

# CISG Advisory Council\* Opinion No. 14

## Interest Under Article 78 CISG

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### **OPINION [BLACK LETTER TEXT]**

#### *Article 78 CISG*

***If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.***

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\* The CISG-AC started as a private initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. The International Sales Convention Advisory Council (CISG-AC) is in place to support understanding of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the promotion and assistance in the uniform interpretation of the CISG.

At its formative meeting in Paris in June 2001, Prof. Peter Schlechtriem of Freiburg University, Germany, was elected Chair of the CISG-AC for a three-year term. Dr. Loukas A. Mistelis of the Centre for Commercial Law Studies, Queen Mary, University of London, was elected Secretary. The founding members of the CISG-AC were Prof. Emeritus Eric E. Bergsten, Pace University School of Law; Prof. Michael Joachim Bonell, University of Rome La Sapienza; Prof. E. Allan Farnsworth, Columbia University School of Law; Prof. Alejandro M. Garro, Columbia University School of Law; Prof. Sir Roy M. Goode, Oxford, Prof. Sergei N. Lebedev, Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation; Prof. Jan Ramberg, University of Stockholm, Faculty of Law; Prof. Peter Schlechtriem, Freiburg University; Prof. Hiroo Sono, Faculty of Law, Hokkaido University; Prof. Claude Witz, Universität des Saarlandes and Strasbourg University. Members of the Council are elected by the Council.

At subsequent meetings, the CISG-AC elected as additional members Prof. Pilar Perales Viscasillas, Universidad Carlos III, Madrid; Professor Ingeborg Schwenger, University of Basel; Prof. John Y. Gotanda, Villanova University; Prof. Michael G. Bridge, London School of Economics; Prof. Han Shiyuan, Tsinghua University and Prof. Yeşim M. Atamer, Istanbul Bilgi University, Turkey. Prof. Jan Ramberg served for a three-year term as the second Chair of the CISG-AC. At its 11th meeting in Wuhan, People's Republic of China, Prof. Eric E. Bergsten of Pace University School of Law was elected Chair of the CISG-AC and Prof. Sieg Eiselen of the Department of Private Law of the University of South Africa was elected Secretary. At its 14th meeting in Belgrade, Serbia, Prof. Ingeborg Schwenger of the University of Basel was elected Chair of the CISG-AC.

1. All aspects of interest are governed by the Convention and the general principles on which the Convention is based.
2. Two different approaches to the award of interest must be distinguished: Whereas Article 84 has a restitutionary character and reflects the idea of disgorgement, Article 78 follows similar principles to damages and aims at compensation.
3. Interest starts to accrue under Article 78 from the moment any sum is in arrears. For example, a sum is in arrears when:
  - a. payment of the purchase price ought to have been made;
  - b. liability in damages arises on the occurrence of loss;
  - c. payment of a claim for reimbursement ought to have been made.
4. Any monetary obligation, liquidated or unliquidated, can bear interest.
5. Parallel to Article 59 no further requirement, such as request or demand for payment or putting in default, or any compliance with formalities, is needed for interest to start accruing.
6. Interest ceases to accrue when the obligation to pay is extinguished.
7. The obligation to pay interest under Article 78 remains notwithstanding an exemption from paying damages under Article 79. However, interest does not accrue when and in so far as the failure to pay the monetary obligation was caused by the act or omission of the creditor or when the debtor has exercised its right to suspend performance.
8. The rate of interest may be determined by the agreement of the parties.
9. In the absence of such agreement, the applicable rate of interest is the rate which the court at the creditor's place of business would grant in a similar contract of sale not governed by the CISG.
10. Compound interest may be payable if the parties have agreed to its payment, or if the court at the creditor's place of business would allow compound interest in a similar contract of sale not governed by the CISG.
11. Interest shall be paid in the same currency and at the same place, complying also with the same payment formalities, as the principal sum.
12. Any loss suffered by the creditor not recoverable as interest under Article 78 may be recovered as damages in accordance with Article 74.

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*“Treaties are not just dry parchments. They are instruments for providing stability to their parties and to fulfill the purposes which they embody. They can therefore change over time, must adapt to new situations, evolve according to the social needs of the international community and can, sometimes, fall into obsolescence.”<sup>1</sup>*

## COMMENTS

### I. Introduction

**1.1** Whenever the purchase price or any other monetary obligation is not paid on time the creditor will encounter losses simply due to the fact of not being able to use this money.<sup>2</sup> Article 78 CISG acknowledges the right of the creditor to claim interest in such cases and to even request compensation of any further loss according to Article 74 CISG. However, Article 78 leaves one major issue unresolved, that is the percentage rate of interest. Given that

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<sup>1</sup> Georg Nolte, Rep. of the Int'l Law Comm'n, 60th Sess., May 5–June 6, July 7–Aug. 8, 2008, U.N. Doc. A/63/10 (here reproduced from *Arato*, Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences, 9 *The Law and Practice of International Courts and Tribunals* (2010), pp. 443–494, at 444.

<sup>2</sup> 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. *Gelzer*, Verzugs-, Schadens- und Bereicherungszins, 2010, para 19.

there is an ongoing debate in jurisprudence and doctrine regarding the applicable interest rate this Opinion aims at proposing an acceptable solution based on the general principles of the Convention (Art 7). In this endeavor the Advisory Council is led by the above statement of Georg Nolte and favors to read the Convention in a manner so as to adapt it according to the needs of the international community for legal certainty.

**1.2** Article 78<sup>3</sup> is the only provision in Part III/Chapter V/Section III of the Convention and follows immediately the provisions regarding damages in Section II. This placement, and the reference to the general norm on damages (Article 74) in Article 78 indicate that interest and damages claims are at least based on parallel value judgments and are both mainly aimed at compensating a loss. Another corresponding feature of these provisions is the abstract calculation method: both, Article 76 as well as Article 78 calculate the payable amount by the obligor independent of the actual loss of the obligee.

**1.3** Even though a specific interest rate is not provided for in Article 78 the major aim of an interest claim to compensate the loss of the creditor, the general principle of full compensation anchored in Article 74 and the abstract calculation method provided in Article 76 offer enough reference points to determine the applicable rate based on the CISG.

## **II. Drafting History**

**2.1** The predecessor of the CISG, the Uniform Law on the International Sale of Goods (ULIS, 1964), provided in Article 83 that a buyer, who was delayed in paying the purchase 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 a great extent and to only add 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>4</sup>

**2.2** But due to irreconcilable divergences among the national delegations the interest question provoked far more difficulties than was probably expected. Whereas some countries were challenging a right to interest in general, others were critical about the rate proposed. The discussions led to the result that the two following Draft Conventions of 1977 and 1978 excluded a general provision regarding the duty to pay interest in case of default. Both Draft Conventions only provided for a rule similar to Article 84 CISG, which obliges the seller to

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<sup>3</sup> If not indicated otherwise all article references are relating to the CISG.

<sup>4</sup> Cf. for details on the drafting history of Article 78 CISG Kizer, *Minding the Gap: determining Interest Rates Under the UN Convention for the International Sale of Goods*, 65 U. Chi. L. Rev. 1279 (1988), 1285-1286; Mazzotta, *CISG Article 78: Endless disagreement among commentators, much less among the courts*, 2004 (here cited from: <http://www.cisg.law.pace.edu/cisg/biblio/mazzotta78.html> - intro) para III.

pay interest on the purchase price whenever it is under the duty to refund the price after avoidance of the contract.

**2.3** 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 not be reached. Ultimately, the Drafters acknowledged the principle of a right to claim interest on any monetary obligation that is due, but did not expressly define the rate of interest or the modalities of payment.

### **III. Interpretation of Article 78**

#### **1. General remarks**

##### **a. Urgent need for a uniform interpretation of Article 78**

**3.1** Looking at the drafting history of Article 78 CISG one might be inclined to interpret the provision such that, other than establishing the right to request interest, it deliberately leaves all details to the national law applicable “by virtue of the rules of private international law” (Art. 7(2), 2<sup>nd</sup> part of sentence). Yet an overview of case law regarding Article 78 proves that there are plenty of other interpretations applied. A study of 274 decisions shows drastically varying solutions, especially regarding the relevant rate of interest.<sup>5</sup> Whereas some national courts regularly employ the interest rate defined by the law applicable according to the private international rules of the forum; others choose to fill in the gap of Article 78 by applying the interest rate at the creditor or debtor’s place of business, or the Libor/Euribor rate, or the rate defined in Article 7.4.9 Unidroit PICC<sup>6</sup>. The interpretation of decisions regarding Article 78 of arbitral tribunals is more problematic still given that they often do not even explain which law or principle the applied interest rate is deduced from.<sup>7</sup> Also issues such as when interest starts accruing or if compound interest can be awarded are debated topics. This very fragmented picture calls for a uniform interpretation of Article 78. This is especially so given the lack of uniformity might induce the parties to base their claims on the law most profitable for them regarding the interest rate. This Advisory Council Opinion is primarily driven by the need to provide a solution that would be generally acceptable in CISG doctrine and case law.

