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The Issue of Interest Rate Under the CISG and Related Judicial Practice

I. Introduction

The Covid pandemic had wide-ranging effects, among others it had serious economic impacts. Fearing a global economic crisis, key economies like the United States of America and the European Union started to inject fresh capital into their economies. This is usually done by issuing bonds and printing money. However, in the long term this can easily lead to high inflation, and this has actually happened. In the Euro zone inflation hit record high: in 2020 December it was -0.3%, and only a year later it was already 5%.[1] The same happened in the USA: the annual inflation rate in the US accelerated to 8.5% in March of 2022, which was the worst since 1981.[2] When there is high inflation, the issue of interest gains on importance in international trade. For the creditor (this might be either the seller or the buyer – if the goods are defective, there is avoidance of contract and refunding is due) the interest is important, because it might compensate the loss it suffered if there is high inflation and it cannot use its money, and it will also motive the debtor to pay as soon as possible. The right to interest is regulated in Article 78 of the CISG, which states that: „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.". However, due to several reasons we are going to discuss, the rate of interest is not regulated in the CISG.

We start the discussion with the right to interest under the CISG, and following this the paper examines the issue of interest rate. Based on the literature, the Advisory Council's opinion and the current case law, we try to find out if a uniform practice has evolved in recent years.

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[1] Eurostat <https://ec.europa.eu/eurostat/documents/2995521/14083883/2-07012022-AP-EN.pdf/49039c42-31ea-3513-8307-eece31d6b25a> (last accessed: 26. 09. 2022.).

[2] Trading economics <https://tradingeconomics.com/united-states/inflation-cpi> (last accessed: 26. 09. 2022.).

II. Interest under the CISG

There are several commentaries and scholarly articles dealing with the issue of (pre-judgment) interest under the CISG,[3] and the CISG Advisory Council has also issued an opinion (No. 14) on the issue.[4] As already noted, the issue of interest is governed by the Convention,[5] that is to say, Article 78 of the CISG ensures interest any time a payment under a contract is untimely.[6] Theoretically, there are two reasons a creditor might be entitled to interest: first, because he or she cannot use his or her money[7] (*i.e.*, it is assumed that the creditor would invest it and earn interest on it if he or she had it)[8], and second, to prevent the debtor from unjust enrichment (Article 84). Therefore Article 78 together with Article 74 of the Convention seek to provide full compensation to the creditor.[9] According to Enderlein and Maskow the main idea of Article 78 is to ensure general entitlement to interest.[10] In a recent case, the Commercial Court of Canton Aargau/Switzerland (*Handelsgericht des Kantons Aargau*) awarded interest based on Article 84 of the CISG.[11] The claimant was a Czech company trading with cars. The first defendant was a Swiss stock cooperation which dealt with trade in new and used vehicles as well as vehicle accessories of all kinds. The second defendant was also a Swiss stock cooperation in the trade of automobiles, in addition operating garages and car washing facilities. The subject matter of the dispute was a sale of a Lamborghini vehicle. The court came to the conclusion that

[3] As post-judgment interest is usually regulated by the forum's general procedural system. HONNOLD, JOHN: Uniform Law for International Sales under the 1980 United Nations Convention. Kluwer Law International. The Hague, (3rd edition) 1999. 465. p. <https://iicl.law.pace.edu/sites/default/files/bibliography/honnold_0.pdf> (last accessed: 26. 09. 2022.).

[4] CISG Advisory Council Opinion No. 14 <http://www.cisg.law.pace.edu/cisg/CISG-AC-op14.html> (last accessed: 26. 09. 2022.).

[5] CISG Advisory Council Opinion No. 14, 1.

[6] CORTERIER, ANDRE: *A New Approach to Solving the Interest Rate Problem of Art 78 CISG*. International Trade and Business Law Annual 2000/5. 33. p.

[7] SCHLECHTRIEM, PETER: Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods. Manz. Vienna, 1986. 100. p. <https://iicl.law.pace.edu/sites/default/files/cisg_files/schlechtriem.html#a76)> (last accessed: 26. 09. 2022.).

[8] The debtor remains liable for interest payments even if his default is due to an impediment beyond his control. SCHLECHTRIEM 1986, 100. p.

[9] CISG Advisory Council Opinion No. 14, 3.3.-3.7.

