of the judges to neutralise the danger of reaching inequitable results."* Felemegas, *supra* note 39. P. 116.

[73] Bjørge, *supra* note 36. P. 65.

[74] *Id*. P. 68.

Considering my construction of the *implied purpose* of CISG presented in the previous parts of this thesis and presumed compatibility and complementarity of Art. 7(1) CISG and the interpretive provisions of Vienna Convention, I perceive the analyzed reference to good faith as a mirror image of general concept of Vienna Convention adjusted to the conditions of hybrid international instrument as CISG. Adding the *international trade* context to the good faith requirement, the CISG explicitly indicate, that *legitimate expectations* of international traders towards governing legal framework should be taken into account, or alternatively speaking, the *reasonableness* within the conditions of international trade should be considered while provisions of CISG are interpreted. In this respect, the rule at stake could be seen as an interpretive realization of the requirement for *substantively suitable* international sales law imposed under *implied purpose* of CISG as introduced in the previous section.

As argued above, the substantive suitability of sales law includes also the requirement of its *actuality*, the feature particularly desired in the dynamic environment of international trade, however hardly achievable by CISG adopted in the form of international convention, amendments of which are politically and practically an unfeasible option. The adaptability of the normative framework of CISG to new economic environment is therefore emphasized by many authors referring to CISG as *"living instrument"*[75], instrument which requires *"dynamic interpretation"*[76] inferring as the one solution the evolutionary interpretation under prescribed need to *promote the observance of good faith in international trade* under Art. 7(1) CISG[77].

[75] Bruno Zeller, *The Observance of Good Faith in International Trade* in *Andre Janssen & Olaf Meyer, CISG Methodology* (2009). P. 138.

[76] Michael Van Alstine, *Dynamic Treaty Interpretation*, 146 UNIV. PA. LAW REV. 687 (1998). Pp. 775 *et seq*.

[77] Kröll, Mistelis, and Viscasillas, *supra* note 29. P.120. From the perspective of CISG's legislative history, accordingly see the paraphrased contribution of Prof. Maskow, representative of German Democratic Republic, to hard discussion on a reference to the principle of good faith: *"Some reference to the need to observe the principles of good faith should be included in the Convention, in order to allow some flexibility in interpreting its provisions in the interests of furthering international trade."* United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980. Official records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees, A/CONF.97/19, *supra* note 23, P. 258.

An observant reader could, however, see the potential tension between the desired *adaptability* and *certainty* of interpretation of substantive rules of CISG, especially if the main task to guarantee the uniformity of interpretation is imposed on dispersed deciding authorities instructed to follow the quasi-precedent effect of previous caselaw. The doctrine explains the difficultly resolvable dilemma, to which a judge or an arbitrator is exposed in such case: *"Therefore, every time a judge presumes to progressively develop the Convention he threatens its uniform application."*[78]

Accepting the economic reasonableness and legitimate expectations of international traders on legal framework in the environment of the economic globalization as the essence of standard of good faith guideline under Art. 7(1) CISG, the reliable ascertaining of permanently developing content of this autonomous internationalized standard could be impracticable task for the most of decision-makers. The suggestions of commentators on appropriate sources for carrying the content out in particular case covering various *"usages and practices in several instruments of international contract law and widely used standard forms and trade"*[79] and even, *inter alia*, including principles *"in so-called international principles of contract law"*[80], are not, in fact, helpful enough to make situation clearer and simpler as well as better compatible with need of certainty of interpretation. The suitability of UPICC suggesting themselves to facilitate the task, which would for sure methodologically simplify the good-faith-compatible interpretation is fully dependent on their substantive qualities – the compatibility with actual background of international trade and the degree and the promptness of their adaptability to its changes.

[78] Olaf Meyer, *Constructive Interpretation – Applying the CISG in the 21st Century* in Janssen and Meyer, *supra* note 75. P. 321.

[79] Kröll, Mistelis, and Viscasillas, *supra* note 29. P. 124.

[80] Schlechtriem and Schwenzer, *supra* note 35. P. 128.

1.2.4. General observations: UPICC and the possible formal modes of their assistance within systematic interpretation of CISG

Previous subchapters, at the first sight concerning with too general and abstract ideas on interpretive regime under CISG, serves as a prerequisite research, which shows the opportunities and moreover the conditions under which the UPICC is employable as the interpretive assistance. The analysis of Vienna Convention and Art. 7(1) CISG in their relationship, which is characterizable in general as methodical development and adjustment of general rules of interpretation for specific international uniform instrument, leads to the knowledge, that use of UPICC as formally independent soft-law instrument should not be considered the separate, mandatory interpretive method contained in canon of interpretation of international treaties, even if the Art. 31(2) and 31(3) Vienna Convention is taken into account. The Principles basically (at least till now) has not qualified as related instrument (Art. 31(2)(b) Vienna Convention) or subsequent practice (Art. 31(3)(b) Vienna Convention) explicitly relevant for the interpretive process, because of their current controversial acceptance by a doctrine and a practice.

While direct reference to UPICC within the process of interpretation of CISG is not anticipated or prescribed by Vienna Convention (as well as CISG itself), the *possibility*[81] of an indirect use of them may be inferred on the grounds of interpretive guidelines[82] (or possibly designatable as desired interpretive achievements or aims) of Art. 7(1) CISG, that, as was shown, should be interpreted (considering *implied purpose* of CISG within teleological approach) in the way formally opening doors for the use of interpretive tool in *systematic mode of interpretation*, that

[81] In compliance with the expressed indication of Preamble of UPICC using the modal verb "may". See UNIDROIT - Principles 2010, *supra* note 10.

[82] Very helpful terminological distinction between interpretive guidelines (Art. 7(1) CISG) and interpretive methods (e.g. in Art. 31 Vienna Convention) offers a traditionally depictive German terminology using terms *Auslegungsziele*/*Auslegungsprinzipien* for rules included in Art. 7(1) CISG, while its stated, that this article is silent about *Auslegungsmethode*. See Janssen and DiMatteo, *supra* note 37. P. 52-53.

would functionally ensure their fulfilment. Such tool would have to be *persuasive* in this respect – it should have a formal as well as substantive qualities – e.g. stabilized content and at the same time a responsive adaptability, an objective substantive normative quality in the context of international trade etc. As it has already been repeated several times, the ultimate assessment, whether Principles can or even should be used as interpretive tool under Art. 7(1) CISG and related preliminary issue, why they are for this role particularly suitable (or, contrary, what are their drawbacks) is the subject of following chapter, while I should focus on the delimitation of potential, as it was referred to, *systematic interpretation* of CISG with assistance of Principles.

Talking about systematic interpretation, different aspects of this method could be meant, depending on the perspective of invoked system, on which background the interpretation should be done. Restricted systematic interpretation limit the system to the interpreted instrument itself, when some author in this respect named such approach illustratively as *"four corner"* interpretation.[83] Of course, such suggested meaning is the basic starting point that is undisputable, since interpretive rules of Vienna Convention themselves order to consider the context of interpreted terms, and therefore certainly applicable in the case of CISG[84], however with probably a little effect. The CISG, it may be argued, provide, actually, a fragmental normative framework limited explicitly within its regulatory scope as well as within the normative comprehensiveness of a formally covered scope. The CISG is metaphorically called *"bare bones"* in need of *"flesh"* to be effective,[85] as an illustration of insufficiency of CISG

[83] Zeller, *supra* note 6.

[84] Doctrine refers to such systematic interpretation as the traditional, undisputed method of *"intraconventional"* systematic interpretation in contrast with controversial *"interconventional"* interpretation seeking the system in the set of related international conventions. See Janssen and DiMatteo, *supra* note 37. P. 59.

The intraconventional interpretation is, after all, anticipated also in Art. 31(1) Vienna Convention, where reference to *context* of used terms is made.

[85] The presented metaphor was used by Prof. Kritzer, who saw the "flesh" needed by CISG's bones in UPICC, respectively in Principles of European Contract Law. See unspecified summarization of Prof. Kritzer's theory in John Y. Gotanda, *Using the Unidroit Principles to Fill Gaps in the CISG* (2007), https://papers.ssrn.com/abstract=1019277. (last visited Oct 28, 2016). P. 15.

itself, in many cases, to constitute the broader internal system for its effective systematical interpretation.

The second possible approach to a systematic interpretation extends its view to the system of law in its entirety, what is fully reasonable in coherent and comprehensive domestic legal system, but much more controversial in the system of international law.[86] The Principles, however are regularly designated as suitable instrument restating the general international contract law and accordingly the suitable backgrounding legal rules for systematic interpretation of international contractual issues of sales law as governed by CISG. Admitting such suitability for the sake of my analysis, there could be established three concrete modes[87] of employment of UPICC in systematic interpretation of CISG on the basis of a degree of formal and substantive overlap of their provisions.[88]

I. The interpretively problematic provision of CISG and black-lettered provision of UPICC are almost identical: although the assistance of UPICC is *prima facie* out of question, the feature of UPICC, that except black-lettered text includes also the authentic explanatory commentary clarifying the meaning of potentially unclear term, the employment of UPICC may be still interpretively contributive.

[86] The doctrine questioned the existence of higher coherent legal system of unified international private law: *"Unlike at the domestic level, however, at the international level there exists no international legislator and thus no legal order, which requires consideration of one statute's relationship to other statutes and interpretation of similar provisions in such a way to avoid contradiction."* Robert Koch, *The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, http://cisgw3.law.pace.edu/cisg/biblio/koch.html#* (last visited Feb 25, 2017). P. 199.

[87] The alleged practicality of each of mode is demonstrated in the chapter 3.

[88] For this purpose and at this point, the reference to results of comparative analysis of collective of jurist summarily presented by Prof. Kritzer is enough. See: Albert H. Kritzer, *General observations on use of the UNIDROIT Principles to inform as to the meaning of provisions of the CISG*, http://www.cisg.law.pace.edu/cisg/text/matchup/general-observations.html (last visited Dec 19, 2016). For more comprehensive comparative analysis of overlaps of provision of CISG and UPICC see for example: Flechtner, *supra* note 55. Pp. 176-181.

II. The interpretively problematic provision of CISG has the counterpart in UPICC, which is fully compatible but substantively more extensive and explanatory: the text of UPICC itself provide the elaboration on the unclear term of CISG.

III. The interpretively problematic provision of CISG has the counter-provision of UPICC adopting formally different solution: even in this case, in my opinion, the systematic employment of UPICC is not automatically ruled out. Contrary, the UPICC, in the extent of provisions dealing with issue at stake, may as context of provision of CISG help ascertain its meaning in the compliance with requirements of Art. 7(1) CISG, especially in the case of justified evolutionary interpretation overriding an outdated text of CISG in respect of reasonableness in the actual economic environment. Role of UPICC would be, nevertheless, excluded in the case, when concepts of CISG and UPICC would substantially contradict each other without the feasibility of mutual coherency in this respect.

Summarizing the potential methodological contribution of interpretive engagement of UPICC in relation to CISG, the idea may be simplified as following: the adjudicator facing the problematic task to interpret the unclear provision of CISG is given the additional interpretive material, that is presumably certain, stabilized, up-to-date and (usually) to the great extend systematized, mutually coherent. The internal coherence of such extended legal system, which implies also multiplied internal semantic links between provisions and used terms, allows to the adjudicator to assign to the unclear term or formulation a compatible meaning preserving this coherency. The adjudicator has to be aware of possibility of incompatibility of CISG and UPICC in minor aspects, that prevents described use of provisions of UPICC, and consequently he should address such examination to a process of an interpretation.

1.3. The interpretation of Art. 7(2) CISG: UPICC as a gap-filler?

The subject of Art. 7(2) CISG, the gap-filling procedure, is apparently interrelated with the issue of the interpretation of CISG specifically governed by Art. 7(1) CISG, however still procedurally different enough to deserve separated legal regime. The ultimate purpose of a supplementation is the same – to guide adjudicator towards ascertaining effectively applicable rule of law under CISG, which would comply, as it was concluded above, with purpose of the CISG (in the sense of the *implied purpose* which mediately ensure the fulfilment of CISG's explicit purpose) – but in contrast with interpretation, the adjudicator is in the case of gap on different starting point. There is not textual (no matter how ambiguous) basis as the primary clue for intended normative meaning and the adjudicator faces more opened but also a more complex issue of a supplementation requiring a different formal approach.

The Art. 7(2) CISG constructs the two-tier procedure of gap-filling and while the second step is more traditional one in international private law, the first, more favored one reflects the specific nature and unifying purpose of CISG. The procedure, according to which the normative gap within framework of CISG shall *"be settled in conformity with the general principles on which it* [CISG] *is based"*[89], through reference to *general principles* opens, *prima facie*, doors to a potential intervention of external normative instrument, especially, in contract with unlike interpretive guidelines of Art. 7(1) in this respect requiring a more fundamental and abstract reasoning. Art. 7(2) therefore offers obvious arguments for proponents of supplementary role of UPICC, anticipated by their Preamble.[90]

[89] Full verbatim of Art. 7(2) CISG (English authentic version): *"Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."*

[90] See subchapter 1.1.

Nevertheless, the doctrine is divided on this issue and also the unfavorable position grounded on the textual interpretation of other parts of provision is held on formal admissibility of employment of UPICC as gap-filler. In this subchapter, therefore, these doctrinal approaches are confronted with my own conclusions on an interpretation of Art. 7(2) CISG making use of textual, historical and in previous subchapter developed teleological interpretation, in order to assess this issue and confirm or refute the first hypothesis with regard to supplementation. Alike in the subchapter devoted to interpretation, the potential operation of UPICC as supplementary tool in relation to CISG is depicted, since the Art. 7(2) CISG is tacit in regard of this matter.

1.3.1. The interpretation of the *"general principles on which it* [CISG] *is based"*: Shut doors to UPICC?

The plain text of the English version of Art. 7(2) that, on the one hand, raises the hope about possibility to use UPICC as supplementary assistance, is, on the other hand, simultaneously the ground for the weightiest counter-argument. The opponents emphasize the element of provision specifying the usable *"general principles"* as these, that underlies the CISG itself. The wording "*on which it* [CISG] *is based*" is interpreted in a narrow notion as the prohibition to recourse to any external sources (like Principles) in order to ascertain general principles under Art. 7(2) except CISG itself.[91] As one eminent commentator held in this respect:

> These principles may correspond to "external" general principles of international commerce (as, for example, the aforementioned UNIDROIT Principles); but even in this instance, the principles to be applied to fill a gap are always, unless otherwise agreed by the parties, those upon which the Convention is based. Other "general principles", regardless of their form, may,

[91] Schlechtriem and Schwenzer, *supra* note 35. P. 138; Flechtner, *supra* note 55. Pp. 189-197. For similar opinions see also Ulrich Drobnig, *The Use of the UNIDROIT Principles by National and Supranational Courts* (paper presented at the colloquium on "Les contrats commerciaux et les nouveaux Principes UNIDROIT: Une nouvelle lex mercatoria?", organized by the ICC Institute of International Business Law and Practice in Paris, 20-21 October 1994), at page 8 cited in Felemegas, *supra* note 39. P. 174; Rolf Herber, *„Lex mercatoria" und „Principles" – gefährliche Irrlichter im internationalen Kaufrecht*, 3 INT. HANDELSR. 1–10 (2012). P. 9.

> if necessary, serve to corroborate a solution based on the Convention's general principles or to interpret the latter. They cannot, however, be used as an independent source of gap-filling.[92]

This type of argument is hardly surprising for an observant reader, who might notice the similarity of presented argumentation with refusal of employment of UPICC within interpretation of CISG due to the prescribed regards to international character of CISG[93], since both arguments drew their rationale form the idea of separated, self-contained and self-sufficient legal regime of CISG.

This argument is often accompanied by argumentation of historical interpretation according to which the drafters of CISG in 1980 were hardly able to contemplate the contemporarily non-existing instrument like UPICC and consequently to design the Art. 7(2) in the way admitting use of such external general rules.[94]

These arguments were denied as *"formalistic"*[95] from the side of a camp of scholars more favorable to UPICC and, in my opinion, such adjective is a fitting designation of their nature. Objections against restrictive notion of Art. 7(2) CISG are twofold: firstly, unfavorable authors invoke just one of the possible meaning of "*on which it* [CISG] *is based*", moreover the most extremely restrictive one, while there is no plain textual justification for excluding a possible interpretation in the way, that would admit the external assistance in determination the solution conforming with the general principles underlying CISG.[96] This argument may also be a result of misinterpretation and textual oversimplification of Art. 7(2) CISG, illustratable on the

[92] Franco Ferrari, *General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 Unidroit Conventions*, 2 UNIF. LAW REV. 451–473 (1997). P. 460.

[93] See *supra* note 54. An expressed link between "autonomous" arguments on inadmissibility of UPICC under Art. 7(1) and 7(2) CISG see Schlechtriem and Schwenzer, *supra* note 35. P. 137-138.

[94] See e.g. Flechtner, *supra* note 55.P. 190; Peter Huber, Alastair Mullis, *The CISG: A New Textbook for Students and Practitioners* (2007). P. 36; and also Fawcett, Harris, and Bridge, *supra* note 32. P. 934.

[95] Bonell, *supra* note 25. P. 232.

[96] Accordingly see Basedow, *supra* note 36. P. 136.

statement of Lucia C. Sica: *"In this sense, the external conflicting principles of the UNIDROIT Principles should not be applied to a contract under the CISG, due to the fact that they are not 'principles in which the Convention is based'."*[97] A confusion of potentially gap-filling substantive provisions of UPICC and general principles on which the CISG is based and a consequent refusal of feasibility of their employment as gap-filler is actually a double mistake, because provisions of UPICC similarly as provisions of CISG are not usually a directly expressed legal principles, but rather they are rules of law (see first sentence of Preamble of UPICC calling them, in contrast with their title[98], *"general rules"*), that reflects and accommodate one or even several principles (that are arguably common to UPICC and CISG) in certain balance[99]; and at the same time, Art. 7(2) under textual interpretation does not anticipate the gap-filling solution to be provided directly by general principles, but in conformity with them. Shortly, even accepting the presumption of a need to consult primarily the substantive rules of CISG for the referred *general principles*, this presumption does not imply the procedural impossibility to consult, in order to substantively supplement CISG a different relevant instrument, particularly UPICC.

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[97] Lucia C. Sica, *Gap-Filling in the CISG: May the UNIDROIT Principles Supplement the Gaps in the Convention?*, 1 NORD. J. COMMER. LAW 2–28 (2006). P. 23.

[98] On the inconclusiveness of a denomination "principles" in the English version of the title of UPICC see, e.g. Vogenauer and Kleinheisterkamp, *supra* note 63. P. 41.

[99] While common language uses 'rules' and 'principles' interchangeably, a legal theory very strictly distinguishes them from each other. Trying to offer the own differencing definition, legal principles may be characterized as the highly abstractive maxims describing morally, economically, or legally desired standards of legal regulation, however of problematic normative value, because of their inherent vagueness and abstractness. The rules of law are their further evaluation, prescribing the concrete rights and duties of addressees, taking into account the pursued policy and consequent desired balance of fulfilment of the legal principles. See in this respect also analysis of Lucia C. Sica referring to classic works of R. Dworkin: Sica, *supra* note 97. P. 8. See also Klaus Peter Berger, *The Creeping Codification of the New Lex Mercatoria* (2010). Pp. 201-202.

The early perceived danger of practicability of a gap-filling trough vague general principles may be demonstrated on warning of Czechoslovak representative, Mr. Kropač participating on the Vienna conference. See: *United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980. Official records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees, A/CONF.97/19, supra* note 23. P. 255.

The counter-argument may be brought even further, and another issue might be opened, namely, what is the scope of denominated general principles and whether Art. 7(2) actually requires so close link between a referred *general principle*s and CISG, that *"particular general principle must be moored to premises that underlie specific provisions of the Convention"*[100], or, in contrast, this wording may lead to broader category of legal principles covering also principles of contract law, that are not explicitly inferable from provisions of CISG, but from the perspective of their scope still relevant for the application of an instrument of CISG's nature (international unification of contractual aspects of sales law) – a supplementation of CISG would become released from the tight boundaries of the text of CISG itself and consequently more opened to external sources, mainly to instruments legitimately reflecting the systematically underlying *internationalized principles of contract law*[101], what arguably UPICC are.[102] A support for more loosen tie between black-letter of CISG and general principles under Art. 7(2) may be deduced from its wording in French (besides English version another authentic version of CISG), that in contrast to English "*is based*" contains *"dont elle s'inspiré"*[103], what

[100] John Honnold, *Uniform Law for International Sales Under the Nineteen Eighty United Nations Convention* (1999). P.108 as cited in Gotanda, *supra* note 85. P.17.

[101] Even advocates of broader interpretation of *"general principles"* do not agree what is the extent of such principles and aspects qualifying a general principle as an *internationalized principles of contract law*, particularly whether it should be ascertained on the basis of a comparative method (*ius commune* approach) or as the element of modern *lex mercatoria*. This distinction apparently does not affect the feasibility of UPICC as gap-filler of CISG, because both approaches state that UPICC qualify for this role. Affirmatively about the derivative normative authority of Principles without distinguishing their *ius commune* or *lex mercatoria* nature see Joseph Lookofsky, *The Limits of Commercial Contract Freedom: Under the UNIDROIT "Restatement" and Danish Law*, 46 AM. J. COMP. LAW 485–508 (1998). P. 491. Further see (for *ius commune* approach), e.g. Felemegas, *supra* note 39. Pp.162 *et seq*. For contrary opinion (against *ius commune*) see, e.g. Enderlein and Maskow, *supra* note 36. P. 60. For *lex mercatoria* approach see, e.g. Marlene Wethmar-Lemmer, *The Vienna Sales Convention and Gap-Filling*, 2012 J. SOUTH AFR. LAW 274–300 (2012). Pp. 334 *et seq*.

[102] For the according opinions see Ulrich Magnus, *General Principles of UN-Sales Law*, 3 INT. TRADE BUS. LAW ANNU. 33–56 (1997). P. 38-39; Herbert Kronke, *The UN Sales Convention, The UNIDROIT Contract Principles and the Way Beyond*, http://www.cisg.law.pace.edu/cisg/biblio/kronke.html (last visited Feb 26, 2017); Felemegas, *supra* note 39. P.156.

[103] Full verbatim of Art. 7(2) CISG (French authentic version): *"Les questions concernant les matières régies par la présente Convention et qui ne sont pas expressément tranchées par elle seront réglées selon les principes généraux dont elle s'inspire ou, à défaut de ces principes, conformément à la loi applicable en vertu des règles du droit international privé."*

would indicate not only not closed doors to UPICC, contrary, the widely-opened gates (under condition of their substantive *persuasiveness*).[104]

Neither the historical argument is convincing, partially lacking real weight, since, as was mentioned above, in Art. 7(2) CISG referred general principles should not be identified with provisions of UPICC itself, which, contrary, may reflect and elaborate these principles, and secondly because it cannot stand in confrontation with the teleological interpretation of Art. 7(2) CISG[105], when the fulfilment of the *implied purpose* of CISG, presented in previous subchapter, putting specific requirements (*neutrality, certainty, substantive suitability*) on the substantive regime of CISG, is naturally determinative for gap-filling, too. Under such considerations, that assume, *inter alia*, the evolutionary, dynamic[106], and also autonomous (neutral)[107] approach to regime of international sales law under CISG, the idea, that objective

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The notification of a "weaker" textual meaning of the French version of Art. 7(2) CISG in comparison to the English version see also Magnus, *supra* note 102. P. 38.

[104] Accordingly see statement of S. Salama:

> Interpreting "general principles" as only those derived from the Convention is too narrow of a construction. The clause "on which [the Convention] is based" does not preclude principles that are not expressly or even implicitly stated in the text of the Convention. Moreover, the rule does not even explicitly reference to drafters' intent. Therefore, there is no constricting rule that the interpretation must be bound to the specific intent of the drafters. The interpretation of Article 7(2) should not be too rooted in formalism but should look to the Convention's broader purposes as espoused in Article 7(1).
>
> Shani Salama, *Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, an Inter-American Application*, 38 UNIV. MIAMI INTER-AM. LAW REV. 225–250 (2006). P. 241.

[105] The Art. 7(1) CISG governing the interpretation of substantive provisions of CISG should not be directly applicable *in stricto sensu* to the interpretation of 7(2) CISG, however, since the aim of interpretation and gap-filling is in relation to substantive regime on international law under CISG the same, the idea of implied purpose of CISG (relevant within teleological interpretation of CISG provisions generally) reflected in Art. 7(1) CISG expressly imposes on supplementation similar requirements as listed in Art. 7(1) CISG. See section 1.2.2.

[106] For example, Prof. Viscasillas claims about interconnection between the purpose of Art. 7(2) CISG and its flexibility: *"Far from being a disadvantage, the vagueness of the content and enumeration of the general principles is compensated by the flexibility and adaptability of the Convention provisions to permeate new general principles as the study and applicability of Convention grows."* Kröll, Mistelis, and Viscasillas, *supra* note 29. P.137.

[107] Seeking autonomous outcomes of the process of gap-filling as the prerequisite of a uniformity of the legal regime within the scope of CISG is evident from the two-tier structure of Art. 7(2) CISG, when the solutions based on the national law determined by rules of private international law are for supplementation only last resort, because such particularization of gap-filling would jeopardize the general unifying aim of CISG and actually would cause effective additional (tacit) limitation of its scope, since a recourse to a national law under Art. 7(2) would equal to solution explicitly excluded from the scope of CISG. As John Felemegas noted in "dramatic" language: *"(...) any resort to the rules of private international law would not only represent regression into the uncertainty of choice of law rules and the escalation of transactional costs for litigants, but it would also spell the end of the*

impossibility of drafters to anticipate the future existence of instrument possibly comprehensively implementing *internationalized general principles of contract law* compatible with CISG (UPICC) causes their inadmissibility as the supplementary tool and accordingly narrows down the scope of general principles under Art. 7(2) leaving behind more room for undesired triggering of second step of supplementary procedure, is hardly justifiable. However, Gotanda apparently conceived by historical argument of opponents in respect to admissibility of Principles as supplementary tool, still tries defends the restrictive perspective on scope of usable general principles as these clearly inferable from the text of CISG by this not unreasonable note:

> In my view, if the drafters of the CISG wanted the Convention to be interpreted according to general principles of international commercial contract law, they could easily have said so. It seems inappropriate to reach that result through a strained reading of CISG Article 7(2).[108]

The *travaux préparatoires* of CISG, however, reveals, that drafters within discussions dealt mostly with conceptual issues of the provision on gap-filling and actually did not devote much deliberations to the specific wording of first, autonomous part of procedure prescribed in Art. 7(2) CISG[109], that substantively adopted the wording of corresponding Art.7 of ULIS from

practical value of CISG as a uniform code." Felemegas, *supra* note 39. P.144. Accordingly see: Garro, *supra* note 4. P. 1156; Koneru, *supra* note 70. P. 122.

