

those manufactured and sold by [the Seller]”<sup>48</sup> The that the buyer did indeed copy the seller’s information and awarded damages based on the profits the buyer earned by using the seller’s technology.

#### 17.4 CONCLUSION

It is hoped that this discussion has highlighted some of the complexities hidden behind the apparent simplicity of the Convention’s damages provisions. In the case of damages for non-conforming goods, the solutions are to be found by drawing on the Convention’s structure and its principles and values. The Convention is idealistic and clearly signals a preference for the concrete measure, which therefore should be the starting point for calculating damages. Other considerations, such as legal certainty and the prevention of speculation, need to be invoked when dealing with such issues as the relevant date for determining the value of the goods for the purpose of the difference in value formula. Finally, the boundaries of what are a recoverable head of loss and permissible methods of calculation will be stretched further if the idea of damage to the performance interest is recognized.

48 *Id.*

## 18 INTEREST CLAIMS UNDER THE CISG: UNIFORM OR DOMESTIC LAW APPROACH?

*Yeşim M. Atamer*

### 18.1 INTRODUCTION

Whenever the purchase price or any other sum due is not paid on time, the creditors will incur losses simply due to the fact that they are not able to use this money.<sup>1</sup> Article 78 of the United Nations Convention on the International Sale of Goods (CISG) acknowledges the right of the creditor to claim interest in such cases and to even ask for compensation for any further loss, according to Article 74 of the CISG.<sup>2</sup>

Article 78 is the only provision in Part III/Chapter V/Section III of the Convention and immediately follows the provisions relating to damages in Section II. The placement of this provision and the reference to Article 74 in Article 78 indicate that claims for interest and damages are based on parallel value judgements and are both primarily aimed at compensating a loss.

However, aside from damages, interest can be claimed without the need to prove any actual loss and even in cases where an impediment beyond control (in the sense of Article 79) precludes the debtor from paying on time. It is irrefutably presumed that the creditor has encountered a loss equal to interest.

Even though a specific interest rate is not provided for in Article 78, the fact that a major aim of an interest claim is to compensate the loss of the creditor, combined with the principle of full compensation anchored in Article 74, offers enough reference points to determine the applicable interest rate on the basis of general principles of the CISG.

### 18.2 DRAFTING HISTORY

The predecessor of the CISG, the Uniform Law on the International Sale of Goods (ULIS, 1964), provided in Article 83 that the buyer, who was delayed in paying the purchase

1 This was already the principle under Roman law: *minus solvit, qui tardius solvit* [he that delays to pay what is due pays less than is due], Digest, 50,16,12,1 (Ulpian), cf. C. Gelzer, *Verzugs-, Schadens- und Bereicherungszins*, Helbing & Lichtenhahn, Basel, 2010, para. 19.

2 All article numbers without any other reference relate to the CISG.

price, had to pay interest "on such sum as is in arrears at a rate equal to the official discount rate in the country where (the seller) has his place of business [. . .] plus 1%". When the first 'Working Group on the International Sale of Goods' was set up in 1969 by the United Nations Commission on International Trade Law (UNCITRAL) with the mandate of reviewing the ULIS, it proposed in its 'Draft Convention on the International Sale of Goods' of 1976 to maintain Article 83 to the greatest extent possible and to add only the following sentence: "*but his entitlement is not to be lower than the rate applied to unsecured short-term commercial credits in the country where the seller has his place of business*".<sup>3</sup>

But due to irreconcilable differences among the national delegations, the interest question provoked far more difficulties than were probably expected. Whereas some countries challenged a right to interest in general, others were critical about the rate proposed. The discussions resulted in the two following Draft Conventions of 1977 and 1978 excluding a general provision regarding the duty to pay interest in cases of default. Both Draft Conventions only provided for a rule similar to Article 84 of the CISG, which obliges the seller to pay interest on the purchase price whenever he is under the duty to refund the price after avoidance of the contract.

During the Diplomatic Conference in Vienna in 1980, the issue was raised once again. Three different alternatives to define the rate of interest were proposed and discussed extensively, but a consensus could be reached only with regard to the principle: The drafters acknowledged the right to claim interest on any sum due but did not define the exact rate of interest or the modalities of payment.

## 18.3 SUGGESTED INTERPRETATION OF ARTICLE 78

### 18.3.1 Urgent Need for a Uniform Interpretation of Article 78

Looking at the drafting history of Article 78 of the CISG, one could be inclined to interpret the provision so that besides establishing the right to ask for interest, it deliberately leaves every detail to the national law applicable "by virtue of the rules of private international law" (Article 7(2), second part of sentence). But an overview of case law having regard to Article 78 proves that many other interpretations have been applied: A study of 245 decisions shows drastically varying solutions, especially regarding the rate of interest. Whereas some national courts regularly employ the interest rate defined by the applicable

<sup>3</sup> Cf., for details on the drafting history of Art. 78 of the CISG, F.G. Mazzotta, *CISG Article 78: Endless Disagreement Among Commentators, Much Less among the Courts*, 2004 (cited from <[www.cisg.law.pace.edu/cisg/biblio/mazzotta78.html](http://www.cisg.law.pace.edu/cisg/biblio/mazzotta78.html)> - intro), para. III.

law, according to the private international rules of the forum; others choose to fill in the gap in Article 78 by applying the interest rate at the creditor or debtor's place of business, or the Libor (London Interbank Offered Rate) or Euribor (Euro Interbank Offered Rate) rate, or the rate defined in Article 7.4.9 of the International Institute for the Unification of Private Law Principles of International Commercial Contracts (UNIDROIT PICC).<sup>4,5</sup> The interpretation of Article 78 by arbitration courts gets even more problematic: 30 out of 108 awards analysed do not even explain which law or principle the applied interest rate is deduced from.<sup>6</sup> Also, issues such as 'when interest starts accruing or if compound interest can be awarded' are debated. This very fragmented picture calls for a uniform interpretation of Article 78. This is especially necessary, since lack of uniformity might encourage the parties to base their claims on the law regarding the interest rate that is most profitable for them. This chapter is mainly driven by the idea of proposing a solution that could find general approval in CISG doctrine and case law.

### 18.3.2 Basic Assumptions of This Chapter

CISG literature today is almost unanimous in concluding that recourse to any national law, which has to be defined according to private international law (PIL) rules, is an *ultima ratio* solution for gap filling under the Convention and should be avoided for as long as possible.<sup>7</sup> Deducing general principles from the CISG is always the first priority (Article 7(2), first part of sentence), given that the success of uniform law lies in its independence from national laws and especially PIL provisions. In order to foster uniformity, this chapter prefers to seek general principles of the CISG, which could assist in cementing the details of an interest claim. This view is encouraged by the fact that the drafters of the Convention, even though they could not find an answer to most of the problems relating to an interest claim, have not chosen to list the interest issue under Article 4, that is, amongst the topics excluded from the CISG.<sup>8</sup>

<sup>4</sup> International Institute for the Unification of Private Law (UNIDROIT), *Principles of International Commercial Contracts (PICC)*.

<sup>5</sup> Cf. Section 18.4.2.1 for case citations.

<sup>6</sup> Cf., for the discretion of arbitral tribunals in determining the applicable interest rate, J.Y. Gotanda, 'Awarding Interest in International Arbitration', *Am. J. Int'l L.*, Vol. 90, 1996, pp. 40-63, at p. 50 *et seq.*

<sup>7</sup> I. Schwenzer & P. Hachem, in I. Schwenzer (Ed.), *Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd edn, Oxford University Press, Oxford, 2010, Art. 7, para. 42; C. Brunner, *UN-Kaufrecht - CISG*, Staempfli Verlag, Bern, 2004, Art. 7, para. 6; U. Magnus, in M. Martinek (Ed.), *J. v. Staudinger, Kommentar zum Bürgerlichen Gesetzbuch, Wiener UN-Kaufrecht (CISG)*, Sellier, Berlin, 2013, Art. 7, Rn. 58; Huber & Mullis, *The CISG*, Sellier, Berlin, 2007, p. 34.

<sup>8</sup> Cf., for a rejected proposal of the UK to introduce a provision in Part I, Chapter I that "this Convention does not affect any right of the seller or buyer to recover interest on money", the Official Records of the UN Conference on Contracts for the International Sale of Goods, 10 March-April 1980, published in 1991, pp. 137-138.

