

# ARTICLES

## APPLICATION OF THE CISG BEFORE THE FOREIGN TRADE COURT OF ARBITRATION AT THE SERBIAN CHAMBER OF COMMERCE—LOOKING BACK AT THE LATEST 100 CASES

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\*\* The authors express their gratitude to Prof. Gašo Knežević, the President of the FTCA, and Dr. Mirjana Cukavac, the Secretary of the FTCA, for providing access to the FTCA archives and for their assistance in conducting this research. Special gratitude goes to Harry Flechtner, Albert Kritzer, and Stephan Kröll, who took the time to review and make valuable comments to this paper. Last but not least, we would like to thank our colleagues, Marko Jovanović and Uglješa Grušić, for their thorough editing of this paper. Any errors of fact or law are, of course, ours.

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## I. INTRODUCTION

Although former Yugoslavia had been active in the drafting process of the 1980 UN Convention on Contracts for the International Sale of Goods (CISG) and was one of the first countries to ratify the CISG,<sup>1</sup> the subsequent application of the CISG before national courts and arbitral tribunals based in Serbia has not been monitored on a regular basis. This survey attempts to bridge a serious gap which has occurred in reporting cases on the CISG originating from Serbia.

Although one would occasionally learn of a correct or incorrect application of the CISG, only after the advent of organized electronic databases of court case-law could one actually attempt to assess how often Serbian courts dealt with the CISG. Because of the difficulties in accessing Serbian court decisions that apply the CISG,<sup>2</sup> our analysis focuses on the caseload handled by the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce (FTCA).<sup>3</sup> Given that the FTCA has an average load

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1. The Socialist Federative Republic of Yugoslavia (SFRY) signed the CISG on April 11, 1980 and ratified it on December 27, 1984. The Law on Ratification of the Convention was published in the Official Gazette of the SFRY, MU 10/84. On March 12, 2001, the Federal Republic of Yugoslavia (FRY) notified the UNCITRAL Secretariat that the Convention had been in force with respect to FRY as of April 27, 1992, i.e., as of the date of state succession. When constitutional changes were made in the FRY in 2003, the CISG remained in force in the State Union of Serbia and Montenegro (former FRY) in accordance with Article 63 of the Constitutional Charter of the State Union. OFFICIAL GAZETTE SM, Nos. 1/03 and 26/05. Upon Montenegro's declaration of independence of June 3, 2006, all international treaties to which the State Union was a party to, including the CISG, remained in force only in respect to the Republic of Serbia, as provided by Article 60(4) of the Constitutional Charter of the State Union and confirmed by the decision of June 5, 2006 of the Serbian Parliament. Montenegro's contracting status to the CISG was later confirmed by filing a notification of succession. *See* STATUS 1980—UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html) (last visited Oct. 2, 2009) [hereinafter STATUS 1980].

2. There are only seven court decisions reported on Paragraf Lex and Ing-Pro, two major Serbian electronic databases of domestic case-law. The authors of this paper are fairly sure that there are dozens of other CISG cases existing in Serbian courts, but one would need to know about them first in order to find them by the case number in the court archives.

3. The FTCA is a permanent arbitration body founded in 1947 that provides for conciliation and arbitration services in settling disputes of international business character when the parties have agreed upon its jurisdiction in accordance with its rules. It is the only institutional arbitration in Serbia that resolves cross-border disputes and has so far handled over 8,000 cases. Proceedings before the FTCA are governed by the Rules of the FTCA and by the provisions of the arbitration agreement. The parties may also stipulate that the procedure before the FTCA will be conducted in accordance with the Rules of Arbitration of the United Nations Commission on International Trade Law. The Rules of the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, arts. 45(1) and 46(1), *available at* <http://eng.komora.net/ForeignTradeCourtOfArbitration/tabid/1029/Default.aspx>; *see generally* Mirko Vasiljević, *Priroda i*

of 25-30 cases per year of which all are international and many deal with sale of goods, and that over 80% of Serbian trade is directed to other CISG contracting states,<sup>4</sup> we assumed that there were plenty of unreported cases waiting in the FTCA archives. It turned out that, luckily, our assumptions were correct. As a starting point, we selected the year 2000, which was the year that international economic sanctions against Serbia were fully lifted, allowing for unhindered trade and resumption of normal and transparent methods of dispute settlement among trading partners (although this was not reflected immediately on the caseload of the FTCA—disputes usually need some time to ripen).

We identified 100 cases within the nine year period starting in 2000 in which the application of the CISG was at stake—sometimes applied, sometimes overlooked. This finding was particularly important given the scarcity of reported CISG case law coming from Serbia and former Yugoslavia.<sup>5</sup> These cases dealt with a wide variety of sales contracts—from sales of raspberries, wheat, and fresh mushrooms to sales of paper rolls, steel

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*karakteristike Spoljnotrgovinske arbitraže pri Privrednoj komori Jugoslavije u Beogradu* [Nature and Characteristics of the Foreign Trade Arbitration Court at the Yugoslav Chamber of Commerce in Belgrade], 1 ARBITRAŽA 3–13 (2000); Dobrosav Mitrović, *Spoljnotrgovinska arbitraža pri Privrednoj komori Srbije* [Foreign Trade Arbitration Court at the Serbian Chamber of Commerce], ARBITRAŽA 122–29 (2003); GASO KNEŽEVIĆ & VLADIMIR PAVIĆ, ARBITRAŽA I ADR [ARBITRATION AND ADR] 17–180 (2009); M. Wietzorek, *Arbitration in Serbia*, 2009 AUSTRIAN ARB. Y.B. 357, 357–82; Serbian Chamber of Commerce, Foreign Trade Court of Arbitration, <http://eng.komora.net/ForeignTradeCourtOfArbitration/tabid/1029/Default.aspx> (last visited Oct. 11, 2009).

4. Compare World Trade Organization [WTO], *Serbia Trade Profile*, <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=RS> (Oct. 2009), with STATUS 1980, *supra* note 1. It must also be noted that upon Albania's accession to the CISG on May 13, 2009, all member states of the Central European Free Trade Agreement (CEFTA), to which Serbia is a party, are now parties to the CISG as well. Consequently, it may be reasonably expected that the volume of trade between Serbian enterprises and enterprises from other CISG Contracting States will further increase in the future. These expectations are also supported by the recent amendments of the Free Trade Agreement between Serbia and Russia of April 3, 2009 that expanded the list of the goods covered by the CEFTA and anticipated entry into force of the Stabilization and Association Agreement (SAA) between Serbia and EU guaranteeing easier and predominantly customs-free access of Serbian products to European markets and vice versa. See Importing from Serbia, [http://www.siepa.sr.gov.yu/site/en/home/1/importing\\_from\\_serbia/trade\\_regulations/](http://www.siepa.sr.gov.yu/site/en/home/1/importing_from_serbia/trade_regulations/) (last visited Jan. 5, 2010).

5. This fact is likely to change in the future given that the University of Belgrade Faculty of Law has recently joined the Queen Mary translation program founded by the Institute for International Commercial Law at the Pace University School of Law and the Centre for Commercial Law Studies at Queen Mary, University of London. Albert H. Kritzer & Loukas A. Mistelis, *Taming the Dragons of Uniform Law: Sharing the Reasoning of Courts and Arbitral Tribunals—English Case Texts and Translated Case Texts*, 5 VINDOBONA J. INT'L COM. L. ARB. 282, 286 (2001). Dozens of translations of the FTCA awards exist at the Pace web site. See Electronic Library on International Commercial Law and the CISG, <http://www.cisg.law.pace.edu/cisg/text/casecit.html#serbia> (last visited Oct. 11, 2009).

pipes, and timber; from sales of DVD-DVX players to sales of milk packaging machines and locomotives. The value at stake in these disputes also varied considerably; some of the transactions were minuscule, while others were worth millions of U.S. dollars or euros. However, as one would expect, the value involved in a dispute does not necessarily reflect its legal complexity and some of the cases turned out to be extremely interesting for the purposes of our research. Still, the vast majority of the cases follow a similar scenario: the seller sues the buyer for non-payment of the contract price. Nevertheless, such a simple scenario has raised some interesting questions with regards to the CISG's scope of application and, even more so, the applicable interest rate that should be applied to outstanding payments. Finally, having approximately 100 cases to analyze enabled us to observe a wide range of interesting topics that are helpful for developing a proper understanding of the application of the CISG. We have, therefore, addressed the issues dealt with in the awards topically rather than analyzing every case separately. This, in our opinion, allows for a more streamlined presentation and, hopefully, somewhat more interesting reading material. Also, given that Serbian scholarly work on CISG has rarely been translated into English, we have included, where appropriate, basic references to the relevant articles and monographs on the CISG published in Serbia.

## II. SPHERE OF APPLICATION OF THE CISG

The initial step towards a correct application, or a correct non-application, of the CISG is assessing whether the contract falls within its scope. In order to be governed by the CISG, Article 1 of the CISG requires a contractual relationship that is international in its character and deals with the “sale of goods” and a proper connection between the parties to the contract and the laws of the CISG Contracting States.<sup>6</sup>

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6. For more on the CISG sphere of application in Serbian legal doctrine, *see* ALEKSANDAR ĆIRIĆ & RADOMIR DJUROVIĆ, *MEDJUNARODNO TRGOVINSKO PRAVO, POSEBNI DEO* [INTERNATIONAL COMMERCIAL LAW, SPECIAL PART] 50–52 (2005); MLADEN DRAŠKIĆ & MAJA STANIVUKOVIĆ, *UGOVORNO PRAVO MEDJUNARODNE TRGOVINE* [THE CONTRACT LAW OF INTERNATIONAL TRADE] 133–48 (2005); GASO KNEŽEVIĆ, *MERODAVNO PRAVO ZA TRGOVAČKI UGOVOR O MEDJUNARODNOJ PRODAJI ROBE* [APPLICABLE LAW TO THE CONTRACT FOR INTERNATIONAL SALE OF GOODS] (1989); JELENA PEROVIĆ, *BITNA POVREDA UGOVORA—MEDJUNARODNA PRODAJA ROBE* [FUNDAMENTAL BREACH OF CONTRACT—INTERNATIONAL SALE OF GOODS] 32–84 (2004); VLADIMIR STOJILJKOVIĆ, *MEDJUNARODNO PRIVREDNO PRAVO* [INTERNATIONAL COMMERCIAL LAW] 141–43 (2003); TIBOR VARADY ET AL., *MEDJUNARODNO PRIVATNO PRAVO* [PRIVATE INTERNATIONAL LAW] 422–27 (2007); JELENA VILUS, *KOMENTAR KONVENCIJE UN O MEDJUNARODNOJ PRODAJI ROBE 1980* [COMMENTARY ON THE 1980 UN CONVENTION FOR CONTRACTS ON

### *1. International Character of the Contract*

The first prerequisite for the application of the CISG is that the underlying contract is international in nature. This requirement is derived from the wording of Article 1, which states that “the [CISG] applies to the contracts . . . between the parties whose places of business are in different states . . . .” If a party has several places of business, the relevant place of business for determination of the international nature of the contract will be the one which has “the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract,” as set out in Article 10 CISG.

The Serbian translation of the CISG contained in the Law on Ratification of the Convention<sup>7</sup> refers to the “seat” of a party in both Articles 1 and 10 and not to its “place of business,” which is used in the English text of the CISG. Although these two terms often coincide, this may not always be the case. Hence, the Serbian translation suffers from inherent logical inconsistencies, since a company cannot have more than one seat. To the best of our knowledge, this mistake in translation has not adversely affected the application of Article 10 of the CISG in Serbia to this date.

The issue of multiple places of business arose only once in the cases we examined. In that case, a Swiss seller and a Serbian buyer entered a contract of sale. When the Serbian buyer defaulted on his payments, representatives of seller’s daughter company,<sup>8</sup> based in Serbia, interfered by attempting to assure that the delay in payment would be as short as possible. It was, therefore, questionable whether, in light of the daughter company’s involvement and the contract’s language, Serbian, the entire transaction had only superficial contacts with Switzerland and the seller’s Serbian establishment was, in effect, the place of business most closely connected with the contract and its performance within the meaning of CISG Article 10. The sole arbitrator found

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INTERNATIONAL SALE OF GOODS] 3–17 (1981); Maja Stanivuković, *Polje primene Konvencije UN o ugovorima o međunarodnoj prodaji robe u dosadašnjoj sudskoj i arbitražnoj praksi* [*Sphere of Application of the CISG in the Current Court and Arbitral Practice*], PRAVO I PRIVREDA No. 5-8/00, 931–44 (2000); Radovan D. Vukadinović, *Teritorijalni domašaj primene Konvencije UN o ugovorima o međunarodnoj prodaji* [*Territorial Extent of Application of the CISG*], PRAVO I PRIVREDA No. 5-8/07, 427–40 (2007).

7. See STATUS 1980, *supra* note 1.

8. The award makes reference to a “daughter company” of the Swiss seller. It cannot be deduced from the award itself whether the daughter company was a wholly owned subsidiary of the Swiss company, its branch office, or representation office.

that the transaction was genuinely international and that the Swiss headquarters had played a decisive role in the conclusion and performance of the contract because it negotiated and signed the contract, it transported and installed the equipment, and the payment was effectuated to its account. Therefore, it was held that the CISG should be applied even without resorting to the principle *in dubio pro conventione*.<sup>9</sup> It is worth noting that, when pointing out the erroneous translation of the CISG into the Serbian language, the court made specific reference to the original English text of Article 10 rather than the Serbian translation contained in the Law on Ratification.

## 2. Relevant Nexus with the CISG Contracting State

Article 1(1) of the CISG defines which contractual relationship triggers application of the CISG.<sup>10</sup> Specifically, the CISG should be applied when either both of the contracting parties have their place of business in different contracting states, or the operation of private international law rules leads to the application of the law of a Contracting State.<sup>11</sup> Given that cases before the FTCA usually involve a Serbian company as one of the parties and Serbian trade is usually directed towards other contracting states, there are numerous cases where conditions for CISG application are met.

Some features of the decision-making process under the FTCA rules are common to other arbitration rules as well, e.g., parties are free to choose the applicable law, or rules of law, and, absent express mandate of the parties, arbitrators are not allowed to decide a case *ex aequo et bono*.<sup>12</sup> However,

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9. Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, Award No. T-04/05, July 5, 2008.

10. This provision has given rise to a great deal of controversy with respect to the assessment of its character, prevailing methodology, and interaction with the reservation contained in Article 95. See JOHN HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION PASSIM* (3d ed. 1999); Christophe Bernasconi, *The Personal and Territorial Scope of the Vienna Convention on Contracts for the International Sale of Goods (Article 1)*, 46 NETH. INT'L L. REV. 137, 141 (1999) (Neth.); Loukas Mistelis, *CISG and Arbitration*, in *CISG METHODOLOGY 375 PASSIM* (Andre Janssen & Olaf Meyer eds., 2009); Alexis Mourre, *Application of the Vienna International Sales Convention in Arbitration*, 17 ICC INT'L CT. ARB. BULLETIN 43–44 (2006); Georgios Petrochilos, *Arbitration Conflict of Laws Rules and the 1980 International Sales Convention*, 52 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL 191–218 (1999) (Fr.), available at [http://www.cisg.law.pace.edu/cisg/biblio/petrochilos.html#N\\_15\\_](http://www.cisg.law.pace.edu/cisg/biblio/petrochilos.html#N_15_); Jacob Ziegel, *The Scope of the Convention: Reaching Out to Article One and Beyond*, 25 J.L. & COM. 59, 59 (2005).

11. CISG art. 1(1)(a), (b). In the context of this study, the reservation of Article 95 has not appeared to be relevant since neither former Yugoslavia nor Serbia have made this reservation and there were no situations which called for taking the said reservation into account.

12. The Rules of the Foreign Trade Court of Arbitration [hereinafter The Rules of the FTCA], arts.

where parties have not exercised their autonomy in choosing the applicable law, or rules of law, arbitrators must arrive at the substantive solution by application of the most appropriate *conflict-of-laws rule*<sup>13</sup> and not the most appropriate *rules of law*, as some institutional arbitration rules prescribe.<sup>14</sup> In all cases, arbitrators are bound to make the award in accordance with contractual provisions and take into account relevant trade usages.<sup>15</sup>

In the majority of the FTCA cases, parties have not exercised their freedom and have omitted to insert a choice of law clause in their contract. On several occasions, parties reached agreement on the applicable law during the arbitral hearing. There has been no explicit choice of the CISG as the applicable law in the analyzed cases and only one case exists where the CISG was expressly excluded. Consequently, the application of the CISG before the FTCA has arisen either as a result of: (1) parties' choice of the law of a contracting state as applicable; (2) application of the CISG as a final result of the conflict-of-laws approach; or (3) by direct application. These three groups of cases will be elaborated in more detail later. Also, we will give special attention to the issue of dissolution of SFRY and its effect on application of the CISG in the FTCA practice. Finally, cases where the CISG was not applied although all prerequisites for its application were met will be discussed under the last heading of this section.

### *2.1.) Choice of the law of a Contracting State*

One of the main principles of the CISG is party autonomy. Article 6 of the CISG embodies this by allowing parties to contract out of the CISG or vary the effect of any of its provisions. However, the majority of courts and tribunals have taken a firm position that choosing the law of a contracting state does not amount to the exclusion of the application of the CISG.<sup>16</sup>

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48(1) and (4) (2007), available at <http://eng.komora.net/LinkClick.aspx?fileticket=FBMu4VYIJUE%3D&tabid=1029&mid=2441>.

13. The Rules of the FTCA, art. 48(2) (2007), available at <http://eng.komora.net/LinkClick.aspx?fileticket=FBMu4VYIJUE%3D&tabid=1029&mid=244>. The end result of this process need not be just the choice of applicable *law*, but applicable *rules of law* as well. The 1997 version of the FTCA Rules allowed arbitrators to choose only the applicable law (and not the applicable rules of law) in the absence of parties' choice.

14. See International Chamber of Commerce [ICC] Rules of Arbitration, art. 17(1) (1998), available at <http://www.sice.oas.org/DISPUTE/comarb/icc/rules.asp>.

15. The Rules of the FTCA, art. 48(3) (2007), available at <http://eng.komora.net/LinkClick.aspx?fileticket=FBMu4VYIJUE%3D&tabid=1029&mid=2441>.

16. See *B.V./Quetard*, Arrondissementsrechtbank [Rb.] [District Court], Gravenhage, June 7, 1995, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=154&step=Abstract>; CLOUT Case No.