The uniformity and the need to avoid a recourse to domestic laws for supplementation of CISG has been emphasized also in practice as the main argument for employment of UPICC as a gap-filler:

> Such UNIDROIT Principles also appear applicable to those matters which are governed by the CISG but not expressly settled by it since Article 7(2) of the CISG provides that they should be settled in conformity with the general principles on which the CISG is based. Among these principles, is the need to promote uniformity in the application of the Convention (Article 7(1)), which is more likely to be fulfilled by application of the UNIDROIT Principles than of any domestic law.
>
> Arbitral award (International court of arbitration of ICC) ICC 11638, 2002, (unknown parties), UNILEX ID: 1407, http://www.unilex.info/case.cfm?id=1407 (last visited Dec 5, 2016).

[108] Gotanda, *supra* note 85. P. 17.

[109] See *supra* note 67.

1964[110], when the notion of international commercial contract law was quite an exotic term without todays connotations. After all, the same could be said about situation at the time of adoption of CISG itself and the resulting contemporary formulation of Art. 7(2) is understandable, albeit not an argument against its evolutionary interpretation justified by a development in this area.

Obviously, I am forced to refuse the validity of arguments intended to rule out the possibility of supplementing the CISG trough provisions of Principles. Basically, meaning of Art. 7(2) CISG under proper interpretation does not unequivocally endorse such conclusions. However, the employment of UPICC is still only *possibility*, and despite Art. 7(2) does not close the doors to UPICC, it does not expressly invite them in via explicit reference. Similarly, as I conclude in previous subchapter in respect to interpretive assistance of UPICC, a legitimacy of their applicability depends on their substantive quality – a *persuasiveness*, in this case, on the fact, whether UPICC shares underlying principles with CISG (what is minimal qualification if the "*general principles on which it* [CISG] *is based* are interpreted in most restricted, internal meaning) or they reflect internationalized general principles of contract law (what is qualification if the more extensive interpretation is favored under whatever justification – *ius commune* or *lex mercatoria* approach), what is, inter alia, the subject of following chapter.

[110] Full verbatim of Art. 17 ULIS (Uniform Law on International Sale of Goods): *"Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based."*

The first substantively same provision on supplementation of legal regime autonomously may be even tracked further to history, to the first draft of Uniform Sales Law of 1935 and the author, Ernst Rabel, justified such concept by a need of uniformity and saw only possibility in general principles resembling *principes généraux* as the source of international public law, which could be established by comparative method of national laws. See: Magnus, *supra* note 102. P. 35-36 and there cited Ernst Rabel, *Der Entwurf eines einheitlichen Kaufgesetzes* (1935). Pp. 1 *et seq*.

1.3.2. General observations: The methodology of the Principles' application as a CISG's gap-filler

Since I concluded that UPICC are a *possible* (formally admissible) supplementary tool in respect of CISG and under the presumption (tested in chapter 2), that they are furthermore legitimate and *persuasive* instrument in respect of such role, another step should be to dedicate some room to methodological issues of Principles' employment generally, what is the matter often ignored by jurisprudence, unlike to issues of legal admissibility or doctrinal suggestions of their concrete gap-filling use. The particular focus to this matter may be perceived surprising, since, unlike in the case of various methodological modes of an interpretive assistance of UPICC (section 1.2.4), where the complex systematic and contextual considerations are taken into account, a process of a gap-filling through UPICC seems to be very evident and simple.

For clarification of this first (and most obvious) methodological aspect, I jump to the intermediate step in the sequence of an ordinary procedure of a gap-filling[111]. A determination of supplementary rule of law preceding its ultimate application, respectively an interpretation and subsequent application, have been in general theory of a supplementation of CISG under its Art. 7(2) extensively discussed, usually with conclusion consisting in more or less elaborated catalogues of general principles underlying the CISG[112], that were suggested to be utilized in

[111] The simulation is built on the abstract model of supplementary procedure of the sequence as following: a gap identification – a determination of a supplementary provision – (an interpretation of supplementary provision) - application of a supplementary provision.

[112] For variously extensive catalogues of inferred *general principles on which the CISG is based* applicable under Art. 7(2) CISG for supplementation see [4 general principles] Albert H. Kritzer, *Guide to practical applications of the United Nations Convention on Contracts for the International Sale of Goods* (1989). Pp. 79-84 as summarized in Camilla Andersen, *General Principles of the CISG -- Generally Impenetrable?*, http://www.cisg.law.pace.edu/cisg/biblio/andersen6.html (last visited Oct 28, 2016); [26 general principles] Magnus, *supra* note 102. P. 41-52. See also: Ferrari, *supra* note 92. Pp. 360 *et seq.*; Koneru, *supra* note 70. Pp. 115-121; Andre Janssen, *The CISG and Its General Principles* (2009), https://papers.ssrn.com/abstract=1595989 (last visited Feb 25, 2017). Po. 11-21.

Many of deduced general principles by their definiteness and their single-provision origin resemble rather concrete rules than principles as legal theory distinguishes them (see *supra* note 99), e.g. the principle of a place of a performance of monetary obligation recognized by practice (See UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, *supra* note 50. P. 44). Their application functionally and methodologically corresponds with an analogical use of provisions of CISG, what is a mean of a supplementation explicitly not anticipated, however from the teleological and systematical perspective reasonable.

subsequent ascertaining of *ad hoc* supplementary rule. The doubtlessly complicated task of normative deduction of rule from vague and in many cases questionable general principles is circumvented in the case of the engagement of UPICC as the gap-filler, because they, despite their soft-law character and the title, contain mostly normatively and concretely formulated rules of law suitable, "pre-prepared" (after proper interpretation) for an immediate application. The potential facilitation of final step of a gap-filling for adjudicator is, therefore, obvious.

The most of commentators see the problematic aspect of Art. 7(2) CISG also in its initial part governing the scope of applicability of the prescribed procedure that is formulated as following: *"Questions concerning matters governed by this Convention which are not expressly settled in it* (…)". The doctrine has developed, on the basis of this provision, CISG-specific concept of *internal gaps* that refers to *questions governed, but not settled* as opposite to *external gaps* covering the issues excluded from the scope of CISG, or, persisting the language of Art. 7(2) – *questions not governed and therefore no settled*.[113] The Art. 7(2) CISG is naturally inapplicable on the *external gap*, because such issue was deliberately excluded from the unified legal regime of international sales law in CISG and such issues seem to be, *prima facie*, easily determinable under Art. 1-5 CISG.[114] However, there are only rarely easy answers in law and therefore, except the fact, that interpretation of the articles delimiting the scope of CISG is in practice a

Despite the attractivity of the topic, it does not fall under the scope of this thesis. For general overview of the problem of an analogical use of provisions of CISG as the supplementary method see e.g. Jan Hellner, *GAP-FILLING BY ANALOGY: Art. 7 of the U.N. Sales Convention in Its Historical Context*, http://cisgw3.law.pace.edu/cisg/text/hellner.html (last visited Dec 3, 2016).

[113] A terminology in respect of designation of these unsettled issues is not unified and except frequently used terms referred in the text, there are also other suggestions: *"intra legem gaps (lacuna)"* v. *"praetor legem gaps (lacuna)"* (used e.g. in Ferrari, *supra* note 92.) or obvious/apparent gaps v. hidden/concealed gaps (used mostly in German jurisprudence, see Bruno Zeller, *Damages Under the Convention on Contracts for the International Sale of Goods* (2009). P.28 and there cited Diedrich, *supra* note 35. P. 303), that can be used interchangeably.

[114] The issue of a validity of contract is in its entirety excluded from the scope of CISG (Art. 4(a) CISG), therefore, despite UPICC contains provisions governing some aspects of validity, they are not applicable to fill this CISG's external gap, no matter how some authors would appreciate such assistance. See e.g. Bridge, *supra* note 16. P. 628.

traditional interpretive conundrum[115], the problems arise also in cases, when certain issue is not expressly excluded from the CISG's scope, but simultaneously it is left unsettled by drafters of CISG, on one hand, doing so deliberately, because of impossibility to draft the legal solution generally acceptable or because of unwillingness of some representatives to accept some solution non-corresponding with their domestic legal tradition, as the *travaux préparatoires* reveal[116], or, on the other hand, just unaddressed without any explanatory indication[117].

Problem, whether these issues fall under the scope of CISG, respectively if they fall, whether there are general principles under Art. 7(2) CISG making possible to formulate the rule governing these situation, has not been answered satisfactorily neither by a doctrine[118], nor by a practice and adjudicator facing eventuality of triggering Art. 7(2) is already imposed to uncertainty of preliminary issue, whether the Art. 7(2) CISG is applicable after all, within the first step of a supplementary procedure.

Methodologically, a use of Principles could be helpful also in this respect. As Prof. Magnus said: *"Very often there will be a correlation between the existence of general principles on the one hand and the application of the convention on the other hand, in that the convention is applicable if and because general principles can be ascertained."*[119] Trying to reformulate this statement and apply it on the employment of UPICC as a gap-filler (what was admitted also by Prof. Magnus[120]), I can claim, that where potential gap can be filled on the basis of Art. 7(2)

[115] E.g. the scope of term "goods" under Art. 1 CISG in relation to documentary sales (see, e.g. Schlechtreim, *supra* note 61. Pp. 282-284.) or of term "preponderant" under Art. 3(2) CISG.

[116] Most prominent and accordingly controversial illustration of such issues are the interest rate in the case of a default with a monetary obligation (Art. 78 CISG). Arguably, also a concept of hardship, that is not explicitly addressed in CISG, could be subsumed under this category, too.

[117] E.g. set-offs, penalty clauses, assignments, payment conditions (currency, form of payment etc.).

[118] A helplessness of doctrine trying to uniformly determine fillable *internal gap* is evident, for example, in attempts of Prof. Andersen: *"Something more than not excluded from the CISG, and something less than explicitly solved by a provision."* Andersen, *supra* note 112.

[119] Magnus, *supra* note 102. P. 38.

[120] *Id.* Pp. 54-55.

CISG (therefore also through UPICC), it is most likely, that it is real *internal gap*. Such initial "reversed" consideration is justifiable as in compliance with a desired priority of autonomous gap-filling before the recourse to a non-uniform domestic law, however alone, naturally, it is not sufficient to achieve correct assessment and critical approach must take a place.

As some authors indicates, except external gaps, especially deliberated silence of CISG on some issues should be seen as their intentional exclusions from its scope, not as the *internal gaps*, and therefore their regime should depend on applicable rules of private international law.[121] I am more cautious about such categorical statements based on historical interpretation[122] and taking into account the need to fulfill *implied purpose* of CISG under teleological method, I admit, in order to achieve under Art. 7(2) the uniform, up-to-date and predictable results, the possibility to override these historical concerns of CISG's drafters and fill the gaps through UPICC, where these gaps are inferable from existence of particular Principles' provision reflecting development resulted to an establishment of a stabilized and generally justified solution.[123] This, on the other hand, means, that that gaps, that are still ill-suitable for a unification, should remain treated as external gaps or no gaps.

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[121] See Bianca and Bonell, *supra* note 39. P. 75 as paraphrased and cited in Felemegas, *supra* note 39. P. 150. Accordingly pointing out the possibility of the CISG's silence or explicit solutions to be perceived as an implicit scope exclusion, respectively as a n exhaustive legal solution without gap see Ziegel, *supra* note 39.

[122] See section 1.2.2.

[123] Contrary to Bonell's suggestions on implied exclusions from the scope of CISG of issues unaddressed by CISG (*supra* note 121) consult also the opinion of Prof. Garro:

> Moreover, the CISG fails to indicate which provisions are the "general principles" on which it is based. Be this as it may, there is no question that there are a great number of issues arising from international contracts for the sale of goods that are not expressly settled by the CISG. It is conceivable to interpret the failure to address a given issue as an intention of the drafters to exclude it from the scope of application of the CISG. A more realistic explanation of that omission is the absence of consensus in UNCITRAL as to whether a particular rule or set of rules should have been incorporated into the text of the CISG. This perception leads one to visualize the UNIDROIT Principles as a component part of the "general principles" underlying the CISG. As long as the UNIDROIT Principles provide a solution to issues that may conceivably fall under the scope of application of the CISG, they should be used to supplement all questions regarding the formation, interpretation, content, performance, and termination of contracts for the international sale of goods.
>
> Garro, *supra* note 4. P. 1156.

In any case, Principles, under condition of their *persuasiveness* as reflection of *internationalized principles of contract law*, offer an assistance, the welcomed indicative starting point for the determination whether some issue is internal gap eligible to be filled under Art. 7(2) CISG, what might a helpful contribution to a desirable elimination current high degree of uncertainty in this respect.

A simulation of potential mode of use of Principles within procedure of gap-filling reveals, that adjudicators could deem Principles helpful in substantially complex procedure of supplementation[124], firstly, in the stage of verification of an existence of the internal gap as well as within a determination of the applicable supplementary rule. As suggested above, the adjudicator favorable to UPICC could recourse to them from the beginning of the supplementary procedure till the very end of application, while his direct considerations on the basis of CISG itself would be practically quite limited to the final checking of a potential internal gap determined on the basis of UPICC (an examination of available historical justification of a gapfullness of CISG in this respect in confrontation of a development of *internationalized general principles of contract law*), respectively, in the case of a need, within the interpretation of the ascertained rule of law. This fact means a significant departure from the original idea of autonomous legal regime of international sales law of CISG and supplementing through general principles underlying CISG. Moreover, the procedure, as described above, is not capable to prevent potential counterproductive results, when mechanical implementation of rules contained in Principles even into the correctly found *internal gap* would cause systematical incoherence and consequential substantive inconsistencies in the legal framework endangering its suitability in the international trade environment.

[124] See more in chapter 2.

Doctrine recognizes and addresses these concerns. One camp of authors perceives such danger as essential and their argumentation is conducted in the more fundamental and preliminary dimension of legal admissibility of use of Principles[125], eventually they admit the "corroborative" relevance of UPICC in respect to CISG and accept as reasonable a possibility to test the results of application of rules of CISG by provisions of UPICC[126]. The effect of such final testing however stayed unexplained and therefore it is not likely that the discrepancies would justify subsequent preference of Principles' solution over one grounded exclusively on the content of CISG.

On the other side of imaginary scale, there is perhaps the most enthusiastic proponent of UPICC as a gap-filler, relying on their suitability, that evidently resigns on the need to methodologically test the outcomes of their employment.[127]

The other scholars, trusting more to the legitimacy of UPICC as the source of rules based on general principles under Art. 7(2) CISG, look for methodological guarantees. One of more cautious suggested modes of a supplementary interoperability of the CISG and the UPICC is introduced by Professor Viscasillas, that approaches the UPICC as the supplementary/interpretive tool more carefully, admitting their engagement in the procedure under the Art. 7 (2) CISG only in the situation, where the CISG itself and its underlying principles do not provide any clue for settlement of interpretation issues or gaps of CISG[128].

[125] See *supra* note 91.

[126] Franco Ferrari, *Gap-Filling and Interpretation of the CISG: Overview of International Case Law Actualites - Conventions Internationales*, 2003 INT. BUS. LAW J. 221–239 (2003). P. 230.

[127] Garro, *supra* note 4. P. 1154.

[128] Pilar Perales Viscasillas, *UNIDROIT Principles of International Commercial Contracts: Sphere of application and general provisions*, 13 ARIZ. J. INT'L & COMP. LAW 381-441 (1996). P. 404. Similarly see Zeller, *supra* note 6.

Against such suggested mode may be argued, that explicitly contradicts the wording of Art. 7(2) CISG, which does not recognize any semi-step between the preferred solution on the basis of principles underlying CISG and a recourse to applicable domestic law.

Because of an authority of his author influential concept of co-application of UPICC and CISG under its Art. 7(2) CISG is presented by Professor Bonell, also seeking the *correct solution between two extreme positions.* He presumes undoubted suitability of UPICC to be applicable in such cases as the default rule, however with the fulfilled precondition (prior test) of compatibility (or rather non-contradiction) of provisions of UPICC contemplated to be applied with the general principles of CISG: "*The only conditions which need to be satisfied are that […] the relevant provisions of the UNIDROIT Principles can be considered an expression of – to use the language of Art. 7(2) CISG – the "general principles on which [the Convention] is based."*[129]

All presented theoretical concepts (except very extreme opinion of Prof. Garro) impose on an practically simplified employment of Principles within supplementary procedure some "conditions precedent", either a preliminary attempt to resolve the gap independently through CISG itself (Viscasillas), or a prior test of compatibility of provision of Principles with general principles under Art. 7(2) CISG (Bonell), making a gap-filling in this way more burdensome.

I would like to, therefore, introduce to a reader a slight evolution of Bonell's *only-condition approach*, presented by Jürgen Basedow, who sees as proper method of the supplementation of CISG thorough UPICC in the rebuttable presumption, that latter instrument contains the *"general principles of international commercial contracts"* primarily applicable to supplement CISG, while only incompatibility of an outcome with provisions of CISG would disqualify Principles from their gap-filling role.[130]

Considering the formal legal admissibility of UPICC as gap-filler, presuming their persuasiveness legitimizing such employment, however being aware of dangers of exemptional

[129] Bonell, *supra* note 25. P. 233.

[130] Basedow, *supra* note 36. P. 138.

potential incompatible outcomes, I can conclude, that in order to make them effective assistance only Bonell' s and Basedow's methodological concepts are acceptable. Both authors introduce to a supplementary procedure using Principles to fill internal gaps of CISG (in every aspect methodologically simplified) an additional check preventing undesirable outcomes, that are functionally similar and only slight procedural difference can be recognized. As my personal assessment, I would favor a Prof. Basedow method, which indicates, that adjudicator would avoid the need of a difficult prior ascertaining of general principles under Art. 7(2) CISG as the testing benchmark for applicable supplementary provision of Principles, but some, as I interpret it, more intuitive posterior check of a potential manifest substantive incompatibility with CISG should be carried out. According to this primary check, a deeper analysis and an eventual refusal of employment of an employment of Principles could take a place. Personally, I consider this methodology the one, that preserves the inherent procedural simplicity of a recourse to UPICC in the greatest possible and justifiable extent, while prevents the undesirable outcomes.

1.4. The preliminary conclusions: The legal admissibility

The first step on the path towards an ultimate answer about an operability of UPICC as the tool to interpret/supplement CISG has been done – the questionable legal admissibility of this Principles' purpose has been examined. With what result?

The analysis of a feasibility of interpretive assistance of Principles has been made more difficult because of diverging opinions on the general interpretive regime of provisions of CISG. In this respect, I needed to deal with some more fundamental and abstract issues of an applicability of Vienna Conventions, respectively issues of the traditional interpretive methods there prescribed, as well as with the according interpretation of guidelines included in Art. 7(1) CISG. With the emphasis on the teleological interpretation, that has been further elaborated to my concept of an *implied purpose* of substantive provisions of CISG, I have concluded, that, despite there is not an independent method invoking instruments like UPICC to interpret CISG, the interpretation of Art. 7(1) functionally opens the doors to their application. The known formal counterarguments based on the text of Art. 7(1) have been interpretively refuted as unjustified and contradictory to purposes of CISG, however, the issue of admissibility is not answered entirely yet, since they need to functionally qualify for such role on the grounds of their formal and substantive qualities. The issue of legal admissibility is apparently interdependent with the issue of persuasiveness and desirability of employment of UPICC, what are subjects addressed in the chapter 2 of this thesis.

The same, could be said in respect of admissibility of a Principles' role of gap-filler of CISG. With support of a part of a doctrine, the formal objection based on the unreasonably narrow interpretation of Art. 7(2) CISG, especially the narrow meaning of *"general principles on which it* [CISG] *is based"*, and on the historical argument of the time gap between adoption of UPICC and CISG, has been clearly denied, however the admissibility has been found still only under the presumption of a reasonable justification of a link between provisions of Principles and

general principles under Art. 7(2) CISG, regardless of its advocated notion. Interim affirmative conclusion on the formal admissibility of Principles' interpretive/supplementary role in relation to CISG allows to take another step forward. An issue of a desirability of such use needs to be analyzed.

On the interrelated issue of procedural method of UPICC's use as an interpretive/supplementary tool, at this stage hypothetically, I have tried to simulate the concrete modes of their employment. In respect of an interpretation, functional mode of *systematic interpretation* within three specific modes differed due to the substantive and formal overlap of an interpreted provision of CISG and provisions of UPICC have been identified as feasible and helpful for interpretive efforts of interpreters. Within the gap-filling, as the multistep procedure, the analysis has been devoted to its concrete stages and method of use of Principles in some of them. Firstly, the potential twofold facilitating consequences of the recourse to UPICC as a gap-filler have been found: UPICC as the starting point for a gap identification and UPICC as the direct source of gap-filling provisions; secondly, the form, and the placement within the procedure of desirable step consisting in a check of a compatibility of a supplementary result (carried out via UPICC) with the legal framework of CISG has been assessed on the grounds of the evaluation of doctrinal concepts dealing with these aspects, favoring the Basedow's approach under which Principles shall be used as gap-filler with rebuttable presumption of their suitability and only posterior check is needed to test the compatibility of the solution with the CISG. Presented methodological simulations and analyses could be considered as the first step towards the evaluation of hypothesis No. 3 – proposal of methodology of UPICC's use, the step that may be adjusted according to the ultimate conclusion on admissibility of use of Principles as interpretive/supplementary assistance under analysis of the desirability of such use in following chapter, that could result to knowledge of additional procedural steps. My still more theoretically methodological construction is finally tested in chapter 3.

2. The UPICC as the tool for interpretation and supplementation of the CISG: The desirability

Presenting the conclusions on a formal admissibility of use of UPICC as interpretive/supplementary tool, I am leaving the field of a strict legal thinking and a formal legal interpretation of CISG and I am approaching the area of no lesser importance – the question of desirability to grant the UPICC opportunity to be used in such way. As I have already mentioned and repeated several times, the issues of an admissibility and desirability are not separated, contrary, there is the relationship of interdependency between them[131]. The favorable assessment of the admissibility of employment of Principles to interpret/supplement CISG presented in the previous chapter is based only on formal interpretive argument of a lack of impenetrable legal barrier, which would be inferable from the Art. 7 CISG, preventing such use. I have always tried to highlight the character of my preliminary conclusions as conditioned by presumption of *the persuasiveness* of UPICC or the desirability of their use. The content of the term desirability used in my thesis, which gets a specific meaning for the stake of my analysis of subject, must be specified and internally structured in sufficient manner before I start with their evaluation in respect of Principles *in concreto*.

One of the first notes, that simultaneously permeates this thesis is the soft-law nature of UPICC. Their Preamble itself admits only authority of Principles, which lack normative authority *stricto sensu*, based on their *persuasiveness*[132]. This the apparently correct general statement, that is relevant and valid also in the case of the use of Principles for a specific purpose that is subject to my research. However, what does it mean to be *persuasive* interpretive/supplementary tool, what is the quality justifying and legitimizing the, in fact, normative employment of this soft-law instrument within an application of the formal law as CISG? Moreover, what does make

[131] See subchapter 1.4.

[132] See supra note 17.

the Principles functionally particularly suitable to help interpret/supplement the CISG, or, contrary, what are their functional drawbacks in this regard? The answers to these questions about legitimacy and practicality of a recourse to UPICC are sought in this chapter, which is therefore divided accordingly to the subchapter dealing with a substantive desirability of use of UPICC – their substantive *persuasiveness* and legitimacy for this purpose, and to the subchapter focusing on the distinguished functional (un)desirability in the meaning of the advantages of engagement of Principles as an interpretive/supplementary assistance for CISG from the perspective of the purposes pursued by CISG itself (especially the *implied purpose* of substantive provisions of CISG, as was constructed and presented above[133]). The assessments on the issue of desirability not only result to examination of the second hypothesis of this thesis, furthermore, they also enable me to ultimately confirm or rebut the first hypothesis on admissibility of use of UPICC under Art. 7 CISG.

[133] See section 1.2.2.

2.1. The substantive desirability of UPICC to interpret and supplement CISG: UPICC as the CISG's general principles restatement, the restatement of *ius commune*, the restatement of *lex mercatoria*

Despite the doubtless legal competence and the eminence of the drafters of UPICC[134], the (deliberately) chosen form of their adoption does not possess the formal nature of source of law with inherent formal legal authority. This notorious fact gains the interestingness, since one realizes that the suggested employment of UPICC as the interpretive/supplementary assistance in respect of CISG, in fact, grants them an effective normative power (that is not founded contractually), not only indirect one in the case of the interpretation consisting in a help of a context Principles' provisions to ascertain the meaning of unclear CISG's term or whole provision, but even direct one in the case of gap-filling elevating and implementing a formally unbinding provision of UPICC to the applicable legal regime of CISG. Since issue of *direct* legal authority of UPICC is out of question, the issue of a necessary different justification of a legitimacy to seek the assistance from the soft-law instrument occurs inevitably. In a closer look this is the matter of nature of Principles – their substance, their aims and their normative sources and inspirations – basically, the matter of the linkage (substantive, purposive, generical) of UPICC with the specific formal legal order possessing the legal authority, from which the derivative normative authority would stem for Principles[135].

Such linkage has to be established and moreover, it cannot be whichever. As it is concluded in previous chapter, the Art. 7 CISG (while interpreted in the way employing the teleological interpretation on the basis of *implied purpose* of substantive provisions of CISG) tends towards

[134] Quite long list of members of UNIDROIT Working Group and other participants contains several most influential scholars in the field of international contract law coming from the different legal cultures and legal backgrounds, what brings to the group of drafters the diversity strengthening the outcome form the perspective of its acceptability, since it passes the scrutiny of different legal views. For the list of drafters and participant of drafting of last version of UPICC from 2010 see UNIDROIT - Principles 2010, *supra* note 10.

[135] Summarizing, it might be stated, that the recourse to Principles is not legitimate merely because they are UNIDROIT Principles of International Commercial Contracts, but because they are an accurate and explicit expression of a set of rules with normative authority, that are relevant from the perspective of interpretation and supplementation of CISG taking into account CISG's place in the international trade law.

the systematic perception of substantive provisions of CISG as it refers (arguably, but in my opinion most likely) to *trans-national* interpretation on the background of *trans-national* legal framework under directive to regard the *international character of CISG*; similarly the interpretation considering the *uniformity* of CISG's application anticipates some substantively appropriate common (and possibly systematically underlying) interpretive benchmark. Finally, the interpretive guideline to *observe a good faith in international trade*, may help to narrow down the character of suitable broader system to be international-trade specific and compatible. Accordingly, the gap-filling provision of Art. 7(2) CISG refers to some underlying system, albeit it uses quite ambiguous term of "*general principles on which it* [CISG] *is based" ("dont elle s'inspiré")*. Depending on its narrower of more liberal interpretation[136], this underlying system of principles and the gap-filling provision inferred form it, in every case, must be compatible with the CISG itself and comply with its purpose. An engagement of Principles as an interpretive/supplementary tool in relation to CISG under Art. 7 CISG consequently impose to their derivative normative linkage also the requirement to be qualified, concretely the UPICC should be linked with the law of *trans-national* nature, substantively suitable for governing international trade relationship (in respect of CISG including international sales transactions) and compatible with CISG as much as possible.