In order to ascertain the general principles that guide Article 78, it is necessary to first define exactly what purpose an interest claim generally serves.<sup>9</sup> The major reason why interest is awarded is certainly to compensate losses incurred by the creditor for not being able to use the money. By way of the interest payment, the creditor is placed in the same pecuniary position it would have been in if payment of the sum was made on time, that is, on the due date. The interest claim presupposes that the creditor would have invested the money. Therefore, the debtor has to compensate the creditor for the time value of the money. A second justification for an interest claim is to prevent unjust enrichment. Any person who keeps another's money longer than they are legally entitled to will benefit from the legal fruits (interest) of this money in an unjust way. Under such circumstances, the interest claim serves to transfer the wealth to the person it belongs to. Finally, granting an interest claim also has a deterrent effect. The awareness of an interest claim will serve as an incentive to pay money back or to solve litigation more quickly.

When analysing Article 78, it can be observed that this interest claim is not based on the idea of disgorgement. The creditor is not claiming the profit on a sum that the debtor has used in good faith for some time without knowing that he will have to return it. In fact, this is the principle upon which Article 84 is based. In cases of avoidance, the original contractual relationship is transformed into a restitutionary relationship.<sup>10</sup> This means that the buyer is obliged to return the goods to the seller and the seller to refund the price paid by the buyer. In addition, the seller must pay interest on the price from the date the price was paid and the buyer must account for all benefits he has derived from the goods from the time of delivery. But since both of them made use of the money and the goods throughout a period during which they were not under a duty to return them, the calculation of benefit and interest is focused only on the question as to what the parties returning the goods or money have earned or might have earned. The reference point is the debtor and not the creditor.

However, Article 78 does not parallel this idea of disgorgement reflected in Article 84.<sup>11</sup> The reference point of Article 78 is the opposite; the loss of the creditor is the focal point.

<sup>9</sup> Cf., in detail, J. Gotanda, *A Study of Interest*, Villanova University School of Law Public Law and Legal Theory Working Paper, No. 10, 2007, p. 4; I. Schwenzer, P. Hächem & C. Kee, *Global Sales and Contract Law*, Oxford University Press, Oxford, 2012, para. 46, pp. 12-16.

<sup>10</sup> Cf., in detail, CISG-AC Opinion No. 9, *Consequences of Avoidance of the Contract*, Rapporteur: Prof. M. Bridge, London School of Economics, London, 2008, para. 3.7.

<sup>11</sup> Cf. also A. Corterier, 'Interest in Uniform Application – How to Solve the UN Sales Law's Interest Rate Problem under Article 78 CISG and Article 84 CISG', *Review of the Convention on Contracts for the International Sale of Goods (2002-2003)*, 2004, paras. 1-18, II bb (cited from <[www.cisg.law.pace.edu/cisg/biblio/cortier1.html](http://www.cisg.law.pace.edu/cisg/biblio/cortier1.html)>).

The provision is concerned with compensating losses of the creditor and putting him in the position he would have been in if timely payment were made.<sup>12</sup> The resemblance of this interest claim to a damages claim is obvious. The positioning of the provision in the CISG (after Section II on damages and before Section IV on exemption from paying damages), and also the wording of the article, which underlines the fact that the claimant may always ask for additional damages if interest does not suffice for compensation, supports the view that the connection to damages is at the forefront.<sup>13</sup> In fact, if Article 78 were based on the idea of providing compensation for benefits unjustifiably received,<sup>14</sup> there would have been no need to separately introduce the duty to pay interest when refunding the price in Article 84.

Given that Article 78 is not concerned with restitution but with compensation, this chapter assumes that the general principle that can be utilized in solving the questions related to the interest claim is the full compensation principle in Article 74. This article declares that damages consist 'of a sum equal to the loss'.<sup>15</sup> The principle reflects the idea that the aggrieved party is entitled to claim compensation for all losses it has suffered and gains of which it was deprived as a result of the breach.<sup>16</sup> Article 74 aims at placing the injured party in the same pecuniary position they would have been in if the contract had been properly performed. Applying Article 78 means that the moment in time at which the creditor first incurs a monetary loss and the time value of the money for the creditor are the main factors applicable in defining the exact amount of loss.<sup>17</sup>

Article 78 of the CISG, just like the other provisions in Parts II and III of the CISG, is a substantive law provision. The drafters of the Convention have followed the civil law approach and have classified the interest claim as a matter of substantive law.<sup>18</sup> Interest will, in principle, accrue from the moment that payment is in arrears up to the moment when payment has been finally effected. Given that actual payment will almost always happen after the award is rendered, a recalculation will be needed during the enforcement

<sup>12</sup> China International Economic and Trade Arbitration Commission (CIETAC), 20 July 2005, CISG-online 1708.

<sup>13</sup> Schwenzer *et al.*, 2012, para. 46.06.

<sup>14</sup> Cf. *infra* note 53.

<sup>15</sup> Parallel view Serbian Chamber of Commerce Arbitration, 19 October 2009, CISG-online 2265.

<sup>16</sup> Cf. CISG-AC Opinion No. 6, *Calculation of Damages under CISG Article 74*, Rapporteur: Prof. J.Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, 2006, Art. 7.4.2 of the UNIDROIT PICC and Art. 9:502 of the PECL (Principles of European Contract Law) work with the same principle.

<sup>17</sup> J.Y. Gotanda, in Kröll *et al.*, (Eds.), *UN Convention on Contracts for the International Sale of Goods (CISG)*, C.H. Beck, Munich, 2011, Art. 78, para. I.

<sup>18</sup> Schwenzer *et al.*, 2012, para. 46.20.

procedure. In most civil law countries, enforcement officers will make this calculation on the basis of the interest rate fixed in the award. But several countries and especially common law countries work with post-judgment interest statutes.<sup>19</sup> That means that the pre-judgment interest only runs until an award is given and from that moment onwards the post-judgment interest rate fixed in the relevant statute is applied until the debt is paid in full. Obviously, these provisions are part of the procedural rules of these particular countries and are also applied when a foreign award has to be enforced. It must be submitted that application of these domestic rules cannot be superseded by the CISG, given that the CISG no longer governs the enforcement proceedings.<sup>20</sup> Therefore, if the enforcement rules of a country opt for the application of the pre-judgment interest rate until actual payment, the CISG interest provision will also have effect until that moment. However, if the enforcement rules opt for a post-judgment interest rate, then the CISG interest provision will have effect only until the award is rendered.

#### 18.4 PREREQUISITES OF BEING IN ARREARS ACCORDING TO ARTICLE 78 - OF THE CISG

##### 18.4.1 Non-Payment of Purchase Price or Any Other Sum

The wording of the CISG is very clear in that 'any' sum in arrears triggers accrual of interest. That means that the reason the sum due has arisen is in general of no importance. It only needs to be an obligation that commits the debtor to pay a monetary amount to the creditor. Whether this sum is the purchase price or expenses encountered by the seller for example under Article 85 or damages that have to be paid to the buyer because of non-conforming delivery does not make any difference.

It is preferable to interpret the term 'sum' in a way that also includes any unliquidated claim, such as damages. Despite the fact that the breaching party will not know the exact sum to be paid as damages, interest will start to accrue on it from the moment of loss. The debtor can only avoid this result by paying an amount that he thinks is close to the loss encountered by the creditor. The risk of paying too much or too little is on the debtor.

<sup>19</sup> Gelzer, 2010, para. 412.

<sup>20</sup> Cf., in detail, J.Y. Gotanda, 'Conflict of Interest: Article 78 CISG and Post-Judgment Interest Statutes', in A. Büchler & M. Müller-Chen (Eds.), *Private Law, National-Global-Comparative, Festschrift für Ingeborg Schwenzer*, Staempfli, Verlag, Bern, 2011, pp. 597-607, at p. 604 *et seq.*

Today, the prevailing view in CISG literature<sup>21</sup> and case law<sup>22</sup> accepts that the amount of any damages claim, which still has to be defined by a court or arbitral tribunal, is subject to Article 78 without any exceptions. In fact, the legislative history does not reveal any argument against this interpretation.<sup>23</sup> Since the creditor's loss arises regardless of the fact that the amount is not precisely measured and the non-performing party enjoys the benefit of the sum it did not pay, it makes sense to accept that even unliquidated sums can accumulate interest.<sup>24</sup>

As already pointed out above, interest on a 'sum' that must be paid back is sometimes governed by Article 84 instead of Article 78. Therefore, the sphere of application of Articles 78 and 84 has to be ascertained according to an underlying value judgement. Whenever disgorgement of accrued benefits is in the foreground, Article 84 applies. That means in the case of a partial or total avoidance or price reduction,<sup>25</sup> which can be judged as a partial avoidance, the amount has to be refunded with the interest defined according to Article 84.