##### **b. Basic assumptions of this Opinion**

**3.2** CISG literature today is almost unanimous in the conclusion that recourse to any national law, which must be defined according to private international law (PIL) rules, is an *ultima ratio* solution for gap filling under the Convention and should be avoided as far as possible.<sup>8</sup>

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<sup>5</sup> Cf. case study attached to this Opinion. Cf. for other case studies *Liu*, Recovery of Interest, Nordic Journal of Commercial Law of the University of Turku, 2003 (here cited from <http://cisgw3.law.pace.edu/cisg/biblio/liu.html>) and *Behr*, The Sales Convention in Europe: From Problems in Drafting to Problems in Practice, 17 Journal of Law and Commerce (1998) 263-299 (here cited from <http://cisgw3.law.pace.edu/cisg/biblio/beh.html>).

<sup>6</sup> International Institute for the Unification of Private Law (Unidroit), Unidroit Principles of International Commercial Contracts 2010 (PICC).

<sup>7</sup> Cf. on the discretion of Arbitral Tribunals in determining the applicable interest rate *Gotanda*, Awarding Interest in International Arbitration, 90 Am. J. Int'l L. 1996, pp. 40-63, at p. 50 et seq.

<sup>8</sup> Cf. e.g. *Schwenzer/Hachem* in: Schlechtriem/Schwenzer (eds.) Commentary on the UN Convention on the International Sale of Goods (CISG), 3<sup>rd</sup> ed., 2010, Art. 7 para 42; *Honnold/Flechtner*, Uniform Law for

Deducing general principles from the CISG is always the first priority (Art. 7(2), 1<sup>st</sup> part of sentence) given that the success of uniform law lies in its independence from national law applicable through PIL provisions. In order to foster uniformity this Opinion prefers to seek general principles of the CISG to assist in concretizing the details of an interest claim. This view is encouraged by the fact that the Drafters of the Convention, although unable to devise an answer to most problems relating to interest claims, still chose not to list the interest issue under Article 4, that is, among the topics expressly excluded from the CISG.<sup>9</sup> This decision can be interpreted as a delegation of this issue to future adjudicators. To arrest the development of the CISG in the late 1970's cannot have been the purpose of the drafters.<sup>10</sup>

**3.3** In order to ascertain which general principles guide interpretation of Article 78, the purpose served by an interest claim must first be defined.<sup>11</sup> The major reason why interest is awarded is to compensate presumed losses incurred by the creditor due to its inability to use the money. By way of interest payment the creditor is placed in the same pecuniary position it would have been in had the payment of the sum been done on time, that is, paid on the due date. The interest claim presupposes that the creditor would have reinvested the money. Therefore the debtor must 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 for longer than it is legally being entitled will benefit from the legal fruits (*fructus civiles*) of this money in an unjust way. Under such circumstances the interest claim serves to transfer the wealth to the person to whom it belongs. Either way, granting an interest claim has also a deterrent effect. The knowledge of a potential interest claim creates an incentive to pay money back or to solve litigations quicker.

**3.4** When analyzing Article 78 it can be observed that this interest claim is not based on the idea of disgorgement or unjust enrichment. The creditor is not claiming the profit on a sum, which the debtor has used in good faith for some time without knowing that it will have to return the money. In fact, this is the principle on which Article 84 is based. There, in the event of avoidance, the original contractual relationship is transformed into a restitutionary relationship.<sup>12</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 it has

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International Sales under the 1980 United Nations Convention, 4th ed., 2009, para 102; *Magnus* in: Staudingers Kommentar zum Bürgerlichen Gesetzbuch, 2013, Art. 7, Rn. 58; *Brunner*, UN-Kaufrecht – CISG, 2004, Art. 7 para 6; *Huber/Mullis*, The CISG, 2007, p. 34.

<sup>9</sup> Parallel *Djordjevic* in: Kröll/Mistelis/Perales Viscasillas (eds.) UN Convention on Contracts for the International Sale of Goods (CISG), 2011, Art. 4 para 45. Cf. for a rejected proposal of the United Kingdom 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-11 April 1980, published in 1991, p. 137-138.

<sup>10</sup> *Kizer* (fn. 4) p. 1295. Cf. regarding dynamic (evolutive) treaty interpretation *Arato* (fn. 1) p. 465 *et seq.*; *Gardiner*, Treaty Interpretation, reprint 2011, p. 253 *et seq.*

<sup>11</sup> Cf. in detail *Gotanda*, A Study of Interest, Villanova University School of Law Public Law and Legal Theory Working Paper No. 2007-10, p. 4; *Schwenzer/Hachem/Kee*, Global Sales and Contract Law, 2012, para 46.12-16.

<sup>12</sup> Cf. in detail CISG-AC Opinion No. 9, Consequences of Avoidance of the Contract, Rapporteur: Professor *Michael Bridge*, London School of Economics, London, United Kingdom, para 3.7.

derived from the goods from the time of delivery. But since both of them made use respectively of the money and the goods in a period during which they were not under the duty to reconstitute them, the calculation of benefit and interest is only focused on the question what the reconstituting parties have earned or might have earned. The reference point is the debtor and not the creditor.

**3.5** However, Article 78 does not parallel the idea of disgorgement that is reflected in Article 84.<sup>13</sup> The reference point of Article 78 is the opposite; the loss of the creditor is the focal point. The provision is concerned with compensating losses of the creditor and putting the creditor in the same position as if timely payment had been made.<sup>14</sup> The resemblance of this interest claim to a damages claim is obvious.<sup>15</sup> The positioning of the provision in the Convention (after Section II on damages and before Section IV on exemption from paying damages), and also the wording of the article, which underlines that the claimant may always request additional damages according to Article 74 if interest does not suffice for compensation, support the view that the connection to damages is at the foreground.<sup>16</sup> In fact, if Article 78 were based on the concept of providing compensation for benefits unjustifiably received,<sup>17</sup> there would have been no need to separately introduce the duty to pay interest when refunding the price in Article 84.

**3.6** Given that Article 78 is not concerned with restitution but with compensation, this Opinion considers it appropriate that questions regarding interest claims be resolved by utilizing the full compensation principle of Article 74, which declares that damages consist “of a sum equal to the loss”.<sup>18</sup> This 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>19</sup> Article 74 aims at placing the injured party in the same pecuniary position it would have been in had the contract been properly performed. This means for the application of Article 78 that the moment in time the creditor first encounters a monetary loss, and the time value of the money for the creditor, are the main features in determining the exact amount of loss.<sup>20</sup>

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<sup>13</sup> Cf. also *Cortier*, 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] 1-18, para II bb (here cited from <http://www.cisg.law.pace.edu/cisg/biblio/cortier1.html>).

<sup>14</sup> *China International Economic and Trade Arbitration Commission [CIETAC]*, 20.07. 2005, CISG-online 1708.

<sup>15</sup> Cf. also *Honnold/Flechtner* (fn. 8) para 421.

<sup>16</sup> *Schwenzer/Hachem/Kee* (fn.11) para 46.06.

<sup>17</sup> Cf. for this view *infra* fn. 58.

<sup>18</sup> Parallel view *Serbian Chamber of Commerce Arbitration*, 19.10.2009, CISG-online 2265.

<sup>19</sup> Cf. CISG-AC Opinion No. 6, Calculation of Damages under CISG Article 74. Rapporteur: Professor *John Y. Gotanda*, Villanova University School of Law, Villanova, Pennsylvania, USA. Article 7.4.2 Unidroit PICC and Article 9:502 PECL (Principles of European Contract Law) work with the same principle.

<sup>20</sup> *Kröll/Mistelis/Perales Viscasillas/Gotanda* (fn. 9) Art. 78 para 1; *Staudinger/Magnus* (fn. 8) Art. 78 para 1.

**3.7** The time value of the sum due has to be determined in an abstract way parallel to Article 76.<sup>21</sup> This provision stipulates that in case of breach of contract there is no need to conclude a substitute transaction in order to calculate the loss of the obligee as long as the goods have a current price. The obligee can right away ask for the difference in the market price at the time the contract was avoided and the contractual price. This value difference is irrefutably presumed to be the loss of the obligee. Parallel to this idea it can be assumed that the interest claim in Article 78 gives the creditor the right to the time value of the money. Other than Article 76 however Article 78 does not mention the place which determines the ‘current price’, in our case the ‘current time value of money’. But given that the loss of the obligee is at the forefront the time value at the place of business of the obligee (creditor) seems to be the most plausible choice. This will be further elaborated on below under paras 3.35-3.44.