The drafters of Principles, represented by Prof. Bonell, were probably fully aware of the need to justify the purposes of Principles anticipating their normative role through establishing the presented linkage. The project of UPICC has been from the early stages of preparatory works designated as "restatement"[137] apparently taking the inspiration from American Restatements

[136] See section 1.3.1.

[137] See title of early Bonell's article in Bonell, *supra* note 24.

of the Law of Contracts, which because its, strictly speaking, formally non-binding nature may resemble UPICC.[138]

Talking about the UPICC as legal restatement, the natural question may arise – restatement of which necessarily pre-existing legal order? The doctrine, again, stayed divided on the issue of the characterization of a *trans-national law* restated in Principles. While the proponents of developing concept of new *lex mercatoria* appreciated Principles as its part and restatement, *ratio scripta*[139] of general rules of contracts of *lex mercatoria*[140], the other part of jurisprudence referred to Principles as the restatement of new global *ius commune*, of general principles of law, of *common core* of contractual laws.[141]

The difference between these concepts of an existence of a *trans-national* legal order could be perceived only as the matter of a theoretical interest, while under both doctrinal streams the sufficient, legitimizing linkage of UPICC with the *trans-national* law in the sense of advocated set of rules is established, however, in my opinion, this issue deserves to be assessed, because such assessment could help to clarify to what extent Principles are through this linkage justified to be used for their normative roles. In other words, whether the backgrounding law[142] is new

[138] It is more than probable, that the Principles' drafters were inspired also with the high persuasive authority and according frequent practical use of American Restatements, hoping to achieve the similar impact with Principles. For more about the primary inspiration of UPICC by American Restatements see Bonell, *supra* note 25. Pp. 9-11.

[139] Bonell, *supra* note 24. P. 874.

[140] Gesa Baron, *Do the UNIDROIT Principles of International Commercial Contracts form a new lex mercatoria?*, http://www.cisg.law.pace.edu/cisg/biblio/baron.html (last visited Oct 29, 2016).

[141] Michaels, *supra* note 54. Pp. 658, 661, 664.

[142] Prof. Michaels introduces the idea of backgrounding law, that he identifies with new *ius commune*, the set of rules that is not directly applicable, but only backs the formally binding law to provide it an interpretive or supplementary assistance in the case of uncertainty or lack of expressed settlement of certain issue. In the notion of Prof. Michaels, such rules alike the rules of pre-modern *ius commune* are not the product of legislator, but rather the product of scholarship, as the basic common legal benchmark, the legal point of balance, where no specific policy interest of legislator is considered, that makes it, from the perspective of Prof. Michaels, the sufficient normative interpretive/supplementary source (obviously generally, not only in relation to CISG) and UPICC, as its restatement, too. Despite the Michaels's idea of backgrounding law is not same as presented systematic perspective (Michaels does not build its concept on idea of a legal system with relationships between general and special law (*lex generalis - lex specialis*), the term of *backgrounding law* of CISG is very illustrative and accurate also in the case of every other doctrinal opinion (*lex mercatoria*, CISG-specific principles), therefore in this thesis it is used in such general meaning. See *Id.* Pp. 657 *et seq*.

lex mercatoria or new *ius commune* could be the aspect determinative for the matter whether UPICC are usable as an interpretive/supplementary tool in their entirety or just partially, what would lead to the additional question, how to determine the scope of their applicable provisions.

2.1.1. UPICC and a new *ius commune*

Starting with *ius commune approach*, one could distinguish more streams related in the basic idea of some international agreement on some aspects of law, especially contract law. The less sophisticated and more functionally oriented concepts are these following *common core approach*[143] and methodologically emphasizing the comparative method for an identification of such common core among relevant domestic law. These tendencies grounded on the partial comparative origin of CISG itself may be observed within the jurisprudence[144] as well as in the caselaw[145], where the assistance of comparative law is sought in order to determine the common core of most influential national laws for purposes of an interpretation or supplementation of CISG. On the other side, the more elaborated and abstract theories of new universal and global *ius commune* referring to historic tradition of the European medieval *ius commune*[146] are constructed as the alternative of emerging theories of new *lex mercatoria*, with which many

[143] For more about *common core approach* within interpretation of CISG see Janssen and DiMatteo, *supra* note 37. Pp. 66-67.

[144] See e.g. (also with a simultaneous admission of use of UPICC as the interpretive/supplementary tool) Felemegas, *supra* note 39. Pp. 159-160. Bianca and Bonell, *supra* note 39. Pp. 81-82. Contrary see Ferrari, *supra* note 92. P. 174; Enderlein and Maskow, *supra* note 36. P. 59. The need to conduct a comparative research with a caution is expressed in Schlechtriem and Schwenzer, *supra* note 35. Pp. 130-131; Huber and Mullis, *supra* note 94. P. 9.

[145] See e.g. decision of the Dutch court, that surprisingly concluded that under Art. 7 CISG the interpretive problems and gap-filling of CISG should be solved with regards the laws of contracting states and *"what may be considered common principles of those legal systems*". Subsequently, the court without further reasoning about the suitability of this step turned to UPICC and Principles of European Contract Law and consulted their provisions for final solution, but the indication of the comparative underlying idea could be seen in court's note about the compliance of the rule with French and Dutch domestic law. Decision of Hof 'S-Hertogenbosch of 16th October 2002, (unknown parties), UNILEX ID: 959, http://www.unilex.info/case.cfm?id=959 (last visited Dec 4, 2016). For another decision in which arbitrators stressed the significance of *"comparative theory"* for filling gaps of CISG, but finally referring, *inter alia*, to UPICC, see Arbitral award (Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce in Belgrade) T-23/08 of 10th November 2009, (unknown parties), http://cisgw3.law.pace.edu/cases/091110sb.html (last visited Dec 5, 2016).

[146] See, e.g. Michaels, *supra* note 54. P. 658; Bonell, *supra* note 25. P. 3 (and there referred scholarly writings *supra* note 6).

analogies may be found, including the controversy of their plain existence as set of rules[147]. The implications of both approaches are however similar in effect, because neither the inherently uncomprehensive legal *common core* resulting from the employed comparison of national laws, nor even though comprehensive new *ius commune* substantively entirely overlaps with the UPICC[148], which include also some diversions towards the innovation under *better-law approach* considering international trade practice[149], what inevitable means their only partial linkage, legitimacy and consequently applicability and methodologically the need of an complicating identification of their overlapping provisions representing the restatement of *common core*, or new *ius commune* in the field of the contract law[150], which should precede the recourse to UPICC as an interpretive/supplementary assistance. Accepting the common core or the new *ius commune* as CISG's backgrounding law restated (partially) in Principles, it would not deprive UPICC their relevance and helpfulness in their interpretive/supplementary role, however, it would undermine their methodological facilitating contribution.[151]

2.1.2. UPICC and a new *lex mercatoria*

Second, and in my opinion prevailing doctrinal opinion identifies the Principles with the restatement of new (modern) *lex mercatoria*[152] on general contract law. The connection

[147] See Bonell stating in respect of new *ius commune*: *„Yet, while such a common legal framework was long considered to be little more than utopia, its realisation has more recently been advocated as a veritable necessity in the far from satisfactory present situation of uniform law."* Bonell, *supra* note 25. P. 4.

[148] Michaels. P. 666.

[149] Bonell, *supra* note 25. Pp. 48-49.

[150] It is noteworthy in this respect, that Principles in their comment stay silent on the issue of the origin or the inspiration taken in relation to specific provision, therefore the identification of *ius commune* restating provisions could cause a significant problems.

[151] See sections 1.2.4. and 1.3.2.

[152] Modern *lex mercatoria* as legal phenomena is far beyond the extent of this thesis, or even any reasonably extensive publication and therefore only short characterization of selected relevant aspects is provided. For actual and comprehensive information about new *lex mercatoria* see e.g. Orsolya Toth, *The Lex Mercatoria in Theory and Practice* (2014).

between *lex mercatoria* and Principles as its restatement or codification, somehow suggesting itself, has been held frequently in the arbitral case law, traditionally favorable to concept of *lex mercatoria* generally.[153]

The Preamble of Principles themselves specifies their scope, however not clearly characterizing their nature, stating that *"*[t]*hese Principles set forth general rules for international commercial contracts"*.[154] The Preamble, however, at the same time claims as one of the Principles' purposes to be applied as norms *"when the parties have agreed that their contract be governed by 'general principles of law', the 'lex mercatoria' or the like"*. Despite the *lex mercatoria* is

[153] The Principles' characterizations by arbitral tribunals referring explicitly or implicitly to *lex mercatoria* include: *"as lex mercatoria"* (translation from Serbian) Arbitral award (Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce in Belgrade) T-9/07 of 23th January 2008, (unknown parties), UNILEX ID: 1442, http://www.unilex.info/case.cfm?id=1442 (last visited Dec 5, 2016); *"restatement of international legal principles applicable to international commercial contracts"* First partial arbitral award (International court of arbitration of ICC) ICC 7110, 1995, (unknown parties), UNILEX ID: 713, http://www.unilex.info/case.cfm?id=713 (last visited Dec 5, 2016); *"general principles and rules of law applicable to international contractual obligations (...) including notions which are said to form part of a lex mercatoria, also taking into account any relevant trade usages as well as the UNIDROIT Principles"* Arbitral award (International court of arbitration of ICC - Paris) ICC 7375 of 5th of June 1996, (unknown parties), UNILEX ID: 635, http://www.unilex.info/case.cfm?id=635 (last visited Dec 5, 2016); *"other recent documents that express the general standards and rules of commercial law"* Arbitral award (International court of arbitration of ICC - Paris) ICC 9474 of February 1999, (unknown parties), UNILEX ID: 690, http://www.unilex.info/case.cfm?id=690 (last visited Dec 5, 2016); *"a reliable source of international commercial law in international arbitration"* Arbitral award (International court of arbitration of ICC - Geneva) ICC 9797 of 28th July 2000, (Andersen Consulting Business Unit Member Firms vs. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative), UNILEX ID: 668, http://www.unilex.info/case.cfm?id=668 (last visited Dec 5, 2016); *"the rules of law and usage's of international trade which have been gradually elaborated by different sources such as* (…) *some institutions like Unidroit and its recently published Principles of International Commercial Contracts"* Arbitral award (International court of arbitration of ICC) ICC 9875, of January 1999, (unknown parties), UNILEX ID: 675, http://www.unilex.info/case.cfm?id=675 (last visited Dec 5, 2016).

Some arbitral tribunal applying *lex mercatoria* as governing rules of law referred to UPICC, apparently implicitly perceived as its source. See e.g. Arbitral award (International court of arbitration of ICC - Paris) ICC 8261 of 27th of September 1996, (unknown parties), UNILEX ID: 624, http://www.unilex.info/case.cfm?id=624 (last visited Dec 5, 2016).

Even domestic courts linked Principles with *lex mercatoria* calling them: *"a restatement of the commercial contract law of the world, refines and expands the principles contained in the United Nations Convention"* Decision of Court of Appeal of New Zealand, (2000) NZCA 350 of 27th November 2000, Hideo Yoshimoto v Canterbury Golf International Limited, UNILEX ID: 802, http://www.unilex.info/case.cfm?id=802 (last visited Dec 4, 2016); *"principles of international commercial contracts"* Decision of Commercial Court of Brest Region in Belarus, 333-7/2006 of 8th November 2006, (unknown parties), UNILEX ID: 1383, http://www.unilex.info/case.cfm?id=1383 (last visited Dec 4, 2016); *"the general principles of international commercial law recognized by international organizations"* Decision of Civil Chamber of the Venezuelan Supreme Court of 2nd December 2014, Banque Artesia Nederland, N.V., v. Corp Banca, Banco Universal C.A, UNILEX ID: 1867, http://www.unilex.info/case.cfm?id=1867 (last visited Dec 4, 2016).

[154] UNIDROIT - Principles 2010, *supra* note 10. P. 1.

explicitly referred by Preamble, what might indicate that this body of law is restated in Principles, it is noteworthy, that formulation invoking *lex mercatoria* is not only one exclusively listed and the official comment on this part of Preamble states, that the purpose of UPICC is to avoid or reduce the vagueness of a *"reference by the parties to not better identified principles and rules of a supranational or transnational character"*[155] with no specific emphasis put on the *lex mercatoria*. In my opinion the text of Preamble is insufficient to reliably conclude about the nature of Principles and closer examination is necessary.[156]

Jurisprudence reaction on suggested linkage is not unequivocal, since the *lex mercatoria* itself is subjected to sharply dissenting evaluations, on one hand enthusiastically welcoming, on the other hand, contrary, denying its existence as an independent set of rules. Whether the part of the doctrine desires so or not, the *lex mercatoria* has been already recognized as the concept with legal consequences, as the rules of law, regardless of the convincingness of arguments of critics.[157] Personally, as well as for the sake of this thesis, I am identified with the concept of *lex mercatoria* as the *trans-national* legal order with the normative quality suitable to provide UPICC (if they are linked) a normative legitimacy, a derivative authority.[158] Problematic aspect of concept of *lex mercatoria* is its blurred boundaries and consequently the uncertain content, what is also one of the serious objections against it as the autonomous legal order. In this respect, I find convincing and helpful the theory of, surprisingly, Prof. Michaels, suggesting

[155] *Id*. P.4.

[156] The Preamble of UPICC containing the purpose of governing rules of law in the case of parties' reference to *"lex mercatoria"* but also to *"general principles of law"* or to similarly denominated rules of law, apparently has ambition to cover all cases of reference to any *trans-national* law regardless of grounding theoretical notion. Contrary (seeing in the Principles' Preamble explicit confirmation of their link with *lex mercatoria*) see: Baron, *supra* note 140.

[157] The traditional criticism of *lex mercatoria* consists of an alleged lack of transparency, methodological foundation, lack of quality of autonomous legal system etc. See for comprehensive discussion: BERGER, *supra* note 99. Pp. 64 *et seq*. Accordingly see Baron, *supra* note 140.

[158] To advocate my statement, I am not lonely in my opinion and eminent scholars concludes (and justifies) in favor of existence of *lex mercatoria* as independent legal order. See e.g. BERGER, *supra* note 99.; Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT. COMP. LAW Q. 747–768 (1985).

that traditional formal distinction of *lex mercatoria* as non-state law in the dichotomy with state commercial law is obsolete, running the discussion about existence of *lex mercatoria* to a deadlock, since both sides build their arguments on relatively exclusive presumptions. Prof. Michaels does not deny the existence and legitimacy of separated, independent *lex mercatoria*, but sees it in the functional dimension as the rules of law of whatever origin serving to commerce that is internationalized, released from the boundaries of national state.[159]

Presumption is clear, but the question stays: are UPICC rather restatement of new *lex mercatoria* or only partially restatement of new *ius commune*? The answer lies in the analysis of the nature of Principles from the perspective of their substance, purpose, and generical sources.

Firstly, while the drafting methodology of UNIDROIT Working Group was truly based primarily on the comparative method, what is emphasized by the mentioned proponent of new *ius commune approach* as the substantial difference from rather on a practice based *lex mercatoria*[160], this method firstly was not limited only to domestic laws (moreover only selected modern domestic laws were analyzed[161]), but the great accent has been put on the international

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[159] Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 INDIANA J. GLOB. LEG. STUD. 447–468 (2007). Pp. 465 *et seq*.

Prof. Michaels in regard of boundaries of *lex mercatoria* expressly states:

> Lex mercatoria does draw a distinction between norms within and norms outside the system. But this distinction does not go along state lines. It goes along functional lines, depending on whether norms are adequate for international commerce or not.
>
> *Id*. P. 457.

It is quite interesting that Prof. Michaels in this article, unlike in his article referred in relation with new *ius commune,* presents the Principles as *"a fullfledged codification of lex mercatoria"* and the sign of conceptual shift toward *new new lex mercatoria*. *Id.* P. 457.

[160] Michaels, *supra* note 54. P. 658.

Second characteristic, that, according to Michaels, disqualifies UPICC as *lex mercatoria* is their form of codification (formally incompatible with uncodified nature of *lex mercatoria*). It noteworthy, that author in this respect disregards, what he emphasizes regarding Principles and their relationship with new *ius commune* – that is wrong to identify them, since Principles are only a restatement. *Id*. P. 662.

[161] Bonell, *supra* note 25. P. 47. Contrary, the limited scale of primary influencing national legal orders may be argued as the drawback disqualifying Principles as restatement of global contract law.

instruments related with international trade, except basically main source – CISG, and another relevant international conventions also soft-law instrument were considered – e.g. INCOTERMS and Uniform Customs and Practice for Documentary Credits (UPC) as initiatives of International Chamber of Commerce or UNCITRAL Model Laws (on Electronic Commerce, on International Commercial Arbitration, on International Commercial Conciliation, on Credit Transfers), FIDIC model contracts etc.[162] It is obvious, that the list of sources that were considered goes beyond the sources, that would be expectable in order to ascertain new *ius commune* of contract law, consisting also of instruments coming from the business environment and based on traditional usages (INCOTERMS, UPC, FIDIC contracts), what would signals rather the plausibility of substantive linkage with the functional notion of *lex mercatoria*.

Second note points out that the comparative method of Working group got the adjective *"functional"*[163], because it did not limit itself to *common core approach* but where this method resulted to functionally undesirable, respectively to no outcome, drafters, pursuing their ambitions to address the potential needs and demands of international traders – addressees of Principles used for their purposes proposed in their Preamble – adopted the functionally optimal normative solution employing the *better-law approach*, which is apparently approach closer rather to *lex mercatoria*, than to *ius commune* (and also, paradoxically, potential counterargument against provisions of UPICC adopted in such way, as one can see below). The *common core approach* is not incompatible with the functional notion of *lex mercatoria*,

[162] *Id*. P. 48.

[163] Generally, in relation to *lex mercatoria* see BERGER, *supra* note 99. Pp. 66-76.

Particularly, in relation to UPICC, Bonell states:

> Consequently, whenever it was necessary to choose between conflicting rules, the criterion used was not merely arithmetical. In other words, what was decisive was not just which rule was adopted by the majority of countries, but rather which of the rules under consideration had the most persuasive value and/or appeared to be particularly well suited for cross-border transactions.
>
> Bonell, *supra* note 25. P. 47.

either.[164] *Lex mercatoria*, actually, does not supervene the *ius commune* or general principles of law, but accepts their universal nature as backgrounding law and covers them as one (but not only) of its components[165], however their extent reaches beyond it.

While the linkage of Principles' solutions inferred from the common core of national laws or instruments of international trade law (solutions *restated* in Principles) with *lex mercatoria* does not raise any considerable questions, controversy is connected with the solutions creatively adopted by drafters on the ground of their perception of legal solution, that would be optimal for international business (solutions *prestated* in Principles).[166] *Prima facie*, their linkage with some preexisting *trans-national* legal order (and their consequential normative legitimacy) is in such cases absent and the situation is like the situation, when Principles would be considered the restatement of new *ius commune* – UPICC would be applicable as an interpretive/supplementary tool only in part, and ad hoc examination of potentially applicable provision of Principles would be necessary.[167]

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[164] Both approaches are not relatively exclusive, since the existence of legal *common core* determined by *common core approach* (comparative method) is a very strong indication, that it is simultaneously the *substantively suitable law* which would probably be a result of *better-law approach*, too.

[165] See accordingly BERGER, *supra* note 99. Pp. 73-75; Berthold Goldman, *The applicable law: general principles of law — the lex mercatoria* in Julian D. M. Lew, *Contemporary Problems in International Arbitration* (1987). P. 113.

[166] The deviations of Principles from their restatement nature are explicitly admitted by their Introduction:

> For the most part the UNIDROIT Principles reflect concepts to be found in many, if not all, legal systems. Since however the Principles are intended to provide a system of rules especially tailored to the needs of international commercial transactions, they also embody what are perceived to be the best solutions, even if still not yet generally adopted.
>
> UNIDROIT - Principles 1994 - UNIDROIT - International Institute for the Unification of Private Law - Institut International pour l'Unification du droit privè, *supra* note 13.

[167] Also, the practice has already reflected the possibility of only limited applicability of UPICC as *lex mercatoria:*

> The Tribunal will apply those principles and rules of law applicable to international contractual obligations which qualify as rules of law and which have earned a wide acceptance and international consensus in the international business community, including notions which are said to form part of the lex mercatoria, also taking into account any relevant trade usages as well as the UNIDROIT Principles, as far as they can be considered to reflect generally accepted principles and rules.
>
> Arbitral award (International court of arbitration of ICC) ICC 7375, 1996, (unknown parties), UNILEX ID: 625, http://www.unilex.info/case.cfm?id=625 (last visited Dec 7, 2016).

This is the strong objection against use of Principles under Art. 7 CISG in their entirety, which had its undisputable rationale in the moment and in a reasonable subsequent time period after the adoption of first version of Principles in 1994, nevertheless, today, after 23 years, one could ask himself, whether the originally *prestated* solutions suggested by UPICC has not subsequently became solutions of international general contract law accepted by international trade, whether UPICC in this respect is not kind of self-fulfilling prophecy of future *lex mercatoria*. Such idea, in my opinion, is not out of questions, because of the *better-law approach* has been taken by expert drafters during Principles' drafting. They, highly competent scholars, basically take a knowledgeable guess of hypothetical and progressive provisions substantively suitable for international commerce, as it would be most probably adopted by practice.[168] Drafters attempted to meet the functional characteristic of *lex mercatoria*[169] and, as

Accordingly BERGER, *supra* note 99. P. 218. See also Berger's statement justified mostly through the formal nation of *lex mercatoria*:

> They are an attempt to formulate a current consensus on international contract rules but remain of a purely contractual nature. For this reason, they should be called a 'Pre-Statement' rather than a 'Re-Statement' of transnational contract law. In order to be considered part of the lex mercatoria, every rule or principle they contain needs to be verified by international contract and arbitration practice, the sources of the institutional creation of the law on the transnational plane.
>
> Klaus P. Berger, *The Relationship between the UNIDROIT Principles of International Commercial Contracts and the New Lex Mercatoria Internatioanl Uniform Law Conventions, Lex Mercatoria and UNIDROIT Principles*, 5 UNIF. LAW REV. 153–170 (2000). P. 169.

[168] The competence of drafters to make such guess is justified by Prof. Perillo:

> The drafters of Principles are not philosophers. They are lawyers who are aware of the practices of the market and who have a respect for party autonomy and a vision of what is efficient, fair and healthy in a commercial relationship. Each of the rules they have promulgated appears to have been examined from each of these perspectives.
>
> Joseph M. Perillo, *Unidroit Principles of International Commercial Contracts: The Black Letter Text and a Review Essay*, 63 FORDHAM LAW REV. 281–344 (1994). P. 315.

[169] See *supra* note 163.

it seems, practice has not protested[170]. On these grounds, I assume, that UPICC may be considered in their entirety the restatement of *lex mercatoria* on general contract law.[171]

The analysis is not still complete, since, unlike in the case of an undisputable relevance of new *ius commune* with their inherent nature of universal background law of any legal order, the link between CISG and *lex mercatoria* has to be tested, too. Under the functional determination of *lex mercatoria*, the assessment seems to be clearly affirmative – CISG is the part of the system of *trans-national* trade law, because its personal and substantive scope refers to the international trade[172], albeit the proponents of formal aspects of *lex mercatoria* could disagree because of its formal nature of international convention. Nevertheless, existence and the substance of CISG has become respected legal framework of international sales of goods that, at least in practice, has overreached its formal conditions of applicability and is considered potentially applicable regardless of meeting its application prerequisites[173]. Finally, I can conclude, that under my

[170] The available literature rarely points out aspects, or even concrete provisions, that are deemed as practically undesirable for the international commercial environment. As one of these rare voices may be mentioned Richard Hill, who sees in Principles the great risk of unpredictability and also their unsuitability for international commerce. However, his concrete criticism is devoted to issues not relevant for a potential interpretation/supplementation of CISG (the issue of a validity), or based on factual circumstances of a highly specific industry, where special rules or usages would be most likely applicable (hardware production, licensing), or stands on more likely the misunderstanding of concepts and the conditions of its applicability (hardship) than their real practical deficiency. See Richard Hill, *A Businessman's View of the UNIDROIT Principles*, 13 J. INT. ARBITR. 163–170 (1997).

UNIDROIT as well as particular members of Working group realizes, that the Principles' reflection in practice is needed to be monitored and evaluated in order to keep UPICC actual and addressing the concerns of international trade in suitable manner. See Bonell, *supra* note 25. Pp. 361-362. The fact, that revisions of Principles have not substantively altered the provisions of version from 1994, obviously reveals that practical experience has not indicated the objective need from the side of international trade practitioners.

[171] See e.g. Perillo, *supra* note 168. P. 283. Accordingly on the link between UPICC and *lex mercatoria* see Zdenek Novy, *The Role of the UNIDROIT in the Unification of International Commercial Law with a Specific Focus on the Principles of International Commercial Contracts* (2014), https://papers.ssrn.com/abstract=2398601 (last visited Jan 28, 2017). P. 356; Ziegel, *supra* note 39.

[172] Accordingly see Goldman and Lew, *supra* note 165. P. 113; Wethmar-Lemmer, *supra* note 101. P. 289; Kilian, *supra* note 42. Pp. 224-226. Also see Magnus stating that principles underlying CISG overlap with principles of *lex mercatoria* in Magnus, *supra* note 102. P. 41.

[173] See e.g. Arbitral award (International court of arbitration of ICC - Paris) ICC 7331, 1994, (unknown parties), UNILEX ID: 140, http://www.unilex.info/case.cfm?id=140 (last visited Dec 5, 2016); Arbitral award (International court of arbitration of ICC - Paris) ICC 8502 of November 1996, (unknown parties), UNILEX ID: 655, http://www.unilex.info/case.cfm?id=655 (last visited Dec 5, 2016); Arbitral award (International court of arbitration of ICC - Paris) ICC 5713, 1989, (unknown parties), UNILEX ID: 16, http://www.unilex.info/case.cfm?id=16 (last visited Dec 5, 2016).

analysis UPICC could be characterized (nowadays) as restatement of *lex mercatoria* on general contract law.

2.1.3. UPICC as a restatement of *general principles on which CISG is based*

Previous argumentation may justifiably raise a reasonable question for advocates of narrow reading of Art. 7(2) CISG: is necessary to look for substantive linkage between UPICC and some global *trans-national* legal order (*lex mercatoria, ius commune*) which would provide justification of Principles' *persuasiveness*, their substantive desirability to be employed as interpretive/supplementary tool in relation to CISG? Would not be enough to narrow down the perspective to the CISG itself and to conclude that UPICC are restatements of general principles on which CISG is based (in a sense of principles directly inferable from the text of CISG)?[174]

Despite, as indicated above, in my opinion such reading is not in compliance with dynamic and teleological interpretation, in arbitral practice, in fact, such internal approach has been taken or, at least, it has been proclaimed.[175] However, to see in the Principles a mere restatement of these expressed principles implies a theoretical uncertainty in the issue of an establishment of

[174] See section 1.3.1.