##### 18.4.2 Non-Payment at Maturity Date

###### 18.4.2.1 Non-Payment

Interest starts accumulating from the moment the original sum is due but not paid. Different payment methods and especially cashless payment methods may be used in

<sup>21</sup> I. Bacher, in P. Schlechtriem & I. Schwenzer (Eds.), *Kommentar zum Einheitlichen UN-Kaufrecht*, 5th edn, C.H. Beck, Munich, 2008, Art. 78, para. 10 *et seq.*; Gotanda, in Kröll *et al.*, 2011, Art. 78, para. 9; C. Thiele, 'Interest on Damages and Rate of Interest under Article 78 of the U.N. Convention on Contracts for the International Sale of Goods', *Vindobona Journal of International Commercial Law and Arbitration*, Vol. 2, No. 1, 1998, para. III/6 (cited from <[www.cisg.law.pace.edu/cisg/biblio/thiele.html](http://www.cisg.law.pace.edu/cisg/biblio/thiele.html)>); Magnus, in Staudinger 2013, Art. 78, para. 8; Gelzer, 2010, para. 173; Brunner, 2004, Art. 78, para. 3; P. Huber, in E.J. Säcker & R. Rixecker (Eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch (BGB)*, Vol. 3, 6th edn, C.H. Beck, Munich, 2012, Art. 78, para. 4; F. Ferrari, in F. Ferrari *et al.* (Eds.), *Internationales Vertragsrecht*, C.H. Beck, Munich, 2007, Art. 78, para. 4.

<sup>22</sup> Landgericht Landshut (Germany), 5 April 1995, CISG-online 193 ('According to the prevailing opinion, Art. 78 CISG also applies to claims for damages'); Kantonsgericht Zug (Switzerland), 21 October 1999, CISG-online 491; US District Court, Northern District of New York (USA), 7 September 1994, CISG-online 113.

<sup>23</sup> Thiele, 1998, para. III/4.

<sup>24</sup> Art. 7.4.10 of the UNIDROIT PICC 2004 expressly accepts that interest on damages for non-monetary obligations can accrue from the moment of breach. The Official Commentary even sees this solution as "the best suited to international trade where it is not the practice for businesspersons to leave their money idle".

<sup>25</sup> Bacher, in Schlechtriem & Schwenzer *Kommentar* 2008, Art. 78, para. 13; Brunner, 2004, Art. 78, para. 1.

international trade. In the case of a funds transfer via a credit institute, the debtor has only performed on time if the transfer to the financial institution by the creditor becomes effective on the due date at the latest. It does not suffice that the payment order was given to the debtor's financial institution on time. However, in cases where payment is made by way of payment order directed to a paying agent, such as a cheque or letter of credit, it is sufficient that the order is received by the creditor on due date. But if these instruments are not honoured later, interest will start accruing retrospectively from the actual due date of performance, since the debtor will be judged to be in arrears from that moment onwards.

#### 18.4.2.2 Maturity Date

Ascertaining the exact date of maturity for every type of sum is crucial, given that interest will start accumulating from that moment onwards. Granting an additional period for payment according to Article 47 or Article 63 does not change the maturity date. If the debtor wants to extinguish the obligation, it has to pay the amount due and also the interest accrued on this amount during the additional period given. But obviously, the parties are free to postpone the time of payment by subsequent agreement. In such cases, interest will start accruing on the new payment date if the debtor does not fulfil its obligation.

##### 18.4.2.2.1 Purchase Price

The purchase price matures either at the time defined by contract or at the time defined by the CISG. If there is no special stipulation in the contract, the due date has to be ascertained according to Article 58. This provision establishes concurrent performance as the rule. Therefore the payment duty must be fulfilled when the seller places either the goods or the documents controlling them at the buyer's disposal at the latest.<sup>26, 27</sup>

<sup>26</sup> But cf. Shanghai New Pudong District People's Court (China), 23 September 2005, CISG-online 1612, where the court neglected to consider Art. 58 of the CISG, even though it decided that the contract was missing an agreement on the time of payment. However, the contract was concluded Free on Board (FOB) Tianjin, and the goods were delivered at Tianjin Port on 21 July 2004. Therefore, the purchase price should also have been due on 21 July. Instead, the court ruled that "As to the [Seller]'s claim for interest, because the parties did not reach an agreement on the time of payment in the offer and acceptance, the interest should be calculated from the time when the [Seller] first urged the [Buyer] to make the payment, i.e., 6 September 2004."

<sup>27</sup> The policy choice of the EU Late Payment Directive is different: where the date or period for payment is not fixed in the contract, the creditor is entitled to interest for late payment upon the expiry of a 30-day period (Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on Combating Late Payment in Commercial Transactions, OJ 2011 L 48/1). This rule is certainly not applicable to any claim based on the CISG. Cf., in detail, P. Perales Viscasillas, 'Late Payment Directive 2000/35 and the CISG', *Pace International Law Review*, Vol. 19, 2007, pp. 125-142, at p. 135.

If the buyer declares that it will not perform before the due date (anticipatory breach), the starting point for the accrual of interest must be defined according to the remedy chosen. In cases where the seller does not make use of its right to avoid the contract but instead insists on payment of the purchase price (since he has, for example, already delivered), interest should still start to accumulate from the due date onwards. Even if it is obvious that the buyer does not want to pay, the seller will not incur any losses due to non-payment until the due date. But if the seller prefers to avoid the contract, he or she may claim damages and interest from the date when the loss has occurred, that is before the due date.

##### 18.4.2.2.2 Damages

This chapter shares the view that unliquidated sums can also accrue interest.<sup>28</sup> Therefore, the moment a damages claim starts to bear interest is crucial. Whereas there are some decisions, which prefer to set the date of maturity for unliquidated sums as the date the proceedings have started or the debtor was informed of the claim,<sup>29</sup> the preferable view is to set the time at the moment the loss has occurred.<sup>30</sup> If it is accepted that the reason for granting an interest claim on money due is to compensate a party for dispensing with the use of money, then the moment of loss should be the decisive moment in time. Loss begins

<sup>28</sup> Cf. Section 18.3.1.

<sup>29</sup> ICC International Court of Arbitration (No. 8786), 1 January 1997, CISG-online 749 ("Defendant has, for the first time, submitted claims against Claimant with a defined amount in its Rejoinder dated [...], i.e., when it substantiated its Answer and Counterclaim. Therefore, Claimant has only known about the exact amount claimed by Defendant at this date. Consequently Defendant may not claim interest on the principal amount prior to date of Rejoinder"); Audiencia Provincial de Cuenca (Spain), 31 January 2005, CISG-online 1241 ("As the Supreme Court's decision of 14 July 2003 (RJ 2003, 4635) states, the principle of '*in illiquidis non fit mora*' refers to the situation of the claim of money debts in which, as the claimed amount is unliquidated, its liquidation ought to be done through the proceedings. Therefore, *mora solvendi* 'delinquency of the obligor in complying with his obligations' cannot be appreciated, for the effects of the claim of legal interest"). See also Landgericht Zwickau (Germany), 19 March 1999, CISG-online 519; CIETAC (China), 31 December 1999, CISG-online 1805.

<sup>30</sup> Cf. literature cited in note 21 and B. Piltz, *Internationales Kaufrecht*, 2nd edn, C.H. Beck, Munich, 2008, para. 5-372; Brunner, 2004, Art. 78, para. 4; Landgericht Landshut (Germany), 05 April 1995, CISG-online 193 ("The claim comes into existence with the occurrence of the loss. On 25 January 1994, the asserted loss had already occurred"); Handelsgericht des Kantons Zürich (Switzerland), 5 February 1997, CISG-online 327 ("The interest on the damage claim is to be paid starting on its maturity date. It becomes due with its emergence. Decisive is the time that the [Buyer] could have realized the lost profit. As the [Buyer] does not substantiate when the profit could have been made, the demand for interest is to be denied"); ICC International Court of Arbitration (No. 9187), 1 June 1999, CISG-online 705 ("interest calculated from the date of occurrence of the damage"); *Kantonsgericht Zug* (Switzerland), 27 November 2008, CISG-online 2024; Tribunal Cantonal du Valais (Switzerland), 28 January 2009, CISG-online 2025; Serbian Chamber of Commerce Arbitration, 19 October 2009, CISG-online 2265.

at the moment the deprivation occurs. This moment may coincide with the moment of breach of contract but may also arise at a later date.<sup>31</sup> If, for example, a party has delivered non-conforming goods that harmed the property of the buyer, loss will arise at the moment of harm, and the claim for interest will arise at the same time. But if the buyer has to pay a penalty to a third party due to a breach by the seller, the interest will start accruing from the moment this payment was made to the third party. Parallel to this, the party avoiding the contract will have a right to interest either from the moment the actual cover transaction was effected according to Article 75 or from the moment of avoidance if the abstract calculation method is applied (Article 76).<sup>32</sup> In cases where an anticipatory breach triggers avoidance of the contract, loss will already occur before the due date and interest will also start to accrue.