Exclusion of the CISG has to be either explicit, (e.g., in the form of a contract term stating that “the CISG shall not be applied”) or at least implicit—either by choosing the law of a non-contracting state<sup>17</sup> or pinpointing applicable provisions within the chosen legal system (e.g., “Swiss Code of Obligations shall apply”).<sup>18</sup>

Opinions are not so uniform when it comes to identifying the exact basis for applying the CISG when the law of a Contracting State is chosen. One position stresses that party autonomy itself is a rule of private international law within the meaning of Article 1(1)(b).<sup>19</sup> Another explanation indicates that, when the law of a contracting state is chosen, the CISG is applied as the

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270 [Bundesgerichtshof (Supreme Court), Germany, Nov. 25, 1998], *available at* <http://cisgw3.law.pace.edu/cases/981125g1.html>; CLOUT Case No. 206 [Cour de Cassation (Supreme Court), France, Dec. 17, 1996], *available at* <http://cisgw3.law.pace.edu/cisg/text/draft/961217case.html>; CLOUT Case No. 166 [Schiedsgericht der Handelskammer Hamburg (Arbitral Tribunal), Germany, Mar. 21, 1996], *available at* <http://cisgw3.law.pace.edu/cases/960321g1.html>; CLOUT Case No. 93 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft (Arbitral Tribunal), Vienna, June 15, 1994], *available at* <http://cisgw3.law.pace.edu/cases/940615a3.html>; CLOUT Case No. 236 [Bundesgerichtshof (Supreme Court), Germany, July 23, 1977], *available at* <http://cisgw3.law.pace.edu/cases/970723g1.html>; ICC Arbitration Case No. 9187 (1999), *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=466&step=Abstract>; ICC Arbitration Case No. 7844 (1995), *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=123&step=Abstract>; ICC Arbitration Case No. 8324 (1995), *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=240&step=Abstract>; ICC Arbitration Case No. 7660 (1994), *available at* <http://cisgw3.law.pace.edu/cases/947660i1.html>; ICC Arbitration Case No. 6653 (1993), *available at* <http://cisgw3.law.pace.edu/cases/936653i1.html>.

17. CLOUT Case No. 483 [Audiencia Provincial de Alicante (Appellate Court), Spain, Nov. 16, 2000] and CLOUT Case No. 49 [Oberlandesgericht Düsseldorf (District Court), Germany, July 2, 1993], *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/V94/239/16/IMG/V9423916.pdf?OpenElement>.

18. CLOUT Case No. 429 [Oberlandesgericht Frankfurt am Main (District Court), Germany, Aug. 20, 2000], *available at* [http://www.uncitral.org/uncitral/en/case\\_law/abstracts.html](http://www.uncitral.org/uncitral/en/case_law/abstracts.html); ICC Arbitration Case No. 10849 (2000).

19. See Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Arbitral Award No. SCH-4318, June 15, 1994 (Austria), *available at* <http://cisgw3.law.pace.edu/cases/940615a4.html>; Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Arbitral Award No. SCH-4366, June 15, 1994, *available at* <http://cisgw3.law.pace.edu/cases/940615a3.html> (Austria); Vestnik Vysshego Arbitrazhnogo Suda RF [The Highest Arbitration Court of the RF], Information Letter 29, Feb. 16, 1998 (Russ.), *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=365&step=Abstract>; Arbitration Court of the Chamber of Commerce & Industry of Budapest, Vb 94124, Nov. 17, 1995 (Hung.), *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=217&step=Abstract>; ICC Arbitration Case No. 7645 (1995), *available at* <http://cisgw3.law.pace.edu/cases/957645i1.html>; ICC Arbitration Case No. 7660 (1994), *available at* <http://cisgw3.law.pace.edu/cases/947660i1.html>. For a critique of this position, see Mourre, *supra* note 10, at 44. This could also open the question of whether the choice of the law of a country which has made reservation under Article 95 would lead to application of its domestic rules or the Convention, even where both parties are from Contracting States. According to at least one court decision, such choice of the law would still lead to application of the CISG. See Valero Mktg. & Supply Co. v. Greeni Oy, 373 F. Supp. 2d 475, 482 (D.N.J. 2005).

primary source of those substantive rules, because ratified international treaties usually occupy a tier above domestic legislation in the hierarchy of legal sources.<sup>20</sup>

Taking into account that Serbia is a Contracting State and that most of the foreign partners of Serbian companies, and foreign FTCA parties, come from other contracting states, choice of law clauses, when inserted, usually point to a law of a contracting state, be it Serbia or another country. In the majority of the cases, arbitrators have correctly identified the consequences of such choice.

In one FTCA decision, the sole arbitrator determined that the fact that a Serbian and a Ukrainian company had chosen the Swedish law as applicable triggered application of the CISG on the basis that Sweden is a Contracting State and that the CISG is incorporated in its legal order.<sup>21</sup> Similarly, choice of Austrian law in a contract concluded between a Serbian company and a German company has justly been interpreted to primarily point to the CISG, with provisions of the Austrian Civil Code as a fall-back source.<sup>22</sup> The tribunal pointed out that:

Article 6 of the CISG allows parties to exclude application of the [CISG]. However, a contract provision which points to Austrian law as applicable does not appear to manifest the parties' intention to exclude application of the [CISG], particularly due to the fact that Austria has ratified the [CISG] and that, consequently, its provisions have become part of Austrian law.<sup>23</sup>

Similarly, another FTCA tribunal understood choice of “substantive law of Serbia and Montenegro” to mean choice of Serbian law, including the CISG.<sup>24</sup> Moreover, even when the sales contract was concluded between a seller from

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20. See ICC Arbitration Case No. 7645 (1995), available at <http://cisgw3.law.pace.edu/cases/957645i1.html>; ICC Arbitration Case No. 7754 (1995), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=519&step=Abstract>; Peter Schlechtriem, *Article 1*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 34 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005) [hereinafter CISG COMMENTARY]; Mourre, *supra* note 10, at 44; Peter Winship, *The Scope of the Vienna Convention in International Sales Contracts*, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1–53 (N. Galston & H. Smit eds., 1984). A further account of the conceptual difficulties experienced in the practical application of Article 1 is offered by Bruno Zeller in *The CISG—Getting off the Fence*, LAW INST. J., Sept. 2000, 73, 73–74 (Austr.), available at <http://www.cisg.law.pace.edu/cisg/biblio/zeller4.html>.

21. FTCA, Award No. T-02/00, Dec. 9, 2002.

22. FTCA, Award No. T-13/05, Jan. 5, 2007.

23. *Id.*

24. FTCA, Award No. T-13/08, Mar. 16, 2009; FTCA, Award No. T-05/08, Jan. 5, 2009; FTCA, Award No. T-06/06, July 31, 2007.

a Contracting State (Serbia) and a buyer from a Non-Contracting State (Albania), contractual choice of law pointing to the law of the Contracting State (Serbia) was considered to trigger application of the CISG pursuant to Article 1(1)(b), since “the primary rule respected in the private international law, points to a law of the Contracting State—Serbia.”<sup>25</sup>

Although the selection of applicable law is more likely to happen at the time of the conclusion of the contract, it can also take place at a later stage, even at the hearing. For example, FTCA award number T-17/06 of September 10, 2007 dealt with a contract between companies from the FYR Macedonia and Serbia that did not contain a choice of law clause. However, the parties’ representatives agreed at the hearing that Yugoslav law should be applied. The sole arbitrator noted that the parties had expressed their choice. Still, given that FR Yugoslavia had ceased to exist (and so did its successor, Serbia and Montenegro) the arbitrator had to further interpret such a choice in order to give it any effect. He found that the applicable law should be that of Serbia, and within it, primarily CISG provisions,<sup>26</sup> while Serbian Law on Contracts and Torts (LCT) should be used to fill any gaps in the CISG.<sup>27</sup>

The FTCA case law also contains decisions where the CISG was not applied although a disputed contract contained the choice of law clause calling for application of the law of a CISG Contracting State. For example, in a dispute between a Polish company and a Serbian company arising out of a contract calling for application of Swiss law, the tribunal erroneously concluded that the parties chose to apply Swiss domestic provisions, specifically the Federal Code of Obligations, although Switzerland is a party to the CISG.<sup>28</sup> A similar slip occurred in case number T-2/03 of October 21, 2003 between a Serbian company and a Macedonian<sup>29</sup> company where the contract provided for Yugoslav law as applicable. Instead of applying the CISG, arbitrators applied the Yugoslav (Serbian) LCT.<sup>30</sup> Also, in award

25. FTCA, Award No. T-08/08, Jan. 28, 2009.

26. Constitution art. 194 (Serb.); Constitutional Charter of the State Union Serbia and Montenegro art. 16; Constitution of the Federal Republic of Yugoslavia (1992) art. 16.

27. The same position was taken in other awards. *See* FTCA, Award No. T-09/07, Jan. 23, 2008; FTCA, Award No. T-16/04, July 18, 2005; FTCA, Award No. T-18/04, May 24, 2005; FTCA, Award No. T-19/03, June 15, 2004; FTCA, Award No. T-13/02, May 9, 2003.

28. FTCA, Award No. T-01/07, Oct. 18, 2007.

29. For the sake of brevity and without prejudice to the ongoing dispute surrounding the name of the country, we use in this article the adjective “Macedonian” to designate parties and laws originating from the FYR Macedonia.

30. A similar outcome, where a contractual choice of Serbian (Yugoslav) law led to application of the Serbian LCT, was reached in FTCA, Award No. T-10/07, Dec. 3, 2008; FTCA, Award No. T-27/02, June 6, 2003; FTCA, Award No. T-20/00, Apr. 3, 2002; FTCA, Award No. T-8/99, Dec. 25, 2000; FTCA,

number T-6/99 of October 15, 2001, the parties' agreement to apply Yugoslav law mistakenly resulted in application of the LCT, not the CISG. Similar errors are fairly common in reported international cases,<sup>31</sup> and have been repeatedly criticized in legal doctrine.<sup>32</sup>

There has been only one case where the application of the CISG was expressly excluded in the contract.<sup>33</sup> However, there has also been one case where the application of the CISG should have been avoided as contrary to parties' agreement, but the application of the CISG nevertheless occurred. Namely, the contract for sale of fresh plums between a Serbian seller and a Bosnian buyer contained the following provision: "the provisions of the Law on Contracts and Torts shall apply to all the issues not covered by this Contract."<sup>34</sup> The sole arbitrator erred by interpreting this provision as an imprecise agreement on the applicable law since "it was not clear which Law the parties have in mind" (although the same 1978 Yugoslav LCT was in force in both countries where parties had their places of business, albeit now in the guise of their own domestic laws). Hence, the arbitrator engaged in the conflict-of-laws analysis in order to determine the applicable law. The end result was the application of the Serbian law and primarily the application of the CISG, as part of the Serbian law. Although the outcome of the dispute would have been the same under the CISG and the LCT, since the claimant requested payment of the remainder of the price, which he is entitled to under both legal documents, the arbitrator's disregard for the express choice of the parties is striking. Fortunately, this was an isolated incident in the FTCA practice.

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Award No. T-10/99, Oct. 16, 2000; FTCA, Award No. T-11/99, July 11, 2000.

31. See ICC Arbitration Case No. 7754 (1995), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=519&step=FullText>. See also CLOUT Case No. 326 [Kantonsgericht des Kantons Zug (District Court), Switzerland, Mar. 16, 1995], available at <http://cisgw3.law.pace.edu/cases/950316s1.html>; CLOUT Case No. 92 [Ad hoc Arbitral Tribunal, Florence, Apr. 19, 1994], available at <http://cisgw3.law.pace.edu/cases/940419i3> (where the choice of Italian law was understood as implied exclusion of the CISG); CLOUT Case No. 54 [Tribunale Civile di Monza (District Court), Italy, Jan. 14, 1993], available at <http://cisgw3.law.pace.edu/cases/930114i3.html>.

32. Franco Ferarri, *CISG Rules on Exclusion and Derogation: Article 6*, in *THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION* 114, 124–28 (Franco Ferrari, Harry Flechtner & Ronald Brand eds., 2004) [hereinafter *UNCITRAL DIGEST*]; Mourre *supra* note 10, at 44–45.

33. FTCA, Award No. T-19/08, Apr. 28, 2009 (involving the sale of mazut between Bosnian and Serbian parties).

34. FTCA, Award No. T-02/08, Sept. 30, 2008.

2.2.) *Application of the CISG when there was no choice of law of a Contracting State*

Where parties refrain from exercising their freedom of choice, there are two additional scenarios for applying the CISG. The first approach is to have a conflict-of-laws rule point to the law of a Contracting State. This conflict-of-laws rule is usually the rule of “the closest connection,”<sup>35</sup> although it is conceivable to use somewhat less flexible connecting factors, such as the seat of the party who provides a characteristic performance, which in the contract of sale means that *lex loci venditoris* is applied. Occasionally, even Article 1(1)(a) of the CISG is interpreted as a unilateral conflict-of-laws rule pointing to the rules common to both contracting parties, which are the rules of the CISG when both parties have their relevant places of business in different Contracting States.<sup>36</sup> The second possible approach is to construct the rules on choosing applicable substantive provisions so as not to insist on using a traditional conflict-of-laws technique, but the application of the “most appropriate rules of law.” This enables arbitrators to directly invoke provisions of the CISG without any need to justify their choice via further conflict-of-laws analyses.

It is, therefore, worth repeating that the Rules of the FTCA provide for the conflict-of-laws method when deciding on the applicable law or applicable rules.<sup>37</sup> FTCA practice reveals that arbitrators have taken different paths in meeting this requirement. In most of the cases where tribunals have correctly applied the CISG in absence of parties’ choice, it is impossible to detect whether this has been done on the basis of subsections (a) or (b) of Article 1(1). This ambivalence has already been noticed in the practice of other arbitral institutions.<sup>38</sup> It is hard not to sympathize with this simplification, as it avoids a controversy which, at least in the practice of the arbitral tribunals, rarely has practical implications.

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35. See ICC Arbitration Case No. 8247 (1996), available at <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13355&x=1>.

36. Kevin Bell, *The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods*, 8 PACE INT’L L. REV. 237, 246–47 (1996); Mourre, *supra* note 10, at 44; Carolina Saf, *A Study of the Interplay between the Conventions Governing International Contracts of Sale*, PACE 2.1 (Sept. 1999), <http://www.cisg.law.pace.edu/cisg/text/saf7.html>.

37. The Rules of the FTCA, *supra* note 13, at 48(2).

38. Compare CLOUT Case No. 164 [Arbitration Court of the Hungarian Chamber of Commerce & Indus., May 12, 1995], with CLOUT Case No. 174 [Arbitration Court of the Hungarian Chamber of Commerce & Indus., Aug. 5, 1997].

In a dispute between Serbian and Romanian companies, the tribunal determined that Serbian law had the closest connection to the disputed contract.<sup>39</sup> This was based on the fact that the preponderance of factors pointed to Serbia as the proper choice: the language of the contract was Serbian; the seller's seat was in Serbia; and the stipulated place of performance was in Serbia. In addition, a "split" dispute resolution clause provided, in addition to jurisdiction of the FTCA, for alternative jurisdiction of Serbian courts.<sup>40</sup> Although the claimant had based its request on provisions of the Serbian LCT, the tribunal correctly determined that the CISG applied instead. After designating Serbian law as applicable, the tribunal noted that both Serbia and Romania are Contracting States to the CISG and went on to apply the CISG in accordance with Article 194 of the Serbian Constitution, which provides that ratified international treaties have primacy over domestic legislation. Therefore, the end result was a correct application of the CISG, while the actual basis for application remained undisclosed.<sup>41</sup>

Award No. T-4/01 of May 10, 2002 dealt with a dispute between Yugoslav and Bulgarian companies. Application of conflict-of-laws rules led the tribunal to Bulgarian law as the proper law of contract. The tribunal then went on to apply the CISG as a part of Bulgarian law. Just like in the above mentioned case, the tribunal then muddled its justification, stating that the CISG was ratified by both Yugoslavia and Bulgaria and had, consequently, become part of their internal legal orders. Once again, arbitrators avoided getting entangled in the intricacies of Article 1(1). Similar approaches have been used in a significant number of cases where the CISG was applied.<sup>42</sup>

In one case involving Yugoslav and Greek companies, the parties made a clearly imperfect choice, providing for application of *either* Serbian *or* Greek law.<sup>43</sup> This alternative clause was naturally impossible to effectuate once the dispute arose. Arbitrators therefore disregarded it and, through conflict-of-laws technique, decided to apply Yugoslav substantive rules. As

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39. FTCA, Award No. T-08/06, Oct. 1, 2007.

40. *Id.* (noting that the respondent did not contest jurisdiction of the arbitral tribunal so the effectiveness of such split clause was not an issue in the proceedings).

41. Similar reasoning was reached in another case involving a Serbian seller and a Romanian buyer. *See* FTCA, Award No. T-07/07, Aug. 19, 2008.

42. *See, e.g.*, FTCA, Award No. T-15/06, Jan. 28, 2008; FTCA, Award No. T-14/03, Oct. 18, 2007; FTCA, Award No. T-22/05, Oct. 30, 2006; FTCA, Award No. T-17/02, Oct. 2, 2006; FTCA, Award No. T-03/06, Sept. 14, 2006; FTCA, Award No. T-09/01, Feb. 23, 2004; FTCA, Award No. T-03/01, Sept. 24, 2001; FTCA, Award No. T-15/01, Mar. 15, 2001.

43. FTCA, Award No. T-19/99, Nov. 22, 2000.

their primary Yugoslav source of rules of law, they have chosen the CISG in accordance with Article 16 of the FRY Constitution.<sup>44</sup>

In another case one of the parties had its place of business in the Contracting State, FR Yugoslavia, while its counterpart was established in Cyprus, a non-contracting state at the time. The tribunal correctly applied the CISG, but again avoided pinpointing the basis for its application, although it was clear that it could have been only Article 1(1)(b). Instead, it invoked the internal hierarchy of applicable rules and primacy of international sources over domestic legislation.<sup>45</sup>

### 2.3.) *Direct application of the CISG*

In some of the cases before the FTCA where both parties came from CISG contracting states provisions of the CISG have been applied through direct reference to Article 1(1)(a) of the CISG.<sup>46</sup> Had it been employed by the courts, this approach would require no further analysis. However, direct application of the CISG on the basis of Article 1(1)(a) is quite different in the arbitral setting because the arbitral tribunal is not a state organ and as such, is not bound by the treaties ratified by the state where it is situated.<sup>47</sup> Hence, it is important to note that although the application of the CISG in these cases was correct, the tribunals avoided spelling out whether they used Article 1(1)(a) as a unilateral conflict-of-laws rule, which seems plausible given that

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44. This provision had a similar effect to the current Article 194 of Serbian Constitution regarding primacy of international conventions.