**3.8** Article 78 CISG, like the other provisions in Part II and III of the CISG, is a substantive law provision. The Drafters of the Convention have followed the Civil Law approach and classified interest claims as matter of substantive law.<sup>22</sup> Interest will in principle accrue from the moment payment is in arrears up to the moment 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 procedure. In most of the Civil Law countries enforcement officers will make this calculation on the basis of the interest rate fixed in the award. However, several countries and especially Common Law countries work with post-judgment interest statutes.<sup>23</sup> That means that the pre-judgment interest runs only until an award is given, and from that moment onwards the post-judgment interest rate fixed in the relevant statute finds application until the debt is paid in full. Obviously these provisions are part of the procedural rules of these particular countries, and also apply to enforcement of a foreign award. It must be submitted that application of these domestic rules cannot be superseded by the CISG given that the CISG no longer governs enforcement proceedings.<sup>24</sup> Therefore, if the enforcement rules of a country opt for the application of the pre-judgment interest rate until actual payment, then the CISG interest rate provision will also continue to have effect until that moment. However, if the enforcement rules opt for a post-judgment interest rate, then the CISG interest rate provision will only have effect until the award is rendered.

## **2. Prerequisites of being in arrears according to Article 78 CISG**

### **a. Non-payment of purchase price or any other sum**

**3.9** The wording of the CISG is very clear in that “any” sum in arrears triggers the accrual of interest. This means that the reason why the sum became due is in general of no importance. It needs only to be an obligation which commits the debtor to pay a monetary amount to the creditor. Whether or not this sum is the purchase price, expenses incurred by the seller e.g.

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<sup>21</sup> Cf. on this provision *Atamer*, Die abstrakte Schadensberechnung und ihr Verhältnis zum Anspruch auf den entgangenen Gewinn am Beispiel von Artikel 74 und 76 CISG, in: *Liber Amicorum Ulrich Magnus*, Mankowski/Wurmnest (eds.), 2014, pp. 154-160.

<sup>22</sup> *Schwenzer/Hachem/Kee* (fn.11) para 46.20.

<sup>23</sup> *Gelzer* (fn. 4) para 412.

<sup>24</sup> Cf. in detail *Gotanda*, Conflict of Interest: Article 78 CISG and Post-Judgment Interest Statutes, in: *Büchler/Müller-Chen* (eds.), *Private Law, National-Global-Comparative*, Festschrift für Ingeborg Schwenzer, 2011, pp. 597-607, at p. 604 et seq.



under Article 85, or damages that must be paid to the buyer because of non-conforming delivery makes no difference. Contractually agreed sums like penalties, which are not paid on time also fall under the scope of this provision.<sup>25</sup>

**3.10** Interpretation of the term “sum” in a way that includes any unliquidated claim like damages is to be preferred. Despite the fact that the breaching party will not know the exact sum to be paid as damages, interest will start to accrue from the moment of loss. The debtor can only impede this result by paying an amount, which it thinks is close to the loss incurred by the creditor. The risk of paying too much or too little is on the debtor. Today the prevailing view in CISG literature<sup>26</sup> and case law<sup>27</sup> accepts that any damages claim, the amount of which is still to be defined by a court or arbitral tribunal, is subject to Article 78 without any exception. In fact, the legislative history does not reveal any argument against this interpretation.<sup>28</sup> Given that the loss of the creditor arises regardless of the fact that the amount is not yet precisely ascertained, 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>29</sup>

**3.11** As already pointed out in para 3.4 *supra*, 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 Article 78 and 84 must be ascertained according to the underlying value judgment. Whenever disgorgement of accrued benefits is in the foreground, Article 84 applies. That means in case of partial or total avoidance or price reduction, which can be viewed as a partial avoidance, the amount must be refunded with interest defined according to Article 84. This interest starts accruing from the moment of payment of the original amount to the party now required to disgorge. However, from the moment of declaration of avoidance or price reduction, the payable sum becomes due, which means that from this very moment onwards, the applicable interest rate will succumb to Article 78. If the sum is not refunded immediately the debtor is in arrears and interest in accordance with Article 78 applies.

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<sup>25</sup> UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2012 edition, Art. 78 para 2 (here cited from <http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf>).

<sup>26</sup> *Bacher* in: Schlechtriem/Schwenzer (eds.) Kommentar zum Einheitlichen UN-Kaufrecht, 5th ed., 2008, Art. 78 para 10 et seq.; Kröll/Mistelis/Perales Viscasillas/*Gotanda* (fn. 9) Art. 78 para 9; *Thiele*, Interest on Damages and Rate of Interest Under Article 78 of the U.N. Convention on Contracts for the International Sale of Goods, 2 *Vindobona Journal of International Commercial Law and Arbitration* (1998), para III/6 (here cited from <http://www.cisg.law.pace.edu/cisg/biblio/thiele.html>); *Staudinger/Magnus* (fn. 8) Art. 78 para 8; *Gelzer* (fn.2) para 173; *Brunner* (fn. 8) Art. 78 para 3; *Huber* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, 6. Aufl. 2012, Art. 78 para 4; *Ferrari*, in: Ferrari/Kieninger/Mankowski u.a. (eds.), *Internationales Vertragsrecht*, 2007, Art. 78 para 4.

<sup>27</sup> *Landgericht Landshut* (Germany), 05.04.1995, CISG-online 193 (“According to the prevailing opinion, Article 78 CISG also applies to claims for damages”); *Kantonsgericht Zug* (Switzerland), 21.10.1999, CISG-online 491; *U.S. District Court*, N.D. of New York (USA), 07.09.1994, CISG-online 113. However cf. also *CIETAC* (China), 15.09.2005, CISG-online 1714.

<sup>28</sup> *Thiele* (fn.26) para III/4.

<sup>29</sup> Art.7.4.10 *Unidroit PICC 2010* expressly accepts that interest on damages for non-monetary obligations can accrue from the moment of breach. The Official Commentary (p. 281) sees this solution even as “the best suited to international trade where it is not the practice for businesspersons to leave their money idle”.

## **b. Non-payment at maturity date**

### ***aa. Non-payment***

**3.12** Interest starts accumulating from the moment the original sum is due but not paid. Different payment methods and, in particular, cashless payment methods may be used in international trade. In case of fund transfer via credit institute, the debtor has performed in a timely manner only if the transfer to the financial institution of the creditor becomes effective on the due date at the latest. It does not suffice that the payment order was given timely to the financial institution of the debtor. However, in case payment is made by way of payment order directed to a paying agent, like a cheque or letter of credit, it is sufficient that the order arrives at the creditor's place of business on the due date. If these instruments are subsequently not honored, interest will start accruing retrospectively from maturity, as the debtor will be considered in arrears from that moment onwards.

### ***bb. Maturity date***

**3.13** Ascertaining the exact date of maturity for every type of sum is crucial, given that interest will start accumulating from that moment onwards. In general, granting of 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 must pay the amount due and also the interest accrued on this amount during the additional period given. However, the parties are obviously free to postpone the time of payment by subsequent agreement. In such case interest will start accruing on the new payment date if the debtor does not fulfill its obligation.