[175] See e.g. the statement of arbitral tribunal*: "Furthermore, the provisions of the Convention and its general principles, now contained in the Unidroit Principles of International Commercial Contracts, are perfectly suited to resolving the dispute (...)"* Arbitral award (International court of arbitration of ICC - Paris) ICC 8817 of December 1997, (unknown parties), UNILEX ID: 659, http://www.unilex.info/case.cfm?id=659 (last visited Dec 5, 2016). See also unofficial translation of originally in French rendered award based on the interpretation of language of French authentic version of Art. 7(2) CISG, that contains the formulation that, *prima facie*, loosens the tie between underlying general principles and text of CISG itself: *"CISG, as per its article 7, may be supplemented by those general principles which have inspired its provisions and particularly those which have been substantiated and codified in the UNIDROIT Principles of International Commercial Contracts and actually used in relation with the CISG implementation."* Arbitral award (International court of arbitration of ICC) ICC 12460, 2004, (unknown parties), UNILEX ID: 1411, http://www.unilex.info/case.cfm?id=1411 (last visited Dec 5, 2016). See also the reasoning of another arbitral award rendered in French invoking besides UPICC also Principles of European Contract Law: "*L'arbitre considère justifié d'appliquer au litige les règles identiques contenues dans les principes UNIDROIT et les principes du droit européen des contrats en tant que principes généraux au sens de l'article 7(2) de la Convention."* Arbitral award (International court of arbitration of ICC - Basel) ICC 8128, 1995, (unknown parties), UNILEX ID: 637, http://www.unilex.info/case.cfm?id=637 (last visited Dec 5, 2016). Accordingly see Partial arbitral award (Netherlands Arbitration Institute) of 10th February 2005, (unknown parties), UNILEX ID: 1235, http://www.unilex.info/case.cfm?id=1235 (last visited Dec 5, 2016).

Principles' indirect normative authority (*persuasiveness*) as an interpretive assistance. This conceptual objection aims, especially, to the fact, that CISG's underlying principles are the category expressly mentioned only in Art. 7(2) CISG, which, as was already stated, arguably may be construed restrictively as principles directly inferable from the text of CISG. Such reference in formally legally binding convention would be decently sufficient to elevate Principles as a restatement of these underlying principles to the normative level and set up their persuasiveness in this respect, nevertheless most likely for the purposes of gap-filling exclusively. Their persuasiveness for an assistance with interpretation of CISG might be more problematic, since Art. 7(1) CISG, that can be interpreted as guideline for *systematic* interpretation, does not mention this specific category of principles and they are not, in contrast with *lex mercatoria* or *ius commune,* generally recognized as independent legal order.

Moreover, substantively, UPICC cannot be identified with mere restatement of CISG's underlying principles, that was not their purpose and although they are considerably (but not exclusively) inspired by CISG as one of the key normative sources, they substantively overcome CISG's legal framework. It has been observed, that UPICC are more comprehensive set of rules[176] covering more extensive scope and, what is more important, also *"more mature product"*[177] in the sense of their receptiveness the modern trends of international commerce. Despite their usual mutual compatibility[178] the possibility of a substantive divergence would put into the question the *persuasiveness* and legitimacy of application of certain provisions of

[176] Perillo, *supra* note 168. Pp. 282-283; Kronke, *supra* note 102.

[177] Perillo, *supra* note 168. P. 283.

[178] As Bonell explains: *"To the extent that the two instruments address the same issues, the rules laid down in the UNIDROIT Principles are normally taken either literally or at least in substance from the corresponding provisions of CISG; cases where the former depart from the latter are exceptional."* Bonell, *supra* note 4. P. 30.

Principles and cause additional uncertainty in this respect, especially when the catalogue of CISG's underlying principles is not definite[179].

[179] See e.g. Andersen, *supra* note 112.

2.2. The functional (un)desirability of UPICC to interpret and supplement CISG: Risks and advantages

After discussion about options of an establishment and justification of Principles' substantive *persuasiveness* legitimizing their employment within the process of an interpretation/supplementation of CISG, my interest is devoted to the functional desirability of such use in a sense of their particular utility and practicality for achievement of a proper interpretation of provisions of CISG as well as a gap-filling its legal framework in the way ensuring the fulfilment of the purpose of CISG in the greatest possible extent. In this respect, the concept of the *implied purpose* of CISG and linked requirements of *neutral, certain* (predictable) and *substantively suitable* legal regime of an international sale under CISG permeates the considerations on certain formal as well as substantive qualities or, contrary, drawbacks of UPICC, that make them a particularly contributive or possibly inappropriate tool for a CISG's proper interpretation and supplementation. Accordingly, this subchapter follows in the conclusions presented in this thesis on the interpretation of Art. 7 CISG, the formal admissibility of Principles' employment as interpretive/supplementary tool and the proposed methodology of their use[180] as well as the specific substantive *persuasiveness* of UPICC - their nature of restatement of *lex mercatoria* of general contract law.[181]

2.2.1. Comprehensibility, certainty, and accessibility v. incomprehensiveness and uncertainty

The certainty of legal framework governing an international sale of goods and the consequent predictability of the normative solutions of specific factual circumstances is the valuable asset for international traders[182] and on top of that also one of the requirements imposed on the CISG

[180] See chapter 1.

[181] See subchapter 2.1.

[182] As Prof. Andersen states in respect of a supplementation of CISG: *"If Tribunals and Courts use the (currently) quite flexible and "fuzzy" concept of general principles to reach the decision which they find right, then the difficult-to-map 'gaps' can become a breeding ground for one of the most unpopular aspects of commercial business: unpredictability and uncertainty."* Andersen, *supra* note 112.

regime under its teleological interpretation. While legal theorist may appreciate the interesting interpretive controversy, the interested practitioner would like to easily and without unreasonable costs familiarize himself with the meaning of all legal provisions potentially applicable to his transaction and to eliminate as many as possible, at least, identified legal risks. Undoubtedly, this is the matter of a legal interpretation and, in the case of an existing gap in the legal framework, also the matter of a supplementation, what means, in regard of the topic of this thesis, that UPICC, which admissibility to be employed as interpretive/supplementary assistance might be generally established, should prove their practical desirability to be employed from the perspective of the uncontroversial meaning of their provisions, too.

Moreover, this is not only the issue of predictability for the parties of the transaction governed by CISG, but also the considerable quality of interpretive/supplementary tool helping its reflection from the side of adjudicators, that are ones primarily dealing with authoritative application of law and in this respect usually seeking rather the reliable and instructive guide than opportunity to employ their legal argumentation creativity. I have already addressed the methodological issue of Principles' employment identifying the potential procedural consequential facilitation in a process of an interpretation and supplementation of CISG in compliance with its Art. 7[183] and despite this perhaps should not be the primary consideration leading to the use of UPICC, in practice, paradoxically, the ease of their use as interpretive/supplementary tool in relation to CISG might become the key incentive for the spread of practice of their application in such role[184] or even for the correct application of Art.

Accordingly, Prof. Zeller calls a certainty *"a paramount need of the commercial community"*. Zeller, *supra* note 6.

[183] See section 1.2.4. and 1.3.2.

[184] Personally, I consider the most apparent contribution of UPICC as gap-filler, since more comprehensive UPICC in comparison with gapfull and fragmental CISG contains numerous potential gap-filling provisions, in the normative form pre-prepared for direct application. These provisions arguably already reflect the *internationalized general principles of contract law* under Art. 7(2) CISG relevant in the addressed specific situation, eventually in their compromise balance, that accords with presumed general needs, interests, and expectations of reasonable

7 CISG, since availability of easily usable Principles might prevent attempts of adjudicators to avoid the uncertain and complex interpretive/supplementary task trough the simplest way of employment of "homeward approach", ethnocentric perspective - domestic interpretive methods or even interpretation on the background of a domestic substantive law[185], eventually through supplementary recourse to domestic law ascertained on the basis of private international law of forum as it is anticipated by Art. 7(2) CISG. The potential of a facilitation presented above, however, would not be realized, if UPICC's substance itself would be a conundrum.

Focusing on the form of Principles, the Principles despite their deliberately chosen, formally not-binding nature of soft-law were apparently adopted in the form of a civil law code-like instrument[186] containing mostly norm-like formulated provisions, following the traditional

international trader. The adjudicator by application of provisions of UPICC as gap-filler would avoid the complex and time-consuming task of an identification of relevant general principles, which are not still definite and eventually may stand in contradiction applied in specific situation (e.g. *pacta sunt servanda* v. good faith, party autonomy v. full compensation, *favor contractus* v. good faith etc.), a on their ground to, in fact, construct the ad hoc legal provision taking into account the factual circumstances of the case of different relevance and importance. Shortly, the adjudicator would avoid inventing already invented. Accordingly see statement of Prof. Bridge: *"Without the assistance of the PICC, courts and tribunals would be called upon unaided to perform difficult juristic tasks in discerning underlying general principles via Article 7(2) of the CISG"* Bridge, *supra* note 16. P. 627.

Nevertheless, the facilitation of an interpretive process is apparent, too. Adjudicators receive additional, certain, unified, detailed and suitable *trans-national* general commercial contract law for systematical approach to interpretively controversial interpretation of legal regime of international sales of goods of CISG. UPICC provides accessible, easily usable and referenceable substantive assistance complying with guidelines prescribed in Art. 7(1) CISG, that would, traditionally interpreted directive to consider domestic and foreign CISG-caselaw (how to evaluate the correctness of interpretation provided in this caselaw for decision about following, distinguishing or overruling of its conclusions?), would be barely helpful and instructive for an adjudicator. Furthermore, complexity of an analysis of an extensive, problematically accessible and often contradictory caselaw.

[185] The clear temptation of judges, that were educated more deeply in domestic law and usually apply this familiar domestic law in their practice, to avoid a different and for them more difficult interpretive/supplementary procedure in relation to international uniform law is evident in criticized decision of U.S. courts. For example, in *Raw Materials Inc v Manfred Forberich GmbH* before US District Court for the Northern District of Illinois, the court expressly stated that as interpretive guidance for interpretation of CISG the caselaw on similar provision of Uniform Commercial Code is usable. See for more Zeller, *supra* note 51. Pp. 311-314.

Another sample case may be named *Delchi Carrier, S.p.A. v. Rotorex Corp.* before U.S. Circuit Court of Appeals (2d. Cir.). Despite the court pointed out the content of Art. 7(1) CISG and proclaimed the need to interpret CISG regarding its *international character* and the need to promote *uniformity of its application*, subsequently, with hardly correct comment about the lack of caselaw under CISG, it, in fact, decided with compliance with domestic UCC. Critically see Cook, *supra* note 51. Pp. 259-263.

[186] This fact if affirmed by Bonell: *"In general the UNIDROIT Principles are drafted more in the style of the European codes than in the notoriously more elaborate fashion typical of common law statutes."* Michael J.

internal structure of codes, that respects the order putting the general provision on the beginning and continuing through the stages of a formation, a performance and a termination of a contract[187] subsequently supplemented with provisions dealing with issues of contractual law related to contractual rights and duties like their sett-offs, assignments, an authority of agents and specific issues connected with the plurality on any party side.[188] In this respect, the Principles were appraised as coherent[189], comprehensive (more than CISG)[190] and systematically well-structured set of rules on general contract law, what certainly facilitates the orientation within their text.

However, this is not the new, specific feature of Principles in comparison with other traditional national codes verified by a long period of their applicability, while their soft-law nature enables them to have their black-letter text supplemented often with very illustrative and detailed comments using also the practical examples of application of a provision under consideration. Unlike commentaries on domestic law or international conventions, that represents knowledgeable but still an unexclusive, scholarly interpretation of provisions of the instrument, comments of Principles' provisions prepared by drafters of provision themselves provide the authentic clarification of the meaning and concrete normative intentions pursued by drafters in relation to the specific provisions. Prof. Bonell states, that comments may seek even more important function of the supplementation of black-letter provisions at stake.[191] This could

Bonell, *The Unidroit Principles of International Commercial Contracts: Towards a New Lex Mercatoria?*, 1997 INT. BUS. LAW J. 145–188 (1997). P. 149. Accordingly see Vogenauer and Kleinheisterkamp, *supra* note 63. P. 17.

[187] UNIDROIT - Principles 1994 - UNIDROIT - International Institute for the Unification of Private Law - Institut International pour l'Unification du droit privè, *supra* note 13. at xvii-xx.

[188] UNIDROIT - Principles 2010, *supra* note 10. at xxxix-xlv.

[189] Rosett, *supra* note 46. P. 446.

[190] Perillo, *supra* note 168. Pp. 282-283; Bonell, *supra* note 25. P. 310.

[191] Bonell, *supra* note 186. P. 150.

considerably eliminate the need of employment of sophisticated, time-consuming interpretive methods and techniques with open-ended outcome.[192]

The multilingual availability of Principles[193] is another purely practical feature of Principles, that additionally enhances availability of their text to the wide and community of international traders as well as adjudicators.

On the other hand, a recourse to UPICC for their interpretive/supplementary help may lead to paradoxical situation, when the it would turn out, that UPICC themselves need interpretation or that there is the gap in the framework covered by their substantive scope. Like every code, no matter how ambitious to be exhaustively comprehensive, also Principles are not able to cover everything as well as they are not perfect product of law-making. The frequency of an occurrence of such uncertainties would be surely lower comparing to CISG, but drafters anticipated such possibility and addressed it in Art. 1.6 UPICC that substantively, with one exemption of lacking reference to need to *promote the observance of good faith in international trade* (general duty to act in accordance with good faith and fair dealing in international trade is contained in Art. 1.7. and should be interpreted as general underlying principle)[194], corresponds with Art. 7 CISG.

What are the implication of the potential uncertainty or gapfullness of UPICC for the practical desirability of their use? Firstly, taking into account efforts to make Principles comprehensible and comprehensive, only limited room was left for some uncertainties, moreover, it is

[192] Accordingly see e.g. Bridge, *supra* note 16. P. 627.

[193] Currently, UPICC in the 2010 version are available on official website of UNIDROIT in 5 official languages (in 3 in their full version including comments, in remaining 2 in their black-letter version) and in 11 "other" languages (in black-letter version). UNIDROIT - Principles 2010, *supra* note 10. There were also documented unofficial translations of UPICC in previous versions to other languages, e.g. to Slovak language. See *Zásady medzinárodných obchodných zmlúv - UNIDROIT* (1996) , http://www.martinus.cz/?uItem=10215 (last visited Mar 31, 2017).

[194] See (comment on Art. 1.7) UNIDROIT - Principles 2010, *supra* note 10. Pp. 19-20. Accordingly see Bonell, *supra* note 25. P. 84.

questionable, whether just these deficiencies are relevant for interpretation/supplementation of problematic aspects of CISG's legal framework within its substantive scope. No indications have been provided by caselaw or jurisprudence, yet.[195]

Secondly, the use of Principles in the role of an interpretive/supplementary tool is the *possibility*, and regardless of the general substantive and practical desirability of their employment, that could be able to justify their character of primary or secondary (after the consideration of analogy of provisions of CISG) method, in the case they are not suitable to help, other interpretive/supplementary techniques could be used afterwards.

2.2.2. Stability, responsive flexibility, institutional backing

As much as the uniformity is interrelated with certainty of law and alike the interpretation with regards to CISG's international character is interdependent with the interpretation promoting the uniformity of CISG's application, the certainty and comprehensibility of the original UPICC substance would be meaningless if their text would be subject to free adjustment and partial amendments creating the multiple parallel and potentially applicable legal regimes, what would impose additional undesirable demands on adjudicators to ascertain the correct one. The stability and uniformity of a content of Principles allows adjudicators to rely on the comprehensibility of their original meaning as has been intended by drafters and captured in the comments. In this respect, the Principles possess similar formal quality as an ordinary

[195] Contrary, the broader scope of UPICC comparing to CISG opens discussion on a questionable existence of internal gaps in case of issues expressly omitted by CISG but specifically addressed in Principles – their inappropriately excessive use is criticized. For example, in respect of Principles' applicability as a gap-filler in order to add a institute of hardship into a legal regime of CISG see critically Anna Veneziano, *UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court*, 15 UNIF. LAW REV. 137–149 (2010); Markus A. Petsche, *Hardship under the UN Convention on the International Sale of Goods (CISG)*, 19 VINDOBONA J. 147–170 (2015).

legislation that formally exists and is applied in single officially published and recognized version in force in the moment relevant for their application.[196]

In previous chapter, I have presented my opinion about substantive desirability (legitimacy) of an employment of UPICC within the process of interpretation/supplementation of CISG on the basis of their common substantive linkage as the reflection of *lex mercatoria* on sales law (CISG) and on the other side as the restatement of *lex mercatoria* on general contract law (UPICC). Following this construction, and considering the inherent "floating", permanently developing nature of *lex mercatoria*, what implies the need of adaptability of its restatement – UPICC, this need is in obvious tension with the quality of the stability as presented.[197] At the first sight maybe, however Principles, unlike CISG, which formal adaptation to new conditions in international commerce is, at least, very unlike, may potentially rapidly, accurately, and simply respond to new challenges of an international commercial environment introducing a modernized, better-suited legal framework without a necessity of long political negotiations and consequent compromises on the substance of the newly adopted framework.[198]

Such responsive flexibility of Principles used as interpretive/supplementary tool could circumvent the formal rigidness of expressed provisions of CISG through their dynamic

[196] Stability of Principles' substance is not undermined by an existence of (current) 3 versions of Principles. Despite their temporary applicability is not expressly stated, the versions of Principles are respectively compatible and no significant changes have adopted out till now, but the publication of new versions were used rather for supplementation of UPICC. In my opinion, an adjudicator in concrete case should determine whether there are specific reasons to recourse to earlier versions of Principles to protect the legitimate expectations of parties (especially if futures version would substantively alter the earlier versions), nevertheless currently the last version from 2010 could be applied in the majority of the cases.

[197] Prof. Berger holds in respect of attempts to codify *lex mercatoria*: *"(…) more than in any other field of law, codification of the NLM* [new *lex mercatoria*] *is dependent upon the creation of an irreconcilable balance: the untying of the Gordian Knot created by the need for the legal certainty on the one hand and the quest for maximum flexibility on the other."* BERGER, *supra* note 99. P. 252.

[198] The difference between the approaches, positions and interests of national representatives on the Vienna conference in 1980 and during discussions within UNIDROIT Working Group is spelled out by Prof. Farnsworth the direct participant of both: *"While the atmosphere in UNCITRAL was political (because delegates represented governments, which were grouped in regional blocs), that in UNIDROIT was apolitical (because participants appeared in their private capacity)."* E. Allan Farnsworth, *American Provenance of the UNIDROIT Principles Symposium: Teaching Sales Laws in a Global Context*, 72 TULANE LAW REV. 1985–1994 (1997). P. 1989.

interpretation in the systematic context of up-to-date general international commercial contract law, respectively supplementing their framework with actualized provisions of general international commercial contract law. A reflective flexibility of UPICC are therefore the feasible mean to help to fulfil the *implied purpose* of CISG to provide a substantively suitable legal framework of an international sale of goods in a sense including, *inter alia*, also the *actuality* of this legal framework.

The stability as well as responsive flexibility are, in respect of interpretive/supplementary purpose of UPICC, very convenient, desired and, because of their *prima facie* contradictoriness, also unique *potential* features of the formal character of UPICC – their nature of a restatement of *lex mercatoria* on general contract law. A realization of this potential, however is not natural, but conditioned by the official maintenance and promotion of UPICC, by the regular monitoring of the practice and adaptation of the Principles to development of a commercial practice and new needs under the auspices of the influential and respected expert authority. The institutional platform of UNIDROIT established in relation to Principles seems to be a sufficient assurance of permanent and expert backing of Principles as a restatement, especially considering the eminence of the members of UNIDROIT Working Group including currently the most excellent experts in the field of international commercial law, on top of that representing the major legal cultures and jurisdictions.[199] Probably the best illustration of the interest of UNIDROIT to develop and improve Principles for their use for suggested purposes as well as the illustration of a fulfilment of the idea of a responsive flexibility is the regular publication of the actualized

[199] The list of the Working group for preparation of the UNIDROIT Principles of International Commercial Contracts 2010 includes names (in most cases frequently cited in this thesis) of M. J. Bonell, P. P. Viscasillas, A. M. Garro, R. Goode, P. Finn, R. Zimmermann. For complete list see Working Group for the preparation of the UNIDROIT Principles of International Commercial Contracts 2010 - UNIDROIT - International Institute for the Unification of Private Law - Institut International pour l'Unification du droit privè, http://www.unidroit.org/overview-principles-2010/309-instruments/commercial-contracts/unidroit-principles-2010/unidroit-principles-2010-history/779-working-group-for-the-preparation-of-the-unidroit-principles-of-international-commercial-contracts-2010 (last visited Apr 4, 2017).

version of UPICC[200] and another initiatives pursuing as broad as possible recognition of Principles and their applicability for the purposes suggested in their Preamble.[201]

2.2.3. Substantive suitability v. substantive unsuitability of a use of UPICC to interpret/supplement CISG

The previous subchapter shows the possibilities of a foundation of substantive desirability of employment of Principles for their purpose, so why another discussion should be devoted to the issue of substantive quality of UPICC? Above, I present the justification of general legitimacy of UPICC used in normative role including their interpretive/supplementary purpose and I find it in a *lex mercatoria* as a common normative denominator of CISG and Principle and this conclusion may in theory provide a justification of the legitimacy of UPICC as the instrument (arguably in its entirety[202]) to interpret/supplement CISG, however practical, functional suitability for this purpose is not given *per se*. *Lex mercatoria* albeit denominated as *trans-national* legal order, actually lacks the character of a deliberately internally structuralized system what would be, in fact, very difficult to achieve because of the permanently developing substance of *lex mercatoria*. Its strict coherency may be therefore easily questioned, similarly as strict substantive compatibility of its formalized expressions – CISG and UPICC.

[200] The 1994, 2004 and 2010 versions have been published till end of March 2017 and another version of 2016 Principles expected to be published in March 2017 was announced. See UNIDROIT Principles 2016 - UNIDROIT - International Institute for the Unification of Private Law - Institut International pour l'Unification du droit privè, *supra* note 3.

[201] The great efforts were devoted to enhancing a recognition of Principles in early stages via numerous conferences, seminars and colloquies. See Felemegas, *supra* note 39. P. 168 (the list of events *supra* note 580).

The tireless work of UNIDROIT in order to achieve the wide spread of a use of Principles is demonstrable on the attempt (unfortunately unsuccessful) to receive the recommendation for UPICC from UNCITRAL and on drafting works on the UNIDROIT model clauses facilitating the invocation of Principles by practitioners (see subchapter 1.1).

[202] See section 2.1.2.

My interpretation of Art. 7 CISG[203] that indicates the functional requirements on interpretation/supplementation of substantive provisions of CISG (ultimately these requirements are imposed on the substantive legal framework of CISG in general) *inter alia* also the requirement of substantive suitability of an outcome for international commercial environment. Analyzing previously the methodology used by drafters of UPICC within the process of their formation containing of a general common-core approach combined with a better-law approach together designated as *functional comparison*[204] and taking into account Principles' responsive flexibility, it seems that they, in compliance with the purpose of substantive provisions of CISG, would bring into a CISG's interpretation/supplementation interpretive context and gap-filling solutions *"especially tailored to the needs of international commercial transactions"*[205] producing results that would fit the contemporary expectations of reasonable international traders.

This does not suffice and the coherence of CISG framework needs to be preserved, too. The admitted extensive inspiration by substantive provisions of CISG[206] that is confirmed by comparative researches[207] might be perceived as the guarantee of such compatibility in respect of substantively corresponding provisions and accordingly, such considerable substantive similarity would make Principles particularly suitable instrument assisting with interpretation/supplementation of CISG.[208] However, as it was mentioned above, the drafting

[203] See subchapters 1.2. and 1.3.

[204] See section 2.1.2.

[205] See *supra* note 166.

[206] The references to corresponding provisions of CISG are only expressed inspirations in comments to Principles' provisions.

[207] See *supra* note 22. From scholarly writings see e.g. Flechtner, *supra* note 55. Pp. 176-181;

[208] The authors, *inter alia*, Prof. Koch, however question the exceptionality of UPICC as the mean of interpretive/supplementary assistance for CISG emphasizing the existence of the instrument that in great extent substantively overlaps with the scope of Principles – the Principles of European Contract Law. He perceives in the mere coexistence of these instrument a jeopardy for a desired uniform interpretation under Art 7 CISG, because they, despite their usual substantive harmony, contain different legal solution and accordingly, applied as an interpretive tool or as a gap-filler they would lead to different final legal regimes. Koch, *supra* note 86. P. 199.

methodology and intentions of drafters that were not tied with political considerations and therefore seeking the objectively best, up-to-date solutions rather than unconditional pursuing of solutions proposed by CISG have resulted also within overlapping substantive scope into several formal divergences[209]. In addition, the substantive scope of Principles exceeding one of

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In my opinion, such criticism may be answered quite simply, pointing out a different territorial and substantive scope of the Principles of European Contract Law and also their different purpose. As I discussed above, Principles are the product made under specific initial intention to provide general rules of international commercial contract law in the form of restatement as comprehensive and persuasive as possible and also specifically adjusted for their practical suitability in international commerce. These considerations determined the methodology of their drafting as well as their substance, that together make Principles arguably the instrument which is a close as possible to restatement of global *lex mercatoria* on general contract law. The Principles of European Contract Law, in contrast with UPICC, grew up from different roots. Their limited territorial scope indicated in their title, the consequential fact that the special emphasis was put on the domestic laws of states of European Union as their inspirational normative sources, their apparent ambition to cover not only commercial transaction but the consumer transactions too and finally, the *ab initio* considered option to use them as the basis for a legislation – the European Civil Code, all these differences undermine the legitimacy, derivative legal authority (using the terminology of this thesis, substantive desirability) of the Principles of European Contract Law as a restatement of some independent legal order (like *lex mercatoria*) to be used within a CISG's supplementation/interpretation. For more about purposes, a use and a nature of the Principles of European Contract Law see e.g. Ole Lando, *Salient Features of the Principles of European Contract Law: A Comparison with the UCC*, 13 PACE INT. LAW REV. 339–370 (2001). Pp. 340-342. For the reflection of different nature of the Principles of European Contract Law see arbitral award containing:

> As to the application of the PECL, i.e., principles established further to an initiative of the Commission of the European Union in order to harmonize private law within the State members of the European Union, the Sole Arbitrator notes that they constitute an academic research, at this stage not largely well-known to the international business community and are a preliminary step to the drafting of a future European Code of Contracts, not enacted yet.
>
> Preliminary arbitral award (International court of arbitration of ICC) ICC 12111 of 6th January 2003, (unknown parties), UNILEX ID: 956, http://www.unilex.info/case.cfm?id=956 (last visited Dec 20, 2016).