45. FTCA, Award No. T-16/99, Feb. 12, 2001. At present, though, Cyprus is a Contracting State of the CISG.

46. This was the technique used in FTCA, Award No. T-18/07, Oct. 15, 2008; FTCA, Award No. T-13/05, Jan. 5, 2007; FTCA, Award No. T-22/03, Jan. 19, 2004; FTCA, Award No. T-22/03, Jan. 19, 2004 (where the arbitrators immediately invoked Article 1 of the CISG, without prior conflict-of-laws analysis). FTCA, Award No. T-22/05, Oct. 30, 2006, stated that the CISG should “primarily be applied” and the conflict-of-laws technique has been used only to determine rules which supplement the CISG. In FTCA, Award No. T-15/06, Jan. 28, 2008, the tribunal noted that the parties have not chosen the proper law and decided that the CISG should be applied “since the conditions for its application are fulfilled.” In some of the awards, the CISG has been applied as “the most appropriate” instrument and the conflict-of-laws technique was consulted only to fill the gaps in the CISG. *See* FTCA, Award No. T-12/04, Jan. 24, 2006; FTCA, Award No. T-03/05, Dec. 15, 2005; FTCA, Award No. T-10/04, Nov. 6, 2005; FTCA, Award No. T-09/01, Feb. 23, 2004; FTCA, Award No. T-18/01 Nov. 27, 2002; FTCA Award No. T-17/01, Apr. 12, 2002; FTCA, Award No. T-15/01, Mar. 15, 2001.

47. Pierre Mayer, *L'application par l'arbitre des conventions internationales de droit privé, in L'INTERNATIONALISATION DU DROIT: MELANGES EN L'HONNEUR DE YVON LOUSSOUARN* 275, 287 (Daloz ed., 1994); Petrochilos, *supra* note 10.

FTCA Rules require conflict-of-laws methodology in determining applicable substantive provisions, or for its persuasive force.<sup>48</sup>

#### 2.4.) *Effects of dissolution of SFRY to application of the CISG*

The CISG entered into force on the territory of former Yugoslavia (SFRY) on January 1, 1988. However, the dissolution of the former Yugoslavia in the 1990's raised the question of application of the CISG in the case of state succession by what are now six independent countries—the former federal units, republics, of the SFRY.<sup>49</sup> Namely, were the newly independent ex-Yugoslav republics to be regarded as the CISG contracting states automatically upon dissolution of SFRY or not?

The answer to this question is simple if we accept the position of Article 34 of the 1978 Vienna Convention on Succession of States in respect of Treaties. This article provides, in case of dissolution of a state, for automatic continuation of application of the multilateral treaties signed by the predecessor state in the territory of the successor state.<sup>50</sup> This view can also be supported by the fact that many of the former Yugoslav republics have, together with their declarations of independence, made firm commitments that the treaties entered into by the SFRY will remain in force in their territories.<sup>51</sup>

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48. See Mayer, *supra* note 46, at 282; Petrochilos, *supra* note 10.

49. Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro and Macedonia.

50. This Convention applies, pursuant to its Article 7, only to the successions, which have occurred after the Convention entered into force, as of November 6, 1996, unless the concerned states agree otherwise. See Vienna Convention on Succession of States in Respect of Treaties art. 7, Aug. 23, 1978, 1946 U.N.T.S. 3. Given that the dissolution of SFRY was held completed in 1992, it can be argued that the 1978 Vienna Convention is inapplicable to this issue. Furthermore, it has often been said in the legal doctrine that the formulation of Article 34 of the 1978 Vienna Convention cannot be taken as reflective of international customary law. Even the automatic state succession to humanitarian treaties is highly controversial and is not supported by much state practice. Moreover, the International Court of Justice never expressed an opinion to the question whether or not the automatic succession reflects international customary law. Consequently, the area of state succession is still deemed as “an area of great uncertainty and controversy,” even amongst the international public law scholars. See generally IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 650, 663–64 (5th ed. 1998); ANTONIO CASSESE, INTERNATIONAL LAW 53 (2001); V. RAKIĆ-VODINELIĆ ET AL., PRESTANAK SFRJ—PRAVNE POSLEDICE [DISSOLUTION OF THE SFRY—LEGAL CONSEQUENCES] 17 (1995); MALCOLM SHAW, INTERNATIONAL LAW 976–77 (6th ed. 2008); Int'l Law Ass'n, 2002 *ILA Rapport final sur la succession en matière de traits*, 14, available at <http://www.ila-hq.org>; Akbar Rasulov, *Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?*, 14 EUR. J. INT'L L. 141 (2003); Maren Tamke, *Succession of States to Multilateral Treaties* (2001), available at <http://www.hausarbeiten.de/faecher/vorschau/104018.html>.

51. See Int'l Law Ass'n, *supra* note 50, at 14; D. Dimitrijević, *Sukcesija država u odnosu na međunarodne ugovore SFRJ [Succession of States with Respect to Treaties Signed by SFRY]*, STRANI PRAVNI ŽIVOT Nos. 1-2/2005, 33–35, at 9.

With respect to the CISG, these promises were further formalized by filing notifications of successions with retroactive application covering the period from the date of state succession to the date of filing of notification.<sup>52</sup> However, these actions were not made with the same expeditiousness by all of the former Yugoslav republics, thus creating legal uncertainty for private parties as to the status of the CISG in the legal systems concerned.<sup>53</sup> While Montenegro waited only four and a half months from the date of its independence to file a notification of succession to the CISG, it took Bosnia little less than two years, Croatia six and a half years, and over 15 years in the case of Macedonia.<sup>54</sup> Consequently, it is necessary to reopen a controversial and unsettled issue of international public law regarding effects of the notifications of successions to treaties, whether they are of declaratory or constitutive character.<sup>55</sup> These effects, especially in Macedonian case, might have important consequences on application of the CISG in the region.

Should Macedonian parties to contracts concluded in the period between the date of state succession, November 17, 1991, and the date of receipt of notification of succession to the CISG, November 22, 2006, be considered as coming from a CISG contracting state for the purposes of Article 1(1)(a) CISG? If Article 1(1)(b) of the CISG points to Macedonian law, should the CISG be applied when the contract was concluded in the abovementioned period? These questions are not purely academic, since some of them have already been addressed in the FTCA practice. However, the approach of the FTCA tribunals with respect to this issue has not been unanimous.

We have identified 14 FTCA awards in the matter of international sales where one of the parties appearing before arbitration was Macedonian.<sup>56</sup> In

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52. See STATUS 1980, *supra* note 1.

53. Bernasconi advises business persons wanting to conclude an international sale contract with a partner who has his place of business in one of the newly independent Republics of both the former USSR and the former Yugoslavia, in order to avoid uncertainty as to CISG's application, to implement into the contract a clear and unequivocal choice of law rule, either in favor of the CISG or in favor of one particular national legal order. See Bernasconi, *supra* note 10, at 154.

54. See STATUS 1980, *supra* note 1.

55. On one hand, the practice of making notifications by the successor states and the acceptance by the depositories could be interpreted as a statement against automatic succession, since had it been otherwise, the status of a Contracting State to the multilateral treaty would be established *ipso facto* from the date when such state declares independence. On the other, the practice of filing notifications of successions should be interpreted as concerned state's assistance to the depository for clarifying the situation and enabling the depository to modify the list of the Contracting States, thus preventing the risk of annulling their acts in the future. See Tamke, *supra* note 50.

56. Only FTCA, Award No. T-16/07, June 18, 2008, deals with the dispute arising out of a contract concluded after Macedonia's filing of notification of succession to the CISG.

some of these cases, the contract contained a choice-of-law clause calling for application of Serbian (Yugoslav) law and the tribunals have reached different results, deciding on some occasions to apply the CISG, resorting to the application of the LCT on others.<sup>57</sup> Where there was no choice of law, tribunals did not address the issue of Macedonia's contracting status to the CISG and instead chose Serbian rules as the most appropriate, pursuant to Article 46(2) of the FTCA Rules.<sup>58</sup> There is one case where the tribunal, without addressing the issue of applicable law, went straightforward to applying the Serbian LCT.<sup>59</sup> Finally, in one third of these cases the arbitrators addressed the issue of whether Macedonia was to be considered a CISG Contracting State prior to filing a notification of succession. We will focus our attention on this last group of cases.

In the two cases decided prior to Macedonia's notification of succession, the sole arbitrator started with examining Article 46(2) of the FTCA Rules and found that the Serbian law, as the law of the seller, should be deemed the most appropriate law to apply to the case at hand. This led to application of the CISG as part of Serbian law. However, in elaborating the reasons for CISG's application, the arbitrator stated the following:

Since the seller is a Serbian company, the applicable law should be the law of Serbia, i.e. the Law on Contracts and Torts. However, since both states on whose territory the parties have places of business were constituents of former SFRY, and since the SFRY has signed the UNCITRAL Convention on Contracts for International Sale of Goods and the contract at hand is the contract for international sale of goods, the arbitrator considers the Vienna (UNCITRAL) Convention as also applicable for reasons of automatic succession to multilateral treaties.<sup>60</sup>

Although the final application of the CISG was in our view correct, it is notable that the arbitrator implicitly invoked Article 1(1)(a) as the basis for application of the CISG and not Article 1(1)(b). Any justification of such an approach would prove to be controversial since the position of international law on state succession to treaties is not that clear<sup>61</sup> and Macedonia was not

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57. The tribunal applied Serbian LCT instead of CISG in FTCA, Award No. T-08/99, Dec. 25, 2000; FTCA, Award No. T-10/99, Oct. 16, 2000; and FTCA, Award No. T-11/99, July 11, 2000.

58. The CISG was applied in FTCA, Award No. T-37/03, May 17, 2004, and FTCA, Award No. T-25/06, Nov. 13, 2007. The CISG was not applied in the FTCA, Award No. T-05/01, Nov. 29, 2001. It is not clear what law the arbitrator applied in FTCA, Award No. T-28/03, Apr. 26, 2004, when granting seller's request for payment of the price.

59. FTCA, Award No. T-11/05-12, Dec. 16, 2005.

60. FTCA, Award No. T-14/04, Feb. 21, 2005; FTCA, Award No. T-15/04, Feb. 21, 2005. The same arbitrator decided both awards.

61. See *supra* text accompanying note 49.

listed on the UNCITRAL web site as the CISG contracting state at the time when the award was made.

There are three FTCA cases decided after Macedonia filed a notification of succession and was listed on the UNCITRAL web site as a CISG Contracting State. In award number T-23/06 of September 15, 2008, in a dispute between a Serbian seller and a Macedonian buyer, the CISG was applied as part of the Serbian law on the basis of the conflict-of-laws method. The sole arbitrator explicitly noted in the *obiter dictum* that the analysis of CISG application on the basis of Article 1(1)(a) was purposefully omitted although Macedonia was a party to the CISG at the time of the making of the award, since this was not the case at the time of the contract conclusion. The opposite conclusion was reached in the awards T-8/07 of May 9, 2008 and T-1/08 of November 17, 2008, where the CISG was applied on the basis of Article 1(1)(a) despite the fact that the underlying contract was concluded prior to Macedonia's filing of notification of succession to the CISG.

It appears that the conditions for application of the CISG on the basis of Article 1(1)(a) were met in all of these cases regardless of the nature and legal effects of Macedonian notification of succession. On one hand, if such notification is of a declaratory character,<sup>62</sup> there are no reasons for denying application of the CISG in these cases since the CISG was in fact in force at the time of the contract conclusion. On the other hand, if it is of a constitutive character,<sup>63</sup> the text of the notification specifying the date of CISG's entry into force in Macedonia as the date of state succession, November 17, 1991,<sup>64</sup> justifies the application of the CISG to contracts concluded after the date of succession, where the disputes arising out of these contracts were decided after the date of notification. Consequently, the phrasing of Macedonian notification of succession suggests that once Macedonia filed notification of succession all the obstacles were removed in finding the CISG applicable. This would be either by virtue of Article 1(1)(a), whenever the Macedonian party concluded the contract with another party based in a contracting state,

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62. See Ulrich G. Schroeter, *Backbone or Backyard of the Convention? The CISG's Final Provisions*, in SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES, Festschrift for Albert H. Kritzer on the Occasion of His Eightieth Birthday 425, 459–60 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008) (arguing that under the “continuity principle” the CISG continues in force in successor States and notifications that are declaratory in nature only confirm preexisting law).

63. This view can, *inter alia*, be supported by the fact that the FYR Macedonia contracting status to the CISG was confirmed on the UNCITRAL web site only upon filing of such notification.

64. The Secretary-General, Depositary Notification (Nov. 27, 2006), <http://treaties.un.org/doc/treaties/1998/12/19981208%2003-03%20AM/Related%20Documents/CN.1103.2006-Eng.pdf>.

or pursuant to Article 1(1)(b), whenever the rules of private international law point to Macedonian law as applicable, irrespective of the date on which the contract was concluded. However, we note that such outcome does not fit neatly with the idea expressed in Article 100 of the CISG in all cases, especially if the notification is regarded to be of the constitutive character.

The tension between Article 100 of the CISG and the potentially constitutive nature of notification would be particularly strong in the cases where Macedonian law was explicitly chosen as the proper law of the contract and the contract was concluded after the Macedonian declaration of independence but prior to Macedonian notification of succession to the CISG. It could be argued that, by opting for Macedonian law in such a case, the parties did not intend to be bound by the CISG since it did not form part of the Macedonian law at the time of contract conclusion. The CISG has a built-in mechanism to protect parties' legitimate expectations. One is contained in Article 100(2), which insulates the parties from subsequent CISG incorporation into national law(s). Without such provision, parties who contract after the CISG enters into force in the relevant jurisdiction(s) would be given greater freedom. They could always exclude application of the CISG via Article 6, while the parties who contracted before CISG entry into force would be deprived of such opportunity. Consequently, there is ambiguity surrounding successions and the status of membership of Macedonia to the CISG (after all, Macedonia was not listed among contracting states of the CISG at the UNCITRAL web site for 15 years<sup>65</sup>). In particular, notifications of succession which, in effect, confirm that a state was bound by the CISG for the past decade and a half seem to run contrary to the spirit of Article 100 and the need for legal certainty. In that context, Article 100 would be powerless to protect the legitimate expectations of the parties. Therefore, in the light of these circumstances, it may be justified to interpret the parties' choice of Macedonian law in the contracts concluded between November 17, 1991 and November 22, 2006 as the choice of Macedonian internal law (LCT) and not the CISG.

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65. The controversies regarding legal character of notification of succession are also relevant with respect to the 1974 Convention on the Limitation Period in the International Sale of Goods. Former Yugoslavia acceded to this convention on Nov. 27, 1978. Yet, only those former Yugoslav republics who have filed notifications of succession are listed on the UNCITRAL web site as Contracting States. Neither Croatia nor FYR Macedonia, which are undisputedly successor states to the SFRY, are, at this moment, listed as Contracting States. See STATUS 1974—CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1974\\_Convention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974_Convention_status.html) (last visited Nov. 13, 2009).

Since 14 percent of the cases we analyzed involved a Macedonian party, this issue is not purely academic even for the FTCA practice, as one can reasonably expect more disputes between Serbian and Macedonian parties to be filed.<sup>66</sup> Given that the court decisions are subject to appeal, *inter alia*, on the questions of law, one is less likely to expect court decisions where considerations of legitimate expectations would trump strictly technical application of the Macedonian law. However, given that arbitral tribunals receive no scrutiny on the merits, protection of parties' legitimate expectations might take priority before the FTCA tribunals in the years to come.

### 2.5.) *Failure to apply the CISG where it was applicable*

Overview of the FTCA case-law has shown that there were generally two groups of cases where the CISG should have been applied, but the arbitrators failed to do so. The first type of situation is where the facts of the case clearly pointed to the application of the CISG, such as where there is a contract for international sale of goods, both parties come from contracting states, and the issue at hand was covered by the CISG, but arbitrators applied domestic provisions of applicable laws instead.<sup>67</sup> The second group of cases deals with situations where it is not clear whether arbitrators resorted to the CISG or to some other rules. In one case, the sole arbitrator simply determined Serbian law to be applicable and later failed to disclose which particular provisions of Serbian law he applied to resolve the dispute, Serbian LCT or the CISG.<sup>68</sup> In another case, the sole arbitrator in a dispute between a Bosnian and a Serbian company noted that both countries have identical *laws* regulating contracts. It was not possible to discern whether he had in mind identical provisions of respective domestic laws, both of them emanating from the 1978 Yugoslav

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66. *See supra* Part II.2.4 (the significance of this issue is limited to disputes arising out of the contracts concluded prior to Nov. 22, 2006).

67. FTCA, Award No. T-10/07, Dec. 3, 2008; FTCA, Award No. T-10/06, Nov. 27, 2006; FTCA, Award No. T-07/05, May 5, 2006; FTCA, Award No. T-11/05–12, Dec. 16, 2005; FTCA, Award No. T-03/04, Nov. 4, 2005; FTCA, Award No. T-38/03, Sept. 23, 2004; FTCA, Award No. T-21/03, May 18, 2004; FTCA, Award No. T-13/01, Sept. 12, 2002; FTCA, Award No. T-04/99, July 8, 2002; FTCA, Award No. T-07-01, Feb. 21, 2002; FTCA, Award No. T-01/00, Dec. 7, 2000; FTCA, Award No. T-17/98, Dec. 7, 2000.

68. *See* FTCA, Award No. T-03/03, Jan. 30, 2004; FTCA, Award No. T-05/02, Apr. 24, 2003. The latter award invokes Serbian LCT only with respect to the right to claim interest. However, we do not consider this as a sufficiently clear indication on whether the sole arbitrator applied CISG or domestic Serbian provisions to the other aspects of the contractual relationship. This hesitation stems from the fact that there were quite a few decisions where, although the CISG has been held applicable, domestic provisions were applied with respect to awarding interest. *See supra* Part XI.

LCT, or the identical provisions on international sales, since both countries are parties to the CISG.<sup>69</sup>

### 3. Meaning of “Contract for Sale”

Arbitration practice regularly encounters contracts which elude clear-cut classification. The CISG is, in accordance with Article 1(1), applicable to the contracts for *sale*. The definition of a contract for sale is not contained in the CISG but it can be derived from the list of essential obligations of the parties to the contract stipulated in Articles 30 and 53 of the CISG. Article 3 further clarifies that the CISG covers “contracts for the supply of goods to be manufactured or produced, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.” Also, if the contract is of a hybrid sales-labor/services nature, the CISG is applicable if the labor/services component is not the preponderant part of the obligations of the party who furnishes the goods.