[10] ENDERLEIN, FRITZ, MASKOW, DIETRICH: International Sales Law – United Nations Convention on Contracts for the International Sale of Goods Commentary. Oceana Publications. 1992. 311. p. <https://iicl.law.pace. edu/sites/default/files/bibliography/fritz_enderlein_dietrich_maskow.pdf> (last accessed: 26. 09. 2022.); "Some national systems take the view that interest is a component of damages; others do not. In most countries interest, however conceived, is at least compensable; in others, it is not. … It is at least clear that the Convention authorizes an award of interest in those fora where such an award would otherwise be valid under national law; the validity of a contractual claim to interest, however, remains a national concern. In those countries where interest is permitted, the injured party will often be left with a choice between Articles 74 and 78. In exceptional circumstances, where a party cannot claim damages by virtue of an Article 79 exemption, a claim under Article 78 will be preferred." (LOOKOFSKY, JOSEPH: The 1980 United Nations Convention on Contracts for the International Sale of Goods. Kluwer Law International. The Hague, 1993. 297. p. <https://iicl.law. pace.edu/sites/default/files/cisg_files/lookofsky.html> (last accessed: 26. 09. 2022).

[11] *Lamborghini Countach 112 Case,* HOR.2021.7, <https://cisg-online.org/files/cases/13757/fullTextFile/5843_69413377.pdf> (last accessed: 26. 09. 2022).

the CISG should be applicable to the case in general. However, the issue of nullity and voidness is excluded from the scope of the CISG. Therefore, the court had to determine the applicable substantive law for these issues. Based on the Hague Convention on the Law Applicable to Contracts for International Sale of Goods Article 3(1) which states "… the law of the country in which the seller has his habitual residence at the time he receives the order" the court applied Swiss law to this issue. The claimant asked for the recovery of the purchase price and related interest. Regarding the interest rate, the court ruled that the claim to interest on the recovery of the purchase price in the event of voidness of the contract is not based on Article 78 CISG, but Article 84(1) of CISG. Thus, the court obliged the seller to pay 5% interest.

The concept of arrear is a central element of Article 74 Paragraph 3 of the CISG Advisory Council Opinion No. 14 defines when a party is in arrears with payment. One such case is when payment of the purchase price should have been made by the buyer, but it has not been. If the parties have not agreed on the exact date, the date of payment can be determined on the basis of Article 58 of the Convention. Another case is when liability for damages arises and when reimbursement should have been made (*e.g.* defective performance by the seller). As regards interest, the Opinion also notes that there is no need for a specific notice to pay interest, which is important, as in many national legal systems this is required.[12] It should be also mentioned, that in the majority of legal systems interest is granted only if the disputed sum is liquidated, while in some others it can be granted even when the amount is still disputed.[13]

Courts in practice a lot of times disregard CISG Advisory Council Opinions. A good example for this is a 2016 Spanish case, in which the court gave an interesting interpretation of the starting date of the interest calculation, which is not entirely in line with the position of Opinion No. 14. This case was tried by the Girona Provincial Court of Appeal, between a Spanish buyer and a Greek seller of live shellfish.[14] There was a dispute between the parties about defective performance, but the buyer was unable to prove this as it only carried out the inspection of the goods a week after the sale, by which time the mussels had died, and it was not possible to establish the condition of the mussels afterwards. As a result, the buyer lost the case both at first instance and at appeal. Although the court of first instance imposed interest on the basis of Article 78, it did not follow the position of Opinion No. 14, and instead set the date of the application as the starting date for the calculation of the interest (February 22, 2013). However, the court of appeal, taking into account the principle of full compensation under Articles 74 and 84(1), decided that the date of the invoice would be the starting date for the calculation of the interest (August 30, 2010). This is presumably the same as the date of receipt of the goods and is therefore consistent with the position taken in Opinion No 14 (application of Article 58). At the same time, interestingly, the court of appeal incorporated the principle of good faith in Article 7(1) of the Convention, and on that basis, changed the starting date for the

[12] CISG Advisory Council Opinion No. 14, 3.19.
[13] HONNOLD 1999, 468. p.
[14] *Depuradora Servimar, S.L. v. G. Alexandridis & CO.O.E.SC case*, Clout case 1580. <http://www.uncitral.org/clout/clout/data/esp/clout_case_1580_210116.html> (last accessed: 26. 09. 2022).

calculation of interest to the date of the first demand for payment (July 11, 2012). The court held that it would be incompatible with the principle of good faith if the buyer had to pay interest for the two-year period between the issuance of the invoice and the payment notice.