### ***aaa. Purchase price***

**3.14** The purchase price matures at the moment defined either by the contract or by the CISG. If there is no special stipulation in the contract, the due date must be ascertained according to Article 58. This provision establishes concurrent performance as the rule. Therefore the payment duty must be fulfilled, at the latest, when the seller places either the goods or the documents controlling their disposition at the buyer's disposal.<sup>30, 31</sup>

**3.15** If the buyer declares before the due date that it will not perform (anticipatory breach) the starting point for the accrual of interest must be defined according to the remedy sought. In

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<sup>30</sup> But cf. *Shanghai New Pudong District People's Court* (China), 23.09.2005, CISG-online 1612, where the Court neglected Art. 58 CISG even though it decided that the contract was missing an agreement on the time of payment. The contract was concluded FOB Tianjin and the goods were delivered at Tianjin Port on 21 July 2004. Therefore the purchase price should also have been due on the 21<sup>st</sup> of 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>31</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 which will start in principle following the date of receipt by the debtor of the invoice or an equivalent request for payment (Art. 3(3)(b)(i), Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on Combating Late Payment in Commercial Transactions, OJ 23.02.2011, L48/1). This rule is certainly not applicable to any claim based on the CISG. Cf. in detail *Perales Viscasillas*, Late Payment Directive 2000/35 and the CISG, 19 *Pace International Law Review* 2007, pp 125-142, at p. 135.

case the seller does not make use of its right to avoid the contract, but insists on payment of the purchase price (for example, because delivery already took place), interest still starts to accumulate from the due date onwards. Even if it is obvious that the buyer does not want to pay, the seller will not encounter any losses due to nonpayment until the due date. However, if the seller prefers to avoid the contract, it may claim damages and interest from the date when the loss occurred, that is, before due date.<sup>32</sup>

### **bbb. Damages**

**3.16** This Opinion shares the view that unliquidated sums can also accrue interest.<sup>33</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 proceedings began, or when the debtor was informed of the claim,<sup>34</sup> the preferable view is that they mature at the moment the loss occurred.<sup>35</sup> Given that the reason for granting an interest claim is to compensate a party for its inability to use the money, the moment of loss ought to be the decisive moment in time. Loss begins 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>36</sup> If, for example, a party has delivered non-conforming goods, which harmed the property of the buyer, loss will arise at the moment of the harm, and the claim for interest will arise at the same moment. But if the buyer had to pay a penalty to a third party due to breach of the seller, interest will start accruing from the moment 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 an actual cover transaction was effected and the price paid according to Article

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<sup>32</sup> Cf. *infra* para 3.16.

<sup>33</sup> Cf. *supra* para 3.10.

<sup>34</sup> *I.C.C. International Court of Arbitration* (No. 8786), 01.01.1997, 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), 31.01.2005, CISG-online 1241 (“As the Supreme Court’s decision of 14 July 2003 [R] 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 its obligations] cannot be appreciated, for the effects of the claim of legal interest”). See also *Landgericht Zwickau* (Germany), 19.03.1999, CISG-online 519; *CIETAC* (China), 31.12.1999, CISG-online 1805.

<sup>35</sup> Cf. literature cited in fn. 26 and *Piltz*, *Internationales Kaufrecht*, 2. Aufl. 2008, para 5-372; *Brunner* (fn. 8) Art. 78 para 4; *Landgericht Landshut* (Germany), 05.04.1995, 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), 05.02.1997, 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”); *I.C.C. International Court of Arbitration* (No. 9187), 01.06.1999, CISG-online 705 (“interest calculated from the date of occurrence of the damage”); *Kantonsgericht Zug* (Switzerland), 27.11.2008, CISG-online 2024; *Tribunal Cantonal du Valais* (Switzerland), 28.01.2009, CISG-online 2025; Serbian Chamber of Commerce Arbitration, 19.10.2009, CISG-online 2265.

<sup>36</sup> In that regard the terminology of Article 7.4.10 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”.

75 or from the moment of avoidance if the abstract calculation method is applied (Art. 76).<sup>37</sup> In case an anticipatory breach triggers avoidance of contract, loss will occur before due date. When, for example, the conduct of the seller shows clearly that it will commit a fundamental breach of contract, the buyer may avoid the contract and enter a replacement contract within a reasonable time and in a reasonable manner. In such case interest starts accruing from this moment onwards.

### **ccc. Other sums**

**3.17** Expenses which the creditor has expended that must be later compensated by the debtor are another type of sums in arrears. Typically these are encountered by the buyer due to the seller's exercise of its right to cure (Articles 34, 37 or 48), or the additional costs of payment the buyer had to bear due to change of place of business of the seller (Art. 57), or storage costs arising under Article 86 where the seller has delivered non-conforming goods which the buyer was obliged to preserve. In all these instances the obligation to compensate the losses of the creditor arises at the moment of actual expenditure by the creditor. From that moment onwards interest also starts to accumulate.

**3.18** Other than expenses, any payment duty imposed upon the debtor in the contract may also give rise to an interest claim if it is not fulfilled on time. For example, any contractual penalty not paid upon maturity will also start to accumulate interest from the time it matures.<sup>38</sup>

#### **c. No other requirement for claiming interest**

**3.19** Article 78 stresses that the amount payable must be "in arrears" in order for interest to start accumulating. Maturity is the only requirement mentioned in the provision. Even though different jurisdictions have different prerequisites for default by the debtor,<sup>39</sup> the CISG abstains from introducing any of these. In particular, no notice of default is needed.<sup>40</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>41</sup> This is also the rule for any other sum that is due. From the moment the monetary claim arises and matures interest will start accumulating. The creditor does not need to give a notice or remind the debtor of the delay. In fact, the tendency to renounce the need for admonition is evident in regard to business

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<sup>37</sup> *I.C.C. International Court of Arbitration* (No. 8740), 01.10.1996, 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), 24.04.2006, 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").

<sup>38</sup> *Oberlandesgericht Hamburg* (Germany), 25.01.2008, 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)").

<sup>39</sup> Cf. in detail *Jones/Schlechtriem*, *Breach of Contract*, Chapter 15, *International Encyclopedia of Comparative Law*, 1999, para 66 *et seq.*; *Gotanda* (fn. 7) at p. 42 *et seq.*

<sup>40</sup> *Gelzer* (fn. 2) para 98; *Staudinger/Magnus* (fn. 8) Art. 78 para 5; *Kantonsgericht Zug* (Switzerland), 12.12.2002, CISG-online 720; *Cour d'appel de Grenoble* (France), 29.03.1995, CISG-online 156; *Landgericht Flensburg* (Germany), 24.03.1999, CISG-online 719; *Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce*, 27.05.2004, CISG-online 2079. Cf. also UNCITRAL Digest (fn. 25), Art. 78 para 4.

<sup>41</sup> Cf. e.g. *Schlechtriem/Schwenzer/Mohs* (Fn. 8) Art. 59 para 2; *Staudinger/Magnus* (Fn. 8) Art. 59 para 4.

transactions in recent soft law instruments as well as law reform projects<sup>42</sup>: Article 7.4.9 PICC, Article 9:508 PECL, Article 166 (1) CESL<sup>43</sup> and Article 3 (1) EU Late Payment Directive<sup>44</sup> follow this trend. The only exception to this could be where a contractual stipulation introduces special requirements before interest can begin to accrue.

**3.20** The creditor does not need to prove the actual loss in order to be awarded interest.<sup>45</sup> For any interest claim it is irrefutably presumed that the creditor has encountered a loss due to the lost opportunity to use the money.<sup>46</sup> The principle of Article 74 that damages consists of ‘a sum equal to the loss’ is lifted for interest claims as the creditor may be awarded interest despite not incurring any actual loss. The compensation is a lump sum one where the creditor need not prove the actual damage incurred.<sup>47</sup> In fact, this is exactly the idea embedded in an abstract loss calculation according to Art. 76. There too the obligee needs not to prove its actual loss but just the market price of the goods and its difference to the contractual price.

**3.21** Third, liability for interest is strict liability, as it is for any other non-performance liability under the CISG.<sup>48</sup> Nonetheless, except for when additional losses are claimed for interest under Article 74, the possibility of exemption in Article 79 does not apply to sums due but not paid on time.<sup>49</sup> Whether or not the debtor intentionally kept the money or did everything to overcome an event impeding payment makes no difference.<sup>50</sup> Further, although the creditor may be barred from claiming damages under Article 79, it may still seek interest on, for example, the purchase price not paid when due.

### 3. Calculation of interest

#### a. Interest rate defined by the contract

**3.22** Given that freedom of contract is the rule under the CISG, the parties may liberally define the default interest rate. Tribunals should prefer to give a contractual rate effect,<sup>51</sup>

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<sup>42</sup> For comparative information see *Gelzer* (fn. 2) p. 74 *et seq.* and 119 *et seq.*

<sup>43</sup> Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (CESL), Brussels, 11.10.2011, COM(2011) 635 final. Cf. on this *Remien*, Zinsen wegen Zahlungsverzug im Vorschlag eines Gemeinsamen Europäischen Kaufrechts (GEKR/CESL) und die Pluralität von dessen Quellen, in: Liber Amicorum Lando, Bonell et al. (eds.), 2012, pp. 335 *et seq.*

<sup>44</sup> See supra fn. 31.

<sup>45</sup> *Piltz* (fn.35) para 5-487.

<sup>46</sup> *Liu*, Recovery of Interest, *Nordic Journal of Commercial Law of the University of Turku* (2003), para 3.2 (Pace); *Mazzotta* (fn. 4) para IV.

<sup>47</sup> *I.C.C. International Court of Arbitration* (No. 7585), 1.1.1992, CISG-online 105; *Oberlandesgericht Koblenz* (Germany), 17.09.1993, CISG-online 91.