There were several FTCA decisions in which the mixed nature of the underlying contract had to be examined in order to determine applicability of the CISG. For example, CISG application was correctly rejected in a case between Serbian and Italian companies in the award number T-22/06 of October 22, 2007. Although the underlying contract was labeled a “Contract of Sale,” the tribunal examined the exact nature of the contract in accordance with principle of *falsa nominatio non nocet* and found that the buyer had to supply the seller with almost all materials needed for production.<sup>70</sup>

The majority of FTCA cases that posed the question of characterization dealt with distribution contracts.<sup>71</sup> For example, in a dispute over a contract concluded between Macedonian and Serbian companies, the sole arbitrator determined that the CISG was not applicable, although the parties had labeled the contract as a contract of sale.<sup>72</sup> Examination of the parties’ rights and obligations revealed that they had actually concluded a distribution contract.<sup>73</sup>

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69. FTCA, Award No. T-17/05, Nov. 1, 2006. There are at least two more cases where one cannot discern which law has actually been applied. *See* FTCA, Award No. T-08/01, Mar. 17, 2003; FTCA, Award No. T-23/01, Sept. 19, 2002.

70. *See also* FTCA, Award No. T-19/03, June 25, 2004.

71. For the purposes of this paper we refer to the term “distribution contracts” as used in the ICC, The ICC Model Distributorship Contract, Sole Importer-Distributor, ICC Publication No. 646 (2d ed. 2002).

72. FTCA, Award No. T-25/06, Nov. 13, 2007.

73. The contract provided, *inter alia*, that the Respondent undertook to resell the goods only within certain areas of FYR Macedonia and the Claimant could rescind the contract if the reselling was directed to other areas as well. Also, distributor (respondent) was to monitor sales on relevant markets and inform

The reasoning contained observation that the CISG is not applicable to contracts of distribution, except in the cases where the subject matter of the dispute are individual shipments within the larger framework of the distribution contract. This reasoning was supported by reference to foreign court and arbitral decisions<sup>74</sup> and later confirmed in award number T-8/08 of January 28, 2009. This case arose from a dispute under a “Sales and Distribution Contract” concluded between a Serbian supplier and Albanian distributor. The facts of the case led to application of the CISG, since the merits of the case revolved around an unpaid shipment of drugs that was made pursuant to the sales and distribution contract. Relying on both FTCA practice and foreign case law, the sole arbitrator held that the “CISG is applicable . . . to individual sales transactions concluded within the framework of the distribution contract and not to the distribution contract as a whole.”

Finally, one FTCA decision addressed the issue of whether a contract of leasing might fall within the scope of the CISG.<sup>75</sup> Leasing contracts, as a rule, are not covered by the CISG.<sup>76</sup> However, there might be instances where the analyses of the contract provisions warrant application of the CISG.<sup>77</sup> In this particular FTCA case, the sole arbitrator had found that the preconditions for CISG application were met. The dispute between a Swiss company and a Serbian company arose out of a “Leasing Contract,” whereby the Swiss company was to transport and install a machine, while the Serbian company was to pay half of the contract price in advance, and the remaining half during the five-year contract period. Once the last installment was paid, the machine would become the property of the buyer. Although the claimant argued that this was a lease, the sole arbitrator found that the contract was actually an installment sale coupled with a *pactum reservati dominii* clause and based his conclusion primarily on the fact that half of the price was paid in advance and that the property would be transferred at the very moment the last installment

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the seller-supplier (claimant) about the figures. *Id.*

74. CLOUT Case No. 231 [Bundesgerichtshof (Federal Supreme Court), July 23, 1997], available at <http://cisgw3.law.pace.edu/cases/970723g1.html>; CLOUT Case No. 169 [Oberlandesgericht Dusseldorf (Provincial Court of Appeal), July 11, 1996], available at <http://cisgw3.law.pace.edu/cases/960711g1.html>; CLOUT Case No. 126 [Fovarosi Birosg Budapest (Metropolitan Court), Mar. 19, 1996], available at <http://cisgw3.law.pace.edu/cases/960319h1.html>.

75. FTCA, Award No. T-04/05 (July 15, 2008).

76. Peter Schlechtriem, *Uniform Sales Law—The Experience with Uniform Sales Laws in the Federal Republic of Germany*, JURIDISK TIDSKRIFT 9 (1991), available at <http://www.cisg.law.pace.edu/cisg/biblio/schlech2.html>.

77. See Schlechtriem, *Article 1*, in CISG COMMENTARY, *supra* note 20, at 27; PETER HUBER & ALASTAIR MULLIS, THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS 48 (2007) [hereinafter CISG TEXTBOOK].

would be paid, i.e. that financing does not constitute a preponderant part of seller's obligations. Invoking the need to promote uniformity in application, decision referred to a similar treatment of a contract labeled as leasing in one Australian case.<sup>78</sup>

### III. INTERPRETATION OF THE CISG

Determining that the application of the CISG is warranted on the basis of the facts of the case does not in itself guarantee correct application of the CISG. Rather, the correct application of the CISG will often depend on the proper understanding of the operation of the provisions on interpretation of the CISG, found in Article 7.

#### 1. *Internationality*

Article 7 of the CISG requires reading the CISG through an international lens even when expressions employed by the CISG are textually the same as expressions which have a specific meaning within a particular legal system. The need to interpret the CISG in an autonomous manner has been repeatedly confirmed by doctrine<sup>79</sup> and case law.<sup>80</sup> Hence, invoking provisions of domestic law when dealing with issues governed by the CISG is completely erroneous. Unfortunately, Serbian arbitrators have on many occasions been

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78. *Roder Zelt- und Hallenkonstruktionen GmbH v. Rosedown Park Pty Ltd.* (1995), 57 F.C.R. 216 (Austl.).

79. See Michael G. Bridge, *The Bifocal World of International Sales: Vienna and Non-Vienna*, in *MAKING COMMERCIAL LAW: ESSAYS IN HONOUR OF ROY GOODE* 277, 288 (Ross Cranston ed., 1997); Franco Ferrari, *Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the CISG's Autonomous Interpretation by Courts*, in *SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES, Festschrift for Albert H. Kritzer on the Occasion of His Eightieth Birthday* 134, 139–46 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008); John Honnold, *The Sales Convention in Action—Uniform International Words: Uniform Application?*, 8 *J.L. & COM.* 207, 208 (1988); Djakhongir Saidov, *Cases on CISG Decided in the Russian Federation*, 7 *VINDOBONA J. INT'L COM. L. & ARB.* 1, 14 (2003), available at <http://www.cisg.law.pace.edu/cisg/biblio/saidov1.html>.

80. See *Am. Mint L.L.C. v. Gosoftware, Inc.*, No. 05-CV-650, 2006 WL 42090 (M.D. Pa. 2006); *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH*, No. 00-CV-9344, 2002 WL 465312 (S.D.N.Y. 2002); CLOUT Case No. 230 [Oberlandesgericht Karlsruhe (Court of Appeal), Germany, June 25, 1997], available at <http://cisgw3.law.pace.edu/cisg/text/draft/970625case.html>; CLOUT Case No. 171 [Bundesgerichtshof (Supreme Court), Germany, Apr. 3, 1996], available at <http://cisgw3.law.pace.edu/cases/960403g1.html>; CLOUT Case No. 84 [Oberlandesgericht Frankfurt am Main (Court of Appeals), Germany, Apr. 10, 1994], available at <http://cisgw3.law.pace.edu/cases/940420g1.html>; CLOUT Case No. 201 [Richteramt Laufen (District Court), Switzerland, May 7, 1993], available at <http://cisgw3.law.pace.edu/cases/930507s1.html>.

inclined to cite in support of their decisions not only the provisions of the CISG, but also the provisions of the relevant national law, predominantly Serbian LCT.<sup>81</sup> Although this kind of practice is reported in other CISG jurisdictions,<sup>82</sup> the CISG requires its abolishment.

## 2. Uniform Application

Even the most proper determination of the need to apply the CISG would be fruitless if the resulting application would deviate from the universal character of the CISG. A parochial approach to decision making would in fact fragment the message of the CISG and erode its widespread adoption.<sup>83</sup> Article 7(1) of the CISG therefore represents a tool designed to ensure uniform application of the CISG and foster legal certainty for parties involved in sales transactions. Practice of foreign courts and arbitral tribunals is, therefore, a very important yardstick against which one may gauge the correctness of his or her own approach and the extent to which available options deviate from the current point of consensus.<sup>84</sup>

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81. See, e.g., FTCA, Award No. T-08/06, Oct. 1, 2008 (basing the award of interest on art. 78 CISG and art. 278 LCT); FTCA, Award No. T-19/07, June 30, 2008; FTCA, Award No. T-24/06, Dec. 1, 2007; FTCA, Award No. T-22/05, Oct. 30, 2006 (basing the award of damages on art. 74 CISG and 275(2) LCT); FTCA, Award No. T-18/04, May 24, 2005; FTCA, Award No. T-19/99, Nov. 22, 2000.

82. See *Schmitz-Werke GmbH & Co. v. Rockland Indus., Inc.*, 37 Fed. Appx. 687 (4th Cir. 2003); *Delchi Carrier, SpA v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995); Saidov, *supra* note 79, at 14.

83. See CAMILLA B. ANDERSEN, UNIFORM APPLICATION OF THE INTERNATIONAL SALES LAW. UNDERSTANDING UNIFORMITY, THE GLOBAL JURISCONSULTORIUM AND EXAMINATION AND NOTIFICATION PROVISIONS OF THE CISG 47 (2007); Michael G. Bridge, *A Commentary on Articles 1–13 and 78*, in UNCITRAL DIGEST, *supra* note 32, at 235, 250; P. Cvetković, *Tumačenje ugovora o međunarodnoj prodaji robe: uloga načela savesnosti i poštenja i problem "međunarodne" interpretacije [Interpretation of International Sales Contracts: The Role of the Good Faith Principle and the Problem of "International" Interpretation]*, PRAVO I PRIVREDA Nos. 5-8/01, 966, 970–73 (2001); Ferrari, *supra* note 79, at 149–50; Peter Schlechtriem, *Article 7*, in CISG COMMENTARY, *supra* note 20, at 96–102; Harry Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187 (1998); Honnold, *supra* note 79, at 208; V. Susanne Cook, Note, *The Need For Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 50 U. PITT. L. REV. 197 (1988).

84. For the most elaborate analyses of the foreign case law, see Trib. Vigevano [Ordinary Court of First Instance], July 12, 2000 n.405, Giur. It. 2001, II, 280 *et seq.* (Italy), available at <http://cisgw3.law.pace.edu/cases/000712i3.html> (citing forty foreign decisions regarding Article 7(1) of the CISG). See also *Am. Mint L.L.C. v. Gosoftware, Inc.*, No. 05-CV-650, 2006 WL 42090 (M.D. Pa. 2006); *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH*, No. 00-CV-9344, 2002 WL 465312 (S.D.N.Y. 2002); Trib. Padova [Ordinary Court of First Instance], Feb. 25, 2004 n.40552, Giur. It. 2004, II, 1405–08 (Italy), available at <http://cisgw3.law.pace.edu/cases/040225i3.html> (citing forty foreign decisions regarding Article 7(1) of the CISG); Trib. Rimini [Ordinary Court of First Instance], Nov. 11,

The practice of the FTCA contains several decisions in which reference has been made to foreign court and arbitral practice. In award number T-25/06 of November 13, 2007, the sole arbitrator used decisions of Hungarian and German courts to support the position that the CISG is not applicable to the distribution contracts, but only to individual sales transactions concluded within the framework of the distribution contract.<sup>85</sup> This position was reaffirmed by award of January 28, 2009, invoking decisions from same jurisdictions on the same issue.

The latter award is an ample example of FTCA's adherence to the mandate of Article 7(1) by quoting a total of eight foreign decisions and arbitral awards. Besides the issue of CISG applicability to distribution contracts, the tribunal consulted foreign case law regarding the applicability of the CISG in a dispute involving a contract that contains a choice of law clause. Namely, although the contract at hand called for application of "the applicable regulations and laws of the Republic of Serbia," the sole arbitrator found that the CISG should be applied to the contract since it is an integral part of Serbian law.<sup>86</sup> This finding was said to be "in accordance with the foreign judicial and arbitral practice, which should be taken into consideration for the purpose of achieving uniform application of the CISG, pursuant to Article 7(1) of the CISG."<sup>87</sup> Specifically, the sole arbitrator noted that

[It] has generally been held that the choice of law of the Contracting State, absent explicit exclusion of the CISG or exercise of Article 95 reservation, means that the CISG will be applicable [OLG Köln February 22, 1994; ICC case 7754 (1995); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award of February 9, 2001].<sup>88</sup>

The sole arbitrator further consulted the foreign judicial and arbitral practice when deciding on the appropriate interest rate and noted that:

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2002 n.3095, *Giur. It.* 2003, I, 896 (Italy), *available at* <http://cisgw3.law.pace.edu/cases/021126i3.html> (citing thirty five foreign decisions regarding article 7(1) of the CISG).

85. Fovárosi Biróság Budapest [Hungary] [Metropolitan Court of Budapest], No. 12 G 75.558/1994/36, Mar. 19, 1996, *available at* <http://cisgw3.law.pace.edu/cases/960319h1.html> (Hungarian case referred to by arbitrator); Bundesgerichtshof [BGH] [Federal Supreme Court], No. VIII ZR 134/96, July 23, 1997 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/970723g2.html> (German case referred to by arbitrator; German case citations do not generally identify parties to proceedings); Oberlandesgericht Düsseldorf [OLG] [Provincial Court of Appeal], No. 6 U 152/95, Nov. 11, 1996 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/960711g1.html> (German case referred to by arbitrator).

86. FTCA, Award No. T-8/08, Jan. 28, 2009.

87. *Id.*

88. *Id.*

[S]ince the matter of interest rates is governed, but not settled by the CISG, there is no need to examine [Seller]'s request in the light of any national law, but rather examine whether it is within the checks provided in Article 7 of the CISG. Therefore, the proposed rate has to be determined in accordance with the principles underlying the CISG [CLOUT cases No. 93, SCH-4366 of June 15, 1994 and No. 94 SCH-4318 of June 15, 1994].<sup>89</sup>

In award number T-4/05 of July 15, 2008, the arbitrator referred to an Australian court decision when deciding on the effect of a *pactum reservati dominii* clause found in the disputed leasing contract to legal qualification of the said contract. In reaching the conclusion that the sale elements of the contract prevail, thus allowing for application of the CISG, the sole arbitrator noted that

All of this indicates that the elements of a contract of sale are dominant over elements akin to the characteristics of a contract of lease in this "Leasing Contract." This position is in accordance with foreign judicial practice, which should be taken into consideration for the purpose of achieving uniform application of the Convention, pursuant to Article 7(1) of the Convention. For example, the Australian Federal Court for South Western Australia . . .<sup>90</sup>

Another case, contained the correct assessment of *widely accepted comparative practice* related to the form of the notice of avoidance, i.e. that the notice of avoidance can be derived from filing of the claim in which avoidance is sought.<sup>91</sup> However, in this case, unlike the previously quoted cases, an explicit reference to particular foreign decisions was omitted. Instead, the tribunal only noted that comparative practice is to be consulted in accordance with Article 7(1) of the CISG.<sup>92</sup>

### 3. Good Faith

Article 7(1) imposes an additional obligation on the tribunals and courts when interpreting the CISG—due regard is to be made to the need to promote observance of good faith in international trade. The correct application of this mandate of the CISG has been highly disputed in the legal doctrine, i.e. whether it solely relates to the interpretation of the CISG or it imposes an additional obligation on the parties to act in accordance with this principle in

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89. *Id.*

90. FTCA, Award No. T-4/05, July 15, 2008.

91. FTCA, Award No. T-08/06, Oct. 1, 2007.

92. *Id.*

the performance of the sales contract.<sup>93</sup> The FTCA has, in at least one of its decisions, adhered to the latter view. In award number T-9/07 of January 23, 2008, the tribunal examined the conduct of the respondent during the entire course of the transaction and noted that respondent, as a seller

[H]as not acted in accordance with the good faith principle, which represents a cornerstone of entire corpus of modern legislature, especially the legislative instruments which the tribunal has identified as applicable rules in this case (CISG, Law on Contracts and Torts, UNIDROIT Principles on International Commercial Contracts and European Principles of Contract Law).<sup>94</sup>

#### 4. Gap-Filling

Article 7(2) of the CISG sets out a basic methodology for filling the gaps in the CISG. The first step is to determine whether the underlying issue falls within the *lacuna praeter legem*, issues to which the CISG applies but which it does not expressly resolve, or *lacuna intra legem*, issues not governed by the CISG.<sup>95</sup> If the gap is *intra legem*, the recourse is to be made to the law to which the private international law points.<sup>96</sup> However, if the gap is *praeter legem*, the CISG requires judges and arbitrators first to examine whether there

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93. See ĆIRIĆ & DJUROVIĆ, *supra* note 6, at 53; Disa Sim, *The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods*, in REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 19 (Michael Maggi ed., 2004); Troy Keily, *Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)*, 3 VINDOBONA J. INT'L COM. L. ARB. 15, 15–40 (1999); M. Milutinović, *Načelo savesnosti i poštenja—univerzalni princip međunarodne trgovine* [*The Good Faith Principle—A Universal Principle of International Trade*], PRAVNI ŽIVOT No. 10/2004, at 419–41; Paul J. Powers, *Defining the Undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods*, 18 J.L. & COM. 332 *passim* (1999); Benedict C. Sheehy, *Good Faith in the CISG: Interpretation Problems in Article 7* (Bepress Legal Series, Working Paper, 339, 2004).

94. See Bundesgerichtshof [BGH] [Federal Court of Justice], Oct. 31, 2001 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/011031g1.html> (holding that parties to the sales contract are to act in accordance with the good faith principle, i.e. that they have to cooperate with regard to the performance of the contract and exchange relevant information).

95. See Camilla Andersen, *General Principles of the CISG—Generally Impenetrable?*, in SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES, Festschrift for Albert H. Kritzer on the Occasion of His Eightieth Birthday 13 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008); Franco Ferrari, *Interpretation of the Convention and Gap-Filling: Article 7*, in UNCITRAL DIGEST, *supra* note 32, at 138, 157–71; Anthony J. McMahon, Note, *Differentiating Between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining “Governed by” in the Context of Article 7(2)*, 44 COLUM. J. TRANSNAT'L L. 992 *passim* (2006).

96. CISG arts. 4–5 list some examples of matters not governed by the CISG.

are general principles underlying the CISG that could resolve the issue.<sup>97</sup> The resort to domestic law via means of private international law is to be regarded as *ultima ratio*.