In addition, their functional desirability in comparison with UPICC may be questioned, too. Besides their not so evident substantive suitability and compatibility with CISG, their responsive flexibility is another controversial aspect of them related to the lack of a permanent institutional backing and support, unlike in the case of Principles. The winner in a potential competition for the best interpretive/supplementary tool in relation to CISG would be, in my opinion, therefore absolutely clear. Accordingly see Bonell, *supra* note 25. P. 354-357.

[209] As Introduction to version of UPICC from 1994 states with explicit reference to diverging provisions of 1994 Principles on applicable usages - particularly the exemption from applicability (Art. 1.8), notices – a *receipt* principle without any exemptions in favor of *dispatch* principle (Art. 1.9) and definition of an offer (Art. 2.2) in connection with a provision on a price determination (Art. 5.7) and a provision on a performance of non-monetary obligation (Art. 7.2.2.) : *"Naturally, to the extent that the UNIDROIT Principles address issues also covered by CISG, they follow the solutions found in that Convention, with such adaptations as were considered appropriate to reflect the particular nature and scope of the Principles."*

Prof. Bonell adds on top of abovementioned also explicit general duty to act in compliance with good faith and fair dealing in international trade law, the informality of conclusion of contract; a right to reject the premature performance, unless oblige has no legitimate interest to do so; the specific performance as an unconditioned primary remedy; unrestricted right to terminate a contract even when party is not able to make a restitution, which are included in UPICC, contrary to CISG. Bonell, *supra* note 25. Pp. 306-310.

CISG naturally contains many provisions without corresponding counter-provision in CISG, that might potentially be used for gap-filling.

The consequent interpretive, eventually supplementary dangers are easily identifiable. Firstly, the normative divergences in corresponding legal regimes of specific issues put into question the suitability of Principles' interpretive assistance, that might result to incoherent interpretive conclusion about the meaning of the CISG's provision at stake. The adjudicator interpreting unclear CISG provision and seeking help in UPICC, that contains different plain text of their provision(s) addressing the same issue, faces the question whether the interpretive context provided by UPICC incompatible formally is incoherent also substantively and therefore insufficient for CISG's interpretation. Similar concern bothers adjudicator in every case using UPICC as s gap-filler, where no initial indication of a problematic character of the operation (differences in texts) is available and the adjudicator is confronted with such question of sufficiency in concrete case every time.

Gap-filling procedure, that is more complex, multi-stage task raise another risk emerging from uncertainties in an identification of internal gaps in CISG legal framework, more concretely the reliable distinction between an internal gap and an implied exclusion from the substantive scope of CISG, eventually between an internal gap and an exhaustive but more restrictive expressed legal solution of CISG.

These arisen questions of a potential unsuitability of the employment of Principles within an interpretation or supplementation of concrete issues of CISG's framework might have discouraging effect on adjudicators considering the use of UPICC, however, in my opinion, these should not prevail over a presented potentiality of a helpfulness and facilitation of a procedure of interpretation or interpretation. On top of that, these concerns can be addressed in

the methodology of application of UPICC[210], concretely through the incorporation of a checking step, that would serve to an examination of compatibility of ultimate result, eventually through the proper interpretation of the provisions related to potential, but controversial gap.

[210] For more see sections 1.2.4. and 1.3.2.

2.3. The preliminary conclusions: The desirability

While in previous chapter I rebut the usual strict arguments against a recourse to UPICC for their interpretive/supplementary help in relation to CISG, this only answers the concerns, whether they could be invoked, however, whether they should be invoked this is the matter of desirability of their employment analyzed in this chapter in two distinguished aspects.

Firstly, the issue closely related with admissibility – substantive desirability, the persuasiveness of substance of Principles in the sense of their nature and the linkage with set of rules that mediates its normative authority to Principles, what would grant them the legitimacy to be utilized in application of hard law – CISG, is subject to an examination. Doctrine, again, has split on the matter of possible substantive linkages identifying, at least two feasible *trans-national* set of rules backgrounding CISG, however under more proper examination the controversy about *what are Principles restatement of* seems to be resolved in favor of *lex mercatoria* rather than a narrower *ius commune*. The normative sources and inspirations, the drafting methodology and the expressed purpose of Principles' drafters apparently pursued more than to identify and restate the common core of commercial contract law and even in the parts of UPICC, than were not constructed on the basis of comparison of national and international sources on contract law but, rather as innovative law-making attempt of expert drafters to address internationally nonuniformly resolved legal issues with a legal solution best adapted for the needs of international trade, could be deemed to be *lex mercatoria* in functional sense, since they have not been challenged by a trade practice as unsuitable. Moreover, seeing *lex mercatoria* as substantive linkage between UPICC and CISG as its formal expressions in their entirety eliminates the concerns about the identification of these provisions of Principles, that would lack a needed normative legitimacy like in the case of contractual *ius commune* that would apparently not overlap with substance of UPICC so extensively. The legitimacy of a use

of Principles for their purpose to help within interpretation/supplementation of CISG is established and with it also the issue of admissibility is finally affirmatively assessed.

After this satisfactory conclusion on preliminary research question, I can shift to second aspect of a desirability, that contains the crucial arguments in favor of UPICC revealing their functional desirability that makes them the best option the most functionally suitable way of an interpretive/supplementary assistance of CISG under its Art. 7. Under consideration of conclusions on the interpretation of Art. 7 CISG presented in this thesis, the Principles show to be an instrument with unique combination of formal as well as substantive qualities that enable them, with high probability of success, to provide interpretive and supplementary solutions complying with Art. 7 CISG, or from the more fundamental perspective helping to interpret/supplement legal framework of CISG in the way that would most likely result to fulfilment of *implied purpose* of CISG and even, to limited extent, to the cure of a great drawback of CISG as convention – its formal rigidity.

Equally valuable (more cynical reader could argue that this aspect is the worthiest) benefit of interpretive/supplementary employment of Principles within application of CISG is the considerable methodological facilitation of the adjudicators' task, since adjudicators could recourse to the codified set of rules in the form of provisions pre-prepared for application, with mostly certain normative meaning instead of carrying out the interpretive or supplementary procedures that are very complex, time-consuming and often doctrinally controversial, what is illustrated in previous chapter dealing with the interpretation of Art. 7 CISG.[211]

[211] In contradiction, for some jurist even the admitted practicality and suitability of Principles are not able to prevail over the approach respecting the superiority of approach within four corners of CISG and the historical interpretation on the ground of preparatory works is favored regardless of the felt need of an actualization of substance of CISG. For example, Prof. Ziegel states:

> If we see an ambiguity in CISG, we cannot simply apply the UNIDROIT solution, attractive and sensible as this may seem. We must first seek to determine what caused the ambiguity and what the drafters had in mind. It is only when these avenues have been exhausted and fail to supply an answer that it appears legitimate to resort to the UNIDROIT Principles to resolve the ambiguity. The post-CISG generation of

Principles seems to be a "divine favor" for interpretation and supplementation of CISG, but as usual nothing is perfect and nor Principles are a panacea reliably providing clear-cut solutions for any CISG's interpretive/supplementary problem. They were not drafted exclusively for this purpose, what implies a chance of their incompatibility with CISG and despite their more extensive comprehensiveness, like every normative instrument they anticipate the need of their interpretation and supplementation, too. Principles may be the first stop of an adjudicator on the route towards ascertaining the applicable legal rule and its meaning under CISG, but it may happen that they will not be the final destination of this route, too. Accordingly, adjudicators must be careful and mindful of limits of Principles in respect of interpretation and supplementation of CISG's legal framework.

lawyers may feel impatient with this fussy approach and may prefer to resolve ambiguities by going directly to the Principles. While I understand and sympathize with this means of bypassing the tortuous process of seeking a formal revision of CISG; it is nevertheless unacceptable. It took ten years for UNCITRAL to reach agreement on the composition of CISG. The governmental representatives at the Vienna diplomatic conference fully appreciated that they were adopting what in many instances were compromise provisions that fell markedly short of what some of the delegates would have liked to adopt. The Contracting Parties are therefore entitled to expect that adjudicators will respect the CISG provisions, despite their shortcomings, even if they feel that they could have been substantially improved upon.

Ziegel, *supra* note 39.

3. The UPICC as the tool for interpretation and supplementation of the CISG: Practical demonstrations

After the warning against excessive optimism about Principles' almighty role of an interpretive tool and gap-filler usable within the process of an application of CISG that concludes previous chapter, the last part of my analysis, that, *inter alia*, is aimed also to illustrate such inappropriate interpretive/supplementary invocations of UPICC, is opened. More theoretical discussions occupying the previous pages and subsequently deduced conclusion in favor of an admissibility and desirability as well as abstract methodological concepts of such employment of Principles are going to be tested practically – on the interpretive/supplementary issues of CISG already identified as problematic or controversial, or, being more accurate, on the selected sample of these issues[212] containing the issue of interpretation of Art. 13 CISG dealing with the writing form and the issue of the proper interpretation of such essential provision of CISG as the fundamental breach under Art. 25 CISG is.

The internal gaps of CISG are represented by the conditions of performance of monetary obligations under Art. 57 CISG and the issues that are extensively discussed and splitting the jurisprudence and the practice along answers on the questions of the existence and nature of the gap as well as the way of its filling (under the condition of its qualification as a CISG's internal gap) – the issues of an interest rate under Art. 78 CISG and a coverage and an assessment of situations falling under the institute of hardship or under substantively and functionally similar institutes present in domestic contract laws[213].

Since the admissibility and desirability of such role of UPICC is generally presumed, these demonstrations show the validity of suggested methodological aspect of potential employment,

[212] For the list of regularly identified conundrums of the CISG's legal framework potentially remedied through interpretation or supplementation see e.g. *Id*.

[213] *Théorie d'imprévision* (France), *Wegfall der Geschäftsgrundlage* (Germany), frustration of contract (United Kingdom), impracticability (USA), different unnamed statutory reflections of principle *rebus sic stantibus* (e.g. Czech Republic), *eccessiva onerosità sopravvenuta* (Italy) etc.

its practical contribution and expectably also the potential limits of the applicability of Principles interpreting/supplementing CISG.

This practical exercise is not performed in absolute vacuum, but it is constructed on the basis of the current experience captured in the available caselaw. These sources reveal two interesting facts about applicability of Principles for their purpose of an interpretive/supplementary assistance for CISG. First of all, encouragingly, arbitrators and (what is perhaps even more encouraging) judges apply Principles in this role and despite their methods are not unified and outcomes sometimes showed to be debatable, the one-sided fundamental theoretical counterarguments of a less favorable part of a doctrine claiming essential inadmissibility of such use are evidently disregarded by practitioners applying CISG. Secondly, another common sign of the existing caselaw is the usual absence of an elaborated reasoning on the admissibility of resorting to Principles,[214] what could be explained by theoretical complexity of the issue

[214] In international practice, unfortunately, arbitrators and judges in decisions, which certainly are not the best place for a development of elaborated theoretical concepts, usually keep brief on the legal justification of employment of UPICC within an interpretation/supplementation of CISG. One could observe several categories of such justification. From the absolute absence of any justification: the corroborative unreasoned reference to Principles – see Arbitral award (Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft – Wien) SCH-4318 of 15th June 1994, (unknown parties), UNILEX ID: 635, http://www.unilex.info/case.cfm?id=635 (last visited Dec 7, 2016) and arbitral award (Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft – Wien) SCH-4366 of 15th June 1994, (unknown parties), UNILEX ID: 636, http://www.unilex.info/case.cfm?id=636/ (last visited Dec 7, 2016); through very vague and general expressions of reasons: for UPICC offering *"reasonable"* legal solution see Arbitral award (International court of arbitration of ICC – Zurich) ICC 8769 of December 1996, (unknown parties), UNILEX ID: 656, http://www.unilex.info/case.cfm?id=656 (last visited Dec 7, 2016); for UPICC as *"general principles of law"* see Arbitral award (International court of arbitration of ICC) ICC 12097, 2003, (unknown parties), UNILEX ID: 1403, http://www.unilex.info/case.cfm?id=1403 (last visited Dec 7, 2016); for UPICC as *"the international commercial practice"* see Arbitral award (International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation), 13/2007 of 13th May 2008, (unknown parties), UNILEX ID: 1475, http://www.unilex.info/case.cfm?id=1475 (last visited Dec 7, 2016); for UPICC as principles on which CISG is based see Arbitral award (International court of arbitration of ICC - Basel) ICC 8128, 1995, (unknown parties), UNILEX ID: 637, http://www.unilex.info/case.cfm?id=637 (last visited Dec 5, 2016) and Arbitral award (International court of arbitration of ICC - Paris) ICC 8817 of December 1997, (unknown parties), UNILEX ID: 659, http://www.unilex.info/case.cfm?id=659 (last visited Dec 5, 2016); including specific domestic practice inviting Principles to regulatory interfere in international commercial disputed: supreme court's resolutions in Belarus see Decision of Supreme Economic Court of the Republic of Belarus of 3rd January 2003, (unknown parties), UNILEX ID: 1389, http://www.unilex.info/case.cfm?id=1389 (last visited Dec 4, 2016), to a more detailed justification emphasizing the uniformity of CISG's application and the potential contribution of UPICC in this respect: see Arbitral award (International court of arbitration of ICC) ICC 11638, 2002, (unknown parties), UNILEX ID: 1407, http://www.unilex.info/case.cfm?id=1407 (last visited Dec 5, 2016).

(what is proven also by first two chapters of this thesis) and, on the other hand, by the more felt than known desirability of engagement of UPICC within an interpretation/supplementation of CISG and their methodological helpfulness (facilitation) in this respect. In every event, this seems to be lost chance to finally resolve the theoretically interesting, but practically undesired doctrinal split through giving preference to one of the streams. Current situation, when the caselaw recognize Principle's applicability without saying why, does not contribute to certainty in this matter that is still, 23 years after the publication of first version of Principles, opened and hardly expected to be resolved by jurisprudence itself.

3.1. "Writing" under Art. 13 CISG

Despite CISG is generally based on the principle of informality, that is, *inter alia*, explicitly expressed in its Art. 11 in respect of a sales contract, it operates with the term *"writing"* which therefore has the normative relevance. Besides mentioned Art. 11, stating no necessity of a conclusion or evidencing contract of sale by writing, and related Art. 12 and 96 CISG, introducing and describing the possible reservation of contracting state that requires in its domestic law specific form for a contract of sale about the principle of informality reflected in CISG, the term *"writing"* is used also in Art. 21(2) CISG, that addresses the special regime of a written acceptance lately delivered exclusively because of the unusual circumstances of transmission, and in Art. 29(2) CISG addressing the form of a modification or termination of written contract.

The wide variety of usable means of a communication between seller and buyer, eventually in precontractual stage between offeror and offeree, however, do not allow to ascertain the meaning of *"writing"* by plain textual interpretation of this very broad and vague word, CISG itself provides in Art. 13 the kind of a definition of *"writing"* as following:

> For purposes of this Convention "writing" includes telegram and telex.

The term *"includes"* in this provision indicates that besides traditional written forms of communication and expressions of intent captured on a tangible medium usually signed of certified and sent via mail services, only additional forms of remote communication covered under "writing" are telegram and telex. Reading the provision this way and employing the logical argument *a contrario*, one might conclude, that any other new means of electronic communication are not covered even if they could be perceived functional equivalents of more traditional ways of communication.

The obsolescence of Art. 13 CISG in confrontation with the current conditions in international trade, that because of technological development and accelerated globalization uses predominantly modern ways of remote communication, is absolutely obvious, since the telegram and telex are almost forgotten communication means in present days, however frequently used means like e-mails are omitted in Art. 13 CISG. Taking the perspective of teleological interpretation, the Art. 13, read restrictively as presented, evidently does not correspond with the purpose of CISG to provide (besides neutral and certain) a substantively suitable legal regime for actual needs of international commerce – transforming the argument to the language of Art. 7(1) CISG, such interpretation apparently contradicts the need to promote the observance of good faith in international trade. What is the appropriate interpretive remedy (evolutionary interpretation) for Art. 13 CISG, representing the typical anachronical rule, under Art. 7(1) CISG?[215]

Following my interpretation of Art. 7 CISG leading to systematic interpretation calling into play the Principles restating the *lex mercatoria* (legal order backgrounding CISG) as systematic context also for Art. 13 CISG[216], firstly, the relevant provisions of UPICC should be identified. Art. 1.11 UPICC named *"Definitions"* provides, in contrast to Art. 13 CISG, the functional approach to the term "writing" stating (with the emphasis on the permanency of preservance of carried information and the reproducibility in tangible form):

[215] The usually suggested way of achieving uniform interpretation of CISG – following the caselaw – would not bring an interpreter very far, simply because there is no explicit and stabilized line of decisions. See UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, *supra* note 50. P. 79.

[216] The problem of obsolescence of Art. 13 CISG may be viewed also from different perspective as the problem of gap-filling. See e.g. opinion of Prof. Schlechtreim, who adopts an evolutionary approach with the outcome that the technological progress in a communication opened the gap in Art. 13 CISG, that needs to be supplemented. See Peter Schlechtreim, *Uniform Sales Law - The Experience with Uniform Sales Laws in the Federal Republic of Germany (excerpt)*, http://cisgw3.law.pace.edu/cisg/text/schlechtriem13.html (last visited Apr 13, 2017).

> In these Principles (…) "writing" means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form.

The adopted functional approach offers open-ended notion of "writing" presumably adaptive to eventual future technological changes, and in this respect timeless, unlike Art. 13 CISG. The comment constituting integral part of Art. 1.11 UPICC accordingly clarifies the broader coverage of all means of communication meeting the prescribed functional elements and also implicitly refers to Art. 13 CISG when suggests: *"*(…) *a writing includes not only a telegram and a telex, but also any other mode of communication that preserves a record and can be reproduced in tangible form."*

The apparently textually and conceptually different rule of Art. 1.11 UPICC in its part defining "writing" distinguishable from Art. 13[217], in fact, provides suitable and helpful context for CISG's provision, suggesting the *extensive interpretation* along the lines outlined by functional requirements of Art. 1.11 UPICC. Such methodologically simple and updated interpretation of Art. 13 CISG in compliance with Principles adopted within CISG's legal framework would not collide with any its relevant provision or principle preserving internal coherency of CISG and simultaneously it would fully accord with interpretive guidelines of Art. 7(1) CISG and ultimately with the purpose of CISG. The wrinkle occurred on face of CISG grown old would be filled up with Principles.[218]

[217] I consider this case the third mode of interpretive assistance of UPICC. See modes of systematical interpretation with employment of Principles a as a systematic context of provisions of CISG in section 1.2.4.

[218] The (unreasoned) conclusion about functional interpretation of Art. 13 CISG in a way corresponding with the approach of UPICC is expressed also in the opinion of CISG Advisory Council. See CISG-AC Opinion No. 1, Electronic Communications under CISG, Rapporteur: Professor Christina Ramberg, Gothenburg, Sweden, http://www.cisgac.com/cisgac-opinion-no14/ (last visited Apr 8, 2017).

For the confirmation of the positive role of Principles within interpretation of Art. 13 CISG see Andrea L. Charters, *Growth of the CISG with Changing Contract Technology: "Writing" in Light of the UNIDROIT Principles and CISG-Advisory Council Opinion no. 1*, http://www.cisg.law.pace.edu/cisg/principles/uni13.html#ac76 (last visited Apr 6, 2017).

3.2. Fundamental breach of contract under Art. 25 CISG

The concept of fundamental breach of contract is as an essential concept incorporated into CISG, that determine the special regime of treatment of such breach, particularly opening in the case of fundamental breach of contract doors to, *inter alia*, the legal remedy with lethal effect of the preservance of the legal relationship – an avoidance of contract. The CISG that is viewed as the instrument giving the emphasis on the principle of *favor contractus*, admits the exemptional possibilities to depart from it in the most severe cases of a breach of contract affecting the substance of the contract as economical relationship.

The fundamental breach is consequently frequently used in the text of CISG, concretely in Art 46, 49, 51, 64, 70, 72, 73, that govern the remedies available to the party (seller or buyer) in the case of fundamental breach of contract. From the perspective of a hypothetical legislator, the task to draft of comprehensive and applicable definition of the "fundamental breach of contract" is a real Gordian knot, especially if one consider the practical variability of the international sale of goods. This characteristic of a heterogeneity of practical situations that should be reasonably addressed and governed by a uniform legal framework of CISG inevitably eliminates the possibility to take some casuistic approach to definition of general legal concept including also fundamental breach of contract and brings the legislator to very abstract formulations using open-ended terms leaving the room for adjudicators to scrutinize the individual factual circumstances of the case from the perspective of purpose of the provision.

Although this is really reasonable and, at least in the civil law jurisdictions, modern tendency in the legislation, it shifts the greater part of burden and responsibility for the just ultimate resolution of the dispute to the adjudicator who faces intellectually demanding interpretive challenge. This is the case of Art. 25 CISG too. This provision constitutes the concept of fundamental breach of contract on the threefold basis: a detriment of an aggravated party, a substantial deprivation of the contractual expectations of an aggravated party, foreseeability of

an effect of a breach at stake to qualify as fundamental by a breaching party and any reasonable party in a similar position:

> A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

However, CISG does not contain any guideline how to ascertain a qualifying magnitude of a detriment or of a substantiality of a deprivation and even though these elements are admittedly very fact-based to be determined in specific situation, the *"rather cryptic"*[219] formulation of Art. 25 CISG does not provide any clue about circumstances that should regularly be taken into adjudicators' consideration.

UPICC adopts textually different designation of the concepts corresponding to the concept of fundamental breach of contract under Art. 25 CISG, when it refers to "fundamental non-performance" in Art. 7.3.1 that, however, is not built as the defining provision, unlike Art. 25 CISG (this has the considerable consequences), but, comparing it to the CISG, combines the legal remedy provided for aggravated party in face of fundamental non-performance consisting in the right to avoid a contract – in language of Principles themselves – a right to terminate a contract, with the characterization of a factual circumstances signaling a fundamental non-performance for the purposes of granting the right to terminate a contract. Second paragraph of Art. 7.3.1(2) UPICC provides broader catalogue of relevant circumstances, that, *inter alia*, contains under letter (a) formulation substantively corresponding (except mentioning detriment) with the qualifying aspects of fundamental breach of contract under Art. 25 CISG[220],

[219] Felemegas, *supra* note 39. P. 170

[220] The verbatim of Art. 7.3.1(2)(a) UPICC*: "(…) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result (…)".*

but besides it also additional four potentially relevant, but not conclusive, circumstances, while this list apparently does not exhaustively enumerate and consequently limit the adjudicators in its supplementation[221]. While circumstances under (b), (c) and (d) relate to the non-performance itself, concretely to the nature of breached contractual duty to perform (contractual essentiality of the strict compliance with the obligation), the nature of the act of non-performance (intentionality, recklessness), consequence of the breach on the proceeding legal relationship (reasonable loss of reliance on future performance), the last listed circumstance refers to consequences of an eventual termination of the contract, therefore its consideration is not relevant as the consideration relevant from the perspective of a severity of non-performance qualifying it as fundamental, but rather as the consideration preventing inference of unreasonable and unjust outcomes of an application of prescribed remedy.

An exclusive list of circumstances potentially (not conclusively) constituting the fundamental non-performance arguably does not equal to definition itself, however examining the explicitly listed circumstances in their mutual relationships, one could conclude that while circumstance under (a) represents a highly abstract and general construct (in the regime of CISG it, in fact, comprises the definition itself under Art. 25), the following non-performance-related circumstances might be considered as the more concrete aspects of the case, that could be determinable more easily on the background of the factual findings. These aspects actually substantively relate to a substantial deprivation of contractual expectations constituting the element of the construction of general circumstance, or definition adapting the CISG's perspective[222], since contractually essential strictness of compliance with obligation, the due

[221] The demonstrativeness of the list is expressed by the use of the terms *"regards shall be had"* and *"in particular"* in wording of Art. 7.3.1(2) UPICC.

[222] Contradictory, see the opinion of Prof. Bridge, who views particularly the referred (in Principles) circumstance, when the breached obligation is of essence under contract, as contradictory to Art 25 CISG because such circumstance *"is not based on the actual consequences of breach in a given case at all"*. Bridge, *supra* note 16. P. 634.

diligence and carefulness of the business partner[223] as well as only accidental and exemptional non-performance of contract at the most establish such expectations of party under contract, that a disappointment of reliance of the party should qualify as a substantial deprivation.

Comparative approach hence clearly reveals that UPICC in their Art. 7.3.1, on the one hand, comply and follow abstract construction of fundamental breach of a contract under Art. 25 CISG (see under (a) of Art. 7.3.1(2) UPICC), on the other side, they offer to adjudicators additional more specific circumstances of the case, that should be taken into account within the determination whether concrete scenario falls under fundamental non-performance (see under (b)-(d) of Art. 7.3.1(2) UPICC). The provision of Principles is therefore more explanatory in contract to laconic Art. 25 CISG, while fully compatible with it.[224] The potential of the interpretive assistance of Principles as the suitable interpretive context to an adjudicator facing a need to interpret the unguiding Art. 25 CISG is evident and it would be perhaps practically appreciated too.[225]

[223] In this respect scholars use to point out that a liability under CISG is not based on the concept of a fault and therefore the reference of UPICC to a circumstance of an intentional or reckless breach of contract is incompatible with reading of Art. 25 CISG in the context of its rules on liability. See e.g. Robert Koch, *Commentary on Whether the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Article 25 CISG*, http://www.cisg.law.pace.edu/cisg/biblio/koch1.html#rk20 (last visited Apr 6, 2017); Chengwei Liu, *Remedies for Non-performance: Perspectives from CISG, UNIDROIT Principles & PECL*, http://cisgw3.law.pace.edu/cisg/biblio/chengwei.html#07-1 (last visited Apr 7, 2017).

I can hardly disagree with the presumed objective character of a liability under CISG, however, in my opinion, the definition of a fundamental breach of a contract should not be confused with the *conditio sine qua non* of the liability itself, but as the additional aspects of a breach qualifying it as fundamental because of its seriousness. The specific subjective relationship of a breaching party to a breach could be considered as such qualification because it reveals the serious defect in the grounds of economic relationship between the parties presumably affecting the basic contractual expectations of an aggravated party of contract.

[224] In my opinion, this case represents the second mode of an interpretive employment of Principles to CISG's application. See section 1.2.4.

[225] Accordingly Irina Buga, *Taking the International Approach to the CISG: The Gap-Filling Role of the UNIDROIT Principles and the Principles of European Contract Law* (2009), http://dspace.library.uu.nl/handle/1874/238503 (last visited Mar 20, 2017). P.10; Felemegas, *supra* note 39. Pp. 170-171; Garro, *supra* note 4. P. 1157; Vogenauer and Kleinheisterkamp, supra note 63. P. 84; Ziegel, *supra* note 39.; Bonell, *supra* note 25. P. 318.