#### 18.4.2.2.3 Other Sums

Expenses that the creditor has advanced in place of the debtor and that have to be compensated for later by the debtor are other types of sums in arrears. Typical examples are the expenses incurred by the buyer due to the seller's use of its right to cure (Article 34, 37 or 48), or the additional costs of payment the buyer has had to bear due to a change in the seller's place of business (Article 57), or storage costs arising under Article 86 in cases where the seller has delivered non-conforming goods that the buyer has had to preserve. In all these instances, the obligation to compensate the losses of the creditor arises at the moment when payment was actually effected by the creditor. From that moment onwards, interest also starts to accumulate.

But other than expenses, any payment duty imposed on the debtor in the contract might also give rise to interest if it is not fulfilled on time. Any contractual penalty that was, for example, not paid upon maturity also starts to accumulate interest.<sup>33</sup>

31 In that regard, the terminology of Art. 7.4.10 of the UNIDROIT PICC is confusing since the provision sets the 'time of non-performance' as the moment interest starts accruing, but in the Official Comment it rephrases this as the 'date of the occurrence of the harm.'

32 ICC International Court of Arbitration (No. 8740), 1 October 1996, CISG-online 1294 ("This difference was to be set off against the main claim, with interest running from the date the cover purchase was made, 30 January 1995"); Hof van Beroep, Antwerpen (Belgium), 24 April 2006, CISG-online 1258 ("It is accepted that, if there is a resale in the sense of article [75] CISG, the interest runs from the payment of the resale").

33 Oberlandesgericht Hamburg (Germany), 25 January 2008, CISG-online 1681 ("The claim for interest became mature concurrently with maturity of the claim for the contractual penalty. The claim for the contractual penalty came into existence when the inventory for ice cream production was not installed in a ready-for-use condition at the time stipulated in the contract (mid-April 1995)").

#### 18.4.2.3 No Other Requirement for Claiming Interest

Article 78 stresses that the amount payable has to be 'in arrears' in order for interest to start accumulating. Maturity is the only requirement that is mentioned in the provision. Even though different jurisdictions have different prerequisites for default by the debtor,<sup>34</sup> the CISG abstains from introducing any of these. In particular, *no notice of default is needed*.<sup>35</sup> Article 59 clearly states that the buyer must pay the price "without the need for any request or compliance with any formality on the part of the seller".<sup>36</sup> This is also the rule for any other sum that is due. From the moment the monetary claim has arisen and is mature, interest will start accumulating. The creditor does not need to give notice or remind the debtor of the delay. The onus is on the debtor to enquire about the date of payment if he wants to prevent interest from accruing. The only exception to this can be a contractual stipulation introducing special requirements for interest to start accruing. In fact, renouncing the need for an admonition is the tendency with regard to business transactions<sup>37</sup> and especially in international law instruments: Article 7.4.9 of the PICC, Article 9:508 of the PECL (Principles of European Contract Law), Article 166 (1) of the CESL (Common European Sales Law)<sup>38</sup> and Article 3(1) of the EU (European Union) Late Payment Directive<sup>39</sup> follow this trend.

The creditor does not *need to prove his actual loss* in order to be awarded interest.<sup>40</sup> Although the interest claim has parallels with a damages claim in that it puts the creditor in the position it would be in if the debtor had paid on time, it still differs in major respects. For any interest claim, it is irrefutably presumed that the creditor has incurred a loss due to the missed chance of using the money.<sup>41</sup> The principle of Article 74, that damages consist of 'a sum equal to the loss', is loosened up for the interest claim since

34 Cf., in detail, G.H. Jones & P. Schlechtriem, 'Breach of Contract', in A.T. von Mehren (Ed.), *International Encyclopedia of Comparative Law*, Mohr Siebeck, Tübingen, 1999, Chapter 15, para. 66 *et seq.*; Gotanda, 2011, p. 42 *et seq.*

35 Gelzer, 2010, para. 98; Magnus, in Staudinger 2013, Art. 78, para. 5; Kantonsgericht Zug (Switzerland), 12 December 2002, CISG-online 720; Cour d'appel de Grenoble (France), 29 March 1995, CISG-online 156; Landgericht Flensburg (Germany), 24 March 1999, CISG-online 719; Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, 27 May 2004, CISG-online 2079.

36 Cf., e.g., Mohs, in Schwenzer Commentary 2010, Art. 59, para. 2; Magnus, in Staudinger, 2013, Art. 59, para. 5.

37 For comparative information, see Gelzer, 2010, p. 74 *et seq.* and p. 119 *et seq.*

38 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (CESL), Brussels, 11 October 2011, COM(2011) 635 final.

39 See *supra* note 27.

40 Piltz, 2008, para. 5-487.

41 C. Liu, 'Recovery of Interest', *Nordic Journal of Commercial Law of the University of Turku*, 2003, para. 3.2 (cited from <<http://cisgw3.law.pace.edu/cisg/biblio/liu.html>>); Mazzotta, 2004, para. IV.

the creditor may be awarded interest even if he has not incurred any actual loss. The compensation is a lump sum and the creditor does not need to prove the actual damage incurred.<sup>42</sup>

Third, liability for interest is a strict liability just like it is for any other non-performance under the CISG.<sup>43</sup> However, apart from the damages claim, even the *possibility of exemption in Article 79 does not apply* in cases where a sum due is not paid on time.<sup>44</sup> Whether or not the debtor wanted to keep the money or did everything possible to overcome an event impeding his payment makes no difference.<sup>45</sup> Even though the creditor may be barred from claiming any damages, he can still ask for the interest on the sum due.

## 18.5 CALCULATION OF INTEREST

### 18.5.1 Interest Rate Definable from the Contract

Given that freedom of contract is the rule by which the CISG operates the parties may liberally define the default interest rate. Tribunals should prefer to give a contractual rate effect<sup>46</sup> as long as this rate does not violate applicable national law provisions on validity (Article 4 of the CISG) or public policy.<sup>47</sup> If the parties have a choice of law clause and the law of a certain state is applied to their contract without the CISG, this may also be interpreted as an arrangement of the parties with regard to the default rate of that country.<sup>48</sup>

42 ICC International Court of Arbitration (No. 7585), 1 January 1992, CISG-online 105; Oberlandesgericht Koblenz (Germany), 17 September 1993, CISG-online 91.

43 Atamer, in Kröll *et al.*, 2011, Art. 79, para. 1. Cf. Oberlandesgericht Düsseldorf (Germany), 24 April 1997, CISG-online 385; Amtsgericht Willisau (Switzerland), 12 March 2004, CISG-online 961.

44 Cf. Atamer, in Kröll *et al.*, 2011, Art. 79, para. 42; Schwenger *et al.*, 2012, para. 46.; Magnus, in Staudinger 2013, Art. 78, para. 11; Piltz, 2008, para. 5-486; Liu, 2003, para. 3.3.

45 In that regard, the Arbitral Award of the Hungarian Chamber of Commerce and Industry Arbitration, 10 December 1996, CISG-online 774, which rejects a claim for interest for the period of the UN embargo on Yugoslavia impeding payment of the sales price, is not convincing. According to the tribunal, interest on the outstanding amount could only accrue after the UN sanctions were suspended, which clearly contradicts Art. 78.

46 E.g., ICC International Court of Arbitration, 1 January 2003 (No. 11849), CISG-online 1421 ("Contractual rate finds application"); CIETAC China International Economic & Trade Arbitration Commission Arbitration, 6 December 2000, CISG-online 1449 ("[Buyer] shall pay the interest on the delayed payment based on the 0.45% monthly interest rate agreed by the two parties"); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry Arbitration, 7 April 2006 CISG-online 1943.