The FTCA tribunals have rarely attempted to seek for a solution of an issue governed but not settled in the CISG within the framework of CISG general principles. As a matter of fact, it can be stated that they have exercised hastiness in invoking the domestic law provisions whenever an issue seemed not to be expressly regulated by the CISG. This has been particularly pronounced not only with respect to the issue of interest rates under the CISG,<sup>98</sup> but also with respect to the form of the notice of non-conformity under Article 39(1).<sup>99</sup>

We have noted only four FTCA awards where express reference has been made to the methodology suggested by Article 7(2) of the CISG, three of which dealt with the issue of determination of interest rates. Award number T-2/00 of December 9, 2002 correctly starts by listing several general principles on which the CISG is based—*bona fides*, party autonomy, the foreseeability rule, principle of cooperation, etc. However, the arbitrator then concluded that these principles cannot serve as the basis for calculating interest and invoked relevant provisions of Serbian law, which is the law applicable by virtue of the rules of private international law. Award number T-23/06 of September 15, 2008, on the other hand, makes clear reference that the issue of interest rates for late payment should be determined on the basis of the CISG general principles. The wording of that award suggests that the arbitrator had the principle of full compensation in mind when determining applicable interest rates. In a more recent award the sole arbitrator noted that “the matter of interest rate is governed but not settled under the CISG” and explicitly resolved the matter by invoking the principle of full compensation, as well as the principle of prohibiting overcompensation of the creditor, which resulted in application of “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.”<sup>100</sup>

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97. CISG art. 7(2). See also Ulrich Magnus, *Die allgemeinen Grundsätze im UN-Kaufrecht*, 59 RABELS ZEITSCHRIFT 492–93 (1995) (containing the most extensive list of CISG general principles), translated at <http://www.cisg.law.pace.edu/cisg/text/magnus.html>.

98. See *infra* Part XI.

99. See *infra* Part VII.2.1.

100. FTCA, Award No. T-08/08, Jan. 28, 2009, available at <http://cisgw3.law.pace.edu/cases/090128sb.html>.

Article 7(2) methodology was correctly avoided in award number T-23/06 of September 15, 2008 where it was stated that the issue of assignment of obligation to pay the price was not governed by the CISG and that it cannot be resolved by means of applying the general principles on which the CISG is based. Instead, the arbitrator applied the substantive law of the seller for resolution of this issue, as required by the rules of private international law.<sup>101</sup> The arbitrator in this case also noted that the CISG does not provide for a rule on the nature of liability for non-payment of price where there are several persons on the buyer's side, i.e. whether such liability is joint or severable or joint and severable. Hence, recourse to the domestic law was justified.

#### IV. INTERPRETATION OF THE PARTIES' STATEMENTS AND CONDUCT

Given that the provisions of the CISG are only default rules and that party autonomy reigns supreme, finding out just what parties have *actually* agreed upon is of crucial importance. According to Article 8, there are two ways to carry out this examination: (1) by establishing the true intent of one party where the other party knew, or could not have been unaware, of such intention; and (2) absent indications of intent, by interpreting statements and conduct in the way a reasonable person of the same kind would interpret them under the same circumstances.<sup>102</sup> This standard of interpretation is of particular importance for those who have to apply the CISG in practice.

In award number T-8/06 of October 1, 2007, the tribunal referred to Article 8 when interpreting correspondence of the parties subsequent to contract conclusion and found that seller had no intention to perform any of the contracted deliveries, and that it was obvious that all subsequent attempts of the buyer to ensure even a belated performance have been in vain. A similar approach was taken in the award number T-15/06 of January 28, 2008. In that

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101. This decision is in accord with foreign case law. *See generally* Bezirksgericht Arbon (District Court), Switzerland, Dec. 9, 1994 (CISG-online Case 376), *available at* <http://cisgw3.law.pace.edu/cases/941209s1.html>; CLOUT Case No. 132 [Oberlandesgericht Hamm (Appellate Court), Germany, Feb. 8, 1995], *available at* <http://cisgw3.law.pace.edu/cases/950208g3.html>; CLOUT Case No. 269 [Bundesgerichtshof (Federal Supreme Court), Germany, Feb. 12, 1998], *available at* <http://cisgw3.law.pace.edu/cases/980212g1.html>; Arrondissementsrechtbank Arnhem (District Court), Netherlands, Apr. 8, 1999 (CISG-online Case 1339), *available at* <http://cisgw3.law.pace.edu/cases/990408n1.html>; Oberlandesgericht Hamburg (Appellate Court), Germany, Jan. 25, 2008 (CISG-online Case 1681), *available at* <http://cisgw3.law.pace.edu/cases/080125g1.html>.

102. *See* Jelena Perović, *Tumačenje ugovora prema Konvenciji UN o međunarodnoj prodaji robe* [Interpretation of Contracts Under the CISG], PRAVO I PRIVREDA, 864, 864–74 (2001); *see also* Vladimir Stojiljković, *Tumačenje ugovora u međunarodnoj trgovini* [Interpretation of Contracts in the International Trade], PRAVO I PRIVREDA 967, 967–73 (2000).

case, the buyer objected that the delivery was not in conformity with the provisions of the contract and that he was not able to take over the goods. This objection was rejected although the goods were delivered to the Subotica (Serbia) warehouse of company X, when the contract actually called for *ex works* Szeged (Hungary) delivery. The tribunal noted that the buyer was aware that the goods were delivered to the warehouse of company X and that no objection was raised concerning such delivery. The buyer could have had actually taken the goods over, as all the accompanying documents had been duly made to his name. Moreover, the buyer already undertook certain steps in order to secure resale (re-export) of delivered goods. Therefore, on the basis of the above mentioned elements, the tribunal concluded that the only reasonable interpretation of the buyer's statements and conduct is that buyer consented to Subotica delivery and undertook what amounted to implied acceptance of the goods in Subotica.

Another example of operation of Article 8 in the FTCA practice can be found in the award number T-18/01 of November 27, 2002. The buyer had resold the non-conforming, delivered goods to a third party although the seller objected to such an action and expressed, upon buyer's notice of non-conformity, his willingness to take the goods back and reimburse buyer's storage cost. Applying Article 8(2), the sole arbitrator concluded that the buyer's action amounted to implied acceptance of the goods. Arbitrator noted that buyer's indication that "a deal has been reached to sell goods at the best price" was in direct contravention with the seller's express instructions to either return the goods or pay them in full against the invoice. As for the buyer's contention that the parties had not been in contractual relationship at all, the arbitrator noted that such an assertion contravenes the entire behavior of the buyer, which included taking the goods over, allegedly objecting to their quality, reselling the goods, and partially paying against the seller's invoice. The arbitrator concluded that the entirety of such behavior could not be ascribed to a person who has not entered a contractual relationship with the seller.<sup>103</sup>

Finally, interpretation of the party's statements and conduct in the light of Article 8 played an essential role in award number T-4/05 of 15 July 2008 regarding the decision on the appropriate date of contract avoidance. Despite the fact that claimant-seller requested termination of the contract in its claim submitted in March 2005, subsequent negotiations on contract performance were deemed as evidence of seller's (claimant's) willingness to keep contract

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103. FTCA, Award No. T-18/01, Nov. 27, 2002.

in force.<sup>104</sup> This situation changed abruptly once the seller activated court interim measure aimed at repossession of the delivered equipment, which resulted in buyer's dispossession on April 2007. The sole arbitrator concluded that activation of the interim measure amounted to effective notice of avoidance pursuant to Article 26 of the CISG and that, consequently, the contract was effectively avoided at the date of the activation.<sup>105</sup>

#### V. MODIFICATION OF CONTRACT AND FORM REQUIREMENTS

Article 29 of the CISG provides that modification of the contract is not subject to any form requirements.<sup>106</sup> However, the second paragraph of the same article provides that a contract containing a no oral modification clause may not be modified orally, although a party may be precluded by his conduct from relying on such clause. Unfortunately, this basic principle of contract modification under the CISG has been neglected in one FTCA award where the initial contract was concluded in writing.

Namely, in award number T-2/00 of December 9, 2002, the disputed contract was concluded in a written form and each page of the contract was signed and stamped by the parties. During the arbitral proceedings, one party alleged that parties subsequently amended the contract orally, and submitted as evidence a telefax message in which the other party confirmed that oral modification took place. A witness invited by the other party challenged the authenticity of the telefax message and stated that it would be rather unusual to amend important provisions of an international commercial contract by telefax. Although Article 29 provides as a general rule that oral modifications are permitted, the sole arbitrator held that:

When the parties . . . have followed rather strict requirements of form when concluding the contract, signing and stamping each page of the document, it is clear that the function of such form was to turn contract into a complete piece of evidence. They wanted that only the pages certified in such manner produce legal effect, i.e. that the will of the parties so evidenced cannot be challenged later.<sup>107</sup>

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104. FTCA, Award No. T-4/05, July 15, 2008.

105. *Id.*

106. This is in line with the no-form requirement of Article 11 of the CISG. *See* CISG art. 11 (stating “[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses”).

107. FTCA, Award No. T-2/00, Dec. 9, 2002.

This conclusion mirrors the prevailing view in interpretation of the Serbian Law on Contracts and Torts by Serbian courts and is clearly erroneous in the case at hand since it lacks support in both text of the CISG and relevant trade usages.

## VI. FUNDAMENTAL BREACH

Fundamental breach represents a pivotal concept in the CISG remedial structure as it represents both a basis for avoidance of contract<sup>108</sup> and a precondition for the exercise of the buyer's right to require delivery of substitute goods.<sup>109</sup> Despite the utmost importance of this legal institute, the current CISG case law and scholarly commentaries have not yet succeeded in providing sufficiently clear and foreseeable interpretation criteria.<sup>110</sup>

The majority of national laws, including the Serbian LCT, are not familiar with the concept of fundamental breach.<sup>111</sup> Consequently, the unfamiliarity of Serbian lawyers with its basic requirements is not surprising. Hence, FTCA awards in which the existence of fundamental breach was clearly established and analyzed are extremely rare. As a matter of fact, there are only five cases that we noted that deal expressly with this issue.

In award number T-17/02 of October 2, 2006, the sole arbitrator found that the breach was clearly fundamental. In this case, claimant sold artificial fishing baits to respondent pursuant to their agreement on business cooperation: during the year 2000 only 45,816 baits were taken over and paid out of the contracted quantity of 300,000. This amounted to roughly 15% of

108. See CISG arts. 49(1)(a), 51(2), 64(1)(a), 72(1), 73.

109. CISG art. 46(2).

110. See Robert Koch, *The Concept of Fundamental Breach of Contract Under the United Nations Convention on Contracts for the International Sale of Goods*, REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 177, 177–354 (Pace Int'l L. Rev. ed., 1999), available at <http://www.cisg.law.pace.edu/cisg/biblio/koch.html>; Peter Schlechtriem, *Article 25*, in CISG COMMENTARY, *supra* note 20, at 281–98; PEROVIĆ, *supra* note 6; STOJILJKOVIĆ, *supra* note 6, at 156–57; ČIRIĆ & DJUROVIĆ, *supra* note 6, at 82–83; M. Milutinović, *Bitna povreda ugovora prema odredbama Bečke konvencije u teoriji i praksi* [*Fundamental Breach of Contract Under the CISG—in Theory and Practice*], PRAVO I PRIVREDA Nos. 5-8/03, 367, 367–80 (2003); A. Čirić & P. Cvetković, *Bitna povreda ugovora u opstim izvorima međunarodnog privrednog ugovornog prava* [*Fundamental Breach of Contract in General Sources of the Law of International Commercial Transactions*] AKTUELNA PITANJA GRADJANSKE KODIFIKACIJE, ZBORNIK RADOVA, PRAVNI FAKULTET U NIŠU 233–52 (2008).

111. Although Serbian Draft Law on Contracts and Torts, prepared by Prof. M. Konstantinović, did incorporate this institute in Art. 95, it was not kept in the final redaction of this law enacted in 1978 and is still in force with minor changes in majority of former Yugoslav republics. The wording of Art. 95(1) of the Draft LCT corresponds entirely to the wording of Art. 10 of the 1964 Uniform Law of International Sales. There is no similar provision in the pertinent Serbian Law on Contracts and Torts.

the contracted figure. In the next year, orders were even slower, falling to less than 2% of the agreed volume. Hence, the arbitrator concluded that the breach was fundamental and that the claimant was entitled to avoid the contract. Although the contract at hand could have called for application of Serbian LCT instead of the CISG as the disputed issue regarded the avoidance of the distributorship contract as a whole, and not any of the installments made under such contract, the case is illustrative with respect to the proportionality and the seriousness of the breach which makes it fundamental in the eyes of the FTCA arbitrators.

In another case, however, the tribunal did not find the breach to be fundamental although the goods were delivered to another place, not to the place designated in the contract, since the buyer was aware of this and was fully capable to take possession of the goods.<sup>112</sup> Hence, the detriment suffered by the buyer was not deemed substantial.

Award number T-4/01 of May 10, 2002 dealt with a dispute arising out of a contract for sale of zinc coated tin. In accordance with the contract, the buyer made the advance payment, but the seller failed to deliver the goods in the quantity equal to the advance payment, thus keeping a part of the advance payment without legal basis. Once it was clear that the seller would not perform the contract in its entirety, the buyer requested the restitution of the advance payment in the amount corresponding to the undelivered quantity of the goods, with domiciliary interest. The sole arbitrator granted the request on the basis that a delivery of goods in a quantity less than contracted for and paid for in advance amounted to fundamental breach of contract. The arbitrator relied on Article 49 of the CISG when granting buyer's request without reference to Article 51, although it was clear from the facts of the case and the holding of the award that the buyer's right to avoid the contract was triggered only with respect to the undelivered part of the goods. In award number T-8/06 of October 1, 2007, the final refusal to deliver the goods was also deemed to constitute a fundamental breach.

In award T-13/05 of January 5, 2007, the sole arbitrator found that the seller's breach of the contract was not fundamental since the impurities in the goods, raspberries, were present in only 18% of the delivered raspberries. Consequently, claimant's request for substitute delivery was rejected. In addition, written evidence and oral testimony was not conclusive on whether the claimant had really made a request for substitute delivery.<sup>113</sup>

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112. FTCA, Award No. T-15/06, Jan. 28, 2008.

113. In this case, Ms. X noted, on behalf of the buyer, that the quality of the delivered raspberries was

## VII. NON-CONFORMITY OF THE GOODS

1. *The Concept of Non-Conformity*

Seller's obligation to deliver conforming goods and conditions for buyer's exercise of the rights in the case of non-conformity are embodied in Articles 35-44 of the CISG. These concepts are similar, although not identical to the provisions of Serbian LCT.<sup>114</sup> The proper understanding of these provisions of the CISG is crucial given that more than 50 percent of all cases that have been litigated and decided under the CISG have dealt with the issue of non-conforming goods.<sup>115</sup>

With respect to the definition of non-conformity there have been no controversies in the FTCA's jurisprudence. Discrepancies in terms of both quality and quantity of the delivered goods have regularly been found to satisfy the non-conformity test. For example, delivery of goods of non-Yugoslav origin, where such origin was agreed upon, constituted non-conforming delivery.<sup>116</sup> Also, the delivery of leather of II, III and IV quality was regarded as non-conforming where the contract required delivery of I, II and III class of leather.<sup>117</sup> The same principle was applied with respect to delivery of non-conforming documents. For example, in award number T-9/07 of January 23, 2009, the tribunal correctly noted that the seller, under the CISG, apart from the goods "must provide the buyer [here claimant] with the specified documents in regard to the goods." Hence the delivery of non-conforming document constituted seller's breach of contract.

In award number T-10/04 of November 6, 2005, a German buyer invoked against a Serbian seller the non-conformity of goods with respect to the labels on the packaging of the bottles of mineral water. Namely, under the regulations of the country of import, Germany, all labels on the bottles of

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not adequate. However, she has not requested seller to do anything particular with respect to that delivery. Instead, she requested future deliveries to be of better quality. In addition, Y, who has performed quality control, noted that the goods are not of the contracted quality (class A). Nevertheless, the goods were accepted and cleared for unloading. FTCA, Award T-13/05, Jan. 5, 2007.

114. J. Perović, *Nesaobraznost robe kao osnov neizvršenja ugovora o prodaji* [*Non-Conformity of the Goods as Basis of Non-Performance of the Sales Contract*], PRAVO I PRIVREDA Nos. 5-8/03, 332-43.

115. Ingeborg Schwenzer, *Buyer's Remedies in the Case of Non-Conforming Goods: Some Problems in a Core Area of the CISG*, 101 AM. SOC'Y INT'L L. PROC. 416, 416 (2007).

116. FTCA, Award No. T-9/07, Jan. 23, 2008, available at <http://cisgw3.law.pace.edu/cases/080123sb.html>.

117. *Id.*

mineral water had to contain printed information about the company of the importer and distributor, accompanied with other prescribed data. Instead of providing data about the buyer's company, the labels on the delivered bottles contained information about another German company to whom the seller has also exported goods. As a consequence, the buyer was prevented from placing the goods in circulation. The arbitrator correctly noted that such delivery was non-conforming, given that seller was aware of German labeling requirements as it already traded with companies from Germany and complied to said requirements with respect to his other business partners.<sup>118</sup> However, the buyer was prevented from exercising any of his rights under the Convention since the notice of non-conformity was not duly made, it was addressed to the representative of the Serbian Chamber of Commerce instead of being addressed to the seller!

## *2. Notice of Non-Conformity*

Exercise of buyer's rights in the case of non-conforming goods proved to be one of the more interesting issues in the reviewed FTCA case law. Under the CISG, the buyer may invoke non-conformity of the goods against the seller only if he examined the goods as soon as practicable and notified the seller on non-conformity within a reasonable time, specifying the nature of the lack of conformity.<sup>119</sup> Given that only the correct exercise of these formalities gives

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118. This finding is in line with the established principles on when the conformity to public law requirements of the buyer's country is required. *See* CLOUT Case No. 123 [Bundesgerichtshof, Germany, May 8, 1995]; CLOUT Case No. 774 [Bundesgerichtshof, Germany, Mar. 2, 2005]; CLOUT Case No. 426 [Oberster Gerichtshof, Austria, Apr. 13, 2000].