The two notes need to be added. Firstly, the inherently vague character of the institute of fundamental breach of a contract entailing the legislative conundrum how to address it prevents Principles to give the absolute and ultimate interpretive instruction. Both instruments deal with this challenge similarly – adopting primarily the vague abstract construction, albeit only UPICC provide a more guidance through a demonstration of possible concrete relevant circumstances of the case. However, it is still very likely, that an employment of UPICC as interpretive tool would not lead to clear-cut resolution whether the fundamental breach is constituted or not.

Secondly, this example shows the danger of a methodologically inappropriate recourse to UPICC as interpretive context of CISG, that an applying adjudicator must be aware of, namely the tricky task to ascertain the relevant interpretive context of UPICC. I am referring to inapplicability of Art. 7.3.1(2)(e) UPICC, that should be perceived as the specific aspect of a case which is relevant exclusively in the context of reasonability of an outcome of an eventual termination of a contract not as the part of the definition of the event of fundamental non-performance. Such circumstance does not constitute the interpretive context for the definition of fundamental breach of contract under Art. 25 CISG.[226]

[226] Accordingly see Koch, *supra* note 223.; Liu, *supra* note 223.

3.3. Monetary obligations – payment conditions under CISG

A reader of the text of CISG has the opportunity to notice its overall briefness, when it expressly governs just essential aspects of sale transactions within its scope without addressing any technical details that are left to be primarily stipulated, eventually regulated within established practices between parties or applicable usages (Art. 9 CISG). The conventional nature of CISG and already mentioned obstacles that accompanied their drafting and adoption make this character of CISG understandable. After all, a preference put on the party autonomy and an openness to usages is undoubtedly the reasonable approach complying with the purpose of CISG and needs of international trade. However, there are still situations, where the suitable legal framework of default rules would find its use. In this respect, the plain text of CISG may be perceived fragmental and of no assistance.

The striking example of gaps in CISG's explicit legal framework is that CISG within its provisions dealing with performance of buyer's fundamental duties under a sale contract (Art. 54-59 CISG), *inter alia,* to pay the price, offers no rules on means of payment and on a currency issue of the payment, although these issues constitutes crucial elements of transactions influencing its ultimate success. It is obvious, that this case, the existence of the internal gap is undisputable – the payment of monetary obligation of buyer is certainly the issue governed by CISG (which, in fact, governs its essential aspect like a time, amount and place of payment[227]) but not entirely settled in all its details.

[227] The issue of a place of a performance of a monetary obligation under CISG in general (not only in respect of a payment of sale price) has been addressed by French court, which referred also to Principles. In the decision of *Cour d'appel de Grenoble*, the court, after the deduction of general principle of place of payment in the creditor's place of a business from Art. 57 CISG, engaged UPICC (Art. 6.1.6 of 1994 UPICC) in the reasoning as corroborative element:

> Que l'interprétation habituellement donnée de cette règle est qu'elle exprime le principe général que le paiement s'exécute au domicile du créancier (cf. MASKOW dans BIANCA et BONELL, article 57, 3-2 et OBERLANDESGERICHT DÜSSELDORF 2 juillet 1993 UNILEX, D.1993-21) étendu aux autres contrats du commerce international par l'article 6.1.6 des Principes d'Unidroit ('lorsque le lieu d'exécution de l'obligation n'est pas fixé par le contrat ou déterminable en vue de celui-ci, l'exécution s'effectue: ... pour une obligation de somme d'argent au lieu d'établissement du créancier.

Principles, on the other hand, in their Art. 6.1.7 – 6.1.10 contain the quite detailed rules governing the performance of monetary obligations from the perspective of utilizable means of payment explicitly covering special rules on a payment by a cheque and by a fund transfer as well as the currency in which the payment is realizable.

Following methodology outlined in previous chapters[228], the existence of the internal gap within CISG is established (first, this gap is objectively apparent and undisputable; second, existence of detailed provisions of Principles corroborates the existence of gap too) and the potential gap-filling provisions are contained in Principles. Subsequent step from the methodological perspective should be testing the eventual systematical inconsistences of implemented gap-filling rules within CISG's legal framework, what can be carried out in different ways according to the adopted methodological approach distinguished in this thesis on the basis of the scholars advocating each of them.

Firstly, considering Bonell's *only-condition approach*, we would be expected to identify the general principle underlying CISG, that is simultaneously reflected in the potential gap-filling provisions. Bonell himself views in cited provisions of Principles appropriate reflection of the principle of *reasonableness*[229], on which CISG is based too, and consequently he admits the

Decision of Cour d'appel de Grenoble of 23rd October 1996, SCEA GAEC Des Beauches Bernard Bruno v. Société Teso Ten Elsen GmbH & COKG, UNILEX ID: 638, http://www.unilex.info/case.cfm?id=638 (last visited Dec 4, 2016).

[228] See section 1.3.2.

[229] The reasonableness of legal solutions provided by Principles, is not, however, admitted unequivocally. For example, Prof. Bridge challenges the suitability of general rule under Art. 6.1.7(1) UPICC according to which, the scale of utilizable means of payment depends on ordinary course of business at the place of payment, arguing that such rule would impose an excessive risk of buyer's insolvency on the seller in the case of payment by a cheque. This concern, however, would appear justified in the practice very rarely because (1) the issue of a form of payment will be expressly stipulated in the contract, (2) the default rule provides as a place of payment at the seller's place of business (except case of a stipulated payment against handover of goods, what happens rarely in international trade where electronic payments are predominantly used), therefore, seller would be hardly taken by surprise by the form of payment. In addition, the adopted rule actually opens doors to employment of local business practices presumably meeting the needs of traders.

Prof. Bridge expresses also another softer objection against substantive quality of Art. 6.1.8(2) UPICC that govems the moment of the discharge of obligor's duty to pay in the case of payment via fund transfer. The concept of effectivity of a transfer is criticized because of the vagueness and uncertainty obviously. Prof. Bridge argument is not without the point, however, as the official commentary states, it is actually impossible to generally describe

supplementation through these provisions of UPICC.[230] I think, his logic in this case is convincing and I would like to add only additional comment related to the facilitation of the supplementation of CISG in regard of payment condition. Currency issues and issues of means of payment are, in their nature, very technical and taking into account the vagueness of the principle of reasonableness and the uncertainty of the perception of an adjudicator (person potentially unknowledgeable about the international trade) of what is a reasonable manner of conduct and therefore applicable rule in this respect, one could be pessimistic of a suitability of an eventual outcome of CISG's supplementation exclusively on the basis of this principle. Moreover, since different adjudicators could achieve different gap-filling solutions, the uniformity of the CISG's legal framework would be jeopardized.

Turning to Basedow's *ex post* checking of inconsistency, I am not able to identify the provisions of CISG, that would signal, that Principles' rules applicable in their context would result to unreasonable or inconsistent solutions. This is not the surprise, since such technicalities of transactions are not addressed in CISG generally and it seems that also here Principles are able to serve well to cure the shortcomings of CISG.[231]

the such moment because of various possible factual circumstances. The comment narrows down the relevant period within which the moment should be set and for the specific rule it refers to banking practices applied in the case. See Bridge, *supra* note 16. Pp. 630-632.

[230] Bonell, *supra* note 25. P. 320.

[231] Accordingly see Felemegas, *supra* note 39. P. 173.

3.4. Interest rate under Art. 78 CISG

Moving to more controversial matters related to the supplementation of CISG, the legal framework governing an interest on payments in arrears under CISG necessarily must be addressed. Art. 78 CISG offers very brief rule expressing only the mere existence of entitlement of the aggravated party to an interest beyond its right to damages:

> 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.

The explicitly stated rule is beyond any discussion insufficient, since it omits any legal solution for a calculation of a granted interest[232] and therefore the provision of Art. 78 is, as such, inapplicable.

What is the nature of the omission? Why CISG does stay silent on such fundamental question, that inevitably raises not only theoretical questions, but also practical inconveniencies? It is regularly stated in scholarly writings, that formulation used in Art. 78 CISG is the consequence of the impossibility of national representatives to achieve the agreement on this matter[233] and, for sake of a clarity, I would add that this fail was consequence of *"fundamental differences in the approach of different national legal systems to the question of interest"*.[234] To find common legal ground for the uniform legal framework on a calculation of interest showed to be too

[232] The Principles' role of a gap-filler of Art. 78 CISG exceeds the mere issue of a calculation of an interest (interest rate. In arbitral practice, tribunals sought in UPICC also interpretative help to ascertain whether the liability exemption under Art. 79 CISG releases a debtor also from the duty to pay an interest. The negative answer was found in official comment on Art. 7.4.9. UPICC (in my opinion this may be considered the first mode of Principles' interpretive assistance – section 1.2.4.). See Arbitral award (International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation),13/2007 of 13th May 2008, (unknown parties), UNILEX ID: 1475, http://www.unilex.info/case.cfm?id=1475 (last visited Dec 7, 2016).

[233] See e.g Janssen, *supra* note 112. P. 7; Wethmar-Lemmer, *supra* note 101. P. 294.

[234] Quoted from the note of Mr. Khoo, Singaporean representative, the chairman of the working group appointed to draft a new formulation of a provision dealing with an interest on payments in arrears and suggesting the actual wording of current Art. 78 CISG at Vienna Conference in 1980. See United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980. Official records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees, A/CONF.97/19, *supra* note 23, P. 226.

difficult task throughout whole procedure of drafting and negotiating CISG, what under a time pressure of the conference schedule ultimately resulted to the minimalistic compromise.[235]

The doctrine, as usually, formed different theoretical streams leaving interested parties in a "darkness". A part of a doctrine referring the preparatory works infers that the interest rate is impliedly excluded from the scope of CISG, what would mean, that the interest rate shall be determined according to the domestic law determined on the grounds of private international law.[236] The same result concluded on different theoretical approach is advocated by another camp of scholars, who views the issue of an interest calculation to be the *internal gap* fillable in accordance with Art. 7(2) CISG, nevertheless, it refuses the sufficiency or even the mere existence of general principles underlying CISG providing certain legal solution and only possibility form they perspective is to recourse again to domestic law under Art. 7(2) CISG *in fine*.[237] Third group of jurists, alike the second presented doctrinal stream, views the interest calculation as CISG's *internal gap*, however, in contrast with previously mentioned scholars, it identifies principles of a *full compensation* and of a *reasonableness* suggesting different rules governing interest rates under Art. 78 CISG.[238]

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[235] For brief history of present Art. 78 CISG showing the multiple suggestion for substantive solution on an interest rate see Francesco G. Mazzotta, *CISG Article 78: Endless disagreement among commentators, much less among the courts*, http://www.cisg.law.pace.edu/cisg/biblio/mazzotta78.html (last visited Apr 8, 2017).

[236] See e.g. Sieg Eiselen, *Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Article 78 of the CISG*, http://www.cisg.law.pace.edu/cisg/principles/uni78.html#sefn24 (last visited Apr 8, 2017); Franco Ferrari, *Uniform Application and Interest Rates under the 1980 Vienna Sales Convention*, 24 GA. J. INT. COMP. LAW 467–478 (1994). P. 477.

[237] See e.g. authors claiming that multifold gap-filling rules formulated based on general principles underlying CISG causes inacceptable legal uncertainty and unpredictability and most likely the nonuniformity of the legal framework in this issue. According to these authors, only possible option guaranteeing, at least, some degree of certainty is an application of domestic law governing the contract, even though such solution doubtlessly leads to nonuniform outcomes. See e.g. Mazzotta, *supra* note 235.; Wethmar-Lemmer, *supra* note 101. P. 296.

Prof. Janssen summarizes an unfeasibility of uniform solution in a clear language: *"There is no (generally approved) general principle of the Convention with regard to the interest rate."* Janssen, *supra* note 112. P. 8.

[238] See e.g. (without reference to UPICC) Koneru, *supra* note 70. Pp. 123-134. See also (with simultaneous reference to UPICC) Bonell, *supra* note 25. Pp. 320-322, Felemegas, *supra* note 39. Pp. 173-174.

From my point of view that is based on my interpretation of CISG as presented in this thesis, the interest calculation should not be appraised as implied exclusion from the scope of CISG. These authors[239] who advocate such qualification apparently rely extensively on historic interpretive argument, however, as I emphasized above, *travaux préparatoires* illustrate that the Art. 78 CISG is rather the consequence of a helplessness of national representatives firmly adhering to their own domestic legal perspective, than demonstration of common will to exclude the other related questions to the real of domestic law.[240] At least, no explicit statement of this content justifying restrictive interpretation of CISG's scope is included in CISG's text itself (for example, in Art. 4 CISG) or in related preparatory works. In addition, presuming that the main reasons of disagreement were only divergent domestic perspectives, such ethnocentric thinking of representatives inacceptable within the application (interpretation) of CISG under Art. 7 CISG and in unreasonable extent certainly undesirable also within negotiations about CISG may hardly provide a solid basis for its proper interpretation, in fact, restrictively limiting CISG's scope. Especially, when Art. 7(2) CISG in compliance with the CISG's purpose expresses the indisputable preference of uniform legal solutions in principle compatible with the CISG over a recourse to domestic laws generating certainly nonuniform results.

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[239] See e.g. Eiselen, *supra* note 236.

[240] Accordingly see Andre Corterier, *A New Approach to Solving the Interest Rate Problem of Art 78 CISG*, 5 INT. TRADE BUS. LAW ANNU. 33–42 (2000). P. 39; Andersen, *supra* note 112.

Apparently, some authors attribute to a silence of CISG more significant meaning. For example, Prof. Bridge designate Art. 78 CISG as "delicate compromise" accommodating the sensitiveness of the issue for Islamic countries which forbid charging of an interest (ribā) according to Sharia law. See Bridge, *supra* note 16. Pp. 632-633.

However, this assumption seems to lack a logic, because Art. 78 CISG guaranteeing the entitlement for an interest contradicts legal prohibition of Sharia law. In addition, in the working group that suggested the formulation of the current Art. 78 CISG no representative of Islamic country actively participated (representative of Egypt alleged that he did not even though he had been appointed). See United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980. Official records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees, A/CONF.97/19, *supra* note 23, Pp. 225-226. The problem of an interest claim in the case of transaction linked with Islamic legal culture might be, in my opinion, addressed via Art. 9 CISG qualifying such traditional religious prohibitions as broadly known trade usages or in the case of litigation before courts of Islamic country adopting Sharia law these prohibitions as mandatory rules (or even rules of public order) would most likely prevail over CISG.

According to my methodological analysis of a possible employment of UPICC as a CISG's gap-filler[241] the fact, that Principles in their Art. 7.4.9(2)[242] address the issue of an interest calculation with the presumably internationally acceptable legal solution (under my qualification of UPICC as a restatement of *lex mercatoria* on general contract law this solution is accepted in international trade[243]), is the indication of existence of *internal gap* of CISG. Presumption based on existence of Principles' potentially gap-filling provisions, in my opinion, is not rebuttable via reference to the preparatory works that are nonconclusive in this respect.

Concluding that the interest calculation constitutes the *internal gap* which can be well filled by Principles, the methodological procedure requires examining the compatibility of gap-filling provisions with CISG, concretely, in accord with Bonell's perception, whether potentially gap-filling provisions are expressions of general principles underlying CISG. The literature in this respect stresses the link between damages and an interest as the functionally similar institutes providing remedies in case of a breach of a contract.[244] The fundamental principle governing the issue of damages under CISG – principle of *full compensation* – is therefore transferred into

[241] See section 1.3.2.

[242] The English version of the black-letter text of Art. 7.4.9 states as following:

> (1) If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment whether or not the non-payment is excused.
>
> (2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.
>
> (3) The aggrieved party is entitled to additional damages if the non-payment caused it a greater harm.

[243] In this respect is interesting, that even Prof. Michaels, the proponent of an idea of Principles as partial restatement of new *ius commune* (see section 2.1.1), admits and appreciates of a contribution of Art. 7.4.9 UPICC as a gap-filler of Art. 78 CISG to it suitability and uniformity, despite this concrete provision of UPICC is not a rule restating the common core of legal orders. Vogenauer and Kleinheisterkamp, *supra* note 63. P. 84.

[244] See e.g. CISG-AC Opinion No. 14, Interest under Article 78 CISG, Rapporteur: Professor Doctor Yeşim M. Atamer, Istanbul Bilgi University, Turkey, http://www.cisgac.com/cisgac-opinion-no14/ (last visited Apr 8, 2017). P. 6.

the area of an interest under Art. 78 CISG, too.[245] Is then the three-tier rule of Art. 7.4.9(2) UPICC localizing the interest rate into the place of payment or into the place of currency the proper expression of this principle? First note should be, that in doctrine and caselaw there are suggested various concrete normative implications (rules) of a *full compensati*on principle within an interest calculation under CISG[246], without any clearly dominant option, what illustrates divergence in the understanding of the specific application of the principle of a full compensation on interest.

I agree that an interest is the legal institute of similar function as damages, however with specifics justified by special nature of a non-performed obligation – a monetary obligation, since a value of money as universal mean of exchange is inevitably dependent on a time. Especially in the case of commercial entities, currently available funds are more valuable than fund spendable in the future and therefore any delayed payment inherently causes a certain loss of a time value of paid money.[247] How to fittingly express this general "time value" of a payable

[245] Accordingly see Bonell, *supra* note 25. P.321; Felemegas, *supra* note 39. P. 174; Koneru, *supra* note 70. P.126, Perillo, *supra* note 168. P. 312.

Some jurists emphasize the difference between the principle of full compensation and the principle of a prohibition of unjust enrichment, especially when distinguishing between interest under Art. 78 CISG and under Art. 84(1) CISG. See e.g. Corterier, *supra* note 240. Pp. 35-36; CISG-AC Opinion No. 14, Interest under Article 78 CISG, *supra* note 244. Pp. 6-7.

Contradicting view is held by Mazzotta, who considers the principle of full compensation unfitting for governing a calculation of an interest. He highlights formal separation of provisions on interest from provisions on damages in CISG and he disagrees with the perception of an interest as a kind of a compensation for damages that, in his opinion, *"results from a misunderstanding of the nature of the interest as defined by Article 78"*. According to Mazzotta, the difference between claims for damages and for the interest, that, in contrast, is not needed to be proven as the matter of fact, disqualifies the principles of a full compensation to be analogically applied on an interest under Art. 78 CISG. Mazzotta, *supra* note 235.

[246] The Opinion No. 14 of CISG Advisory Council summarizes these suggestion as following: the current interest rate at the creditor's place of business; the current interest rate at the debtor's place of business; the current rate of interest related to the particular currency of the claim (*lex monetae*); an internationally or regionally applied interest rate like the Libor (London Interbank Offered Rate) or the Euribor (Euro Interbank Offered Rate) or the reference rate defined by Directive 2011/7/EU on Combating Late Payment in Commercial Transactions; application of Article 7.4.9 of the Unidroit PICC. CISG-AC Opinion No. 14, Interest under Article 78 CISG, *supra* note 244. Pp. 15-16.

[247] My explanation of the "time value" is not usual one. Scholars trying to explain the compensatory nature of an interest under Art. 78 CISG usually use the concepts of hypothetical behavior of a creditor of a debtor. They presume that *creditor's* loss consists in the loan interest that he would be to pay for hypothetical bank loan financing the needs of a creditor instead an unpaid debt or in the saving interest on an unpaid amount of money as a hypothetical investment he would be hypothetically deprived of. The authors considering as the relevant principle

money in the environment of international trade in a way allowing relatively easy determination and application of the formula? Is it the rule of Principles?

Shortly, yes.[248] Under my consideration, Principles fulfills two important aspects: firstly, they refer primarily to usually available commercial rates[249] capturing objectively, how do participants of a financial market primarily generating a supply of money in certain currency – banks – evaluate mentioned actual "time value" of money. Secondly, Principles objectivize a localization the benchmarking financial market[250] via the reference to place of a payment (a place of a contractual allocation of a payment – in a current practice of electronic payments by default the place of seller's business) or subsidiarily to a state of a payable currency (a place where financial market is not affected by local influences of e.g. a state currency policy). The

applicable to the issue of an interest also the principle of an unjust enrichment would add the explanations based on a *debtor's* hypothetical behavior and a consequent hypothetical unjust enrichment in a form of earned interest from unpaid money as an investment or saved loan interest of hypothetical loan financing payment of the contractual obligation. These constructions generate the four different rules of a calculation of interest rate, all with some rationale behind, however containing hypothetical presumptions with questionable probability. The legitimacy of every of them is open to criticism as fitting fiction. For examples of the hypothetical legal thinking about the interest and its function see Koneru, *supra* note 70. Pp. 127-129; Gotanda, *supra* note 85. Pp. 17-19.

[248] For the contradictory assessment (the danger of overcompensation of under Art. 7.4.9 UPICC) see Gotanda, *supra* note 85. P. 19.

[249] Corterier expresses the similar idea: *"The goals of the convention are probably best served by the application of market interest rates, as these best reflect the needs of the parties. The market, after all, is the domain of commercial traders."* Corterier, *supra* note 240. P. 38.

In comparison, statutory interest rates may, but also may not be accurate expression of actual commercial "time value" of money. The statutory interest rates may reflect rather the domestic policy in respect of debts in default (an interest as a sanction or as an incentive for a payment of debts etc.) than the relevant financial markets. Statutory interest in some countries may be published only in general without distinguishing between payable currencies, what prevents to consider the circumstances of the concrete case. In this regard, it is surprising for me that CISG Advisory Council adapted as the solution of a nature of the private international law, formulating rule of conflicts of law invoking the law of a creditor's place of a business. See CISG-AC Opinion No. 14, Interest under Article 78 CISG, *supra* note 244. Pp. 18-19.

[250] As I explain *supra* note 247, the localization of the interest according to the place of business of parties constitutes diverging solutions and operates with some kind of hypothetical presumption about behavior of the parties. The objected interpretive problems with ascertaining of a place of the payment in concrete transactions (primary localization of commercial interest under Art. 7.4.9(2) UPICC are two-edged argument, because same objection could be raised in any localizing aspect, including the place of a business. See CISG-AC Opinion No. 14, Interest under Article 78 CISG, *supra* note 244. P. 17.

elaborated rule of Art. 7.4.9(2) UPICC apparently has its rationale that most likely would be considered economically reasonable.[251]

The use of the methodological perspective of Jürgen Basedow instead the one of Bonell[252] does not change the outcome of my analysis, since CISG's a very general provision on interest on payments in arrears in Art. 78 CISD does not raise a significant danger of potential incompatibilities, moreover, if the potential gap-filling provisions are actually in compliance with principles on which CISG is based.

My methodology does not reveal any obstacles to apply the Art. 7.4.9 UPICC as a gap-filler of Art. 78 CISG[253], contrary, the employment contained provisions would therefore improve the current state of total legal uncertainty caused by substantially divergent practice and theories on the applicable legal framework of an interest under CISG. Providing that the issue of an interest is the CISG's *internal gap*, Principles in this respect have a unique potential to achieve the *implied purpose* of CISG in the greatest extent, when they provide the desired neutral (unlike a recourse to the solutions of domestic law) and certain legal solution that, in my opinion, suitably takes into account needs and conditions of the international trading (e.g. the possibility of a need to allocate the payment in a different place than in a place of a business, the specific role of a currency). The viability of this specific supplementary application of CISG proves the relatively numerous cases where the rule of Principles was invoked within the

[251] As the official comment to Art. 7.4.9 UPICC states in regard of rule contained in paragraph 2: *"This solution seems to be that best suited to the needs of international trade and most appropriate to ensure an adequate compensation of the harm sustained."*

Another way of an inference and justification of the rule invoking average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment (first step of threefold rule of Art. 7.4.9 (2) UPICC) is analogical application of Art. 76 CISG. See Corterier, *supra* note 240. Pp. 40-41.

[252] See section 1.3.2.

[253] Significant number of authors welcomes the supplementary application of UPICC in respect of CISG's *internal gap* in respect of an interest under Art. 78 CISG. See e.g. Bonell, *supra* note 25. Pp. 320-322; Garro, *supra* note 4. P. 1157; Felemegas, *supra* note 39. Pp. 173-174; Vogenauer and Kleinheisterkamp, *supra* note 63. P. 84.

CISG's framework[254], however even though the engagement of Principles seems to be the desirable and admissible option, it is questionable whether desirability itself would prevail over the practical predominant popularity of *"much less hassle"*[255] resorting to interest determined in compliance with domestic law governing contract.[256]

[254] The use of Art. 7.4.9. UPICC (in version from 1994) was the early premiere of Principles as a gap-filler of CISG, in this case, however, only as the corroboration of the solution inferred from the general principle of a *full compensation*. Arbitral award (Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft – Wien) SCH-4318 of 15th June 1994, (unknown parties), UNILEX ID: 635, http://www.unilex.info/case.cfm?id=635 (last visited Dec 7, 2016) and arbitral award (Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft – Wien) SCH-4366 of 15th June 1994, (unknown parties), UNILEX ID: 636, http://www.unilex.info/case.cfm?id=636/ (last visited Dec 7, 2016).

This corroborative employment has been abandoned and arbitral tribunals seeking the provisions potentially filling the gaps of Art. 78 CISG have started to refer to Art. 7.4.9 UPICC directly with different explanations: *"The sole Arbitrator considers it appropriate to apply a commercially reasonable interest rate (see Art. 7.4.9. subs. 2 Unidroit Principles)."* Arbitral award (International court of arbitration of ICC – Zurich) ICC 8769 of December 1996, (unknown parties), UNILEX ID: 656, http://www.unilex.info/case.cfm?id=656 (last visited Dec 7, 2016); "*L'arbitre considère justifié d'appliquer au litige les règles identiques contenues dans les principes UNIDROIT et les principes du droit européen des contrats en tant que principes généraux au sens de l'article 7(2) de la Convention."* See Arbitral award (International court of arbitration of ICC - Basel) ICC 8128, 1995, (unknown parties), UNILEX ID: 637, http://www.unilex.info/case.cfm?id=637 (last visited Dec 5, 2016).

Interesting case of an application of rules contained in Art. 7.4.9(2) UPICC is the case before CIETAC, when arbitral tribunal finally applied Principles' rule, however, paradoxically held:

> The Arbitration Tribunal held that the Principles are neither an international convention, nor did the parties stipulate the Principles in the Contract, and therefore, it lacked either legal or contractual grounds for the Arbitration Tribunal to rule according to the Principles; however, the Arbitration Tribunal could refer to the Principles.
>
> Arbitral award (CIETAC) of 2nd September 2005, (unknown parties), UNILEX ID: 1355, http://www.unilex.info/case.cfm?id=1355 (last visited Dec 4, 2016).

In the litigation where courts are traditionally more reluctant to apply soft law instruments, unlike German courts, the courts of Belarus showed more favorable attitude to the calculation of an interest under Art. 78 CISG in compliance with Art. 7.4.9(2) UPICC. See Decision of Supreme Economic Court of the Republic of Belarus of 3rd January 2003, (unknown parties), UNILEX ID: 1389, http://www.unilex.info/case.cfm?id=1389 (last visited Dec 4, 2016) and decision of Supreme Economic Court of the Republic of Belarus, 8-5/2003 of 20th May 2003, Holzimpex Inc. v. Republican Agricultural Unitary Enterprise, UNILEX ID: 1007, http://www.unilex.info/case.cfm?id=1007 (last visited Dec 4, 2016).