47 Cf. Bacher, in Schlechtriem & Schwenger Kommentar 2008, Art. 78, para. 42; Gotanda, 1996, p. 57. Cf., for comparative information on limits to interest rates, Schwenger *et al.*, 2012, paras. 46.37-46.41.

48 Cf. Rechtbank Rotterdam (the Netherlands), 15 October 2008, CISG-online 1899; ICC International Court of Arbitration (No. 7565), 1 January 1994, CISG-online 566; ICC International Court of Arbitration (No. 1308), 1 October 1998, CISG-online 1308.

On the other hand, the parties may be bound by any usage to which they have agreed and by any practices that they have established between themselves, which are presumed to be included in the contract based on Article 9.<sup>49</sup> Whether or not the parties might be considered to have impliedly made international trade usages regarding an interest rate applicable to their contract should be judged very carefully. The fact that the existence of an international usage is only acceptable if, in international trade, it is widely known to and regularly observed by parties to contracts of the type involved in the particular trade concerned should not be disregarded. In fact, the CISG doctrine does not give any example of an international trade usage regarding the applicable interest rate in case of default. Therefore, Article 9(2) should not be interpreted in a way to become a gateway for arbitral choices of interest rates.<sup>50</sup>

### 18.5.2 Residuary Rule for Defining the Interest Rate

Whenever the parties' intentions with regard to a default interest rate cannot be ascertained, Article 78 will apply. Given that the drafters of the Convention have left the issue of default interest rates unresolved, the best way to fill this lacuna in Article 78 has to be decided. Below, the tendencies in doctrine and case law will first be explained and then the proposed solution will be outlined.

#### 18.5.2.1 Different Approaches in Practice and Literature

Tendencies in defining the rate of interest to be applied have been manifold. But the two major streams that can be discerned are those preferring a uniform approach and those giving national law primacy. The first one interprets the lacuna in Article 78 as

49 J.O. Honnold & H.M. Flechtner, *Uniform Law for International Sales Under the 1980 United Nations Convention*, 4th edn. Kluwer Law International, the Netherlands, 2009, para. 421; F. Faust, 'Zinsen bei Zahlungsverzug', *RabelsZ*, Vol. 68, 2004, pp. 511-527, at p. 517.

50 But cf., e.g., Juzgado Nacional de Primera Instancia en lo Comercial (Argentina) 23 October 1991, CISG-online 460 (The court expressly referred to the international trade usages on the basis of Art. 9 of the CISG. In this respect, the Court held that payment of interest, "at an internationally known and used rate such as the Prime Rate", constitutes "an accepted usage in international trade, even when it is not expressly agreed between the parties", then granting the seller recognition for its credit for interest "at the Prime Rate [...] as required by the creditor", without specifying which Prime Rate it was, and applying a rate of 10%). Similarly, see also Juzgado Nacional de Primera Instancia en lo Comercial (Argentina), 6 October 1994, CISG-online 378 (the court just states that international business practices allow an annual interest rate of 12%, especially when there is an obligation in arrears and the parties have agreed, as a financing mechanism, an annual interest rate of 9% as evidenced by the invoice, without explaining which business practice this is exactly).

an invitation to the tribunals to define the applicable interest rate by way of resorting to general principles deduced from the CISG (cf. Article 7(2), first part of the sentence). It is perceived as an *intra legem* lacuna. The second approach however interprets Article 78 as excluding the question of the interest rate from the sphere of application of the CISG and therefore as an express invitation to the tribunals to resort directly to the applicable national law (Article 7(2), second part of the sentence); a *praeter legem* lacuna is assumed.

Even though those in favour of the uniform law approach aim to define one principle applicable to all cases where the default interest rate has to be ascertained, the suggestions regarding this general principle vary to a considerable degree. The major proposals can be summarized as follows<sup>51</sup>:

- The current interest rate at the creditor's place of business;<sup>52</sup>
- The current interest rate at the debtor's place of business;<sup>53</sup>
- The current rate of interest related to the particular currency of the claim;<sup>54</sup>

51 Cf., for an overview, Gelzer, 2010, para. 295 *et seq.*; Schwenzler *et al.*, 2012, para. 46.103-106; Huber, in Münchener Kommentar BGB 2012, Art. 78 CISG paras. 13-14.

52 P. Perales Viscasillas, 'La Determinación Del Tipo De Interés En La Compraventa Internacional', *Cuadernos Jurídicos*, No. 43, pp. 5-12, at § II A 5, July-August 1996 (cited from <www.cisg.law.pace.edu/cisg/biblio/78art.html>); Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft in Österreich (Arbitration), 15 June 1994, CISG-online 691 (cf. CISG-online 120 and 121); ICC International Court of Arbitration (No. 7331), 1 January 1994, CISG-online 106; Landgericht Frankfurt am Main (Germany), 16 September 1991, CISG-online 26; Rechtbank van Koophandel, Hasselt (Belgium), 20 September 2005, CISG-online 1496; Serbian Chamber of Commerce Arbitration, 19 October 2009, CISG-online 2265.

53 V. Heuzé, 'La vente internationale de marchandises: droit uniforme', *L. G. D. J.*, 2000, p. 420, para. 464; I. Saenger, in H.G. Bamberger & H. Roth (Eds.), *Beck'scher Online-Kommentar BGB*, C.H. Beck, Munich, 2011, Art. 78 CISG para. 5; Landgericht Berlin (Germany), 21 March 2003, CISG-online 785; Tribunal Cantonal Vaud (Switzerland), 11 April 2002, CISG-online 899; Yugoslav Chamber of Commerce Arbitration, 28 January 2009, CISG-online 1856; Rechtbank van Koophandel Oudenaarde (Belgium), 10 July 2001, CISG-online 1785; LG Heidelberg (Germany), 2 November 2006, CISG-online 1416.

54 Bacher, in Schlechtriem & Schwenzler Kommentar 2008, Art. 78, para. 30; Corterier, 2004, para. IV; Piltz, 2008, paras. 2-160 and 5-495 *et seq.*; U. Drobning, in H. Kronke *et al.* (Eds.), *Der Zinssatz bei internationalen Warenkäufen gemäß CISG nach Rechtsprechung und Schiedspraxis*, FS von Hoffmann, Giesecking, Bielefeld, 2011, p. 775; Rechtbank van Koophandel Oudenaarde (Belgium), 10 July 2001, CISG-online 1785.

55 ICC International Court of Arbitration (No. 11849), 1 January 2003, CISG-online 1421; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 15 November 2006, CISG-online 2008.

56 Rechtbank van Koophandel, Hasselt (Belgium), 10 May 2006, CISG-online 1259 (European Central Bank rate for the marginal loan facility); Serbian Chamber of Commerce Arbitration, 23 January 2008, CISG-online 1946; Serbian Chamber of Commerce Arbitration, 4 June 2009, CISG-online 2266.

- An internationally or regionally accepted interest rate like the Libor<sup>55</sup> (London Interbank Offered Rate) or the Euribor<sup>56</sup> (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 Principles.<sup>57</sup>

But given that none of these proposals have prevailed to date in doctrine or case law, the most supported view is still to accept a lacuna *praeter legem*. Consequently, the interest rate is determined according to domestic law applicable by reference to the conflicts rules of the forum state.<sup>58</sup> However, there are also some decisions that prefer to apply directly the law of the forum (*lex fori*) to define the applicable interest rate.<sup>59</sup>

### 18.5.2.2 Evaluation and Proposal

This very diverse picture in doctrine and case law calls for an effort to unify the application of Article 78 around one common principle. Given that predictability is of the utmost importance for parties in international trade, a uniform approach towards the interest issue would certainly further foster trade relations. This is what this chapter aims at addressing.

57 Brunner, 2004, Art. 78, para. 12; ICC International Court of Arbitration (No. 8769), 1 December 1996, CISG-online 775; China International Economic and Trade Arbitration Commission, 2 September 2005, CISG-online 1712.