119. This is prescribed by Arts. 38 and 39 CISG, but could be overridden to some extent if the requirements of Arts. 40 or 44 are met. In any event, the examination of the goods is not, per se, relevant for the buyer's exercise of remedies for non-conformity. However, it is an important step to be taken by the buyer within the prescribed time period since it may impact the calculation of the "reasonable time" for giving notice of non-conformity under article 39. Similar, although not identical, obligations are prescribed in the Serbian LCT Arts. 481, 484. However, these two texts differ in respect to the required time-frame within which the notice of non-conformity has to be given, and form and contents of such notice. Under the LCT the buyer is obliged to inspect the goods as soon as possible and to notify the seller of the defects without delay (in a non-commercial setting within 8 days). In any event, the buyer loses the right to rely on the lack of conformity if he does not give notice within 6 months after delivery of the goods, unless a longer time period has been agreed upon by the parties. Regarding the form of such notice, although the provisions of Serbian LCT Art. 484(1) do not contain an explicit reference as to the form of notice of non-conformity, and the law itself is generally based on the principle of consensualism, interpretation of this provision in the commercial setting has been such as to require written (reliable) form of notice. This view has been affected by the 1954 General Usages for Turnover of Goods which in Art. 152 explicitly require notice of non-conformity to be sent in a "reliable way" and any notice given over the telephone, telegram or teleprinter to be immediately confirmed by means of registered mail. This is further supported by the fact

rise to buyer's unrestricted use of remedies in the case of non-conforming delivery, the correct interpretation of Article 39(1) of the CISG is essential for buyer's protection in such case.

### 2.1.) *Form of notice*

The CISG does not explicitly prescribe formal requirements for the notice of non-conformity. Pursuant to Article 7(2) and the general principle of consensualism on which the CISG is based,<sup>120</sup> one can easily discern that no particular form is required for such notice and that oral notice would be sufficient to meet the conditions laid out in Article 39.<sup>121</sup> Proving that the oral notification has actually been made is, of course, another matter.

In the Serbian context, however, there is a rather unusual potential obstacle to a correct application of Article 39(1), namely the Yugoslav (Serbo-Croatian) official translation of the CISG is not precise enough. This was reflected in FTCA award number T-09/01 of February 23, 2004. Faced with the question of validity of notice of non-conformity, the tribunal held that the:

[CISG] does not prescribe form requirements explicitly. However, given that [the notice] has to be sent and [given] its contents, written form is the only logical solution. It is a standard practice in foreign trade transactions that objections are sent in writing and that any oral objection has to be immediately evidenced in writing. Since this matter is not settled by the CISG, Serbian Law on Contracts and Torts should fill the gaps, given that the provisions of the Private International Law Act direct to its application. LCT states that notice of non-conformity containing description of the defect has to be sent by registered mail, telegram or by any other reliable means.<sup>122</sup>

A similar result was reached in award number T-18/01 of November 27, 2002, where the sole arbitrator concluded that written form of notice was necessary.<sup>123</sup> He noted that the testimony of witnesses who have allegedly

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that Serbian LCT Art. 484(2) regulates the consequences of late arrival or lost notification of defects sent in a reliable way, thus implying, according to the majority opinion, that oral notices of defects are not sufficient under Serbian law. As to the contents of such notice, the LCT requires specificity of such notice in the same manner as does the CISG. However, the LCT further requires in Article 484(1), as did the 1964 ULIS Art. 39(2), that the buyer has to invite the seller to inspect the goods.

120. See CISG art. 11.

121. Ingeborg Schwenzer, *Article 39*, in CISG COMMENTARY, *supra* note 20, at 465. See also CISG-AC Opinion No. 2, *Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39*, June 7, 2004, available at <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=144&sid=144>.

122. Despite the fact that panel's analysis of the form requirements under CISG art. 39 was erroneous, this did not impact the tribunal's finding since the written form of the notice was required by the contract and buyer complied with such requirement. FTCA, Award No. T-09/01, Feb. 23, 2004.

123. See also FTCA, Award No. T-10/04, Nov. 6, 2005.

heard phone conversation in a foreign language, cannot represent a credible proof that the notice of non-conformity was given and that the buyer simply had to confirm such oral notice in writing within a reasonable time. Finally, in award number T-15/04 of February 21, 2005 the sole arbitrator, besides holding that the notice was not given within appropriate period also questioned the validity of oral notices by stating “even if the phone conversation could have been regarded as a notice of defects, *such notice was not given within reasonable time.*”<sup>124</sup>

To a Serbian lawyer, examination of the abovementioned awards reveals that the initial misinterpretation of the CISG stemmed from the faulty translation it received when it was incorporated in Yugoslav legislation. The requirement of Article 39 that a buyer has to ‘*give notice*’ had been translated in a manner which suggested that notice had to be ‘*sent*’ (“*pošalje obavještenje*” in Serbian). To a Serbian reader, this might suggest that notification has to be conducted in a manner and through a medium which allows for “sending” in the classical written form. This initial hint was further reinforced once the arbitrators abandoned looking for solutions in the CISG general principles and resorted to interpretations in light of domestic legislation and court practice.<sup>125</sup> International commercial usages might have been used as a tool to circumvent consensuality, but that could have been done only through Article 9 of the CISG, and by proving the widespread use of the written form of notices in international trade practice, outside of Serbia, or at least by proving the existence of such practice between the parties. However, no similar attempts have been made. To the contrary, it seems that in the first case a shortcut was taken and Serbian legal practice was simply substituted for usage. Luckily, such distortion did not affect the outcome of the second case—the award makes it clear that the testimony on which the buyer relied to prove that seller was given notice would not have convinced the arbitrator even if he held that notification required no special form.

In conclusion, the analyzed awards evidence a firm position in the FTCA practice that Article 39(1) of the CISG requires written form of notice. Since the main cause of such position is the erroneous translation of Article 39(1) of the CISG to Serbian, the most effective way to overcome its continuous application in the FTCA practice would be to amend the language of the Law on Ratification of the CISG. However, given that such procedure would be rather complicated, it seems that the only plausible way to change the

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124. FTCA, Award No. T-15/04, Feb. 21, 2005 (emphasis added).

125. See *supra* note 109.

interpretation of Article 39(1) in Serbian practice is in raising the awareness of the Serbian legal community and FTCA arbitrators, in particular, of such errors in translation and recommending interpretation of the CISG in light of the formulations used in one of its authentic texts (Arabic, Chinese, English, French, Russian and Spanish)<sup>126</sup> in accordance with the 1969 Vienna Convention on the Law of Treaties, to which Serbia is a party, and the prevailing interpretation in foreign case-law and scholarly work, evidenced, *inter alia*, in the CISG-AC Opinion No. 2.<sup>127</sup>

### 2.2.) Content of notice

According to Article 39(1), notice must “*specify the nature of the lack of conformity.*” According to the relevant case law and CISG-AC Opinion No. 2, the level of specificity should not be exaggerated. Namely, it is not always necessary to describe the nature and cause of the problem: pointing out the “symptoms” may be sufficient.<sup>128</sup> Otherwise, a buyer would carry a heavy burden of dissecting specific problems of non-conformity in matters where he lacks technical knowledge. However, laconic notices such as “*bad quality,*”<sup>129</sup> “[*the goods*] *caused some problems,*”<sup>130</sup> or “[*the goods*] *were not labeled according to the schedule of items*”<sup>131</sup> are deemed insufficient. This is because

126. Such an approach has already been utilized in the decision of CLOUT Case No. 885 [Schweizerisches Bundesgericht (BGer) (Federal Court), Switz., Nov. 13, 2003] (“The UN Sales Law was drafted in Arabic, English, French, Spanish, Russian and Chinese. It was also translated into German, among other languages. In the case of ambiguity in the wording, reference is to be made to the original versions, whereby the English version, and, secondarily, the French version are given a higher significance as English and French were the official languages of the Conference and the negotiations were predominantly conducted in English.”), *translated at* <http://cisgw3.law.pace.edu/cases/031113s1.html>. The mistake in German translation of the Convention that this Court addressed regards the specificity of the notice of non-conformity required under Article 39(1) of the CISG. *Id.* (holding that a higher degree of specificity is required for German text in comparison to English and French texts), *translated at* <http://cisgw3.law.pace.edu/cases/031113s1.html>. The use of English text of the Convention instead of its faulty translation to the language of the CISG member state was evidenced in the FTCA practice itself in FTCA, Award No. T-4/05, July 15, 2008 (regarding Article 1 in context of Article 10, i.e. translation of the English phrase “place of business” to Serbian phrase meaning “seat”).

127. See CISG-AC Opinion No. 2, *supra* note 121.

128. *Id.* at 121, at cmt. 4. See also CLOUT Case No. 319 [Bundesgerichtshof (Federal Supreme Court), Germany, Nov. 3, 1999], *available at* <http://cisgw3.law.pace.edu/cases/991103g1.html>.

129. See Rechtbank van Koophandel, Kortrijk [District Court] Belgium, Dec. 16, 1996, *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=340&step=FullText>.

130. Trib. Vigevano [Ordinary Court of First Instance], July 12, 2000 n.405, Giur. It. 2001, II, 280 *et seq.* (Italy), *available at* <http://cisgw3.law.pace.edu/cases/000712i3.html>.

131. Landesgericht Köln [Trial Court] Germany, Nov. 30, 1999, *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=799&step=FullText>.

the purpose of the notice is to allow seller to cure the defect, or collect and secure evidence regarding the conformity of goods and perform other activities which might help him later in protecting his rights against his suppliers.<sup>132</sup>

Having all this in mind, it can be concluded that award number T-18/01 of November 27, 2002 arrived at the correct conclusion that notice has to be devoid of any doubts and contain description of the lack of conformity. The sole arbitrator found, stating that poultry's rate of reproduction decreased, while at the same time their mortality rate increased, that the communication was precise enough to represent a proper notice of non-conformity under the contract for sale of poultry. On the same line, another tribunal was correct in finding that a buyer's notice that significant portions of delivered leather pieces were discarded during production of the leather items was inadequate.<sup>133</sup> It would have been proper to explain that the goods delivered were of classes II, III and IV, instead of the contracted classes I, II and III, as buyer had done later in the proceedings.

### 2.3.) *Reasonable time*

Article 39(1) provides that notice has to be made within a “*reasonable time*” after a defect is discovered or ought to be discovered. This standard was fiercely debated during the CISG drafting process<sup>134</sup> and still represents one of the most controversial issues in court and arbitral practice.<sup>135</sup> According to CISG-AC Opinion No. 2,<sup>136</sup> the length of this period has to be determined on a case by case basis, taking into account all the circumstances, and should not be linked to any fixed periods prescribed by national laws.<sup>137</sup> Unless the parties have agreed on such period in advance, this usually boils down to examination of the circumstances of the case, with special emphasis to the nature of the goods, the nature of the defect, the situation of the parties, relevant trade usages, and practices established between the parties.<sup>138</sup>

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132. Harry Flechtner, *Buyer's Obligation to Give Notice of Non-Conformity*, in UNCITRAL DIGEST, *supra* note 32, at 384–88; Ingeborg Schwenzer, *Article 39*, in CISG COMMENTARY, *supra* 20, at 462.

133. FTCA, Award No. T-16/99, Feb. 12, 2001.

134. *See* Vienna Diplomatic Conference, Summary Records, 1st comm., 16th mtg., A/Conf.97/19 (Mar. 20, 1980).

135. CISG-AC Opinion No. 2, *supra* note 121 (discussing the disparate periods which have been regarded as noncompliant with the reasonableness requirement among the awards listed in the annex).

136. CISG-AC Opinion No. 2, *supra* note 121, at cmt. 3.

137. *See* Schwenzer, *supra* note 132, at 467.

138. German courts, for example, appear to regard a one month period as reasonable. *See* CLOUT

FTCA award number T-18/01 of November 27, 2002 dealt with the notice of non-conformity which was given 16 days after the goods were taken over. There the arbitrator found that such a period was not timely and not in accordance with Article 39 of the CISG. He noted that such period might have been reasonable under different circumstances, but the perishable nature of the goods, fresh mushrooms, meant that notice had to be made at an earlier point in time. In another case, the sole arbitrator found that a notice given three months after the goods, poultry, were received was not timely.<sup>139</sup> In a more recent case, failure to send notification within one month after delivery of the goods, again poultry, precluded the buyer from asserting his rights based on non-conformity.<sup>140</sup> Finally, in award number T-09/01 of February 23, 2004 the wording of Article 39 was erroneously paraphrased to require notice of non-conformity to be sent “without delay.” This mistake, however, did not cause the buyer’s loss of rights for non-conformity since he sent notice of non-conformity in a timely manner.

#### VIII. NO-FAULT LIABILITY

It has often been said that, unlike many national laws, the CISG’s remedial system is based on the concept of no-fault liability.<sup>141</sup> This contention has been confirmed by FTCA practices as well. For example in award number T-14/07 of May 23, 2008, the arbitrator rejected the buyer’s reasons for non-payment of the price. The arbitrator stated:

The debtor is liable for his monetary obligations in those cases when he is left without financial means without his fault, for example, if his debtors have failed to pay him the amounts owed, as in the case at hand. Hence, the buyer is obliged to pay the price even where it is not his fault that he is unable to do so. This is because such non-payment represents a breach of contract.<sup>142</sup>

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Case No. 123 [Bundesgerichtshof (Federal Court of Justice), Germany, Mar. 8, 1995]; CLOUT Case No. 319 [Bundesgerichtshof (Federal Court of Justice), Germany, Nov. 3, 1999]; CLOUT Case No. 289 [Obrelandesgericht Stuttgart (District Court), Germany, Aug. 21, 1995].

139. FTCA, Award No. T-15/04, Feb. 21, 2005.

140. FTCA, Award No. T-21/06, Aug. 29, 2008.

141. See Stoll & Gruber, *Article 74*, in CISG COMMENTARY, *supra* note 20, at 750; CISG TEXTBOOK, *supra* note 77, at 256; HONNOLD, *supra* note 10, at 297; Joseph M. Lookofsky, *Fault and No-Fault in Danish, American and International Sales Law: The Reception of the United Nations Sales Convention*, 27 SCANDINAVIAN STUD. L. 109, 130 (1983).

142. FTCA, Award No. T-14/07, May 23, 2008.

## IX. AVOIDANCE

According to Articles 45 and 61 of the CISG, in case of breach of contract, the aggrieved party may, *inter alia*, avoid the contract. Contrary to the view sometimes expressed in Serbian court practice that there is little difference when it comes to the contents of the CISG and the LCT, the conditions for avoidance of contract, as well as the manner of exercising the right to avoid the contract differ significantly between these two legal instruments. Hence, we shall pay a special emphasis to these differences.

### 1. Basis of Avoidance

Aside from avoidance based on mutual consent of the parties, there are two major bases for contract avoidance under the CISG: (1) the existence of fundamental breach; and (2) non-delivery or non-performance of buyer's obligation to pay the price or take delivery of the goods within the additional period of time fixed by the other party in accordance with Articles 47(1) and 63(1) (*Nachfrist* notice).

As has been previously mentioned, the concept of fundamental breach is novel for Serbian lawyers. Hence, there are not many awards that elaborate on this issue. The ones that do have already been covered in section VII of this paper.

On the other hand, fixing an additional period of time for contract performance and avoiding the contract upon expiry of such a period is a well established institute in Serbian contract law.<sup>143</sup> However, its importance and effect differ from the provisions of the CISG.<sup>144</sup> First, giving notice of additional time for performance to the defaulting party is a condition *sine qua non* for the exercise of the right to avoid under Serbian law, except for fixed-time contract and for situations where it is clear from the circumstances of the case that the debtor will not perform even within the additional period of time.<sup>145</sup> Second, upon expiry of this period the contract is avoided *ipso facto*, unless the aggrieved party notifies without delay the debtor that he is still interested in contract performance.<sup>146</sup> Finally, unlike the CISG, Serbian law

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143. See art. 126(2) LCT.

144. Milena Djordjević, *Naknadni rok za izvršenje ugovora prema odredbama Bečke konvencije* [*Fixing an Additional Period of Time for Contract Performance Under the CISG*], 11 PRAVNI ŽIVOT 259, 259–77 (2003).

145. See art. 126(1) LCT and art. 127 LCT.

146. See art. 126(3) and art. 125(1–2) LCT.

recognizes the possibility of the contract avoidance on the basis of changed circumstances.<sup>147</sup>

The avoidance of contract on the basis of *Nachfrist* notice was addressed in only one of the analyzed FTCA decisions. In award number T-4/05 of July 15, 2008, the parties' settlement of October 7, 2005 on the buyer's payment of the price by January 31, 2006 was considered to be an effective notice of performance of the buyer within the additional period of time of four months fixed therein.<sup>148</sup> Arguably the settlement did not in fact constitute a *Nachfrist* notice within the meaning of Article 63(1), since the *Nachfrist* notice does not represent a unilateral action, but rather an agreed extension of the date for performance. Instead, seller's statement of September 15, 2006 that he would postpone enforcement of a provisional measure entitling him to repossession of the goods from the buyer for two weeks was probably the real *Nachfrist* notice in the mentioned case, since this statement contained all the necessary contents required from the *Nachfrist* notice: specificity of the time-period; and serious intentions as to the avoidance and reasonableness of the length of the set period.<sup>149</sup> However, the final outcome of this case seems just since the arbitrator found the contract was avoided on April 16, 2007, more than 14 months after the expiry of the first *Nachfrist* notice and more than six months from expiry of the second notice containing cut-off date for performance.

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147. See art. 133 LCT; FTCA, Award No. T-10/07, Dec. 3, 2008 (dealing with a party's request for avoidance of contract on the basis of changed circumstances since the party's bank account was blocked and he could not get a loan from the bank). Unfortunately, the award in this case is of little value for this study since the tribunal erred by applying the Serbian LCT instead of the CISG, although its application was warranted since the parties agreed on Serbian law to be applicable to their contract, which should include the CISG, as already elaborated in section II.2.1. of this paper.

148. FTCA, Award No. T-04/05, July 15, 2008 ("The evidence suggests that the parties have negotiated on the performance of the Contract even after the Statement of Claim was submitted. The consequence of these negotiations is a "Statement" signed by Mr. X, the owner of the [Buyer] . . . on October 7, 2005, in which he promised to pay all due sums under the Contract by January 31, 2006. This additional period of nearly four months represents a reasonable and clear time period within the meaning of Article 63(1) of the Convention, by which the [Buyer] was given an additional period of time for performance of its obligations.").

149. *Id.* ("At the meeting of September 15, 2006, Ms. Y, the [consultant at the Serbian subsidiary of Seller], informed the [Buyer] that the [Seller] would help the [Buyer] by postponing the execution of the provisional measure if the [Buyer] pays its obligations in an additional period of two weeks—by September 30, 2006. The [Buyer] was thereby clearly informed that the [Seller] would commence enforcement of the provisional measure after the expiration of this period, which would make the Contract effectively avoided.").