[255] Andersen, *supra* note 112.

[256] Such predominant position is observable in the case of German courts. See Eva Diederichsen, *Commentary to Journal of Law & Commerce Case I; Oberlandesgericht, Frankfurt am Main Recent Development: CISG*, 14 J. LAW COMMER. 177–182 (1994). P. 181. Some authors perceive this stabilized practice the conclusive argument in favor of looking for an interest calculation rule in a domestic law governing the contract. See e.g. Ferrari, *supra* note 236. P. 477; Gotanda, *supra* note 85. Pp. 17-18.

3.5.Hardship under CISG

Finally, I approach the last issue of the legal regime of CISG potentially soluble through a supplementation via provisions of UPICC - the issue in respect of which my approach favorable to the employment of UPICC might be considered particularly controversial and provokingly far-reaching.

Art. 79 and 80 CISG constituting Section IV named "Exemptions" represents CISG's explicit legal framework addressing the crucial aspects of contract law – a determination of circumstances of a case exempting a breaching party from contractual liabilities as well as the extent of such exemption. Generally, Art. 79 CISG[257] builds on the concept of an impediment autonomously designating the qualified exempting events (para.1) and as the legal consequence of such event provides only release from a liability for damages (para. 5). It is important to note, that CISG deliberately adopts the autonomous terminology, since it uses the CISG-specific term *an impediment* instead terms resembling specific national legal equivalents like *force majeure, impossibility* or, approaching the institutes related to an excessive onerousness, like *impracticability*, *frustration* etc., in order to prevent an enhancement of the ethnocentric

[257] English version of Art. 79 CISG states:

> 1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
>
> (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:
>
> (a) he is exempt under the preceding paragraph; and
>
> (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
>
> (3) The exemption provided by this article has effect for the period during which the impediment exists.
>
> (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.
>
> (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

approach to the interpretation of this provision instead of uniform interpretation with regard to international character of CISG (Art. 7(1) CISG).

Several interpretive questions arise in relation to the concept of *an impediment* under Art. 79 CISG. What is the scope of the Art. 79 CISG in respect of qualified exempting events? To be more concrete, does the term *an impediment* cover besides undisputed events of an objective impossibility (in terminology of UPICC and the international practice – *force majeure*) also less obstructing events making the performance of contractual obligations unreasonably onerous (in terminology of UPICC and the international practice – *a hardship*)? If it does not, does the potentially fillable gap exist within Art. 79 CISG? Or contrary, does the Art. 79 CISG represent the exhaustive explicit legal framework of liability exemptions under CISG?

Fully comprehensive, justified and persuasive answers to these questions exceeds the aims of this subchapter, therefore I would like to refer to knowledgeable jurists, who have already addressed them, asking them for the conclusions relevant from the perspective of the possibility of interpretive/supplementary assistance of CISG. Unfortunately, as doctrine uses to, it offers different assessments on the issue of a hardship under CISG, what can be illustrated on Prof. Petsche's identification of totally four different legal solutions formulated on the grounds of a doctrine and a caselaw.[258]

Despite recent theories based on the extensive interpretation of a term *an impediment*[259] it seems that prevailing tendency of caselaw and a doctrine is to interpret Art. 79 CISG as a provision

[258] Prof. Petsche identifies and subsequently analyzes four solutions: (1) The absence of a specific hardship provision constitutes a gap which must be filled by the applicable domestic law, (2) The absence of a specific hardship provision constitutes a gap which must be filled by the general principles underlying the CISG, (3) Hardship may constitute an impediment in the sense of Art. 79 CISG, (4) Hardship is excluded under the CISG. See Petsche, *supra* note 195.

[259] The part of doctrine support the liberal reading of the term *an impediment* under Art. 79 CISG covering also the events of a hardship. See e.g. CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA, http://www.cisgac.com/cisgac-opinion-no7/ (last visited Apr 8, 2017); Ingeborg Schwenzer, *Force Majeure*

governing exclusively events of *a force majeure*, leaving the evens of a hardship out of its scope.[260] As Prof. Petsche notices in his analysis, using the Principles as the context for interpretation of Art. 79 CISG supports this conclusion, since Art. 79 CISG textually and conceptually (in the part of a definition of exempting events and conceptually also in the part of their legal consequences) corresponds with Art. 7.1.7 UPICC on *force majeure* and Principles draws the clear line between a *force majeure* and a hardship regulated in Art. 6.2.2 and 6.2.3 UPICC, which substantively differs in respect of definition of an event of a hardship and most importantly in the legal effects of these events.[261]

Building on the prevailing negative answer on the first interpretive question, the way is open to considerations of potential existence of a gap in the Art. 79 CISG where, as I explain above[262], the Principles methodologically might be suitable starting point, which, because of it explicitly addresses the issue of a hardship, would indicate that CISG has the gap consisting in its silence on this issue. While this Principles' assistance in finding gaps is used also in the analysis of the role of Principles as a gap-filler in respect of the issue of an interest under Art. 78 CISG, where they serves to help ascertain of *a nature of the evident gap*, here the situation is even more complicated with the reasonable objection of exhaustiveness of Art. 79 CISG.

The proponents of idea of the exhaustiveness of Art. 79 CISG refer mostly to the historical interpretive argument based on preparatory works documenting the rejections of initiatives to

and Hardship in International Sales Contracts Wider Perspectives, 39 VIC. UNIV. WELLINGT. LAW REV. 709–726 (2008).

[260] See e,g, Bruno Zeller, *Article 79 Revisited*, 14 VINDOBONA J. INT. COMMER. LAW ARBITR. 151–164 (2010). P. 153; Catherine Kessedjian, *Competing Approaches to Force Majeure and Hardship*, 25 INT. REV. LAW ECON. 415–433 (2005). P. 419; Dionysios P. Flambouras, *The Doctrines of Impossibility of Performance and Clausula Rebus SIC Stantibus in the 1980 Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law - A Comparative Analysis*, 13 PACE INT. LAW REV. 261–294 (2001). P. 278; Scott D. Slater, *Overcome by Hardship: The Inapplicability of the UniDroit Principles' Hardship Provisions to CISG*, 12 FLA. J. INT. LAW 231–262 (1998). P.253; Petsche, *supra* note 195. P. 170.

[261] Petsche, *supra* note 195. P. 156.

[262] See section 1.3.2.

explicitly deal with events qualifiable as a hardship within Art. 79 CISG. However, in my opinion, the mere fact of a rejection is not conclusive in this respect and one, looking for really convincing historical interpretive argument, should take a closer look at *travaux préparatoires*, especially at the final stages of negotiations on Vienna conference, where the ultimate formulation of current Art. 79 CISG was adopted.[263]

Norwegian proposal in this respect contained the amended provision of current Art. 79 CISG, that would provide for, *inter alia*, exemption also in the case of *"the circumstances were so radically changed that it would be manifestly unreasonable to hold liable the party concerned"*, with the note that *"[t]he question had been discussed for a long time within UNCITRAL without arriving at any agreement"*. Alongside the strong support of Norwegian proposal (at least from the side of commenting representatives including also representatives of leading trading states – USA, United Kingdom, Italy, Netherlands), also critical voices were sounded. Comments of disagreeing representatives reveals interesting information.

Certainly, Swedish representative explicitly referred in respect of Norwegian proposal to *"the doctrine of frustration in English law or the théorie de l'imprévision in French law"* however Swedish representative did not contradict the concept as such, but he expressed the concerns about fragmental nature of the regime under proposed amendment concluding that in result *"the working group had decided to leave the matter open in the Convention to be solved either by some contractual arrangement between the parties or by applicable law"*. It seems to me, that Swedish position was, for the sake of comprehensiveness of a legal regulation, rather to admit

[263] Following quotations of comments of national representatives are cited from United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980. Official records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees, A/CONF.97/19, *supra* note 23, Pp. 381-382.

the existence of a fillable gap in the provision than to normatively exclude the doctrine of hardship from the regime of CISG.[264]

In contrast to Swedish position, French representative apparently opposed the introduction the doctrine of a hardship into CISG from the conceptual point of view, but not providing any detailed explanation. It would be useful to note, that French civil law traditionally rejected the admissibility of any kind of a hardship defense at that time and the French concept of *imprévision* was limited to the field of the French administrative law, what could indicate that the unfavorable attitude of French representative was caused by adopting the ethnocentric view.

The other comments of disagreeing representatives do not show any particular dislike of a hardship defense, but just expressions of concerns about appropriate legal circumstances of such events (Argentina) or the need of a more comprehensive framework (Japan). In every event, the shortcoming of *travaux préparatoires* is their incomprehensiveness preventing to clearly identify the common position of rejecting majority and, as I demonstrate, the usual argument in favor of deliberate exclusion of a hardship defense from the framework of CISG based on the content of documents capturing preparatory works is hardly convincing.[265]

Leaving the historical interpretation behind, lets focus on the purposive (teleological) arguments. The purpose of the *uniformity*of application of CISG is certainly the evident one, however, in my opinion that is illustratable on the concept of *implied purpose* of substantive

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[264] See also the comment of Mrs. Kamarul, representative of Australia seeing a gap in the text of current Art. 79 CISG. *Id*. P. 381.

[265] As Prof. Garro states: *"The legislative as well as the drafting history of Article 79 is not conclusive enough to warrant a conclusion that the hardship problem was meant to be excluded or included within its scope."* CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, *supra* note 259.

The textual interpretive argument has been raised, too. Prof. Petsche analyses the text of Art. 79 CISG concluding that if CISG's drafters wanted to leave open room for different defenses than expressly stated, they would have not used the title "*Exemptions"* and would have incorporated the corresponding *chapeau* to indicate that Art. 79 CISG is just the illustrative provision. Petsche, *supra* note 195. P.159.

In my opinion, such far-reaching conclusions cannot be conclusively inferred from the text of an international convention drafted in several stages and consequently there is a decent chance that it does not reflect precisely the intentions of drafters.

legal framework of international sale law under CISG, there is no reason for absolutizing this purpose.[266] The effectivity of CISG depends in the same extent on the *substantive suitability* and actuality of substantive provisions as well as their *neutrality*.

Recent development signals the favorable trend in respect of the hardship defenses, since this doctrine has been introduced to modern domestic civil codes[267], inter alia, also to the traditionally redundant French Code Civil[268], the practical relevance of the hardship has been confirmed by the initiative of International Chamber of Commerce[269], but most importantly the provisions regulating the issue of events qualified as the hardship have been included in the restatement of *lex mercatoria* on general contract law – in Principles. Maybe this development in the area of liability exemptions towards general acceptation of the doctrine of a hardship makes understandable, that at least jurists try to read a hardship into the legal framework of CISG.[270] I sympathize with this initiatives and I view their underlying idea in an awareness, that introduction of a doctrine of a hardship into CISG's legal framework would be the

[266] See *Id*. P. 161.

[267] The functional equivalents of a hardship doctrine were relatively recently introduced into Dutch Civil Code. See Joseph M. Perillo, *Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts*, 5 TULANE J. INT. COMP. LAW 5–28 (1997). P. 10. In Germany, the *adaptation* remedy for the events of changed circumstances was codified in 2001. See Schwenzer, *supra* note 259. P. 711.

[268] Art. 1195 Code civil after 2016 amendment states:

> Si un changement de circonstances imprévisible lors de la conclusion du contrat rend l'exécution excessivement onéreuse pour une partie qui n'avait pas accepté d'en assumer le risque, celle-ci peut demander *une renégociation* du contrat à son cocontractant. Elle continue à exécuter ses obligations durant la renégociation. En cas de refus ou d'échec de la renégociation, les parties peuvent convenir de *la résolution du contrat*, à la date et aux conditions qu'elles déterminent, ou demander d'un commun accord au juge de procéder à *son adaptation*. A défaut d'accord dans un délai raisonnable, le juge peut, à la demande d'une partie, réviser le contrat ou y mettre fin, à la date et aux conditions qu'il fixe.

See e.g. the overview of the legislative changes in Code civil in Andrew Tetley, *Legal revolution in France – civil law reforms (or Napoleon's second coming)*, https://www.reedsmith.com/Legal-revolution-in-France--civil-law-reforms-or-Napoleons-second-coming-04-04-2016/ (last visited Apr 10, 2017).

[269] ICC has drafted the separated model clauses governing the events of *force majeure* and of a hardship. See ICC Force Majeure Clause 2003/ICC Hardship Clause 2003, ICC - International Chamber of Commerce, https://iccwbo.org/publication/icc-force-majeure-clause-2003icc-hardship-clause-2003/ (last visited Apr 11, 2017).

[270] See e.g. CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, *supra* note 259; Schwenzer, *supra* note 259.; Veneziano, *supra* note 195. Pp. 144-147.

substantively desirable step corresponding with the needs of international trade, however their way of pursuing the purpose of CISG is evidently open to creditable criticism.[271] My also evolutionary interpretive assessment therefore differs in presumptions, since I believe that with the evolution of international trade law the CISG's *internal gap* has occurred in respect of a hardship. Today, when not only significant number of major jurisdictions recognizes in some form a hardship as a liability exemption, but either so Principles as the *lex mercatoria* restatement do[272], it is infeasible to deprive the international traders such reasonable and functional remedy[273], because such unsuitability of CISG's legal framework could lead to

[271] The criticism may be aimed mostly on the too loose interpretation of CISG in order to infer the appropriate remedy for such events, especially the legal ground for renegotiation. These theories in this respect operate with general principle of good faith or refer to and creatively interpret the provisions of CISG like Art. 77 or 79(5) that, *prima facie*, were intended for different normative effect. See, e.g. in respect of CISG-AC Opinion No. 7 the critical comments of Prof. Petsche in Petsche, *supra* note 195. Pp. 167-169.

[272] However, in contradiction, several arbitral tribunals refused the applicability of a hardship rule as a general principle, practice, custom or usage. See e.g. Arbitral award (International court of arbitration of ICC) ICC 12446, 2004, (unknown parties), UNILEX ID: 1424, http://www.unilex.info/case.cfm?id=1424 (last visited Dec 5, 2016); Arbitral award (International court of arbitration of ICC - Rome) ICC 9029 of March 1998, (unknown parties), UNILEX ID: 660, http://www.unilex.info/case.cfm?id=660 (last visited Dec 5, 2016); Arbitral award (International court of arbitration of ICC - Paris) ICC 8873 of July 1997 (unknown parties), UNILEX ID: 641, http://www.unilex.info/case.cfm?id=641 (last visited Dec 5, 2016).

[273] See Lindström's arguments:

> It is evident that many scholars have an urge to either find a gap in the CISG concerning hardship or an urge to interpret Article 79 so that the article governs hardship and makes a permanent exemption possible. Such an urge is understandable and is most probably a result of the fact that one of these solutions would be hoped for and appropriate. The author's own interpretation, in other words the notion that the CISG governs hardship but does not allow for a permanent exemption, is not well suited in practice as this interpretation results in an inflexible system that only allows an exemption in cases of impossibility. This is an inappropriate interpretation for tradesmen whose contract is governed by the CISG and also unsuitable for modern international trade. Provisions that allow for an exemption only in cases of impossibility can neither be regarded as modern nor functional. Such provisions do not reflect the principles of loyalty or favour contractus.
>
> Niklas Lindström, *Changed Circumstances and Hardship in the International Sale of Goods*, http://www.cisg.law.pace.edu/cisg/biblio/lindstrom.html#86 (last visited Apr 11, 2017).

Practical unsuitability of Principles' provisions is claimed by Richard Hill, who, on the basis of an uncertainty of the used terms, apparently presumes the broad interpretation of a hardship definition and therefore he is afraid of a unjust application of this doctrine in situations, where it would be clearly out of question (defects of products caused by a failure of a process of manufacturing). Hill, *supra* note 170. P. 167.

One may observe another type of an unsuitability argument under a hardship under UPICC consisting in the accent on the usual short-term duration of sale transaction where a protection against changes of circumstances is not so felt so necessary. See Michaels, *supra* note 54. P. 667.

I am fully aware of possibility to cure the shortcoming of CISG contractually, including so called hardship clause and I would recommend it, however matter itself gives raise the question whether it is correct legislative technique to set the default rule not distinguishing hardship defenses and to rely on the prudency and the wisdom (not always

increased number of opt-outs and it could undermine the CISG's effectivity. This conclusion seems to be even more convincing since the *travaux préparatoires* do not contain any expressed and justified objection against the doctrine of a hardship as such implying its deliberated absolute exclusion from CISG, which could be still considered relevant and reasonable.

The found *internal gap* is apparently fillable through Art. 6.2.2 and 6.2.3 UPICC, that comprehensively and explicitly address the issue of a hardship. How does these potentially gap-filing provisions stand in confrontation with principles on which CISG is based under Bonell's *only-condition approach*?

Prof. Bonell himself observes that Principles' provisions on a hardship reflect the principle *favor contractus*, that is one of the principles underlying also the CISG.[274] This claim gives to raise some justified suspicion, since, at the same time, CISG is undoubtedly built on the principle *pacta sunt servanda* too, which may be read as contradicting the concept of a hardship[275]. However, principle of *pacta sunt servanda* or in more illustrative words *sanctity of a contract* is not absolute value without any exemption. CISG governs the international trade, the legal relationships based on the economic considerations, with the ultimate goal of *"the development of international trade on the basis of equality and mutual benefit"*[276]. Pursuing this goal, the principle of *good faith in international trade and a fair dealing* or more generally the principle of *reasonableness* (certainly reflected by CISG[277]) should (maybe blasphemous idea) prevail over sanctity of contract in the extreme situations where the economic reasonableness of the transaction subsequently disappears because of an event in the detriment

present) of contractual parties to stipulate the clause if needed or *vice versa* especially when one speaks about the events that should not be foreseeable.

[274] Bonell, *supra* note 25. P. 323.

[275] Petsche, *supra* note 195. P. 162.

[276] See Preamble of CISG.

[277] See e.g. Felemegas, *supra* note 39. P. 161.

of one of contractual parties that cannot be reasonably blamed for such consequence or imposed by the risk of occurrence of such consequence. This reconciliation of conflicting principles is the justification of the doctrine of hardship in principle.[278]

Principles in their definition of events of hardship fully comply. Firstly, preceding provision of Art. 6.2.1 UPICC emphasizes the general rule of the persisting obligation to perform in the case of changed circumstances (principle *pacta sunt servanda*) and just afterwards, as the naturally restrictively interpreted exemption, a hardship is addressed. Moreover, under Art. 6.2.2 UPICC, the formulation of the main qualification of an event of a hardship – *the fundamental alteration of the contract equilibrium*, as well as the additional elements of definition related to the disadvantaged party (the precontractual knowledge, the foreseeability of an event, the control over an event, assumption of the risk) apparently demonstrate strict requirements conditioning effective invocation of a hardship defense.

The event of a hardship, unlike *force majeure*, does not rule out the possibility of fulfilment of the economic function of original transaction, therefore the mere remedy consisting in the exemption from contractual liability for damages alike remedy under Art. 79 CISG seems to be inappropriate. Art. 6.2.3 UPICC provide the elaborated system of remedies, as first and primary *the renegotiation* of contract terms between parties and in case of the nonsuccess the judicial remedies of the contract *adaptation* or its *termination*. Despite Art. 6.2.3 UPICC does not state it explicitly, the court is allowed also to uphold the original terms of the contract.[279] One may

[278] A slightly different perspective is presented in the paper of Prof. Perillo, who claims that the principle of *pacta sunt servanda* is not altered by a hardship, because the contractual consent of the party is conditioned by circumstances and the qualified unexpected shift of economic risks causes that the original contractual consent does not cover the transaction under new circumstances. Perillo, *supra* note 267. P. 12-14.

[279] See official comment on Art. 6.2.3 UPICC in this respect supplementing black-lettered text:

> The circumstances may even be such that neither termination nor adaptation is appropriate and in consequence the only reasonable solution will be for the court either to direct the parties to resume negotiations with a view to reaching agreement on the adaptation of the contract, or to confirm the terms of the contract as they stand.

observe, that Principles provide three remedies that keep transaction effectively "alive", including the *renegotiation* as a primary remedy, against the one "lethal" option. The approach following the principle *favor contractus* is evident. The choice of a court among the remaining options is not arbitrary, but court should pick the reasonable one[280], what is the explicit reference to the principle of *reasonableness*.

Since, the provisions of UPICC on a hardship evidently passes the CISG-compatibility test under the methodology of the employment of UPICC as a gap-filler of CISG, there is no reason not to apply Art. 6.2.2 and 6.2.3 UPICC within the CISG's legal framework.

Practically, this approach has been used only once nevertheless by the national supreme court. Belgian *Cour de Cassation* rendered the controversial and hotly discussed judgement[281] concluding (without any deeper reasoning) that the provisions on hardship adopted by UPICC are, *inter alia*, relevant general principles, which govern the law of international trade, called to fill the gaps of CISG under its Art. 7(2) and therefore applicable under similar circumstances.[282] While this decision on the matter of facts, perhaps, is not the good example

[280] Art. 6.2.3(4) UPICC.

[281] Judgement raise mostly critical reactions of a doctrine. Prof. Veneziano, Petsche and Flechtner similarly argue against the legal admissibility of a use of UPICC under Art. 7(2) CISG. See also Veneziano, *supra* note 195.; Petsche, *supra* note 195. Pp. 169-170; Harry M. Flechtner, *The Exemption Provisions of the Sales Convention, Including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court* (2011), https://papers.ssrn.com/abstract=1785545 (last visited Apr 12, 2017). Pp. 13-14.

[282] Decision of Court of Cassation of Belgium, C.07.0289.N of 19th June 2009, Scafom International BV v. Lorraine Tubes S.A.S., UNILEX ID: 1456, http://www.unilex.info/case.cfm?id=1456 (last visited Dec 4, 2016).

In the case, the court of first instance held, that the CISG address the issue of events excusing the party from liability for non-performance exhaustively in Art. 79 CISG, that is perceived to be granting of such excuse only in the case of impossibility (*force majeure*) and hence refused to grant claims invoked by the seller.

The appellate court reversed the decision of court of first instance and found the gap within CISG in respect to events of hardship and (apparently) did not found any general principles, on which the CISG is based (Art. 7 (2) CISG), to apply and resorted to applicable French domestic law, finding the legal grounds (general duty to act in compliance with good faith requirement) for rendering the decision in favor of the seller.

The *Cour de Cassation* upheld the conclusions of appellate court, although it found their justification in different argumentation (see in the text).

In my opinion, the decision raises several important factual issues putting into question the quality of this decision. Firstly, the court did not clarify, whether in respect to events of the hardship there is the gap in the CISG and

of a proper application of a hardship under Principles, the idea of the availability of a hardship defense within the legal framework of CISG on the basis of a supplementary employment of Art. 6.2.2 and 6.2.3 UPICC is not only available but also the desirable option which brings international, neutral solution[283] adopting modern trends of international trade law and contract law generally. In addition, providing that Principles would be used regularly, the chance to achieve a uniformity of application of CISG would considerably is higher too.

eventually what is its nature; and secondly, court, at least in reasoning, failed to examine the requirement of hardship defense under Art. 6.2.1 UPICC.

In recent case with similar circumstances, before French *Cour de cassation*, the aggravated party tried to invoke the hardship under UPICC within the transaction governed by CISG, however the court refused his motion, although it did it of the factual grounds of the case and expressly did not refused the applicability of UPICC to supplement CISG on the issue of the hardship. Decision of Cour de Cassation, 12-29.550 13-18.956 13-20.230 of 17th February 2015, Dupiré Invicta industrie v. Gabo, UNILEX ID: 1923, http://www.unilex.info/case.cfm?id=1923 (last visited Dec 4, 2016).

[283] Contrary, Prof. Flechtner suggestively accuses the Belgian Supreme Court of homeward trend since it adopted as a remedy the Civil law traditional solutions (adaptation) that are incompatible with Common Law tradition.

Prof. Flechtner, apparently perceive the CISG mostly from the comparative perspective as a compromise between great legal families, ignoring the purpose of CISG as a law governing international trade with specific interests and needs accommodating of which may in effect means to adopt the solution exclusively inferred from the one of legal families. Moreover, it may be observed, that CISG's link to Civil Law concepts is often stronger than to Common Law ones - see. e.g. the rejection of parole evidence rule, specific performance remedy, explicit reference to the good faith etc. Flechtner, *supra* note 281. Pp. 13-14.

Conclusion

After the many expressed thoughts and written words, this thesis is coming to its end. At the beginning, I had the understandable doubts about the affirmation of stated hypotheses. Certainly, one could wonder how it is so, that non-binding soft law could have so significant impact to the application of the hard law – the international convention. However, one should realize that this is the specific realm of international uniform commercial law, with its own specific legislator (states), addressees (international businessmen), their specific aims, needs and requirements, that are not always feasibly accommodatable only through the formally adopted legal framework. These specifics justify the acceptability of some level of "legal modernism" in order to assure the legal framework as suitable as possible.

Are Principles the help that adjudicators prayed for in order to resolve the CISG's shortcomings? In my opinion, presented in this paper, there are not reasons to refuse this idea. I understand that jurists watching the "legal purism" may raise the sophisticated legal counterarguments based on the plain text of CISG adopted in 1980 by drafters with contemporary views on the subject of a regulation and the law generally, however, in confrontation with possible progressive, up-to-date interpretation, their arguments could be perceived as the pure legal formalism without any actual and reasonable justification. Accordingly, I conclude, that strictly legally speaking UPICC are an admissible interpretive/supplementary tool under Art. 7 CISG, that in the connection with the nature of Principles themselves, in addition, indicates the methodologies of the employment of UPICC – as the *systematic interpretive context* and within the *facilitated gap-filling*.

This conclusion is conditioned by presumed *substantive desirability* (legitimacy) of the normative use of Principles. Since their direct normative authority is out of question (because of their formal nature of soft law instrument), the establishment of substantive link with other legal order providing them *derivative normative authority* is the only option. The drafting

methodology and their purpose prove for their nature of a restatement of *lex mercatoria* that is the also the regular perception of a practice expressed in a caselaw.

While my theoretical conclusions on admissibility and interrelated substantive desirability with the underlying argumentation is disputable, the potential functional contribution of the use of Principles under Art. 7 CISG to the methodological facilitation of an interpretation/supplementation of CISG and also to the fulfilment of the purpose of CISG as the international uniform instrument is not. Principles, alike any other product of a man, are not flawless and it would be naive to expect that they resolve all complex interpretive/supplementary problems occurred in relation to CISG, however, their unique nature cumulating the advantages of a well-drafted, high-quality and maintained codification and a flexibility of a soft law, makes them first step towards interpretive/supplementary solutions that is more suitable for this role than anything else. The practical demonstrations, in my opinion, illustrate this fact very clearly, but also reveal the necessity of a cautious methodological approach of adjudicators resorting to them while interpreting/supplementing the CISG' legal framework.