58 B. Nicholas, in C.M. Bianca & M.J. Bonell (Eds.), *Commentary on the International Sales Law*, 1987, pp. 568-571 (cited from <www.cisg.law.pace.edu/cisg/biblio/nicholas-bb78.html>), n. 2.1; Huber, in Münchener Kommentar 2012, Art. 78 CISG, para. 15; Magnus, in Staudinger 2013, Art. 78, paras. 12-13; Ferrari, in Ferrari *et al.* 2007, Art. 78, para. 18; P. Schlechtriem & P. Butler, *UN Law on International Sales*, Springer, Berlin *et al.*, 2009, para. 318; Huber & Mullis, 2007, pp. 359-360; B. Zeller, *Damages Under the Convention on Contracts for the International Sale of Goods*, Oxford University Press, Oxford, 2005, pp. 136-137. Case Law: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry Arbitration, 9 June 2004, CISG-online 1239; Kantonsgericht Zug (Switzerland), 27 November 2008, CISG-online 2024; Tribunal Cantonal du Valais (Switzerland), 28 January 2009, CISG-online 2025; Handelsgericht des Kantons Aargau (Switzerland), 19 June 2007, CISG-online 1741; Rechtbank Breda (Netherlands), 16 January 2009, CISG-online 1789; Landgericht Dresden (Germany), 28 April 2006, CISG-online 1630; Oberlandesgericht Hamburg (Germany), 25 January 2008, CISG-online 1681; Hof van Beroep, Antwerpen (Belgium), 24 April 2006, CISG-online 1258; District Court Dolny Kubin (Slovak Republic), 17 June 2008, CISG-online 1874.

59 US District Court, Northern District of New York (USA), 7 September 1994, CISG-online 113; US District Court, Western District of Pennsylvania (USA), 25 July 2008, CISG-online 1776; Supreme Court of Western Australia (Australia), 17 January 2003, CISG-online 807; Tribunal de Grande Instance de Strasbourg (France), 22 December 2006, CISG-online 1629.



#### 18.5.2.2.1 Evaluation of the Different Approaches

As already stated above, the uniform law approach, that is to fill in the gap in Article 78 from within the Convention, is preferable. The major problem of leaving issues regarding interest to the applicable PIL rules is the unpredictability of this solution for the parties. The PIL rules might sometimes refer to the law of the creditor, sometimes to that of the debtor or sometimes to the law of another place, like the place of performance. As long as the PIL rules themselves are not unified globally, this approach will always hamper uniform application.

Among the different uniform law approaches, the utilization of the law at the 'debtor's place of business' is also not favoured in this paper, given that Article 78 (as put forward above) is not aimed at disgorgement. Parallel to what is stated in CISG Advisory Council (CISG-AC) Opinion No. 9 regarding the 'Consequences of Avoidance of the Contract', the commercial investment rate current at the debtor's place of business should be applied for restitution claims based on Article 84.<sup>60</sup> However, the interest claim in Article 78 is grounded on the idea of compensation and has to have other reference points.

Any solution based on the interest rate applicable at the 'place of payment' (as preferred by Article 7.4.9 of the PICC or Article 9:508 of the PECL, for example) seems to be problematic, given that it does not provide a simple and clear-cut solution. Contractual stipulations regarding the place of payment will almost always give rise to interpretation problems; differing interpretations will hamper the unification ideal. For example, where exactly is the place of payment, if 'cash on delivery', 'documents against payment', 'payment according to letter of credit' is stipulated? Or in cases where the parties have agreed payment is to be made by means of fund transfer, direct debiting or cash card, or by sending a check to the creditor, the place of payment will always be a matter of interpretation.<sup>61</sup> Whether or not the place of payment is also the place where the creditor would like to invest the money or would have to refinance the sum due is certainly also very questionable. The place of payment can be chosen purely with a motive of simplifying the transaction (cash on delivery) without ever really thinking of keeping the money at the place of payment.

On the other hand, applying the interest rate at the place of payment is similarly very problematic with regard to a damages claim. In fact, the UNIDROIT PICC separate

<sup>60</sup> Cf., in detail, CISG-AC Opinion No. 9, Consequences of Avoidance of the Contract, Rapporteur: Prof. M. Bridge, London School of Economics, London, 2008, para. 3.25.

<sup>61</sup> Cf., on this issue, Y.M. Atamer, in S. Vogenauer & J. Kleinheisterkamp (Eds.), *Commentary on the Unidroit Principles of International Commercial Contracts (PICC)*, Oxford University Press, Oxford, 2009, Art. 6.1.6 PICC, paras. 11-16; Huber & Mullis, 2007, p. 309 *et seq.*; Mohs, in Schwenzer Commentary 2010, Art. 57, paras. 6-8.

between the interest for failure to pay money (Article 7.4.9) and the interest on damages (Article 7.4.10). Regarding the interest on damages, an interest rate is not even defined in the PICC. In literature, resorting to the applicable national law is suggested.<sup>62</sup> That means different interest rates apply according to the nature of the monetary claim, which is certainly not suitable for a uniform approach. Even if it should be accepted that, per analogy, the interest rate at the place of payment is also applied to a damages claim, one has to again answer the delicate question as to where the place of payment for damages is. And precisely, this is highly debated in the CISG doctrine, as well as in case law.<sup>63</sup> All in all, defining the place of payment and thereby the significant law relating to the interest rate involves so many difficulties that accepting this proposal would not serve the purpose of unification.<sup>64</sup>

The suggestion of using internationally recognized 'rates like the Libor or Euribor' does not seem satisfactory either, since the scope of application of these rates is too narrow. The Libor is defined for five different currencies,<sup>65</sup> while the Euribor applies only to the Euro. Therefore, these rates would not provide an interest rate that is applicable for every currency. On the other hand, to apply the interest rate of the country of the currency does not seem convincing. It is a fact that there are some currencies like the US Dollar, Euro or the Swiss Franc (CHF) that are very often used in international trade, even though the official currency at the place of payment or at the parties' places of business is different.

<sup>62</sup> McKendrick, in Vogenauer & Kleinheisterkamp 2009, Art. 7.4.10 PICC, para. 5.

<sup>63</sup> Further information on this debate is provided by C. Liu, 'Place of Performance: Comparative Analysis of Articles 31 and 57 of the CISG and Counterpart Provisions in Article 7:101 of the PECL', in J. Felemegas (Ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, Cambridge University Press, Cambridge, 2007, pp. 346, 355-356; Mohs, in Schwenzer Commentary 2010, Art. 57, para. 29; Huber in Münchener Kommentar BGB 2012, Art. 57 CISG, paras. 30-32. Different views have also been expressed in case law: while for monetary claims some favour generalizing the rule expressed in Art. 57 according to Art. 7 and accepting the place of business of the creditor as the place of performance for all kinds of monetary claims (Germany: OLG Düsseldorf, 2 July 1993, CISG-online 74; France: CA Grenoble, 23 October 1996, CISG-online 305; Austria: OGH, 18 December 2002, CISG-online 1279), others apply the principle that secondary obligations, like damages, follow the main obligation and share its place of performance (Germany: OLG Braunschweig, 28 October 1999, CISG-online 510). According to the Austrian Supreme Court, the place of performance of restitutionary obligations is to be determined by transposing the primary obligations – through a mirror effect – into restitutionary obligations (OGH, 29 June 1999, CISG-online 483).

<sup>64</sup> Another criticism regarding the suggestions of the PICC and PECL ("average commercial bank short-term lending rate to prime borrowers") is that they refer to an interest rate that is hardly foreseeable for the party in breach and that calculation of the exact amount of interest to pay would be very burdensome for the tribunals and therefore prone to discussions. Cf. Schwenzer *et al.*, 2012, para. 46.108; Gelzer, 2010, para. 325. In fact, the CESL has also abandoned this approach and has chosen to apply a rate announced by either the European Central Bank or, for Member States which are not in the Euro-Zone, the Central Bank of that Member State.

<sup>65</sup> Swiss franc, British pound sterling, Japanese yen and US dollar. The Danish, Swedish, Canadian, Australian and New Zealand Libor rates have been terminated at the end of July 2013.

But exactly why the average bank short-time lending rate in the US should be applied in a case where a Turkish seller and an Israeli buyer conclude a contract and the price is fixed as US Dollars is not explicable. It is quite normal that in countries with weaker currencies, there are also established lending rates for strong currencies such as the US Dollar, the Euro and the CHF. Therefore, applying the rate that has a closer connection to the contract should be preferred.

#### 18.5.2.2.2 Proposed Rule

This chapter sees the major purpose of an interest claim as compensating the time value of money for the creditor. The interest claim in Article 78 is closer to a damages claim than to any other claim. But it is more advantageous than a damages claim since the creditor can demand a lump sum amount without needing to prove loss, and without the possibility of the debtor exempting himself. The compensation idea behind the interest claim already indicates that it is the creditor and its losses one needs to focus on. The crucial question is what is the amount of loss the creditor will almost certainly sustain in cases of non-timely payment. This is because compensation without proving loss and without exemption should only be accepted for this amount. Since in the vast majority of cases, it can be assumed that the creditor would invest the money at his place of business or take out a loan at this place to refinance his business, the interest rate at this very place should be decisive in defining the amount of loss claimable as interest. This solution would be predictable for any obligor who delays payment. In fact, the obligor, as a rule, is under the duty to effect payment at the seller's place of business (Article 57(1)(a)) and can therefore also presume that the seller, as the creditor, will make use of the money at the given place.