## 2. Declaration of Avoidance

Unlike the Serbian LCT which recognizes *ipso facto* avoidance in certain cases,<sup>150</sup> the CISG always requires avoidance to be effectuated by means of a declaration of avoidance, i.e. notice to the other party.<sup>151</sup> Given that determination of the exact time of contract avoidance may have significant consequences to the rights and obligations of the parties, e.g. calculation of damages on the bases of cover transaction under Article 75 is contingent on such transaction taking place after avoidance of contract or determination of the market price at the time of contract avoidance for the purposes of calculation of damages under Article 76, this question is of utmost importance.

The CISG requires no form as to the declaration of avoidance. An explicit declaration is, of course, sufficient, but so can an implied notification, i.e. notification by conduct.<sup>152</sup> The essential requirement is that the notice to the party in breach unambiguously manifest that the other party does not wish to be further bound by the contract.<sup>153</sup>

Issues of avoidance of a contract and the form of declaration of avoidance were raised in award number T-8/06 of October 1, 2007, dealing with a contract concluded between Serbian and Romanian companies. Claimant-buyer wrote to the Ministry of Internal Affairs of Romania and Ministry of Public Information of Romania asking them to urge respondent-seller to return the sums he received as the advance payment. No explicit statement was at that time directed to the buyer himself, hence, such conduct was not deemed sufficient to constitute valid declaration of avoidance. However, taking into account comparative judicial and arbitral practice on Article 26 of the CISG, without express reference to it, but with reference to a mandate from Article 7(1), the tribunal concluded that only filing a claim before arbitration was sufficient to constitute a proper declaration of avoidance since the statement of claim contained a declaration that claimant considered the contract to be terminated. The tribunal found such language sufficiently clear and unambiguous to meet the requirements of Article 26 of the CISG.

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150. See Serbian LCT art. 125(1) (involving cases of fixed-time contracts); Serbian LCT art. 126(3) (involving cases of non-performance within an additional period of time for performance).

151. See CISG art. 26; J. Perović, *Izjava o raskidu ugovora kao uslov za raskid ugovora zbog neispunjenja obaveze* [Declaration of Avoidance as a Condition for Avoidance of Contract for Non-Performance], PRAVNI ŽIVOT No. 11/05, 473–97 (2005) (Serbia).

152. Rainer Hornung, *Article 26*, in CISG COMMENTARY, *supra* note 20, at 302–03.

153. CLOUT Case No. 6 [Landgericht Frankfurt a.M. (District Court), Germany, Sept. 16, 1991].

Award T-4/05 of July 15, 2008 pushed the moment of avoidance even further—after the claim was submitted. In that case, claimant-seller delivered a machine and respondent-buyer did not pay the price in full. Claimant submitted its claim to arbitration, requesting “to terminate the contract.” However, even after the claim was lodged, the parties were negotiating about possible ways in which the respondent might fulfill its obligations. The first result of those negotiations was a declaration signed by the Respondent, which stated that he would settle his debt by January 31, 2006, within less than four months. However, respondent did not act on his promise. Although, according to the tribunal, the claimant had every right to declare the contract avoided upon expiry of this period, it did not do so until April 2007. During this time fruitless negotiations occurred, empty promises were exchanged, and claimant managed to obtain a court interim measure on March 15, 2005 aimed at repossession of the delivered equipment which, pursuant to a *pactum reservati dominii* clause, was still the property of claimant. Claimant waited until April 2007 to activate such measure, and the arbitrator treated activation of the measure and subsequent dispossession of the buyer as effective notice of avoidance pursuant to Article 26 of the CISG.

### 3. Effects of Avoidance

According to Article 81, avoidance of contract releases both parties from their obligations, subject to damages which might be due. Normally this presupposes a symmetrical restitution, whereby both parties are supposed to return concurrently what they have received pursuant to contract performance. In several FTCA awards, this provision was applied in a straightforward and expected manner.<sup>154</sup> However, award number T-4/05 raised another interesting issue. In this case, once the contract was declared avoided, only one of the parties, claimant-seller, requested return of what he gave under the contract, a machine. The other party, although it participated in the proceedings, did not at any time request restitution, and the arbitrator took a restrained attitude with respect to such position. Consequently, while ordering restitution pursuant to Article 81(1), the arbitrator noted that his jurisdiction was limited only to requests that parties have actually made, and that stepping over the line would constitute a violation of the *non ultra petita* principle and render the award

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154. See FTCA, Award No. T-08/06, Oct. 1, 2007, available at <http://cisgw3.law.pace.edu/cases/071001sb.html>; FTCA, Award No. T-02/00, Dec. 9, 2002.

partially unenforceable. This resulted in a one-sided restitution only, whereby partial payment for the returned goods was kept by the claimant.

## X. DAMAGES

The right to damages for breach of contract is an essential right of both the seller and buyer under the CISG Articles 45 and 61. It is available as an independent remedy and concurrently with other remedies, such as avoidance. The basic preconditions for its exercise are contained in Article 74 of the CISG, whereas the special methods for calculation of damages in case of contract avoidance can be derived from Articles 75-76. Article 77 contains an important limitation to recovery of damages by allowing reduction in damages by the amount the loss sustained should have been mitigated by the aggrieved party.

Unsurprisingly, the request for damages has often been raised in the FTCA practice. This survey will not represent an extensive analysis of all the damages awards in FTCA practice. Rather, it will provide an overview of some of the issues tackled by the FTCA and point to the major differences in assessment of damages under the CISG and Serbian LCT.

### 1. *Categories of Loss*

Article 74 states that the damages for breach of contract shall consist of “a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.” So the CISG endows recovery of both “actual damage” (lat. *damnum emergens*) and “lost profit” (lat. *lucrum cessans*), as also provided by the Serbian LCT.<sup>155</sup> While the types of losses recoverable, other than those falling within the two above mentioned categories, are not specified, it is clear that the basic prerequisite for recovery of damages is that the loss is a consequence of the breach. In the FTCA practice, the following types of losses have been deemed recoverable: travel expenses by buyer’s employees in connection with the conclusion and performance of the sales contract;<sup>156</sup> interest for acquiring a bank loan for the advance payment of the price;<sup>157</sup> customs, VAT, and other expenses incurred

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155. See art. 266(1) LCT.

156. FTCA, Award No. T-08/06, Oct. 1, 2007, available at <http://cisgw3.law.pace.edu/cases/071001sb.html>.

157. *Id.*

as a result of seller's breach of contract;<sup>158</sup> administrative penalties;<sup>159</sup> costs of opening the letter of credit;<sup>160</sup> etc.

The controversial issue of awarding attorneys' fees and costs of procedure as damages<sup>161</sup> has not been addressed, since the request for such an award was always made separately from the request for damages.<sup>162</sup> However, the costs of legal representation and the costs of proceedings incurred before a different institution, e.g. tax organs, as a consequence of the seller's breach of contract, have been awarded by the FTCA tribunals as damages.<sup>163</sup>

## 2. Proof of Damages

It goes without saying that damages have to be proven in order to be recovered.<sup>164</sup> This rule is also sustained by the CISG, with the exception of Article 76, which allows for recovery of "abstract damages" provided that the conditions contained therein are fulfilled.

The issue of proof of damages was addressed in several FTCA decisions and recovery of damages was denied in all the cases where claimants were not in a position to prove the loss. For example, in award number T-4/05, claimant-seller requested avoidance of the contract, repossession of the goods, and compensation for respondent-buyer's use of the goods for several years,

158. FTCA, Award No. T-09/07, Jan. 23, 2008, available at <http://cisgw3.law.pace.edu/cases/080123sb.html>.

159. FTCA, Award No. T-10/06, Nov. 27, 2006.

160. FTCA, Award No. T-22/05, Oct. 30, 2006.

161. See John Felemegas, *An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals*, 15 PACE INT'L L. REV. 91, 91-147 (2003) (supporting the award of attorney's fees as damages). But see Joseph Lookofsky, *Commentary: Zapata Hermanos v. Hearthside Baking*, 6 VINDOBONA J. INT'L COMM. L. & ARB. 27, 27-29 (2002); Harry M. Flechtner, *Recovering Attorneys' Fees as Damages under the U.N. Sales Convention (CISG): The Role of Case Law in the New International Commercial Practice, with Comments on Zappa Hermanos v. Hearthside Banking*, 22 NW. J. INT'L L. & BUS. 121, 12-159 (2002).

162. This is in line with the Serbian practice of requesting attorneys' fees and costs of the procedure under the Serbian Law on Civil Procedure which is based on the "loser pays" principle. Prior to enactment of the LA, FTCA awards predominantly followed such practice. Upon enactment of the LA, which leaves to the discretion of the tribunals to determine the allocation of the costs of procedure (including attorneys' fees), the FTCA awards made their decisions on costs dependent on the result on merits which means that the "loser-pays" principle is still followed. See FTCA, Award No. T-08/06, Oct. 1, 2007; FTCA, Award No. T-09/07, Jan. 23, 2008; FTCA, Award No. T-04/05, July 15, 2008; FTCA, Award No. T-23/06, Sept. 15, 2008; FTCA, Award No. T-18/07, Oct. 15, 2008; FTCA, Award No. T-01/08, Nov. 17, 2008; FTCA, Award No. T-05/08, Jan. 5, 2009.

163. FTCA, Award No. T-09/07, Jan. 23, 2008, available at <http://cisgw3.law.pace.edu/cases/080123sb.html>.

164. See 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 cmt. 2.2.

claiming lost profits and amortization. Claimant's request for damages was rejected on the grounds that claimant did not prove such damages. In other cases, the recovery was awarded up to the amount proven by the aggrieved party or the expert witness' calculation. For example, in award number T-8/06 of October 1, 2007 buyer's request for recovery of an interest paid on a loan from a bank for securing the necessary funds for advance payment under the sales contract was only partially granted. Having examined the evidence presented by the buyer, the tribunal determined that

[T]he interest on the borrowed amount was not running after the date of repayment of the loan (February 1, 2004) until March 31, 2006 (being the calculation date used by the expert in her opinion). Therefore, the Tribunal refused [Buyer]'s claim for compensation of direct damage on this ground, because only the interest actually paid to the bank could be recognized as direct damage.<sup>165</sup>

### 3. *Foreseeability*

Similar to many national legislations,<sup>166</sup> the CISG requires damages arising out of a contractual relationship to be foreseeable in order to be recoverable.<sup>167</sup>

In award number T-8/06 of October 1, 2007, buyer's claim for actual damages had two components: the costs of daily allowances and transportation costs that the buyer incurred in relation to the business visits to the seller; and the interest buyer had to pay in order to service the bank loan he took to pay the advance on the contract price to the seller. The tribunal found that both types of damages were foreseeable to the seller, including the interest rate of the bank loan.

As to the first portion of the damages award, the tribunal noted that they were foreseeable since it is:

[C]ommon in business practice that [Buyer] would attempt to negotiate with [Seller] the subsequent performance of the contract in case of non-performance of the delivery under it. This conclusion is especially justified having in mind that the correspondence between

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165. FTCA, Award No. T-8/06, Oct. 1, 2007.

166. See Franco Ferrari, *Comparative Ruminations on the Foreseeability of Damages in Contract Law*, 53 LA. L. REV. 1257, 1257-69 (1993); Stoll & Gruber, *supra* note 141, at 763-69; Djakhongir Saidov, *Methods of Limiting Damages under the Vienna Sales Convention on the International Sale of Goods* (2001), <http://www.cisg.law.pace.edu/cisg/biblio/saidov.html>.

167. This requirement exists under Serbian law as well. Serbian LCT art. 266(1). However, Serbian law differs from the CISG in that respect that the foreseeability of the loss is not a limitation to the amount of recoverable damages in case of fraudulent, willful or grossly negligent breach of contract. Serbian LCT art. 266(2).

the parties indicates that [Seller] had suggested to [Buyer] that he would subsequently perform the first delivery.<sup>168</sup>

With respect to the second portion of the damages award, the tribunal found that:

[Seller] at the time of conclusion of the contract could have presumed that [Buyer] would obtain a loan from a bank for securing the necessary funds for the advance payment under the sales contract, since it is a well known and established business practice that companies secure necessary funds by borrowing money from banks . . . . Hence, [Seller] ought to have foreseen that [Buyer] would suffer damage in the amount equal to the interest on the amount borrowed from the bank, from the moment in which the advance payment has been made until the repayment of the loan. Consequently, [Seller] is obliged to compensate [Buyer] for the damage suffered.<sup>169</sup>

In addition, the buyer was awarded lost profits since the tribunal concluded that seller could have foreseen that the goods ordered, planks, were purchased so that the buyer could manufacture goods for sale to third parties. The arbitral tribunal found that:

[Seller] could have foreseen that [Buyer] was purchasing the poplars for the purpose of their processing and reselling, and that [Buyer] had contracted for the resale of the quantity for which the advance payment was made. Therefore, the condition of foreseeability for awarding damages pursuant to Article 74 of the [CISG] is met.<sup>170</sup>

However, the amount of damages awarded on this basis was limited only to the amount of lost profit corresponding to the quantity of a resale agreement concluded by the buyer with the third party.<sup>171</sup> Although the tribunal was correct in not awarding the claimant further damages for loss of profit, it erred

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168. FTCA, Award No. T-8/06, Oct. 1, 2007.

169. *Id.*

170. *Id.*

171. *See* FTCA, Award No. T-8/06 at 8.2, Oct. 1, 2007 (“The Arbitral Tribunal determined that the loss of profit calculated by the [Buyer] as presumed profit which [Buyer] would have acquired after selling [planks produced] from all six installments does not meet the condition of foreseeability for compensation of damage, set out in Article 74 of the Vienna Convention. Namely, the Tribunal found that the [Seller] at the time of conclusion of the sales contract could not have foreseen, nor were there any circumstances which would cause the [Seller] to foresee, that the [Buyer], as a reseller, had concluded a contract of sale of the timber for the total quantity of 10,000 m<sup>3</sup> of poplar. This conclusion is supported by the provisions of the Sales Contract, which provides for several deliveries, with each delivery being triggered by the [Buyer] by making the advance payment for the respective delivery. This indicates that at the time of the conclusion of the sales contract the whole quantity of poplar could not have been envisaged for processing and reselling to specific subsequent buyers. The [Buyer] only proved that it had contracted to sell 40 m<sup>3</sup> of timber (a minimal quantity even in respect of the first delivery of 1.538 m<sup>3</sup> of poplar), thereby not meeting the condition for awarding loss of profit.”).

in relying on non-foreseeability of claimant's claim. In doing so the tribunal contradicted its previous finding that buyer's purpose of further processing and resale of poplars was foreseeable to the seller. However, the true and valid reason for denying buyer's claim for future loss of profits in this case was his omission to prove that any future profit would be lost. The only proof submitted by the buyer was a contract for the planks, and the quantity ordered was minuscule, not only with respect to the total amount of timber to be delivered, but also with respect to the actual amount of timber delivered before avoidance of the contract.

In a case involving a contract for sale of sugar,<sup>172</sup> the tribunal correctly concluded that respondent, as a professional trader, could have foreseen that shipment of sugar, which did not conform to the specifications of the contract, Yugoslav origin, 2002 harvest, could result in damages for the claimant in the amount of customs and other expenses to be paid, given that the origin of the goods was crucial in getting a zero-duty customs treatment.<sup>173</sup> The tribunal expressly stated that, in regard to the evidentiary material in this case:

[It] had no dilemma whether [Seller] knew or could have known that in Italy sugar is imported under a favored treatment and that there is a financial consequence for [Buyer] if [Seller] does not deliver goods which are in conformity with the conditions of the contract, especially in regard to the origin and the type of harvest.<sup>174</sup>

#### 4. Liquidated Damages

The analysis of the FTCA practice confirms the view that recovery under liquidated damages clauses is permissible under the CISG and subject only to limitations of the public policy requirements of the applicable national law.<sup>175</sup> In the words of award number T-4/05 of July 15, 2008:

[The CISG] does not contain any provisions which could be applied to this legal question, but the principle of party autonomy (Article 6 of the Convention) enables the parties to stipulate freely the amount of compensation to be paid by the debtor to the creditor in case of non-performance or untimely performance of the contractual obligation, as is the case here. The validity of this clause is not contested by the Law of Contracts and Torts of the Republic of Serbia, which is based on the same principle

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172. FTCA, Award No. T-09/07, Jan. 23, 2008, available at <http://cisgw3.law.pace.edu/cases/080123sb.html>.

173. *Id.* (affirming that, had the goods been conforming, the buyer would have been exempt from paying custom duty in accordance with the then applicable EU preferential treatment for sugar of Yugoslav origin).

174. *Id.*

175. Stoll & Gruber, *supra* note 141, at 769–70.

(Article 10 of the Law on Contracts and Torts), and these provisions could not be held contrary to the imperative norms, public policy or customs.<sup>176</sup>

## XI. INTEREST

Most of the claims revolve around money, and the cost for use of money—interest—invariably comes into picture. Hence, it is not surprising that almost every case we researched for this article dealt with the issue of determining the appropriate interest rate. There are three articles in the CISG that deal directly or indirectly with the issue of awarding interest: Articles 74, 78 and 84(1).<sup>177</sup> Given that the examined FTCA awards have shown only one example where the interest was awarded as damages, under Article 74,<sup>178</sup> and no example where Article 84(1) was explicitly invoked,<sup>179</sup> our analysis will focus entirely on application of Article 78 of the CISG in the FTCA practice.

Although Article 78 of the CISG provides that creditors are entitled to interest on the sum in arrears, it does not instruct how to compute the appropriate interest rate. This goal appeared to be too difficult to be achieved during the drafting process. The issue remained controversial and complex, often debated in the context of the CISG.<sup>180</sup> Judicial and arbitral practice

176. FTCA, Award No. T-4/05, July 15, 2008.

177. See CISG art. 78 (setting the basis for a party's entitlement to interest if the other party fails to pay the price or any other sum that is in arrears). Article 78 also makes it clear that the interest can be sought under the general damages rule in Article 74 of the CISG (provided that the preconditions for its application are met); see also CISG art. 84(1) (specifying the date of accrual of restitutionary interest if the seller is bound to refund the price).

178. The buyer was awarded interest on the amount borrowed from the bank in order to make an advance payment as damages. FTCA, Award No. T-08/06, Oct. 1, 2007 ("By inspecting the loan agreement that [Buyer] had concluded with the [Bank], the Arbitral Tribunal found that the [Buyer] was to pay interest under that contract at the rate of 12% annually on the amount granted for making the advance payment, and made the decision on compensation of the direct damage by applying the interest rate actually paid. Therefore, the Arbitral Tribunal granted the [Buyer]'s claim for compensation of direct damage in the amount of the interest paid on the amount the [Buyer] had borrowed from the bank to make the advance payment to the [Seller], as of the date of making the advance payment (July 3, 2002) until the date of repayment of the loan (Feb. 1, 2004) at the rate of 12% annually, which was stipulated in the loan contract (EUR 2,948.62)."), available at <http://cisgw3.law.pace.edu/cases/071001sb.html>.