The Canadian Supreme Court of Justice of Ontario in 2018 took another position regarding the starting date of the calculation of the interest.[15] Solea, the claimant, was a distributor of shrimps based in Antwerp, Belgium. The defendant, Bassett&Walker International (BWI) was a Canadian company that dealt with international trade in food. The parties agreed in the contract 8% interest rate and accumulated payment was due. Although the shrimp was delivered on June 13, 2014, BWI informed Solea on August 11, 2014, that it would not pay for or accept the shrimp. The defendant did not pay the price of shrimps, and did not import it to Mexico, because the claimant did not ensure the required Health Certificate. Therefore, Solea filed a case and demanded the amount of $228.604 and pre-judgment and post-judgment interest from July 17, 2014 at a rate of 8% per annum. For us the interest rate part of the court ruling is interesting: "With respect to the claim for interest, Solea provided the invoice for the shrimp to BWI by email. The invoice stated on its face that the general terms of sale were on the reverse side, and made reference to the CIF Incoterm. BWI accepted the invoice and subsequently confirmed that payment of the invoice was being sent. The invoice terms on the reverse are based on the EURIBOR rate, stating that interest shall accrue at the rate of the Euribor rate plus 2%, with a minimum interest rate of 8% per annum. There was no evidence or submissions made by BWI on the issue of the applicable interest. Solea submits that the interest rate was set out, and implicitly agreed to by BWI, which promised it would be paid. The interest is due pursuant to Article 78 of the CSIG. Solea submited that the 8% per annum rate is based on the EURIBOR rate often adopted in CISG cases as a commercially reasonable rate, and should therefore apply to the $228,604 pursuant to the invoice. In the absence of contradictory evidence or submissions made by BWI on this issue, I find that interest of 8% per annum is due on the purchase price of the shrimp from the date of the delivery of the shrimp to BWI on June 13, 2014.".[16]

III. Interest rate under the CISG

Commentaries as well as the Opinion point out, in relation to interest, that the main problem in terms of harmonization is the rate of interest.[17] ULIS, the predecessor of the CISG provided for a rate equal to the official discount rate in the country where the seller had

[15] *Solea International BVBA v. Bassett & Walker International Inc.,CV-15-527848/2018 ONSC 4261* <https://cisg-online.org/files/cases/10108/fullTextFile/4194_40989613.pdf> (last accessed: 17. 08. 2022).

[16] *Id.*

[17] SCHLECHTRIEM 1986, 100. p; ZIEGEL, JACOB, SAMSON, CLAUDE: Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods. UNCITRAL. 1981. Article 78 comment. <https://iicl.law.pace.edu/sites/default/files/bibliography/english2_0.pdf> (last accessed: 26. 09. 2022).

his place of business plus 1%.[18] Whereas, the CISG does not deal with the issue of the interest rate at all. That is to say, Article 78 (or any other) does not ascertain a particular interest rate or a method to specify such a rate. During the first few years of the application of the CISG a large number of court decisions dealt with this problem.[19] The reason for not determining the rate of interest or the way of its calculation was in the fact that there were (are) countries with different economic, political and religious perceptions towards interest.[20] The majority of countries with Islamic Law rejected the application of interest.[21]

Among those countries which accepted the application of interest, there were disagreements on whether to apply market rates or legal rates, and whether that of the country of the buyer or the seller.[22] For example, in socialist countries the interest rate was artificially low. When these countries asked for loans from Western countries, they had to pay higher interest rates, therefore, they were interested to get the same higher rates from their debtors.[23]

Theoretically, there are two reasons for not mentioning this issue by the Convention. One is that the issue of interest rate is not mentioned, because the intention of the drafters was to exclude it from the sphere of application of the Convention. In this case, national laws determined by applicable private international law will help to find the solution. The other possibility is that it is just a gap in the law. In this case, Article 7(2) of the CISG can potentially help to fill in the gap left in the Convention, which provides that: „Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private

[18] ULIS Article 83. UNIDORIT <https://www.unidroit.org/instruments/international-sales/ulis-1964> (last accessed: 26. 09. 2022).

[19] NICHOLAS, BARRY: *Article 78 Commentary*. In: Bianca-Bonell (ed.): Commentary on the International Sales Law. Giuffrè. Milan, 1987. 570. p. <https://iicl.law.pace.edu/cisg/scholarly-writings/comments-article-78-bianca-bonell-commentaryNicholas> (last accessed: 26. 09. 2022.).

[20] CORTERIER 2000, 33. p; NICHOLAS 1987. 569. p.