<sup>48</sup> *Kröll/Mistelis/Perales Viscasillas/Atamer* (fn. 9), Art. 79 para 1. Cf. *Oberlandesgericht Düsseldorf* (Germany), 24.04.1997, CISG-online 385; *Amtsgericht Willisau* (Switzerland), 12.03.2004, CISG-online 961.

<sup>49</sup> Cf. *Kröll/Mistelis/Perales Viscasillas/Atamer* (fn. 48) Art. 79 para 42; *Schwenzer/Hachem/Kee* (fn. 11) para 46.68; *Staudinger/Magnus* (fn. 8) Art. 78 para 11; *Piltz* (fn.35) para 5-486; *Liu* (fn. 46) para 3.3.

<sup>50</sup> In that regard the *Arbitral Award of the Hungarian Chamber of Commerce and Industry Arbitration*, 10.12.1996, CISG-online 774, which rejects a claim for interest for the period of the UN embargo on Yugoslavia impeding payment of the sales price, does not convince. According to the Tribunal interest on the outstanding amount could only accrue after the UN sanctions were suspended, which is clearly contradicting Article 78.

<sup>51</sup> E.g. *I.C.C. International Court of Arbitration*, 01.01.2003 (No. 11849), CISG-online 1421 (“Contractual rate finds application”); *CIETAC China International Economic & Trade Arbitration Commission Arbitration*,

provided this rate does not violate applicable national law provisions on validity, especially usury (Art. 4 CISG) or public policy.<sup>52</sup> If the parties have a choice of law clause and the law of a certain state applies to their contract without the CISG, this law also defines the interest rate.<sup>53</sup> A contractual clause regarding place of payment may sometimes also be interpreted as a latent agreement regarding interest rate.

**3.23** On the other hand, the parties may be bound by any usage to which they have agreed, and by any practices, which they have established between themselves, which are presumed to be included into the contract based on Article 9.<sup>54</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. It should not be disregarded that the existence of an international usage is only acceptable if the usage is widely known in international trade, and regularly observed by parties to contracts of the type involved in the particular trade concerned. In fact, 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 manner that allows it to become a gateway for arbitrary choices of interest rates.<sup>55</sup>

#### **b. Residuary rule for defining the interest rate**

**3.24** Whenever the parties' intention in regard to a late payment interest rate cannot be ascertained, Article 78 will find application. Given that the Drafters of the Convention have left the issue of default interest rate unresolved, it must be decided how this lacuna in Article 78 can be best filled. Below, the tendencies in doctrine and case law will be reflected first and then the preference of the Advisory Council will be outlined.

#### **aa. Different approaches in practice and literature**

**3.25** Tendencies in defining the rate of interest have been manifold. But the two major streams that can be discerned are those preferring a uniform approach, and those giving

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06.12. 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*, 07.04.2006 CISG-online 1943.

<sup>52</sup> Cf. Schlechtriem/Schwenzer/Bacher (fn.26) Art. 78 para 42; *Gotanda* (fn.7) at p. 57. Cf. for comparative information on limits to interest rates *Schwenzer/Hachem/Kee* (fn. 11) paras 46.37-46.41.

<sup>53</sup> Cf. *Rechtbank Rotterdam* (Netherlands), 15.10.2008, CISG-online 1899; *I.C.C. International Court of Arbitration* (No. 7565), 01.01.1994, CISG-online 566; *I.C.C. International Court of Arbitration* (No.1308), 01.10.1998, CISG-online 1308.

<sup>54</sup> *Honnold/Flehtner* (fn. 8) para 421; *Faust*, Zinsen bei Zahlungsverzug, *RebelsZ* Bd. 68 (2004) pp. 511-527, at p. 517.

<sup>55</sup> But cf. for example *Juzgado Nacional de Primera Instancia en lo Comercial* (Argentina) 23. 10. 1991, CISG-online 460 (The court expressly referred to the international trade usages on the basis of Article 9 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%). Similar also *Juzgado Nacional de Primera Instancia en lo Comercial* (Argentina), 06.10.1994, 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 exactly is). Cf. also on the difficulty of defining such international usage *Kizer* (fn. 4) 1297.

national law the primacy. The first one interprets the lacuna in Article 78 as inviting 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 tribunals to resort to the applicable national law (Article 7 (2) second part of the sentence); that is, a *praeter legem* lacuna is assumed.

**3.26** Even though those in favor of the uniform law approach aim at defining one principle applicable to all cases where a default interest rate must be ascertained, the suggestions regarding this general principle vary considerably. The major proposals can be summarized as follows<sup>56</sup>:

- The current interest rate at the creditor's place of business;<sup>57</sup>
- The current interest rate at the debtor's place of business;<sup>58</sup>
- The current rate of interest related to the particular currency of the claim (*lex monetae*);<sup>59</sup>
- An internationally or regionally applied interest rate like the Libor<sup>60</sup> (London Interbank Offered Rate) or the Euribor<sup>61</sup> (Euro Interbank Offered Rate) or the reference rate defined by Directive 2011/7/EU on Combating Late Payment in Commercial Transactions;

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<sup>56</sup> Cf. for an overview case study attached to this Opinion, and also UNCITRAL Digest (fn. 25), Art. 78 para 11-14; *Gelzer* (fn.2) para 295 *et seq.*; *Schwenzer/Hachem/Kee* (fn. 11) para 46.103-106; *MünchKomm/Huber* (fn.26) Art. 78 para 13-14.

<sup>57</sup> *Perales Viscasillas*, La Determinacion Del Tipo De Interes En La Compraventa Internacional, Cuadernos Juridicos (julio-agosto 1996) No. 43, 5-12, at II A 5 (here cited from <http://www.cisg.law.pace.edu/cisg/biblio/78art.html>); *Kröll/Mistelis/Perales Viscasillas/Djordjevic* (fn. 9) Art. 4 para 45 (savings rate for the currency in the creditor's place of business); *Stoll*, Inhalt und Grenzen der Schadensersatzpflicht sowie Befreiung von der Haftung im UN-Kaufrecht, im Vergleich zu EKG und BGB, in: *Schlechtriem* (ed.) *Einheitliches Kaufrecht und nationales Obligationenrecht*, 1987, pp. 279-280; *Kizer* (fn. 4) 1297 (savings rate for the currency in the creditor's place of business); *Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft in Österreich* (Arbitration), 15.06.1994, CISG-online 691 (= cf. CISG-online 120 and 121); *I.C.C. International Court of Arbitration* (No.7331), 01.01.1994, CISG-online 106; *Landgericht Frankfurt am Main* (Germany), 16.09.1991, CISG-online 26; *Rechtbank van Koophandel, Hasselt* (Belgium), 20.09.2005, CISG-online 1496; *Serbian Chamber of Commerce Arbitration*, 19.10.2009, CISG-online 2265.

<sup>58</sup> *Heuzé*, La vente internationale de marchandises: droit uniforme, 2000, para 464 (p. 420); *Saenger* in: *Bamberger/Roth* (eds.) *Beck'scher Online-Kommentar BGB*, 2011, Art. 78 CISG para 5; *Landgericht Berlin* (Germany), 21.03.2003, CISG-online 785; *Tribunal Cantonal Vaud* (Switzerland), 11.04.2002, CISG-online 899; *Yugoslav Chamber of Commerce Arbitration*, 28.01.2009, CISG-online 1856; *Rechtbank van Koophandel Oudenaarde* (Belgium), 10.07.2001, CISG-online 1785; *LG Heidelberg* (Germany), 2.11.2006, CISG-online 1416.

<sup>59</sup> *Schlechtriem/Schwenzer/Bacher* (fn. 26) Art. 78 para 30; *Cortier* (fn.13) para IV; *Piltz* (fn. 35) para 2-160 and 5-495 *et seq.*; *Drobning*, Der Zinssatz bei internationalen Warenkäufen gemäß CISG nach Rechtsprechung und Schiedspraxis, in: *Kronke/Thorn* (eds.), *FS von Hoffmann*, p. 775; *Rechtbank van Koophandel Oudenaarde* (Belgium), 10.07.2001, CISG-online 1785.

<sup>60</sup> *I.C.C. International Court of Arbitration* (No. 11849), 01.01.2003, CISG-online 1421; *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry*, 15.11.2006, CISG-online 2008.

<sup>61</sup> *Rechtbank van Koophandel, Hasselt* (Belgium), 10.05.2006, CISG-online 1259 (European Central Bank rate for the marginal loan facility); *Serbian Chamber of Commerce Arbitration*, 23.01.2008, CISG-online 1946; *Serbian Chamber of Commerce Arbitration*, 04.06.2009, CISG-online 2266.