Therefore, the reference point for the default interest rate applicable to any mature sum shall be defined according to the *law of the state where the creditor has his place of business*. The laws of this country will define the amount of loss that can be demanded under the special regime of interest claims.

Consequently, Article 78 should be read as follows:

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 *that a court at the creditor's place of business would grant under its own law in respect of similar contracts of sale not governed by this Convention* without prejudice to any claim for damages recoverable under article 74.

The advocated principle would have the same effect as a PIL rule since it refers the judge to the laws of a certain country. Therefore, a tribunal searching for the rate of interest to be paid by the debtor does not have to inquire PIL provisions anymore, but can directly apply the laws of the creditor's state. In fact, this solution is inspired also by Article 28 of the

CISG. Just like the interest claim, the specific performance claim was also much debated among the drafters of the Convention, and Article 28 was introduced as a compromise.<sup>66</sup> There the deciding court is entitled to consider its own laws in respect of a specific performance claim. Under Article 78, the court is referred to the laws of the creditor's place of business.

This proposal overlaps to a certain extent with the results in courts practice. From the analysed 245 decisions, 104 were either directly or by way of reference of PIL rules applying the law of the state of the creditor. For the sake of uniformity and predictability, it is preferable to come to the same solution that is applying the residual rate of interest at the creditor's country, by inferring it directly from Article 78. In fact, ascertaining the interest rate by way of reference to the state of the creditor was also the approach of the ULIS in Article 83.<sup>67</sup> Besides, it is interesting to note that the 2011 EU Proposal for a CESL does not anymore share the approach of the PICC, PECL or the DCFR (Draft Common Frame of Reference), which all refer to the interest rate at the place of payment, but has preferred to work in Article 166 with the interest rate applicable at the place of the creditor.

Given the huge differences in doctrinal discussion, this chapter tries to focus on the minimum global consensus that could be reached, that is, defining the applicable law without the help of PIL rules. It is not preferable to go one step further and to also choose a specific interest rate as is done in Article 7.4.9 of the UNIDROIT PICC, Article 9:508 of the PECL or Article 166 of the CESL, for example. Given that the interest claim is an exceptional claim, since the creditor does not need to prove his actual loss, its calculation must also be backed up by the idea underlying this exception: the creditor is granted this special claim only for the amount of loss of interest it is assumed he will definitely suffer. And this loss of interest can only be what the creditor is normally entitled to get at his place of business in respect of similar contracts of sale not governed by the Convention. In cases where the creditor's country has a statutory rate applicable for debts in arrears such as '8%', this rate will apply; in cases where this law just refers to 'the average bank short-term lending rate to prime borrowers', for example, then this rate will also apply under the CISG.<sup>68</sup> Otherwise, the case law of the relevant country will be decisive in finding the correct rate. The burden of proof regarding the interest rate and the calculation of interest lies on the claimant, that is, the creditor.

<sup>66</sup> Müller-Chen, in Schwenger Commentary 2010, Art. 28, para. 1.

<sup>67</sup> "Where the breach of contract consists of delay in the payment of the price, the seller shall in any event be entitled to interest on such sum as is in arrear at a rate equal to the official discount rate in the country *where he has his place of business* or, if he has no place of business, his habitual residence, plus 1%."

<sup>68</sup> Cf., for a detailed comparative overview on statutory interest rates, Gotanda, 1996, pp. 41-50; Schwenger *et al.*, 2012, paras. 46.80-46.94.

The proposed solution might have the negative side effect that the domestic law of the creditor works with a residuary rule, which provides for a fixed interest rate that does not reflect market conditions anymore.<sup>69</sup> But whenever the creditor remains under-compensated due to this fixed interest rate, a correction can be achieved through a damages claim based on Article 74.<sup>70</sup> To suggest an interest provision that circumvents the residual rules of the creditor's country and gives the creditor a chance to always claim the opportunity cost of the sum due without even proving his loss as an alternative would fail the ratio of Article 78. As long as the general rule in many countries is that the residuary interest rate is a fixed one defined by state authorities, and any further damage has to be proven by the creditor, it would not be convincing to accept a different rule on the international level.

Obviously, the mirror image of the problem is balancing an overcompensation caused by fixed interest rates. Since the debtor is not granted the right to prove the creditor's actual loss or to prove that the default interest rate is above market conditions, the risk of enrichment of the creditor is a given. But this windfall profit must be accepted as a side effect of the proposed rule, since this overcompensation happens in the same way in domestic contracts. If the lawmaker in the creditor's country does not react properly to the changes in the market, it cannot be the role of a tribunal to just bypass these residual interest rules in order to find a more adequate interest rate for international disputes. The creditor would be able to claim this fixed amount of interest without a discussion about the fairness of this rate in a national dispute. The same should be valid for an international dispute. Besides, this solution would also be in line with the tendency in some countries to use high statutory interest rates as a deterrent for late payment practices.<sup>71</sup> The Late Payment Directive of the EU,<sup>72</sup> for example, deliberately sets the interest rate applicable between businesses at 8% points above the European Central Bank's reference rate with the obvious intention of creating such a deterrent.

The proposed residuary rule might be to no avail if the domestic law of the creditor does not provide for any rule that defines the default interest rate, either generally or specifically

69 J.Y. Gotanda, 'When Recessions Create Windfalls: The Problems of Using Domestic Law to Fix Interest Rates under Article 78 CISG', *Vindobona Journal of International Commercial Law & Arbitration*, Vol. 13, No. 1, 2009, pp. 229-240, at p. 230.

70 Cf. *infra* 18.10.

71 Cf. also Schwenzler *et al.*, 2012, para. 46.120.

72 See *supra* note 27.

for the currency of the claim.<sup>73</sup> Here, the courts must try to discern what the practice in the creditor's country is from the evidence served by the parties and whether or not an established rate can be found in case law of that country. If not, because an interest claim is forbidden in that country, for example, the tribunal cannot award any interest based on Article 78. In such cases, the losses of the creditor should only be compensated subject to the prerequisites of Article 74.

## 18.6 COMPOUND INTEREST

Given that the parties are free to define the rate of interest payable in cases of default, they may also stipulate capitalization of interest at certain intervals. The CISG does not contain any provision that might preclude compound interest.<sup>74</sup> But the more important question is whether or not the residuary default interest accrues on a simple or compound basis. In case law, the tendency is towards rejection of automatic awards of compound interest.<sup>75</sup> CISG literature partly follows this line of thought, only allowing for it under Article 74 and in cases where the creditor can prove that he himself had to pay compound interest due to the breach of the debtor.<sup>76</sup> However, parallel to the solution favoured above, the issue should be decided according to the domestic law of the creditor. If residuary rules in his country provide for capitalization of interest during the time of default and for compound interest in respect of similar commercial contracts of sale not governed by this

73 Cf., e.g., Yugoslav Chamber of Commerce Arbitration, 28 January 2009, CISG-online 1856 ("In order to determine exact 'domicile' (Serbian) rate for euro, one should not resort to Serbian law, since it regulates and is appropriate for local currency (RSD) rates only and would result in overcompensation if applied to sums denominated in Euro. Rather, it is more appropriate to apply an interest rate which is regularly used for savings, such as short-term deposits in the first class banks at the place of payment (Serbia) for the currency of payment, as this represents a rate on a relatively riskless investment"); Serbian Chamber of Commerce, 23 January 2008, CISG-online 1946 (Since as of March 2001, there was no law in Serbia which fixed an interest rate for claims in a foreign currency, the Arbitral Tribunal resorted to the Euribor given that the claim was a Euro claim).

74 The validity of such clauses remains to be decided by national law provisions according to Art. 4 of the CISG. In particular, stipulations in standard terms regarding compound interest can trigger stricter control under national laws.

75 ICC International Court of Arbitration, Case No. 8502, 1 November 1996, CISG-online 1295; ICC International Court of Arbitration, Case No. 8908, 1 December 1998, CISG-online 1337 (CISG-online 751); Hof van Beroep, Antwerpen (Belgium), 24 April 2006, CISG-online 1258 ("In any event, under the CISG, compound interest is not accorded automatically and the claimant, in this case the [Seller], has to prove that it is entitled to compound interest, e.g., because [Seller] had to pay extra interest itself since it lacked the payments that were due").