[21] CORTERIER 2000, 33. Only few Arab countries (Egypt, Iraq, Mauritania, Syria and Lebanon) have signed and adopted the CISG. It is interesting to mention that in Egypt, interest is regulated under art. 226, 227 and 231 of the Egyptian Civil Code in contradiction to Qoran and its prohibition of riba. It provides 5% for commercial matters and 4% for civil matters. (EL-SAGHIR, HOSSAM: The CISG in Islamic Countries: The Case of Egypt. In: DiMatteo, Larry (ed.): International Sales Law- A Global Challenge. Cambridge University Press. Cambridge, 2014. 510. p.). We would like to mention here a case based on the CISG, in which a Saudi defendant invoked the Islamic prohibition of interest (the doctrine of riba) in an arbitration case. The opinion of the tribunal was that riba does not preclude an award for the reasonable compensation of the claimant's loss which was caused by the defendant's breach of contract. Regarding the determination of the interest rate, the tribunal did not take into consideration the commercial rate, but only the inflation rate over the period at issue. (Final Award no. 7063 (1993) reprinted in 22 Y.B. Com. Arb. 87 (1997), IADR Ref. No. 112 in AKADDAF, FATIMA: *Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?* Pace International Law Review 2001/13. 47-48. p.)

[22] CORTERIER 2000, 33. p.

[23] SCHLECHTRIEM 1986, 100. p.

international law.". This means that first of all, tribunals should resort to the general principles of the Convention to fill in the gap, and only in the absence of such can resort to the rules of private international law.[24]

Before examining the current case law, we should mention that Honnold offers wider range of possibilities, and suggests that there are four possibilities to fill in the gap left by article 78: (1) interest at the rate determined by national substantive law under the conflict of laws (second part of article 7(2)), (2) interest at the rate determined by the national law of the creditor, (3) interest at the rate determined by international custom, (4) the cost of the credit to the aggrieved party.[25]

Regarding the first case, that is to say, when the interest rate should be determined by national substantive law under the conflict of laws, several scholars have supported this solution, among others one of the most prominent experts of the CISG, Professor Schlechtriem.[26] During our research we have found several recent cases which support this view. For example, in a dispute before the Dutch District Court of Noord-Holland in 2022 between a Turkish manufacturer of home furnishings (claimant), and Katintrad Nederland B.V., international wholesaler for business customers in home furnishings based in the Netherlands (defendant), the court applied national law determined by private international law rules.[27] The parties had a business relationship since 2016, whereby the claimant on order supplied goods to the defendant. There were two invoices unpaid by the defendant despite summonses. Since the defendant was domiciled in the Netherlands, the court held that it had jurisdiction according to article 4 of Brussels I Regulation. The court found that both parties were from countries which were parties to the CISG, and they did not exclude the application of the Convention. Furthermore, the court ruled that the issue of interest should be decided based on the Dutch law. This was justified by article 7(2) of the Convention. According to this provision, as already mentioned above, issues not expressly settled by the Convention should be resolved by the law applicable under the rules of private international law. This was determined based on Rome I Regulation (article 3(1)), and it was the Dutch law. Based on this, the court awarded 8%, which was at the time the Dutch commercial interest rate.

In a Swiss case from 2013, the Commercial Court of Canton Zurich (*Handelsgericht des Kantons Zürich*) decided very similarly.[28] The claimant was a Swiss stock cooperation and dealt with trade in raw materials, in particular metals. The defendant was a limited liability company registered in Slovakia. The parties signed two contracts. In their agreement, the parties expressly designated the applicable law as Swiss law and the international jurisdiction as the courts of Zurich. The first contract issued the delivery of 2500 mt of first-class, newly produced hot-rolled steel sheets. The defendant undertook

[24] United Nations Convention on Contracts for the International Sale of Goods UNITED NATIONS New York, 2010 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf> (last accessed: 26. 09. 2022.); see also CORTERIER 2000, 34. p.

[25] HONNOLD 1999, 470. p.

[26] SCHLECHTRIEM 1986, 100. p.

[27] *[…] Tic. Ltd. Sti. v. Karintrad Nederland B.V.*, ECLI:NL:RBNHO:2022:1173; <https://cisg-online.org/files/cases/13712/fullTextFile/5798_18881036.pdf> (last accessed: 10.05.2022).