- Application of Article 7.4.9 of the Unidroit PICC.<sup>62</sup>

**3.27** Given that none of these proposals has so far prevailed in doctrine and 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 of the conflict of law rules of the forum state.<sup>63</sup>

#### ***bb. Evaluation and proposal***

**3.28** This very diverse picture in doctrine and case law demonstrates the urgent need for an effort to unify the application of Article 78 around one common principle. Given that predictability is of utmost importance for parties in international trade, a uniform approach towards the interest issue would certainly further foster trade relations.

#### **aaa. Evaluation of the different approaches**

**3.29** As already stated about at paras 3.1-3.2, 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 private international law rules is the unpredictability of this solution for the parties. The PIL rules might sometimes refer to the law of the country where the creditor has his place of business, or 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 of the CISG.

**3.30** Among the different uniform law approaches summarized above, utilization of the interest rate at the **debtor's place of business** is not favored, since Article 78 (as put forward at paras 3.4-3.5 above) is not aimed at disgorgement. Parallel to what is stated in 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 restitutionary matters in Article 84.<sup>64</sup> However, the interest claim in Article 78 is based on the concept of compensation and requires different reference points.

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<sup>62</sup> Brunner (fn. 8) Art. 78 para 12; *I.C.C. International Court of Arbitration* (No. 8769), 01.12.1996, CISG-online 775; *China International Economic and Trade Arbitration Commission*, 02.09.2005, CISG-online 1712.

<sup>63</sup> Nicholas, in: Bianca/Bonell (eds.), *Commentary on the International Sales Law*, 1987, 568-571 (here cited from <http://www.cisg.law.pace.edu/cisg/biblio/nicholas-bb78.html>) note 2.1; Mazzotta (fn. 4) para V; MünchKomm/Huber (fn.26) Art. 78 para 15; Staudinger/Magnus (fn. 8) Art. 78 para 13; Ferrari (fn. 26) Art. 78 para 18; Schlechtriem/Butler, *UN Law on International Sales*, 2009, para 318; Huber/Mullis (fn. 8) p.359-360; Zeller, *Damages under the Convention on Contracts for the International Sale of Goods*, 2005, p. 136-137; Magnus in: Honsell (ed.), *Kommentar zum UN-Kaufrecht*, Art. 78 para 12; Garbers, *The Dogmatic and Practical Implications of Article 78 of the CISG on Claims for Interest under International Sales Contracts Case Law* (here cited from <http://www.cisg.law.pace.edu/cisg/biblio/garbers.html>); Behr (fn. 5) V C; *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry Arbitration*, 09.06.2004, CISG-online 1239; *Kantonsgericht Zug* (Switzerland), 27.11.2008, CISG-online 2024; *Tribunal Cantonal du Valais* (Switzerland), 28.01.2009, CISG-online 2025; *Handelsgericht des Kantons Aargau* (Switzerland), 19.06.2007, CISG-online 1741; *Rechtbank Breda* (Netherlands), 16.01.2009, CISG-online 1789; *Landgericht Dresden* (Germany), 28.04.2006, CISG-online 1630; *Oberlandesgericht Hamburg* (Germany), 25.01.2008, CISG-online 1681; *District Court Dolny Kubin* (Slovak Republic), 17.06.2008, CISG-online 1874.

<sup>64</sup> Cf. in detail CISG-AC Opinion No. 9, *Consequences of Avoidance of the Contract*, Rapporteur: Professor Michael Bridge, London School of Economics, London, United Kingdom, para 3.25.



**3.31** Any solution based on the interest rate applicable at the **place of payment** (such as those in Article 7.4.9 PICC or Article 9:508 PECL) also seems to be problematic given that it does not provide a simple and clear-cut solution. Contractual stipulations regarding place of payment will almost always raise interpretation problems; differing interpretations will hamper the aim of unification. For example, it will always be a matter of interpretation as to exactly where the place of payment is if ‘cash on delivery’, ‘documents against payment’, ‘payment according to letter of credit’ is stipulated, or in cases in which parties have agreed on payment by means of fund transfer, direct debiting or cash card, or by sending a check to the creditor.<sup>65</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 it, is certainly also very doubtful. The place of payment may be chosen with the sole motive of simplifying the transaction (cash on delivery) without the creditor ever giving any real consideration to the possibility of retaining the money at the place of payment.

**3.32** On the other hand, applying the interest rate at the place of payment is similarly problematic in regard to damages claims. In fact, the Unidroit PICC have a separate provision for interest accruing on damages in Article 7.4.10, in which a rate is not even defined. Literature suggests this requires resort to the applicable national law.<sup>66</sup> That means under the PICC different interest rates apply according to the nature of the monetary claim, which certainly is unsuitable for a uniform approach. Even if it is accepted that for a damages claim the interest rate at the place of payment must be decisive, one has to answer again the delicate question concerning where the place of payment for damages is. This precise issue is highly debated in CISG doctrine as well as in case law.<sup>67</sup> All in all, defining the place of payment and thereby the relevant law for the interest rate, involves with so many difficulties that accepting this approach would not serve the unification purpose.<sup>68</sup>

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<sup>65</sup> Cf. on this issue *Atamer*, in: Vogenauer/Kleinheisterkamp (eds), *Commentary on the Unidroit Principles of International Commercial Contracts (PICC)*, 2009, Art. 6.1.6 paras 11-16; *Huber/Mullis* (fn. 8) at p. 309 et seq.; *Schlechtriem/Schwenzer/Mohs* (fn. 8) Art. 57 paras 6-8.

<sup>66</sup> Vogenauer/Kleinheisterkamp/*McKendrick* (fn. 65) Art. 7.4.10 para 5.

<sup>67</sup> Further information on this debate is provided by *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 (2007)* p. 346, 355-356; *Schlechtriem/Schwenzer/Mohs* (fn. 8) Art. 57 para 29; *MünchKomm/Huber* (fn.26) Art. 57 paras 30-32. Different views have also been expressed in case law: while for monetary claims some favor to generalize the rule expressed in Art 57 according to Art 7 and to accept the place of business of the creditor as the place of performance for all kinds of monetary claims (Germany: *OLG Düsseldorf*, 2.07.1993, CISG-online 74; France: *CA Grenoble*, 23.10.1996, CISG-online 305; Austria: *OGH*, 18.12.2002, 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*, 28.10.1999, 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*, 29.06.1999, CISG-online 483).

<sup>68</sup> Another criticism regarding the suggestions of the PICC and PECL (‘average commercial bank short-term lending rate to prime borrowers’) is that they are referring to an interest rate that is hardly foreseeable for the party in breach and that the calculation of the exact amount of interest to pay would be very burdensome for the Tribunals due to changes over a short period of time and therefore prone to discussions. Cf. *Schwenzer/Hachem/Kee* (fn. 11) para 46.108; *Gelzer* (fn.2) para 325. In fact the CESL has

**3.33** Neither does the suggestion to use **internationally or regionally applied interest rates** like the Libor or Euribor seem satisfactory, since the scope of application of these rates is simply too narrow: The London Interbank Offered Rate is defined for just five different currencies;<sup>69</sup> the Euro Interbank Offered Rate just for the Euro. Therefore these rates would not provide an interest rate that could be applied for every currency.

**3.34** Finally, to apply the interest rate of the **country of the currency** does not seem convincing either. In fact some currencies like the US Dollar, Euro or the Swiss Franc are very often defined in international trade as the payment currency even though they are not the official currency at the place of payment, or at the parties' places of business. Why exactly the average bank short-time lending rate in the US should be applied in a case involving a Turkish Seller and an Israeli buyer who conclude a contract with the price fixed in USD is not explicable. This interest rate would certainly not reflect the loss of the Turkish creditor given that the money would most probably have been used in Turkey and not in the US. In fact, it is also quite normal that in countries with weaker currencies there are established default interest rates for currencies other than the national one. Therefore it is preferable to apply an interest rate which has a closer connection to the contract.

#### **bbb. Proposed Rule**

**3.35** This Opinion sees the major purpose of an interest claim as compensating the time value of money for the creditor.<sup>70</sup> The interest claim in Article 78 is closer to a damages claim than to any other claim. Therefore the full compensation idea behind damages claims should also be applied to interest claims and the focus should be on the creditor and compensating its losses. However these losses need not be proven; just like the abstract calculation method of Article 76, Article 78 favors also a calculation independent of the creditor's actual loss. Obviously it is of crucial importance to determine which amount of loss a creditor will sustain almost certainly in a case of late payment. Only for this amount should it be accepted that compensation without proving the loss and without exemption is possible. Since in the vast majority of the cases it can be assumed that the creditor would invest the money at its place of business, or take a loan at this place to refinance its business, the interest rate at this very place should be decisive in defining the amount of loss claimable as interest. This solution would in most of the cases be predictable for an obligor who delays payment.