76 E.g., Bacher, in Schlechtriem & Schwenzler Kommentar 2008, Art. 78, para. 43; Brunner, 2004, Art. 78, para. 15.

Convention, this would also be applicable under the CISG regime.<sup>77</sup> The law of the seller's place of business will govern this issue. If there is no provision that allows for interest to accrue on a compound basis, the creditor may not ask for it merely on the basis of Article 78. In such cases, he may be able to claim compound interest only as an additional loss item under Article 74, but subject to the prerequisites of that article.

#### 18.7 MODALITIES OF PAYMENT

Given that the claim for interest is an accessory claim, its payment modalities should always follow the main claim.<sup>78</sup> It has to be paid in the same currency and at the same time and place as the main sum in arrears. In cases where interest on damages is claimed, the currency in which the loss has occurred has to first be ascertained.<sup>79</sup> This will generally be the currency at the creditor's place of business.<sup>80</sup>

#### 18.8 DEFENCES AGAINST AN INTEREST CLAIM

Although an exemption under Article 79 does not preclude the accrual of interest, the debtor still might have some defences against the interest claim. According to Article 80, "a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission". Whereas Article 79 only provides an exemption from paying damages, the contributory negligence exemption in Article 80 applies to all types of claims, including the claim for interest. That means that the creditor is barred from claiming interest to the extent that non-payment was caused by his own act or omission. The debtor is excused from all the consequences of his non-performance.<sup>81</sup> If, for example, a seller has assigned his claims against the buyer to a factoring business without duly informing the buyer, delay in payment cannot trigger the accumulation of interest.<sup>82</sup>

77 Cf. for a very detailed account of different legal systems approaches to compound interest, J.Y. Gotanda, 'Compound Interest in International Disputes', *Law and Policy in International Business*, Vol. 34, No. 2, 2002-2003. See also Schwenger *et al.*, 2012, paras. 46.43-46.46. In favour of compound interest under the CISG, Gotanda, in Kröll *et al.* 2011, Art. 78, para. 28.

78 Brunner, 2004, Art. 78, para. 6; Bacher, in Schlechtriem & Schwenger Kommentar 2008, Art. 78, para. 23.

79 Schwenger, in Schwenger Commentary 2010, Art. 74, para. 63; Brunner, 2004, Art. 74, para. 49. See, for a parallel, Art. 7.4.12 of the PICC.

80 Magnus, in Staudinger 2013, Art. 74, para. 56.

81 Schwenger, in Schwenger Commentary 2010, Art. 80, para. 8; H.M. Flechtner, in F. Ferrari, H.M. Flechtner & R. Brand (Eds.), *The Draft Digest and Beyond*, Sellier, Berlin, 2003, pp. 839-840; Atamer, in Kröll *et al.*, 2011, Art. 80, paras. 11-12.

82 But cf. Amtsgericht Willisau (Switzerland) 12 March 2004, CISG-Online 961 where the court applied Art. 79 and did not consider the application of Art. 80.

A right of the debtor to suspend performance will also have an effect on the interest claim since the due date for the debtor's payment will be postponed.<sup>83</sup> If, for example, the buyer is under the duty to fulfill his payment duty first but it becomes apparent that the other party will not perform a substantial part of his obligation, the buyer may suspend his payment until the other party provides adequate assurance of performance (cf. Article 71). Obviously, this provision is based on the same value judgement as Article 80, since it is the other party's failure that triggers suspension.

Finally, any counterclaim of the debtor that might give rise to the right of set-off can also bar interest from accruing.

#### 18.9 CESSATION OF AN INTEREST CLAIM

An interest claim is an accessory to the main obligation. Therefore, it stops accumulating at the moment the principal obligation is paid in total.<sup>84</sup> Although some legal systems operate on the presumption that the accrued interest is extinguished in cases where the creditor accepts payment of the principal debt without explicitly reserving the interest claim, this presumption should not be generalized and applied to the CISG. Even though the creditor has accepted the main sum due without any reservation, he should still have the right to claim for the accrued interest separately. Set-off also has the effect of extinguishing the principal obligation so that the interest claim will stop accruing. The expiration of the limitation period with respect to the principal debt has the same effect on the claim for interest in many jurisdictions.<sup>85</sup> If the principal obligation ceases to exist due to avoidance or is partially extinguished due to partial avoidance or price reduction, the accrued interest will diminish either in full or in proportion to the remaining principal sum.

As already mentioned above, the CISG interest might also stop accumulating with the rendering of the award, in cases where the laws of the country in which the award is going to be enforced provide for post-judgment interest. Under such circumstances, the contractual interest claim is superseded by the procedural one.

#### 18.10 RELATION OF INTEREST TO ADDITIONAL DAMAGES

The residuary interest rate applicable in the country of the creditor generally represents a lump sum, which can be claimed by the creditor. But Article 78 expressly stresses that the

83 Bacher, in Schlechtriem & Schwenger Kommentar 2008, Art. 78, para. 21.

84 Gelzer, 2010, paras. 409-412.

85 Cf. Gelzer, 2010, para. 415 and also Art. 27 of the 1974 UN Convention on the Limitation Period in the International Sale of Goods.

aggrieved party is entitled to interest 'without prejudice to any claim for damages recoverable under Article 74'. Therefore, the creditor must always prove that default interest by itself did not compensate the losses incurred due to late payment. If the creditor, for example, proves that he would have involved risky investments to maximize his profit, he might ask for damages that go further than the risk-free amount.<sup>86</sup> If the creditor had to take out a bank loan due to a shortage of money, the difference between the contractual interest rate of the loan and the applicable interest rate under Article 78 could be claimed as a loss.<sup>87</sup>

But any damages claim is also subject to the prerequisites of the CISG. That means that, according to Article 74, the loss has to be proved by the creditor,<sup>88</sup> it has to be foreseeable, the creditor must have respected its duty to mitigate loss under Article 77 and an exemption under Article 79 must not apply to such a claim.

### 18.11 BURDEN OF PROOF

Whenever the creditor claims interest, he has to prove the existence of a sum due and the applicable interest rate in the given case.<sup>89</sup> If the claim is based on a contractual interest rate, the existence of such a contractual provision has to be proven. If the interest rate requires the application of the domestic law of the creditor, the *lex fori* provisions of the tribunal will decide about the duty of inquiry regarding foreign law. This may sometimes be the obligation of the parties, and sometimes, the tribunal does this investigation *ex officio*.

86 Cf. Amtsgericht Oldenburg in Holstein (Germany), 24 April 1990, CISG-online 20. Cf., in detail on how interest itself can be awarded as damages especially in international investment disputes, T.J. S  n  chal & J.Y. Gotanda, 'Interest as Damages', *Colum. J. Transnat'l L.*, Vol. 47, No. 3, 2008-2009, p. 491 *et seq.*

87 Cf. Handelsgericht des Kantons Z  rich (Switzerland), 21 September 1995, CISG-online 246; Bundesgericht (Switzerland), 28 October 1998, CISG-online 413; ICC International Court of Arbitration (No. 7197), 1 January 1992, CISG-online 36 (the tribunal found that the seller operated on the basis of credit for which it had to pay interest at the rate of 12% and applied that rate since the seller would have to obtain credit in order to replace the funds missing due to the non-payment by the buyer); Kantonsgericht Zug (Switzerland), 12 December 2002, CISG-online 720; Handelsgericht Wien (Austria), 3 May 2007, CISG-online 1783; Oberlandesgericht Hamburg (Germany), 25 January 2008, CISG-online 1681; Handelsgericht des Kantons Aargau (Switzerland), 19 June 2007, CISG-online 1741.

88 Oberlandesgericht Frankfurt am Main (Germany), 18 January 1994, CISG-online 123 ("Pursuant to Article 1284 Codice Civile [of Italy] the interest rate amounts to 10% [...] The [seller's] claim for default interest at an amount of 13.5% could not be awarded. CISG, Article 78 does not bar a claim for damages under CISG, Article 74 to recover additional loss resulting from finance charges. However, the [seller] has not shown evidence of any further loss caused by using credit. The submitted certificates issued by the Banca d'Italia only refer to the discount [rate] fluctuations").

89 Brunner, 2004, Art. 78, para. 13; Magnus, *in* Staudinger, 2013, Art. 78, para. 20.

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