[28] *Ukrainian Hot-Rolled Steel Coils Case,* HG120275-O, <https://cisg-online.org/files/cases/13573/fullTextFile/5659_40638076.pdf> (last accessed: 26. 09. 2022.).

to pay purchase price in three installments. Even though the claimant fulfilled its obligations under the contract, the defendant failed to pay the dispute-matter amount of payment. The second contract issued the delivery of 3500 mt of first-class, newly produced hot-rolled steel sheets. Same method of the payment was agreed. But the defendant again failed to fulfill its obligation to pay. The court ruled that the parties made and express and unambiguous choice of Swiss law and both parties are signatories to CISG. According to the Court, the defendant had breached its obligations under the Purchase Agreements which is why it's to be obliged to pay the amount of $1,082,202 for the first contract) and $436,581 (for the second contract) to the claimant. The Court also explained that "… According to the prevailing opinion, the amount of interest is determined by the national law applicable under the conflict of laws.". Since the parties agreed upon the Swiss law, 5% of interest would apply to case.

In another very similar case in front of the same court (District Court of Noord-Holland), a Greek company Geitonas (claimant), sold fish products to a Dutch company (defendant) which did not pay for the deliveries. Since the defendant domiciled in the Netherlands, based on Article 4 of the Brussels IA Regulation the court established its jurisdiction.[29] After that, the court looked for applicable law. As both parties were domiciled in contracting states, the CISG was applicable. The court pointed out the ambiguity of determination of interest rate. Thus, the Court applied Article 7(2) of the CISG and looked for conflict of laws rules in order to solve the concrete dispute. This was Article 4(1) of the Rome I Regulation. According to this, the contract for the sale of movable property shall be governed by the law of the country in which the seller has his habitual residence. The court ruled that since Geitonas is domiciled in Greece, Greek law shall be applied to the dispute, and based on this decided to apply the commercial interest rate of 8%.

There are also scholars, among others Ziegel and Samson, according to whom it is not clear that the rules of private international law should be used to determine the applicable rules in the case the parties did not agree on the applicable interest rate.[30] In the recent case law we can find support for this as well. In 2021 in a case decided by the U.S. District Court for the Southern District of Texas,[31] the claimant Ziking, was a global manufacturer of steel pipes based in China. The defendant, Meever and Meever was a company based in the Netherlands dealing with distribution and rental of steel materials. Its subsidiary, Meever USA, was a distributor in the USA. Russell Marine (also defendant) was a civil marine construction company based in Channelview, buying supplies for its construction projects through distributors such as Meever USA. Meever USA concluded two purchase contracts for structural steel pillars with Ziking, with the intention to resell them to Russell Marine in connection with two construction projects on which Russell Marine served as the general contractor. Regarding the payment, the parties agreed on irrevocable letters of credit by Rabobank (Meever and Meever's bank located in the Netherlands). While the steel pillars were en route to the Port of Houston, Rabobank informed Meever representatives that the shipping documents received from Ziking did not conform to the L/C terms

[29] *V. Geitonas & Co. Ltd. v. Palinghandel […] B.V.,* ECLI:NL:RBNHO:2022:86, <https://cisg-online.org/files/cases/13725/fullTextFile/5811_78376264.pdf> (last accessed: 14.05.2022).

[30] ZIEGEL, SAMSON 1981, Article 78 2.

[31] *Hefei Ziking Steel Pipe Co., Ltd. v. Meever & Meever et al.,* 4:20-CV-00425, <https://cisg-online.org/files/cases/13599/fullTextFile/5685_47942688.pdf> (last accessed: 14.05.2022).

in various respects. Meever informed Rabobank that Meever would not accept the documents. Upon arrival of the goods at the Port of Houston, Ziking sought payment from Meever, but Meever declined, as did Russell Marine. Therefore, Ziking had to forward the shipment to a port in Mexico, and later to China, and thus incurred extra costs. Ziking's lawyer sent notice to Meever USA demanding a total amount of two contracts plus storage costs, interest, and attorney's fees. Meever USA refused payment and Ziking brought an action in front of the Court. The Court found that the CISG would apply to the concrete dispute. Interestingly, the Court ruled, without any reasoning, that article 78 of the CISG entitled the claimant to demand pre-judgment federal interest rate.