**3.36** Consequently, the reference point for the interest rate applicable to any mature sum shall be defined according to the law of the state where the creditor has its place of business. The provisions of this country regarding the default interest rate will define the amount of loss demandable under the special regime of interest claims. The advocated principle would be similar to a private international law rule, since it refers the tribunal to the laws of a certain country. Therefore, a tribunal searching for the rate of interest to be paid by the debtor would not have to refer to private international law provisions anymore, but could directly apply the

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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>69</sup> Swiss franc, Euro, British pound sterling, Japanese yen, and U.S. dollar. The Danish, Swedish, Canadian, Australian and New Zealand Libor rates have been terminated as end of July 2013.

<sup>70</sup> Cf. supra para 3.5-3.7.

laws of the creditor's state. In fact, this solution is inspired also by Article 28 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>71</sup> There the deciding tribunal is entitled to consider the laws of the forum in respect of a specific performance claim. Under Article 78 the court is referred to the laws of the creditor's place of business.

**3.37** This proposal overlaps to a certain extent with the results in current practices of the tribunals. From the analyzed 274 decisions 103 were either directly, or by way of reference to PIL rules, applying the law of the state of the creditor.<sup>72</sup> For the sake of uniformity and predictability it is preferable to come to the same solution, that is, to apply 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>73</sup> It is interesting to note that the 2011 EU Proposal for a Common European Sales Law no longer shares the approach of the PICC, PECL or the DCFR, which all refer to the interest rate at the place of payment. Instead it has preferred in Article 166 to refer to the interest rate applicable at the place of the creditor.

**3.38** Given the huge differences in doctrine, this Opinion attempts to focus on the minimum for which a global consensus could be reached; that is, in the view of the Council, defining the applicable law without the help of national PIL rules. This Opinion does not prefer to go one step further and to choose also a specific interest rate in the creditor's country, such as, for example, the bank short-term lending rate to prime borrowers (cf. Art. 7.4.9 Unidroit PICC, Art. 9:508 PECL or Art. 166 CESL). Even a dynamic interpretation of a Treaty should always aim at finding the most acceptable interpretation. Choosing a specific interest rate which is thought to best compensate the losses of the creditor would be too far reaching a goal given the drafting history of the Convention. Therefore this Opinion only looks for the law which presumably is best applied to compensate the losses of the creditor. Given that the interest claim is an exceptional claim, since the creditor needs not prove its actual loss, its calculation must also be backed up by the idea underlying this exception; that the creditor is granted this special claim only for the amount of loss of interest it is assumed it will undoubtedly suffer. And this loss of interest can only be what the creditor normally is entitled to get at its place of business according to the residuary rules of its own domestic law under a domestic sales contract.

**3.39** In cases where the country of the creditor has a statutory rate applicable for debts in arrears such as '8 %', this rate will apply; where such a law has a dynamic reference like 'the average bank short-term lending rate to prime borrowers' then this rate finds application also under the CISG.<sup>74</sup> Otherwise the case law of the relevant country will be decisive in finding

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<sup>71</sup> Schlechtriem/Schwenzer/Müller-Chen (fn. 8) Article 28 para 1.

<sup>72</sup> Cf. the chart attached to this opinion to see how often other approaches were used.

<sup>73</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>74</sup> Cf. for a detailed comparative overview on statutory interest rates *Gotanda* (fn.7) pp. 41-50; *Schwenzer/Hachem/Kee* (fn. 11) para 46.80-46.94.

the correct rate. The burden of proof regarding the interest rate and the calculation of interest lies on the creditor.

**3.40** 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 no longer reflects market conditions.<sup>75</sup> Yet whenever the creditor remains under-compensated due to a fixed interest rate, a correction can be achieved through a damages claim based on Article 74.<sup>76</sup> To suggest as an alternative an interest provision that circumvents the residual rules of the creditor's country and which gives the creditor a chance to claim opportunity cost of the sum due without even proving its loss, would fail the ratio of Article 78. As long as it is the general rule in many countries that the residuary interest rate is a fixed one defined by state authorities and any further loss has to be proven by the creditor, a different rule on the international level is not convincing.

**3.41** Obviously, the mirror image problem is balancing an over-compensation caused by fixed interest rates. Since the debtor is not granted the right to prove the creditor's actual loss, or that the default interest rate is above market conditions, the risk of enrichment of the creditor is given. But this windfall profit must be accepted as a side effect of the proposed rule since the problem of overcompensation is also existent under domestic contracts. If the lawmaker in the country of the creditor does not react properly to the changes in the market, it cannot be the role of a tribunal to simply bypass these residual interest rules in order to find a more adequate interest rate for international disputes. The creditor would in a national dispute be able to claim this fixed amount of interest without discussion on the fairness of this rate. 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 interest rates as a deterrent for late payment practices.<sup>77</sup> The Late Payment Directive of the European Union<sup>78</sup> for example sets the interest rate applicable between businesses at 8 percentage points above the European Central Bank's reference rate.

**3.42** Another question which can arise is the lack of a residuary interest rate for the currency at dispute. If, for example, the loss has arisen in another currency than the one at the place of business of the creditor, the creditor might demand interest to accrue on this currency. However, many countries provide the debtor the right (*facultas alternativa*) to convert the foreign currency debt to the local currency and make payment with this currency.<sup>79</sup> That would mean that the late payment interest rate of the local currency applies. But the parties may have contracted for the currency of account to be exclusive (*effectivo* clause). In such case the obligor can only effect payment in this currency. In principle conversion is excluded. If, for example, in a sales contract a buyer from Brazil and a seller from Mongolia define the

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<sup>75</sup> Gotanda, When Recessions Create Windfalls: The Problems of Using Domestic Law to Fix Interest Rates under Article 78 CISG, 13 *Vindobona Journal of International Commercial Law & Arbitration* (1/2009) 229-240, at p. 230.

<sup>76</sup> Cf. *infra* para 3.51-52.

<sup>77</sup> Cf. also *Schwenzler/Hachem/Kee* (fn. 11) para 46.120.

<sup>78</sup> See above at fn. 31.

<sup>79</sup> For comparative information see Vogenauer/Kleinheisterkamp/*Atamer* (fn. 65) Art. 6.1.9 PICC para 3.

price in USD and an effective payment clause is given, the Mongolian seller may, in case of late payment, demand interest according to the rate applicable to USD debts, if such rate exists in Mongolia. In fact, many weak currency countries also have an official default interest rate for hard currencies like USD, Euro, GBP or CHF. Even if such an official rate does not exist, it is highly probable that an interest rate for foreign currency debts has been developed in case law, since weak currency countries also tend to use hard currencies in national contracts where a similar problem of defining a default interest rate arises.<sup>80</sup> However, if no special rate can be found for the contractual currency, in our example USD, the only option will be to apply the default interest rate for the local currency of Mongolia (Tögrög) to the USD debt.<sup>81</sup>

**3.43** The proposed residuary rule might be of no avail if the domestic law of the creditor does not provide for any rule defining a default interest rate. Here the courts must try to define, from the evidence presented by the parties, what the practice is in the creditor's country and whether or not an established rate can be found in the case law of that country. If not, because an interest claim is, for example, forbidden in that country, the tribunal should not award any interest based on Article 78. In such cases, the losses of the creditor can only be compensated subject to the prerequisites of Article 74.

**3.44** It is obvious that the proposed rule cannot pretend to perfectly mimic a market default rule which reflects the parties' alleged interest in the best way possible. On the contrary, it merely attempts to provide a simple answer to the urgent need for unification by way of proposing a private international law rule. This rule is closer to a penalty default rule which sets an incentive for the parties to provide for a contractual rate of interest. If the parties do not want to encounter the problems of over- or undercompensation, they are well advised to define the late payment interest rate in their contract.

#### **4. Compound interest**

**3.45** Given that the parties are free to define the rate of interest payable in case of default, they may also stipulate capitalization of interest in certain intervals. The CISG does not comprise any provision which might impede compound interest.<sup>82</sup> But the more important question is whether or not residuary default interest accrues on a simple or compound basis.

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<sup>80</sup> Cf. *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry*, 27.12.2005, CISG-online 1484.

<sup>81</sup> But cf. *Yugoslav Chamber of Commerce Arbitration*, 28.01.2009, 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 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 rate on a relatively riskless investment"), *Serbian Chamber of Commerce*, 23.01.2008, CISG-online 1946 (Since as of March 2001 there was no law in Serbia to fix an interest rate for claims in a foreign currency, the Arbitral Tribunal resorted to the EURIBOR given that the claim was a Euro claim).