As I was working on this thesis, I have become more and more convinced, that the use of Principles as a tool to interpret and supplement CISG is a new opportunity to enhance the unification of international commercial law (sales law) in the effective way, that reflects the specific needs of the practice and the ultimate purpose of CISG with a decent chance to preserve such ability for a long time. I think, it would be a shame to sacrifice such opportunity on the altar of a consistency of a legal theory, as the part of the doctrine suggests.

Adjudicators apparently hesitate to take a clear position and split doctrine offers only little help in this respect. This thesis offers the comprehensive reasonable justification in favor of the employment of Principles under Art. 7 CISG, I am personally convinced about. I am fully aware

of the probable reluctance of national courts (unlike arbitral tribunals) to identify themselves with it because of the advocated *lex mercatoria* nature of Principles, since the application of *rules of law* instead of *law* is still predominantly excluded in a litigation[284], but in every event, I will be very glad, if some ideas of this thesis bring the new impulse to the stagnating discussion about this topic, perhaps resulting to the final conclusion – will the use of UPICC under Art. 7 CISG become the regular practice of adjudicators (what is my recommendation) or will such purpose be finally rejected and abandoned?

[284] However, the Principles, at least partially, contain the provisions qualifiable as a *common core* of the international contract law or of the comparative contract law and in this extent, their applicability could not be excluded even in a litigation.

Bibliography

Books

Klaus Peter Berger, *The Creeping Codification of the New Lex Mercatoria* (2010).

Cesare M. Bianca, Michael J. Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987).

Eirik Bjørge, *The Evolutionary Interpretation of Treaties* (2014).

Michael J. Bonell, *An International Restatement of Contract Law: The Unidroit Principles of International Commercial Contracts* (2009).

Fritz Enderlein, Dietrich Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods: Convention on the Limitation Period in the International Sale of Goods : Commentary* (1992).

J. J. Fawcett, Jonathan Harris & Michael G. Bridge, *International Sale of Goods in the Conflict of Laws* (2005).

Franco Ferrari, *The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences* (2003).

Andre Janssen, Olaf Meyer, *CISG Methodology* (2009).

Stefan Kröll, Loukas A. Mistelis, Pilar Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)* (2011).

Julian D. M. Lew, *Contemporary Problems in International Arbitration* (1987).

Peter Schlechtriem, Ingeborg H. Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2010).

Orsolya Toth, *The Lex Mercatoria in Theory and Practice* (2014).

Stefan Vogenauer, Jan Kleinheisterkamp, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2009).

Bruno Zeller, *Damages Under the Convention on Contracts for the International Sale of Goods* (2009).

Articles

Michael Van Alstine, *Dynamic Treaty Interpretation*, 146 UNIV. PA. LAW REV. 687 (1998).

Jurgen Basedow, *Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts Internatioanl Uniform Law Conventions, Lex Mercatoria and UNIDROIT Principles*, 5 UNIF. LAW REV. 129–140 (2000).

Klaus Peter Berger, *The Relationship between the UNIDROIT Principles of International Commercial Contracts and the New Lex Mercatoria Internatioanl Uniform Law Conventions, Lex Mercatoria and UNIDROIT Principles*, 5 UNIF. LAW REV. 153–170 (2000).

Michael J. Bonell, *Symposium Paper: The UNIDROIT Principles of International Commercial Contracts: Achievements in Practice and Prospects for the Future*, 17 AUST. INT. LAW J. 177–184 (2010).

Michael J. Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG - Alternatives or Complementary Instruments*, 1 UNIF. LAW REV. 26–39 (1996).

Michael J. Bonell, *The Unidroit Principles of International Commercial Contracts: Towards a New Lex Mercatoria?*, 1997 INT. BUS. LAW J. 145–188 (1997).

Michael J. Bonell, *Unidroit Principles of International Commercial Contracts: Why What How*, 69 TULANE LAW REV. 1121–1148, (1994).

Michael Bridge, *The CISG and the Unidroit Principles of International Commercial Contracts*, 19 UNIF. LAW REV. - REV. DROIT UNIF. 623–642 (2014).

V. Susanne Cook, *The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity Recent Developments Relating to CISG*, 16 J. LAW COMMER. 257–264 (1996).

Andre Corterier, *A New Approach to Solving the Interest Rate Problem of Art 78 CISG*, 5 INT. TRADE BUS. LAW ANNU. 33–42 (2000).

Eva Diederichsen, *Commentary to Journal of Law & Commerce Case I; Oberlandesgericht, Frankfurt am Main Recent Development: CISG*, 14 J. LAW COMMER. 177–182 (1994).

E. Allan Farnsworth, *American Provenance of the UNIDROIT Principles Symposium: Teaching Sales Laws in a Global Context*, 72 TULANE LAW REV. 1985–1994 (1997).

E. Allan Farnsworth, *Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions and National Laws*, 3 TUL.J.INT.COMP.L. 47-63 (1995).

Franco Ferrari, *Gap-Filling and Interpretation of the CISG: Overview of International Case Law Actualites - Conventions Internationales*, 2003 INT. BUS. LAW J. 221–239 (2003).

Franco Ferrari, *General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 Unidroit Conventions*, 2 UNIF. LAW REV. 451–473 (1997).

Franco Ferrari, *Uniform Application and Interest Rates under the 1980 Vienna Sales Convention*, 24 GA. J. INT. COMP. LAW 467–478 (1994).

Dionysios P. Flambouras, *The Doctrines of Impossibility of Performance and Clausula Rebus SIC Stantibus in the 1980 Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law - A Comparative Analysis*, 13 PACE INT. LAW REV. 261–294 (2001).

Alejandro M. Garro, *Gap-Filling Role of the Unidroit Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG*, 69 TULANE LAW REV. 1149–1190 (1994).

Rolf Herber, *„Lex mercatoria" und „Principles" – gefährliche Irrlichter im internationalen Kaufrecht*, 3 INT. HANDELSR. 1–10 (2012).

Richard Hill, *A Businessman's View of the UNIDROIT Principles*, 13 J. INT. ARBITR. 163–170 (1997).

Catherine Kessedjian, *Competing Approaches to Force Majeure and Hardship*, 25 INT. REV. LAW ECON. 415–433 (2005).

Monica Kilian, *CISG and the Problem with Common Law Jurisdictions*, J. TRANSNATL. LAW POLICY 217–243 (2000).

Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 MINN. J. GLOB. TRADE 105–152 (1997).

Ole Lando, *Salient Features of the Principles of European Contract Law: A Comparison with the UCC*, 13 PACE INT. LAW REV. 339–370 (2001).

Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT. COMP. LAW Q. 747–768 (1985).

Joseph Lookofsky, *The Limits of Commercial Contract Freedom: Under the UNIDROIT "Restatement" and Danish Law*, 46 AM. J. COMP. LAW 485–508 (1998).

Ulrich Magnus, *General Principles of UN-Sales Law*, 3 INT. TRADE BUS. LAW ANNU. 33–56 (1997).

Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 INDIANA J. GLOB. LEG. STUD. 447–468 (2007).

Ralf Michaels, *The UNIDROIT Principles as Global Background Law*, UNIF. LAW REV. 643–668 (2014).

Joseph M. Perillo, *Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts*, 5 TULANE J. INT. COMP. LAW 5–28 (1997).

Joseph M. Perillo, *Unidroit Principles of International Commercial Contracts: The Black Letter Text and a Review Essay*, 63 FORDHAM LAW REV. 281–344 (1994).

Markus A. Petsche, *Hardship under the UN Convention on the International Sale of Goods (CISG)*, 19 VINDOBONA J. 147–170 (2015).

Arthur Rosett, *UNIDROIT Principles and Harmonization of International Commercial Law: Focus on Chapter Seven*, 2 UNIF. LAW REV. 441 (1997).

Shani Salama, *Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, an Inter-American Application*, 38 UNIV. MIAMI INTER-AM. LAW REV. 225–250 (2006).

Peter Schlechtreim, *Interpretation, Gap-Filling and Further Development of the U.N. Sales Convention*, 16 PACE INT. LAW REV. 279–306 (2004).

Ingeborg Schwenzer, *Force Majeure and Hardship in International Sales Contracts Wider Perspectives*, 39 VIC. UNIV. WELLINGT. LAW REV. 709–726 (2008).

Christopher Sheaffer, *The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law Note*, 15 CARDOZO J. INT. COMP. LAW 461–496 (2007).

Lucia C. Sica, *Gap-Filling in the CISG: May the UNIDROIT Principles Supplement the Gaps in the Convention?*, 1 NORD. J. COMMER. LAW 2–28 (2006).

Anna Veneziano, *UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court*, 15 UNIF. LAW REV. 137–149 (2010).

Pilar Perales Viscasillas, *UNIDROIT Principles of International Commercial Contracts: Sphere of application and general provisions*, 13 ARIZ. J. INT'L & COMP. LAW 381-441 (1996).

Marlene Wethmar-Lemmer, *The Vienna Sales Convention and Gap-Filling*, 2012 J. SOUTH AFR. LAW 274–300 (2012).

Bruno Zeller, *Article 79 Revisited*, 14 VINDOBONA J. INT. COMMER. LAW ARBITR. 151–164 (2010).

Bruno Zeller, *The Challenge of a Uniform Application of the CISG - Common Problems and Their Solutions*, 3 MACQUARIE J. BUS. LAW 309–322 (2006).

Articles (electronic sources)

Camilla Andersen, *General Principles of the CISG -- Generally Impenetrable?*, http://www.cisg.law.pace.edu/cisg/biblio/andersen6.html (last visited Oct 28, 2016).

Gesa Baron, *Do the UNIDROIT Principles of International Commercial Contracts form a new lex mercatoria?*, http://www.cisg.law.pace.edu/cisg/biblio/baron.html (last visited Oct 29, 2016).

Irina Buga, *Taking the International Approach to the CISG: The Gap-Filling Role of the UNIDROIT Principles and the Principles of European Contract Law* (2009), http://dspace.library.uu.nl/handle/1874/238503 (last visited Mar 20, 2017).

Andrea L. Charters, *Growth of the CISG with Changing Contract Technology: "Writing" in Light of the UNIDROIT Principles and CISG-Advisory Council Opinion no. 1*, http://www.cisg.law.pace.edu/cisg/principles/uni13.html#ac76 (last visited Apr 6, 2017).

Frank Diedrich, *Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG*, http://cisgw3.law.pace.edu/cisg/biblio/Diedrich.html (last visited Mar 13, 2017).

Sieg Eiselen, *Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Article 78 of the CISG*, http://www.cisg.law.pace.edu/cisg/principles/uni78.html#sefn24 (last visited Apr 8, 2017).

John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and uniform interpretation* (2000), http://eprints.nottingham.ac.uk/11055/ (last visited Apr 8, 2017).

Peter L. Fitzgerald, *The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nation's Convention on the International Sale of Goods (CISG) and the Unidroit Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States* (2008), http://papers.ssrn.com/abstract=1127382 (last visited Oct 4, 2016).

Harry M. Flechtner, *The Exemption Provisions of the Sales Convention, Including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court* (2011), https://papers.ssrn.com/abstract=1785545 (last visited Apr 12, 2017).

Harry M. Flechtner, *Changing the Opt-Out Tradition in the United States* (2010), https://papers.ssrn.com/abstract=1571281 (last visited Feb 26, 2017).

Martin Gebauer, *Uniform Law, General Principles and Autonomous Interpretation*, http://www.cisg.law.pace.edu/cisg/biblio/gebauer.html (last visited Oct 28, 2016).

John Y. Gotanda, *Using the Unidroit Principles to Fill Gaps in the CISG* (2007), https://papers.ssrn.com/abstract=1019277 (last visited Oct 28, 2016).

Jan Hellner, *GAP-FILLING BY ANALOGY: Art. 7 of the U.N. Sales Convention in Its Historical Context*, http://cisgw3.law.pace.edu/cisg/text/hellner.html (last visited Dec 3, 2016).

Andre Janssen, *The CISG and Its General Principles* (2009), https://papers.ssrn.com/abstract=1595989 (last visited Feb 25, 2017).

Andre Janssen & Larry A. DiMatteo, *Interpretive Uncertainty: Methodological Solutions for Interpreting the CISG* (2012), https://papers.ssrn.com/abstract=2051499 (last visited Apr 12, 2017).

Robert Koch, *The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, http://cisgw3.law.pace.edu/cisg/biblio/koch.html#* (last visited Feb 25, 2017).

Robert Koch, *Commentary on Whether the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Article 25 CISG*, http://www.cisg.law.pace.edu/cisg/biblio/koch1.html#rk20 (last visited Apr 6, 2017).

Albert H. Kritzer, *General observations on use of the UNIDROIT Principles to inform as to the meaning of provisions of the CISG*, http://www.cisg.law.pace.edu/cisg/text/matchup/general-observations.html (last visited Dec 19, 2016).

Herbert Kronke, *The UN Sales Convention, The UNIDROIT Contract Principles and the Way Beyond*, http://www.cisg.law.pace.edu/cisg/biblio/kronke.html (last visited Feb 26, 2017).

Niklas Lindström, *Changed Circumstances and Hardship in the International Sale of Goods*, http://www.cisg.law.pace.edu/cisg/biblio/lindstrom.html#86 (last visited Apr 11, 2017).

Chengwei Liu, *Remedies for Non-performance: Perspectives from CISG, UNIDROIT Principles & PECL*, http://cisgw3.law.pace.edu/cisg/biblio/chengwei.html#07-1 (last visited Apr 7, 2017).

Francesco G. Mazzotta, *CISG Article 78: Endless disagreement among commentators, much less among the courts*, http://www.cisg.law.pace.edu/cisg/biblio/mazzotta78.html (last visited Apr 8, 2017).

Zdenek Novy, *The Role of the UNIDROIT in the Unification of International Commercial Law with a Specific Focus on the Principles of International Commercial Contracts* (2014), https://papers.ssrn.com/abstract=2398601 (last visited Jan 28, 2017).

Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods* (1984), http://hdl.handle.net/1811/64227 (last visited Mar 28, 2017).

Peter Schlechtreim, *Uniform Sales Law - The Experience with Uniform Sales Laws in the Federal Republic of Germany (excerpt)*, http://cisgw3.law.pace.edu/cisg/text/schlechtriem13.html (last visited Apr 13, 2017).

Ingeborg Schwenzer, *Interpretation and gap-filling under the CISG in Current issues in the CISG and arbitration* 109–118 (2014), http://edoc.unibas.ch/dok/A6146166 (last visited Mar 15, 2017).

Andrew Tetley, *Legal revolution in France – civil law reforms (or Napoleon's second coming)*, https://www.reedsmith.com/Legal-revolution-in-France--civil-law-reforms-or-Napoleons-second-coming-04-04-2016/ (last visited Apr 10, 2017).

Paul Volken, *The Vienna Convention: Scope, Interpretation, and Gap-filling*, http://www.cisg.law.pace.edu/cisg/biblio/volken.html (last visited Feb 21, 2017).

Bruno Zeller, *Four-Corners - The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods*, http://cisgw3.law.pace.edu/cisg/biblio/4corners.html (last visited Dec 19, 2016).

Karl Zemanek, *Vienna Convention on the Law of Treaties Vienna, 23 May 1969. Introductory note*, http://legal.un.org/avl/ha/vclt/vclt.html (last visited Apr 10, 2017).

Jacob S. Ziegel, *The UNIDROIT Contract Principles, CISG and National Law*, http://www.cisg.law.pace.edu/cisg/biblio/ziegel2.html (last visited Dec 19, 2016).

Caselaw

Arbitral award (CIETAC) of 2nd September 2005, (unknown parties), UNILEX ID: 1355, http://www.unilex.info/case.cfm?id=1355 (last visited Dec 4, 2016).

Arbitral award (Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce in Belgrade) T-9/07 of 23th January 2008, (unknown parties), UNILEX ID: 1442, http://www.unilex.info/case.cfm?id=1442 (last visited Dec 5, 2016).

Arbitral award (Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce in Belgrade) T-23/08 of 10th November 2009, (unknown parties), http://cisgw3.law.pace.edu/cases/091110sb.html (last visited Dec 5, 2016)

Arbitral award (International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation), 13/2007 of 13th May 2008, (unknown parties), UNILEX ID: 1475, http://www.unilex.info/case.cfm?id=1475 (last visited Dec 7, 2016).

Arbitral award (Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft – Wien) SCH-4318 of 15th June 1994, (unknown parties), UNILEX ID: 635, http://www.unilex.info/case.cfm?id=635 (last visited Dec 7, 2016).

Arbitral award (Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft – Wien) SCH-4366 of 15th June 1994, (unknown parties), UNILEX ID: 636, http://www.unilex.info/case.cfm?id=636/ (last visited Dec 7, 2016).

Partial arbitral award (Netherlands Arbitration Institute) of 10th February 2005, (unknown parties), UNILEX ID: 1235, http://www.unilex.info/case.cfm?id=1235 (last visited Dec 5, 2016).

Arbitral award (International court of arbitration of ICC - Paris) ICC 5713, 1989, (unknown parties), UNILEX ID: 16, http://www.unilex.info/case.cfm?id=16 (last visited Dec 5, 2016).

First partial arbitral award (International court of arbitration of ICC) ICC 7110, 1995, (unknown parties), UNILEX ID: 713, http://www.unilex.info/case.cfm?id=713 (last visited Dec 5, 2016).

Arbitral award (International court of arbitration of ICC - Paris) ICC 7331, 1994, (unknown parties), UNILEX ID: 140, http://www.unilex.info/case.cfm?id=140 (last visited Dec 5, 2016).

Arbitral award (International court of arbitration of ICC) ICC 7375, 1996, (unknown parties), UNILEX ID: 625, http://www.unilex.info/case.cfm?id=625 (last visited Dec 7, 2016).

Arbitral award (International court of arbitration of ICC – Paris) ICC 7375 of 5th of June 1996, (unknown parties), UNILEX ID: 635, http://www.unilex.info/case.cfm?id=635.

Arbitral award (International court of arbitration of ICC - Basel) ICC 8128, 1995, (unknown parties), UNILEX ID: 637, http://www.unilex.info/case.cfm?id=637 (last visited Dec 5, 2016).

Arbitral award (International court of arbitration of ICC - Paris) ICC 8261 of 27th of September 1996, (unknown parties), UNILEX ID: 624, http://www.unilex.info/case.cfm?id=624 (last visited Dec 5, 2016).

Arbitral award (International court of arbitration of ICC - Paris) ICC 8502 of November 1996, (unknown parties), UNILEX ID: 655, http://www.unilex.info/case.cfm?id=655 (last visited Dec 5, 2016).

Arbitral award (International court of arbitration of ICC – Zurich) ICC 8769 of December 1996, (unknown parties), UNILEX ID: 656, http://www.unilex.info/case.cfm?id=656 (last visited Dec 7, 2016).

Arbitral award (International court of arbitration of ICC - Paris) ICC 8817 of December 1997, (unknown parties), UNILEX ID: 659, http://www.unilex.info/case.cfm?id=659 (last visited Dec 5, 2016).

Arbitral award (International court of arbitration of ICC - Paris) ICC 8873 of July 1997 (unknown parties), UNILEX ID: 641, http://www.unilex.info/case.cfm?id=641 (last visited Dec 5, 2016).

Arbitral award (International court of arbitration of ICC - Rome) ICC 9029 of March 1998, (unknown parties), UNILEX ID: 660, http://www.unilex.info/case.cfm?id=660 (last visited Dec 5, 2016).

Arbitral award (International court of arbitration of ICC – Paris) ICC 9474 of February 1999, (unknown parties), UNILEX ID: 690, http://www.unilex.info/case.cfm?id=690.

Arbitral award (International court of arbitration of ICC - Geneva) ICC 9797 of 28th July 2000, (Andersen Consulting Business Unit Member Firms vs. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative), UNILEX ID: 668, http://www.unilex.info/case.cfm?id=668 (last visited Dec 5, 2016).

Arbitral award (International court of arbitration of ICC) ICC 9875, of January 1999, (unknown parties), UNILEX ID: 675, http://www.unilex.info/case.cfm?id=675 (last visited Dec 5, 2016).

Arbitral award (International court of arbitration of ICC) ICC 11638, 2002, (unknown parties), UNILEX ID: 1407, http://www.unilex.info/case.cfm?id=1407 (last visited Dec 5, 2016).

Arbitral award (International court of arbitration of ICC) ICC 12097, 2003, (unknown parties), UNILEX ID: 1403, http://www.unilex.info/case.cfm?id=1403 (last visited Dec 7, 2016).

Preliminary arbitral award (International court of arbitration of ICC) ICC 12111 of 6th January 2003, (unknown parties), UNILEX ID: 956, http://www.unilex.info/case.cfm?id=956 (last visited Dec 20, 2016).

Arbitral award (International court of arbitration of ICC) ICC 12446, 2004, (unknown parties), UNILEX ID: 1424, http://www.unilex.info/case.cfm?id=1424 (last visited Dec 5, 2016).

Arbitral award (International court of arbitration of ICC) ICC 12460, 2004, (unknown parties), UNILEX ID: 1411, http://www.unilex.info/case.cfm?id=1411 (last visited Dec 5, 2016).

Decision of Civil Chamber of the Venezuelan Supreme Court of 2nd December 2014, Banque Artesia Nederland, N.V., v. Corp Banca, Banco Universal C.A, UNILEX ID: 1867, http://www.unilex.info/case.cfm?id=1867 (last visited Dec 4, 2016).

Decision of Court of Appeal of New Zealand, (2000) NZCA 350 of 27th November 2000, Hideo Yoshimoto v Canterbury Golf International Limited, UNILEX ID: 802, http://www.unilex.info/case.cfm?id=802 (last visited Dec 4, 2016).

Decision of Commercial Court of Brest Region in Belarus, 333-7/2006 of 8th November 2006, (unknown parties), UNILEX ID: 1383, http://www.unilex.info/case.cfm?id=1383 (last visited Dec 4, 2016).

Decision of Supreme Economic Court of the Republic of Belarus, 8-5/2003 of 20th May 2003, Holzimpex Inc. v. Republican Agricultural Unitary Enterprise, UNILEX ID: 1007, http://www.unilex.info/case.cfm?id=1007 (last visited Dec 4, 2016).

Decision of Supreme Economic Court of the Republic of Belarus of 3rd January 2003, (unknown parties), UNILEX ID: 1389, http://www.unilex.info/case.cfm?id=1389 (last visited Dec 4, 2016).

Decision of Cour d'appel de Grenoble of 23rd October 1996, SCEA GAEC Des Beauches Bernard Bruno v. Société Teso Ten Elsen GmbH & COKG, UNILEX ID: 638, http://www.unilex.info/case.cfm?id=638 (last visited Dec 4, 2016).

Decision of Cour de Cassation, 12-29.550 13-18.956 13-20.230 of 17th February 2015, Dupiré Invicta industrie v. Gabo, UNILEX ID: 1923, http://www.unilex.info/case.cfm?id=1923 (last visited Dec 4, 2016).

Decision of Court of Cassation of Belgium, C.07.0289.N of 19th June 2009, Scafom International BV v. Lorraine Tubes S.A.S., UNILEX ID: 1456, http://www.unilex.info/case.cfm?id=1456 (last visited Dec 4, 2016).

Decision of Hof 'S-Hertogenbosch of 16th October 2002, (unknown parties), UNILEX ID: 959, http://www.unilex.info/case.cfm?id=959 (last visited Dec 4, 2016).

Official materials

Draft and corresponding commentary of UPICC in Working Group for the Preparation of Principles for International Commercial Contracts. Chapter 1: General Provisions (Draft and Comment prepared by Professor Michael J. Bonell, University of Rome I, "La Sapienza") – Rome, December 1991, http://www.unidroit.org/work-in-progress-studies/studies/contracts-in-general/1363-study-l-principles-of-international-commercial-contracts (last visited Feb 16, 2017).

CISG-AC Opinion No. 1, Electronic Communications under CISG, Rapporteur: Professor Christina Ramberg, Gothenburg, Sweden, http://www.cisgac.com/cisgac-opinion-no14/ (last visited Apr 8, 2017).

CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA, http://www.cisgac.com/cisgac-opinion-no7/ (last visited Apr 8, 2017).

CISG-AC Opinion No. 14, Interest under Article 78 CISG, Rapporteur: Professor Doctor Yeşim M. Atamer, Istanbul Bilgi University, Turkey, http://www.cisgac.com/cisgac-opinion-no14/ (last visited Apr 8, 2017).

ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties 2013, ILC Report 2013 UN Doc A/68/10, http://legal.un.org/ilc/reports/2013/english/chp4.pdf (last visited Feb 16, 2017).

ICC Force Majeure Clause 2003/ICC Hardship Clause 2003, ICC - International Chamber of Commerce, https://iccwbo.org/publication/icc-force-majeure-clause-2003icc-hardship-clause-2003/ (last visited Apr 11, 2017).

UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, New York (2012), https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf (last visited Feb 16, 2017).

UNIDROIT - Principles 1994 - UNIDROIT - International Institute for the Unification of Private Law - Institut International pour l'Unification du droit privè, 5, http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-1994 (last visited Feb 16, 2017).

UNIDROIT - Principles 2010, http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010 (last visited Feb 16, 2017).

UNIDROIT Principles 2016 - UNIDROIT - International Institute for the Unification of Private Law - Institut International pour l'Unification du droit privè, http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016 (last visited Mar 31, 2017).

UNIDROIT - UPICC Model Clauses - UNIDROIT - International Institute for the Unification of Private Law - Institut International pour l'Unification du droit privè, http://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses. (last visited Apr 4, 2017).

Model Clauses for Use of the UNIDROIT Principles of International Commercial Contracts in Transnational Contract and Dispute Resolution Practice (Comments submitted by UNCITRAL),
UNIDROIT 2013 - Study L - MC Doc. 2 Add. 4, http://www.unidroit.org/english/documents/2013/study50/mc/s-50-mc-02add-04-e.pdf. (last visited Feb 16, 2017).

Report of the United Nations Commission on International Trade Law, 46th session, A/68/17 Part I (2013).

Report of the United Nations Commission on International Trade Law, 40th session, A/62/17 Part I (2007).

United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980. Official records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees, A/CONF.97/19, https://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf (last visited Mar 14, 2017).

Websites

Working Group for the preparation of the UNIDROIT Principles of International Commercial Contracts 2010 - UNIDROIT - International Institute for the Unification of Private Law - Institut International pour l'Unification du droit privè, http://www.unidroit.org/overview-principles-2010/309-instruments/commercial-contracts/unidroit-principles-2010/unidroit-principles-2010-history/779-working-group-for-the-preparation-of-the-unidroit-principles-of-international-commercial-contracts-2010 (last visited Apr 4, 2017).

Zásady medzinárodných obchodných zmlúv - UNIDROIT (1996), http://www.martinus.cz/?uItem=10215 (last visited Mar 31, 2017).