In a case from 2022, the U.S. District Court for the Eastern District of Texas ruled in the same way.[32] Synergy, the claimant, was a manufacturer, distributor and exporter of computer tablets and other electronic devices based in Shenzen, China. Mingtel, the defendant, was an importer and distributor of electronics based in Texas, USA. The parties had done business for around three years, Synergy would manufacture and sell to Mingtel computer tablets in accordance with specifications provided by Mingtel. During this time, Synergy received multiple purchase orders from Mingtel for computer tablets with specifications and golden samples. MT0560 purchase order included 10.000 tablets with various colors and 16 GB of storage with unit price of $73, in total $730,300. Mintgel paid a 10% deposit for this order. The other purchase order no. MT0559 included 10,000 G1058A tablets with various colors and 32 GB of storage with unit price of $76.32, in total $763,200. Mintgel paid a 5% deposit for this order due to its cash flow issues. Mintgel fully paid for purchase order no. MT0560. But the delivered goods did not meet the conditions agreed in the contract. In other words, the goods were defective, and the client complained about it. On March 20, 2019, Synergy filed an action, asserting a breach of contract claim against Mingtel for failing to take delivery of the tablets and pay the balance owed under purchase order MT0559, and $575,400 plus prejudgment interest. The Court ruled that the CISG would apply to the case, and the court found that Mintgel was liable to Synergy for breach of contract under purchase order MT0559. Last but not least, the Court held that parties are entitled to prejudgment interest and federal law governs the allowance and the rate of interest.[33] It is interesting to mention that the judge, Amos M. Lazzant, ruled that the court has the discretion to decide the rate of interest.[34] As for this case, the Court's opinion was that the prejudgment interest rate should be determined based on the federal law (it was 5%). The judge also pointed out that when federal law was silent on this issue, state law is an appropriate source of guidance.[35]

[32] *Shenzen Synergy Digital Co., Ltd. v. Mingtel, Inc., 4:19-cv-00216,* <https://cisg-online.org/files/cases/13759/fullTextFile/5845_81061612.pdf> (last accessed: 17.08.2022).

[33] The Court cited above mentioned Hefei decision about this issue. On the other hand, it has been pointed out that the Court has discretion in choosing prejudgment rate of interest.

[34] *Shenzen Synergy Digital Co., Ltd. v. Mingtel, Inc., 4:19-cv-00216, Memorandum* <https://cisg-online.org/files/cases/13862/fullTextFile/5948_68019475.pdf> (last accessed: 08.09.2022).

[35] *Id.*

In another case the U.S. District Court for the Eastern District of Virginia ruled the same way without detailed reasoning.[36] In the concrete dispute, the claimant Azienda Agricola Fattoria Le Pupille was a privately held winery based in Italy. The defendant *inter alia* Nickolas Imports LLC, operated wine importing and wholesaling based in Virginia. On September 16, 2010, the defendant ordered 5448 bottles of various wines from the claimant. On September 29, 2010, the claimant shipped this wine to the defendant, and issued the first invoice. The defendant took over the goods. The second purchase was made on February 8, 2011, including 192 bottles of wine. On March 2, 2011, the claimant shipped the order and issued the second invoice. The defendant did not pay despite receiving all the ordered goods. The Court ruled that the CISG would apply to the concrete case and that the claimant is entitled to receive interest pursuant to CISG Article 78, thus, it awarded 4.75% interest.

In a Canadian case, the Superior court of Quebec in the dispute between Hewlett-Packard France (claimant) and Matrox Graphics Inc. (defendant) related to the sale of defective computer graphic cards had to decide on the interest rate.[37] The claimant asked for damages, interest and indemnity. It also demanded that the accrued interest itself bear interest at the same rate plus the said additional indemnity. The Court first determined which law had to be applied to the case. Since both parties were from a CISG signatory country, the court applied the Convention. The Court considered that the issue of interest rate payable on an award for damages, including any provision related thereto such as additional indemnity, was governed by the forum's substantive law. The Court also added that applying domestic law to determine the interest rate is in line with the principle that recourse to the CISG prevails over recourse to the forum's domestic substantive law, although the latter shall apply where the subject matter is not governed specifically or alternatively through the general principles set forth in the CISG. After that, the Court ruled that the additional indemnity should be granted without compound interest. The interest rate was also determined according to the Canadian law.

The second solution mentioned by Honnold above, *i.e.* interest at the rate determined by the national law of the creditor, was accepted by the CISG Advisory Council in its Opinion No. 14, which states in addition in point 8 that the parties are free to agree on the rate of interest, provided this is not against the provisions of the applicable substantive law (public policy). Here we should mention that Enderlein and Maskow are of the opinion that national prohibitive rules can not apply in this case because of the CISG.[38] Getting back to the Opinion, if the parties do not agree on the rate of interest, it will be that which the court of the creditor's place of establishment would apply to a similar sale.[39]

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[36] *Le Pupille v. Nickolas Imports, LLC,* 1:12–cv–668–TRJ, <https://cisg-online.org/files/cases/8593/fullTextFile/2679_77947437.pdf> (last accessed: 22.09.2022).