<sup>82</sup> The validity of such clause remains to be decided by national law provisions according to Article 4 CISG. Especially stipulations in standard terms regarding compound interest can trigger stricter control under national laws.

In case law the tendency is towards rejection of automatically awarding compound interest.<sup>83</sup> CISG literature partly follows this line of thought, and only allows for it under Article 74 if the creditor can prove that it had to pay compound interest due to the breach of the debtor.<sup>84</sup> However, parallel to the solution favored above, the issue should be decided according to the domestic law of the creditor. If residuary rules in its country provide for a capitalization of interest during the time of default and for compound interest to be paid in commercial transactions, this must also be applicable under the CISG regime.<sup>85</sup> The law of the creditor's place of business will govern this issue. If there is no provision which allows for interest to accrue on compound basis, the creditor cannot claim it pursuant to Article 78. In such case it may only be able to claim compound interest as an additional loss item under Article 74, subject to the prerequisites of that article.

## 5. Modalities of payment

**3.46** Given that the claim for interest is an accessory claim, its payment modalities should always follow the main claim.<sup>86</sup> It has to be paid in the same currency and at the same time and place as the main sum in arrears. For interest claimed on damages, the currency in which the loss occurred must first be ascertained.<sup>87</sup> This will generally be the currency at the place of business of the creditor.<sup>88</sup>

## 6. Defenses against an interest claim

**3.47** Although an exemption under Article 79 cannot impede liability for interest under Article 78, the debtor still might have some defenses against an 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 exempts only from liability for damages, the contributory negligence exemption of Article 80 finds application to all types of claims, including claims for interest. This means that the creditor is barred from claiming interest to the extent that the non-payment was caused by its own act or omission. The debtor is excused from all the consequences of its non-performance.<sup>89</sup> For example, if a seller has assigned its claims against the buyer to a factoring-business without

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<sup>83</sup> *ICC International Court of Arbitration*, Case No 8502, 01.11.1996, CISG-online 1295; *ICC International Court of Arbitration*, Case No 8908, 01.12.1998, CISG-online 1337 (= CISG-online 751); *Hof van Beroep, Antwerpen* (Belgium), 24-Apr-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 interests itself since it lacked the payments that were due").

<sup>84</sup> E.g. *Schlechtriem/Schwenzer/Bacher* (fn. 26) Art. 78 para 43; *Brunner* (fn. 8) Art. 78 para 15.

<sup>85</sup> C.f. for a very detailed account of different legal systems regarding compound interest *Gotanda*, Compound Interest in International Disputes, 34 *Law and Policy in International Business* 393 (2002-2003). See also *Schwenzer/Hachem/Kee* (fn. 11) para 46.43-46.46. In favor of compound interest under the CISG *Kröll/Mistelis/Perales Viscasillas/Gotanda* (fn. 9) Art. 78 para 28.

<sup>86</sup> *Brunner* (fn. 8) Art. 78 para 6; *Schlechtriem/Schwenzer/Bacher* (fn. 26) Art. 78 para 23.

<sup>87</sup> *Schlechtriem/Schwenzer/Schwenzer* (fn.8) Art. 74 para 63; *Brunner* (fn.8) Art. 74 para 49. Parallel also Article 7.4.12 PICC.

<sup>88</sup> *Staudinger/Magnus* (fn.8) Art. 74 para 56.

<sup>89</sup> *Schlechtriem/Schwenzer/Schwenzer* (fn. 8) Art. 80 para. 8; *Flechtner*, in: Ferrari/Flechtner/Brand (eds.), *Draft Digest and Beyond* (2003), pp. 839-840; *Kröll/Mistelis/Perales Viscasillas/Atamer* (fn. 9) Art. 80 para 11-12.

duly informing the buyer about this assignment, delay in payment cannot trigger the accumulation of interest.<sup>90</sup>

**3.48** The 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 performance will be postponed.<sup>91</sup> If, for example, the buyer is under the duty to fulfill its payment obligation first, but it becomes apparent that the other party will not perform a substantial part of its obligation, the buyer may suspend its payment until the other party provides adequate assurance of performance (Article 71). Obviously this provision is based on the same policy as Article 80, since it is the other party's failure, which triggers suspension.

## **7. Cessation of an interest claim**

**3.49** An interest claim is an accessory to the main obligation. Therefore it stops accumulating at the moment the principal obligation is paid in full.<sup>92</sup> Although some legal systems work on the presumption that the accrued interest extinguishes where the creditor accepts payment of the principal debt without also explicitly reserving its interest claim, this presumption should not be generalized and applied for the CISG. Even though the creditor has accepted the main sum due without any reservation, it should still have the right to claim separately for the accrued interest. Set-off also has the effect of extinguishing the principal obligation so that the interest claim will stop accruing. 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 either diminish in full or in proportion to the remaining main sum. The expiration of the limitation period with respect to the principal debt and its effect on the interest claim will be decided according to the applicable law.<sup>93</sup>

**3.50** As already mentioned above at para 3.8, CISG interest might also stop accumulating with the rendering of the award, where the laws in the country in which the award will be enforced, provide for post-judgment interest. Under such circumstances the contractual interest claim is superseded by the procedural one.

## **8. Relation of interest to additional damages**

**3.51** The residuary interest rate applicable in the country of the creditor generally represents the rate pursuant to which a lump sum can be claimed by the creditor. But, Article 78 expressly stresses that the aggrieved party is entitled to interest "without prejudice to any claim for damages recoverable under Article 74". Therefore the creditor may always prove that default interest by itself does not fully compensate the losses incurred due to late payment. If the creditor, for example, proves that it would have utilized the funds to become

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<sup>90</sup> But cf. *Amtsgericht Willisau* (Switzerland) 12 March 2004, CISG-Online 961 where the Court applied Article 79 and did not exempt the buyer from paying interest.

<sup>91</sup> Schlechtriem/Schwenzer/Bacher (fn. 26) Art. 78 para 21.

<sup>92</sup> Gelzer (fn.2) paras 409-412.

<sup>93</sup> Cf. Gelzer (fn. 2) para 415 and also Article 27 of the 1974 UN Convention on the Limitation Period in the International Sale of Goods.

involved in risky investments to maximize its profit, it might seek damages which go beyond a risk-free measure like default interest.<sup>94</sup> In cases where the creditor had to take a bank loan due to cash flow shortages, the difference between the contractual interest rate of the loan and the applicable interest rate under Article 78 can also be claimed as a loss.<sup>95</sup>

**3.52** However, any damages claim is subject to the prerequisites of the CISG. That means, according to Article 74, the loss must be proven by the creditor<sup>96</sup>, must be foreseeable, and the creditor must have acted upon its duty to mitigate its loss under Article 77. Further, the debtor may seek to defeat such a claim by establishing the exemption under Article 79.

## **9. Burden of proof**

**3.53** Whenever the creditor claims interest it must prove the existence of a sum due and the applicable interest rate in the given case.<sup>97</sup> If the claim is based on a contractual interest rate, the existence of the contractual provision must be proven. If the interest rate requires the application of the domestic law of the creditor, the *lex fori* provisions of the tribunal will determine the duty in relation to proof of foreign law. This may sometimes be a burden placed upon the parties, whereas in other instances the Tribunal undertakes this investigation *ex officio*.

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<sup>94</sup> Cf. *Amtsgericht Oldenburg in Holstein* (Germany), 24.04.1990, CISG-online 20. Cf. in detail on how interest itself can be awarded as damages especially in international investment disputes *Sénéchal/Gotanda*, Interest as Damages, 47 Colum. J. Transnat'l L. 2008-2009, pp. 491 et seq.

<sup>95</sup> Cf. *Handelsgericht des Kantons Zürich* (Switzerland), 21.09.1995, CISG-online 246; *Bundesgericht* (Switzerland), 28.10.1998, CISG-online 413; *ICC International Court of Arbitration* (No. 7197), 01.01.1992, 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), 12.12.2002, CISG-online 720; *Handelsgericht Wien* (Austria), 03.05.2007, CISG-online 1783; *Oberlandesgericht Hamburg* (Germany), 25.01.2008, CISG-online 1681; *Handelsgericht des Kantons Aargau* (Switzerland), 19.06.2007, CISG-online 1741.

<sup>96</sup> *Oberlandesgericht Frankfurt am Main* (Germany), 18.01.1994, 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").

<sup>97</sup> *Brunner* (fn. 8) Art.78 para 13; *Staudinger/Magnus* (fn. 8) Art. 78 para 20.