[37] *Hewlett-Packard France v. Matrox Graphics Inc.,* 2020 QCCS 78/500-05-070786-023, <https://cisg-online.org/files/cases/12790/fullTextFile/4876_24042430.pdf> (last accessed: 22.05.2022).

[38] ENDERLEIN, MASKOW 1992, 312. p.

[39] „Article 78 entitles the creditor to interest, even if the applicable domestic law makes no provision for this. The rate to be applied is, however, a matter, in the first place, for the domestic law. If that law provides no relevant formula for calculating interest, it would seem that the court should look to the cost of credit at the creditor's place of business" (NICHOLAS 1987, 570. p.).

The reason for this is that it is assumed that the creditor would invest the money in the country of its own establishment.

In one Japanese case, the District Court of Tokyo took Honnold's solution to the concrete case in 2019.[40] The claimant was a Spanish corporation engaged in the manufacturing, distribution, marketing, and sale of shopping carts, aluminum ladders and metal furniture products for household use. The defendant was a Japanese corporation engaged in the processing and sale of interior furniture and decorations, production, import and sale of household goods. The parties signed three sales contracts in 2013. Payment date was set for August 7, 2013 and August 24, 2013, due to two-stage delivery. However, the defendant did not pay the purchase price (€13.876). The Court ruled that interest rate would be determined by the national law of the creditor by reference to Article 7(2) of the CISG and Article 8(1) of the Japanese Private International Law Act, which referred to the Spanish law. As there was no agreement between the parties regarding the interest rate for the unpaid amount, the court ordered the payment of interest based on the Spanish statutory interest rate (4% per annum) from the date of payment of sales contracts.

The ruling of the District Court of Amsterdam (*Rechtbank Amsterdam*) also took into consideration this "second solution".[41] However, the way the Court reached this result was relatively complicated, and it did not refer to the CISG Advisory Council Opinion No. 14. In the concrete dispute, the claimant Akarteks (a Turkish company) dealt with the sale and supply of clothing to chain stores, while the defendant was a Dutch group of companies engaged in relaunch of clothes to chain stores. On August 7, 2020 several companies in the fashion industry went bankrupt. Within the group, the bankrupt companies took care of the designs and sales of various brands and formulas in the Netherlands and Germany including the matter in dispute. By email dated September 17, 2020, Akarteks sent the first invoice dated September 15, 2020 in the amount of €79,860. The invoice states October 15, 2020 as the payment date. By e-mail dated October 12, 2020, Akarteks sent a second invoice of the same date on €147,585. Akarteks also sent a proforma invoice dated October 12, 2020 in the amount of €448,149. Defendants sent an e-mail to Akarteks that they would not pay the invoices due to major changes on board. So, Akarteks filed an action demanded the bankruptcy of the defendants. Then and there due to Corona sanctions, on December 14, 2020, all non-essential stores were shut down till April 28, 2021 by order of the Dutch government. Since the concrete dispute had foreign element, the Court first had to determine the applicable law. The Court found that the CISG would apply to the case, and that this issue was not regulated by the CISG. Due to the reference of article 7(2) of the CISG, Rome I Regulation would apply, and the contract should be governed by the seller's habitual residence law (Turkish law). In other words, any issue not governed by governed by the CISG was governed by the Turkish law pursuant to the aforementioned article of Rome I. Both the amount and the starting date of interest payment should have been determined under the Turkish law. However, because the claimant did not insist on the application of Turkish law, the court applied Dutch statutory

[40] *Rolser S.A. v. Global Living Inc.,* <https://cisg-online.org/files/cases/13557/fullTextFile/5643_65498286.pdf> (last accessed: 22.09.2022).

[41] *Akarteks v. […] B.V. et al.,* C/13/702652/HAZA 21-505, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2022:2920> (last accessed: 21.09.2022).

commercial interest, what might be a controversial decision. It is a common knowledge that the interest rate in Turkey is higher (15,75%) than in the Netherlands, due to considerable inflation. Finally, the court awarded interest to the claimant at the rate of 8%.

In an Uzbek case, the Court of Appeal of Bukhara had to decide on the rate of interest in the dispute between Klaster Emir Fruit Industry (the Uzbek claimant) and LLC Wood-Prom (the Russian defendant) related to the supply of agricultural products.[42] The parties signed a contract dated June 19, 2020, and amendment dated June 25, 2020. The subject matter of the contract was supplying agricultural products, and the total value of the contract was $16.000. The claimant delivered the goods to the defendant and issued an invoice on July 6, 2020. However, the defendant did not pay the full amount. The claimant sent an e-mail to the defendant on October 5, 2020 requesting the payment of the outstanding amount of $9.000, however, there was no response. Their contract contained a clause which stated that the buyer should pay to the seller a penalty at the rate of 0.1% of the untimely paid amount for each day of delay, but not more than 50% of the unpaid amount. The court applied these penalty provisions of the parties' contract to the calculation of the interest rate without further explanation. In this case the court never referred to Opinion No. 14.

IV. Conclusions

We have established that the CISG does not regulate the issue of interest rate, and theoretically there might be two reasons for this: the drafters of the Convention did not want to regulate this issue, or it is just a gap in the law. In the former case the conflict of law rules can help to find the applicable national law determining the interest rate. In the latter case, the gap should be filled with the help of the general principles on which the Convention is based, or if there are no such principles, with laws determined by the applicable conflict of law rules. So, at the end of the day the solution should be found with the help of conflict of laws.

The legal literature offers more solutions for filling the gap: interest at the rate determined by national substantive law under the conflict of laws, interest at the rate determined by the national law of the creditor, interest at the rate determined by international custom, and the cost of the credit to the aggrieved party. The CISG Advisory Council in its Opinion No. 14 suggests the solution according to which the parties are free to agree on the rate of interest, provided this is not against the provisions of the applicable substantive law. However, if they miss it, the interest rate should be determined by the national law of the creditor.

Unfortunately, the cases examined show that there is still no uniform interpretation of the provisions of the Convention, and that the opinions of the Advisory Council are not always taken into account by national courts, despite the fact that these opinions would

[42] *Klaster Emir Fruit Industry v. LLC WoodProm,* 4-20-2007/16, <https://cisg-online.org/files/cases/13595/fullTextFile/5681_60641036.pdf> (last accessed: 21.09.2022).

be important for a uniform interpretation of the Convention. Due to different interpretations of interest provisions, we support the opinion that it might be more practical for the creditor to claim the lost use of capital as damages in the amount of his own costs of credit according to Article 74 rather than to expose himself to uncertainties as to the applicable law and its interest provision".[43]

VÍG ZOLTÁN – SARGIN BENGI

A KAMAT MÉRTÉKÉNEK KÉRDÉSE A BÉCSI VÉTELI EGYEZMÉNYBEN ÉS A KAPCSOLÓDÓ JOGGYAKORLAT

(Összefoglaló)

Az Egyesült Nemzeteknek az áruk nemzetközi adásvételi szerződéseiről szóló Bécsi Egyezménye úgy rendelkezi, hogy ha valamelyik szerződő fél elmulasztja a vételár megfizetését vagy bármely más összeg megfizetésével hátralékba esik, akkor a másik fél kamatra jogosult ezekre az összegekre. Ugyanakkor, az Egyezmény nem rendelkezik a kamat mértékéről, ami fontos aspektus. A kamat mértékének meghatározását illetően az utóbbi évtizedekben több megoldást is alkalmaztak a bíróságok, illetve a jogirodalomban is több elmélet alakult ki. A Bécsi Vételi Egyezmény Tanácsadó Testülete megalkotott egy véleményt a kamat kapcsán (14. számú vélemény), mely kihangsúlyozza a kamat kapcsán, hogy a legnagyobb problémát a jogegységesítés tekintetében a kamat mértéke jelenti. Ezzel összefüggésben a vélemény 8. pontja megállapítja, hogy a felek szabadon megegyezhetnek a kamat mértékében. A következő pont pedig kimondja, hogy amennyiben a felek ebben nem egyeztek meg, a kamat mértéke az lesz, amit a hitelező telephelye szerinti bíróság alkalmazna egy hasonló adásvételnél. Ennek az az indoka, hogy a hitelező feltételezhetően a saját telephelye szerinti országban fektetné be a pénzét. Az elmúlt évek esetjoga, a jogirodalom, valamint a Tanácsadó Testület véleménye alapján a tanulmány azt vizsgálja, hogy kialakult-e a kamat mértékének megállapítása tekintetében egy egységes joggyakorlat az utóbbi néhány évben, valamint, hogy a bíróságok figyelembe veszik-e a Tanácsadó Testület véleményét.

[43] SCHLECHTRIEM 1986, 100. p.