179. Although FTCA Award No. T-08/06, Oct. 1, 2007, available at <http://cisgw3.law.pace.edu/cases/071001sb.html>, dealt with the issue of a price refund upon avoidance of a contract, no reference was made to Article 84(1) CISG and the same interest rate was applied both to the amount sought as repayment of the price and to the amount claimed as damages.

180. The views are not only divided as to whether the issue of interest rate is *lacuna intra legem* or *lacuna praeter legem*, but also as to how, if it is *lacuna praeter legem*, to resolve it. See Francesco G. Mazzotta, *CISG Article 78: Endless Disagreement Among Commentators, Much Less Among the Courts* (2004), <http://www.cisg.law.pace.edu/cisg/biblio/mazzotta78.html>; Alan F. Zoccolillo, *Determination of Interest Rate Under the 1980 United Nations Convention on Contracts for the International Sale of Goods:*

worldwide is also anything but uniform, on either of the possible approaches.<sup>181</sup> The practice of the FTCA is not different in that respect. We have identified five main approaches that were used to determine relevant interest rate: (1) using national legislation on statutory interest rate; (2) using the domicile interest rate<sup>182</sup> of a particular currency with reference to court and arbitral practice; (3) using the domicile interest rate of a particular currency with reference to international payment usages; (4) examining the general principles on which the CISG is based; and (5) applying the interest rate set by the contract. Given the importance of the party autonomy rule under the CISG, the last approach is, of course, always the preferable method of interest calculation. Unfortunately, this approach has been used in only one contract dispute before the FTCA.<sup>183</sup> The first two approaches operate on the assumption that the issue of interest rate is not governed by the CISG, i.e. that it is *lacuna intra legem*. The third approach observes the international usages

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*General Principles vs. National Law*, 1 VINDOBONA J. INT'L COM. ARB. 3, 3–43 (1997); André Corterier, *A New Approach to Solving the Problem of the Interest Rate Under Article 78 CISG*, 5 INT'L TRADE & BUS. L. ANN. 33, 33–42 (2000); Volker Behr, *The Sales Convention in Europe: From Problems in Drafting to Problems in Practice*, 17 J.L. & COM. 263, 263–99 (1998); Franco Ferrari, *Uniform Application and Interest Rates Under the 1980 Vienna Sales Convention*, in CORNELL REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 3–19 (1995); John Y. Gotanda, *A Study of Interest* 172–73 (Villanova Univ. Sch. of Law Working Paper Series, No. 83, 2007), available at <http://law.bepress.com/villanovalwps/papers/art83>; VILUS, *supra* note 6, at 172–73; M. Milutinović, *Kamatna stopa zbog docnje u izvršenju novčane obaveze—da li je uniformno rešenje moguće? [Interest Rates for Late-Payment—Is a Uniform Solution Achievable?]*, 11 PRAVNI ŽIVOT 557–76 (2005); M. Stanivuković, *Stopa zatezne kamate na ugovorna potraživanja u stranoj valuti kada je merodavno srpsko pravo [Default Interest Rate Applicable to Foreign Currency Contractual Claims Governed by Serbian Law]*, ZBORNIK RADOVA SA MEDJUNARODNE KONFERENCIJE “REGIONALNA SARADNJA U OBLASTI GRADJANSKOG SUDSKOG POSTUPKA SA MEDJUNARODNIM ELEMENTOM” 207–25 (2009).

181. Those favoring uniform determination of interest rate pursuant to the general principles on which the CISG is based have different starting positions. Some use the principle of full compensation, while others resort to the principle of full restitution. Two of the solutions preferred within the uniform method are application of the prevailing interest rate of the place of payment and application of international interest rate, such as LIBOR. Those who prefer application of national law to the issue of interest rate have different ideas on how to pick the proper law. Some propose application of the *lex causae*, others the law of debtor's seat, the law of the seller's country, the law of the country of the currency, or the law of the place of performance, etc.

182. The phrase “domicile interest rate” is often used in Serbian judgments and awards, although it is not defined in any statute. The courts and tribunals have so far used this term to designate the interest rate applicable in the country of origin of the currency in which the money is due, which sometimes results in the application of statutory interest rates or the application of other otherwise applicable interest rates such as the Federal Funds rate for debts in U.S. dollars. For example, according to the High Commercial Court opinion of September 27, 2004, for claims in Euros, this rate is equal to the “euro interest rate set by the Central European Bank.”

183. The parties chose Macedonian law to govern the issue of applicable interest rate. FTCA, Award No. T-16/07, June 18, 2008.

as a primary source of law for the issue of interest rates, while the fourth approach regards the matter of interest rate as *lacuna praeter legem* and determines the interest rate via examination of CISG general principles. Regardless of the approach taken by the arbitrators in the analyzed cases, the tribunals have on all occasions observed the *non ultra petita* principle and have never awarded interest at a rate higher, or for the period longer, than the parties requested.<sup>184</sup>

### 1. Statutory Interest Rate Approach

Article 2 of the 1993 Yugoslav Law on Statutory Interest Rate<sup>185</sup> provided for a six percent interest rate on monetary claims in foreign currency. The absence of an explicit rule on interest rate in the CISG led many of the FTCA tribunals to direct application of the Yugoslav statutory rate whenever conflict-of-laws rules chose Yugoslav (Serbian) law as applicable. With similar justification, award number T-13/05 of January 5, 2007 applied the interest rate provided by § 1333 of the ABGB since the parties had chosen Austrian law to govern the contract.

The 2001 Amendments to the Law on Statutory Interest Rate<sup>186</sup> were designed to suppress effects of inflation and have derogated the provision on statutory interest rate for foreign currency debts. Consequently in applying the FTCA, the arbitrators took the position that computing interest rate for foreign currency debts on the basis of rates for domestic currency, which are higher than foreign rates, could ill serve the purpose of suppressing inflation and would produce “unacceptable, inappropriate and onerous results for the [debtors].”<sup>187</sup> Departures from this position were rare.<sup>188</sup>

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184. FTCA, Award No. T-09/01, Feb. 23, 2004 (awarding interest for late payment of price from the date of filing of the claim instead of the date when payment was due, since these were the exact terms of the claimant’s request).

185. OFFICIAL GAZETTE FRY, No. 32/93.

186. OFFICIAL GAZETTE FRY, No. 09/01.

187. FTCA, Award No. T-03/01, Sept. 24, 2001, available at <http://cisgw3.law.pace.edu/cases/010924sb.html>; FTCA, Award No. T-09/02, Mar. 24, 2003; FTCA, Award No. T-18/04, May 24, 2005; FTCA, Award No. T-16/04, July 18, 2005; FTCA, Award No. T-19/07, June 30, 2008.

188. See FTCA, Award No. T-13/05, Jan. 5, 2007 (applying Serbian legislation to statutory interest rate with the following justification: “. . . having in mind that the legislator wanted to adequately protect creditors who owed sums in [Serbian dinars] and has therefore provided for a monthly rate of compensation in order to prevent decrease of the value of the sums owed due to the fall in the exchange rate.” This resulted in applying 0.5% monthly interest rate to Euro-denominated debt. The arbitrator noted that this approach was in accordance with Art. 3 of the Law on Statutory Interest Rate. One can suppose that this kind of reasoning was due to the fact that domestic currency, the dinar, was enjoying a stable exchange rate,

## 2. Interest Rate “In Accordance with Practice of Courts and Arbitration Tribunals”

Despite the 2001 Amendments of the Law on Statutory Interest Rate, arbitrators continued applying a six percent interest rate to foreign currency debts as an emanation of established arbitration practice.<sup>189</sup> This was done to avoid an inadequate method of interest rate calculation which was designed with dinar debts in mind. In other decisions, tribunals invoked the *cursus curiae est lex curiae* rule and the established practice of the FTCA in order to apply the domicile interest rate of a particular foreign currency.<sup>190</sup> Therefore, if the debt was euro-denominated, arbitrators awarded Central European Bank deposit rates, marginal lending rates, or Euribor rates,<sup>191</sup> while debts denominated in US dollars were usually accompanied by application of the Federal Funds Rate.<sup>192</sup>

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and that application of a different, lower, rate to foreign currency debts would prompt claimants to denominate their claims in domestic currency, dinars, in order to avail themselves of a relatively high interest rate prescribed for dinar-denominated debts.)

189. FTCA, Award No. T-03/01, Sept. 24, 2001, available at <http://cisgw3.law.pace.edu/cases/010924sb.html>. In the present case, the 1994 Law on Statutory Interest Rate was in force at the time of the conclusion of the contract, and it provided for a 6% rate for foreign currency. OFFICIAL GAZETTE FRY, No. 24/94. However, at the time when the arbitration proceedings took place, the 2001 Law on the Statutory Interest Rate had already come into force, and it contained no such provision. The reasoning of the award invoked the FTCA practice and the fact that the parties had the 1994 law in mind when concluding the contract.

190. In FTCA, Award No. T-13/06, May 28, 2007, arbitrators noted that the CISG does not prescribe interest rate on late payments and also remarked that Serbian law does not provide for interest rate on foreign currency payments. They went on to apply domicile interest rate, stating that such approach is well-established in domestic court and arbitral practice. *Id.* See also FTCA, Award No. T-14/03, Oct. 18, 2007; FTCA, Award No. T-14/07, May 23, 2008; FTCA, Award No. T-18/07, Oct. 15, 2008; FTCA, Award No. T-1/08, Nov. 17, 2008; FTCA, Award No. T-05/08, Jan. 5, 2009; FTCA, Award No. T-16/03, Jan. 27, 2009; FTCA, Award No. T-13/08, Mar. 16, 2009.

191. See FTCA, Award No. T-37/03, May 27, 2004; FTCA, Award No. T-03/05, Dec. 15, 2005; FTCA, Award No. T-22/05, Oct. 30, 2006; FTCA, Award No. T-13/06, May 28, 2007; FTCA, Award No. T-06/06, July 31, 2007; FTCA, Award No. T-17/06, Sept. 10, 2007; FTCA, Award No. T-08/06, Oct. 1, 2007; FTCA, Award No. T-14/03, Oct. 18, 2007; FTCA, Award No. T-24/06, Dec. 1, 2007; FTCA, Award No. T-15/06, Jan. 28, 2008; FTCA, Award No. T-01/08, Nov. 17, 2008.

192. See FTCA, Award No. T-05/05, Apr. 4, 2007; FTCA, Award No. T-19/06, June 8, 2007; FTCA, Award No. T-14/03, Oct. 18, 2007.

### 3. Interest Rate in Accordance with International Payment Usages

The role of usages within the framework of the CISG is rather specific.<sup>193</sup> Article 9(2) permits that they may bind the parties, irrespective of whether parties were aware of their existence, as long as they are “widely known to, and regularly observed by, the parties to contracts of the type involved in the particular trade concerned.”<sup>194</sup> The role of usages is further reinforced by rules of arbitral institutions, including the Rules of the FTCA, where arbitrators are regularly instructed to take into account trade usages when deciding a case.<sup>195</sup> Arbitration practice of the FTCA has predominantly, although not exclusively, dealt with usages in the context of determining appropriate interest rates.

In some of the awards tribunals arrived at an appropriate interest rate by invoking international usages contained in the 1992 UNCITRAL Model Law on International Credit Transfers, which were deemed applicable on the basis of Article 9(2) of the CISG.<sup>196</sup> For example, in award number T-17/06 of September 10, 2007 it was stated that:

These international commercial usages, codified in the Model Law, represent a common practice which has been harmonized and widely applied in international trade, and is repeatedly used and found applicable in cases where parties have not agreed otherwise. Parties, who are both traders, knew or ought to have known of such usages. Payment of interest in the case of default represents a regular and very widely observed practice in the business environment.

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193. See Aleksandar Goldstajn, *Usages of Trade and Other Autonomous Rules of International Trade According to the UN Sales Convention*, in *INTERNATIONAL SALE OF GOODS, DUBROVNIK LECTURES* 55, 95–110 (Paul Volken & Petar Šarčević eds., 1986); HONNOLD, *supra* note 10, at 124; Michael Bridge, *A Commentary on Articles 1–13 and 78*, in *UNCITRAL DIGEST*, *supra* note 32, at 235, 255; Martin Schmidt-Kessel, *Article 9*, in *CISG COMMENTARY*, *supra* note 20, at 141–53; Jelena Perović, *Uloga običaja u međunarodnoj prodaji robe [Role of Usages in International Sale of Goods]*, 5-8/02 *PRAVO I PRIVREDA* 247, 247–54 (2002); STOJILJKOVIĆ, *supra* note 6, at 16–18, 145–47; ĆIRIĆ & DJUROVIĆ, *supra* note 6, at 54–55.

194. On the other hand, the role of usages under the Serbian LCT is limited to situations where either of the parties agree on their application or the law specifically calls for their application. The latter is the case in approximately forty out of over a thousand articles of the law.

195. See The Rules of the FTCA, *supra* note 12, at art. 48(3) (2001); ICC Arbitration Rules art. 17(2) (2008); China International Economic and Trade Arbitration Commission [CIETAC] Rules art. 53 (2005); German Institution of Arbitration [DIS] Rules § 23.4 (1998); Judicial Arbitration and Mediation Services [JAMS] Rules art. 18.3 (2005). However, there is no comparable provision in the Vienna rules, Zagreb rules, or Rules of the LCIA.

196. See FTCA, Award No. T-16/04, July 18, 2005; FTCA, Award No. T-09/02, Mar. 24, 2003; FTCA, Award No. T-08/05, Mar. 28, 2006; FTCA, Award No. T-03/06, Sept. 14, 2006; FTCA, Award No. T-09/07, Jan. 23, 2008.

Article 2(1)(m) of the Model Law on International Credit Transfers defines interest as “the time value of the money involved, which, unless otherwise agreed, is calculated at the rate and on the basis customarily accepted by the banking community for the funds or money involved.” Consequently, the average Eurozone interbanking rate was applied to euro-denominated debt based on the excerpts from the May 2007 ECB Statistical Bulletin. Similarly, in award number T-5/05 of April 4, 2007, it was stated that, in the absence of CISG provisions specifying the interest rate, arbitrators have to take into account widely accepted banking and commercial usages where parties have implicitly subjected their contract to such usages and where such usages are regularly observed in the same course of trade. The tribunal held that the parties “knew or ought to have known, as professional traders and business partners, of a widely accepted principle of commercial practice that a defaulting debtor has to pay interest,” and went on to apply the Federal Funds Rate on a dollar-denominated debt. Assuming that usage on the applicable interest rate truly exists, such approach should be preferred in the future, as it would bring predictable results and legal certainty to the contracting parties.

Among the FTCA decisions dealing with usages, we have found award number T-9/07 of January 23, 2008 to be particularly interesting, although the application of usages in this case was not based on Article 9 of the CISG, but rather on the applicable arbitration rules. Specifically, acting pursuant to Article 48(3) of the FTCA Rules, which suggests application of trade usages, the tribunal took into account the Principles of European Contract Law (PECL) and UNIDROIT Principles of International Commercial Contracts (PICC). Justifying its position, the tribunal stated that it:

[P]aid due regard to the widely known fact that from the end of the 20th and the beginning of the 21st century there could be noted a development and harmonization of a new international commercial practice and trade usages which was “codified” in the form of the abovementioned UNIDROIT Principles, UML on International Credit Transfers and Ole Lando Principles. They became available to everyone who performs international business transactions as well as to those who arbitrate disputes in the field of international commerce. Respectable arbitral tribunals in the world (especially the ICC Court of Arbitration) have long since made awards pursuant to these Principles and arbitrated disputes between parties by applying these principles as *lex mercatoria*. Considering that there is no reason for this Court of Arbitration to keep avoiding their application . . . .<sup>197</sup>

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197. FTCA, Award No. T-9/07, Jan. 23, 2008.

The tribunal concluded that the said principles may offer a more modern set of solutions for issues in the case at hand and that they “set general rules for international commercial contracts” and “may be used for interpretation and gap-filling of uniform international rules . . . and provisions of national law.”<sup>198</sup>

Although the harmonizing goal is noble, it seems to us that invoking PECL and PICC in the case at hand as *lex mercatoria* was not only erroneous but also unnecessary, given that the disputed issue, assessment of damages, was explicitly settled by the CISG. The only aspect where, theoretically, these legal documents might have been of some assistance was the determination of interest rate.<sup>199</sup> However, such approach would require importing invoked principles into the system of the CISG either through Article 7(2), general principles on which the CISG is based,<sup>200</sup> or, more controversially, via Article

198. *Id.*

199. Both PICC art. 7.4.9 and PECL art. 9.508 provide that the rate of interest should amount to the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment. Application of PICC to the issue of interest rate has already been reported in a number of cases. See *Holzimplex Inc. v. Republican Agric. Unitary Enter.*, No. 8-5/2003 (Supreme Econ. Ct. of Belr. May 20, 2003), available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=635&step=Abstract>; ICC Arbitration Case No. 8769 (1996) (Switz.), available at <http://www.unilex.info/case.cfm?pid=2&id=656&do=case>; ICC Arbitration Case No. 8128 (1995) (Switz.), available at <http://www.unilex.info/case.cfm?pid=2&id=637&do=case>; Arbitral Award No. SCH-4318 (Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft Wien 1994) (Austria), available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=635&step=FullText>; Arbitral Award No. SCH-4366 (Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft Wien 1994) (Austria), available at <http://www.unilex.info/case.cfm?pid=2&id=636&do=case>.

200. Both the timing of these documents and the drafting process make it difficult to sustain that PICC and PECL are the principles on which the Convention is based. Namely, both PICC and PECL were drafted more than a decade after adoption of the CISG. Furthermore, they were drafted under a more or less private initiative whereas the CISG is the result of UNCITRAL's efforts finalized at the Diplomatic Conference in Vienna in 1980. Also, the preambles of these two documents provide for their scope of application in a different setting in comparison to the CISG's provisions on its scope of application, which are directly applicable when conditions of Art. 1 are fulfilled. On the other hand, the scope of CISG's application is limited to certain issues arising out of contracts of sale, whereas PICC and PECL regulate some of the issues regarding the sales contract not governed by the CISG, e.g. validity of a contract, and other types of contracts. Finally, while PECL, as its name suggests, reflects the development of *European* principles of contract law, the CISG is designed as a *global* instrument, which is confirmed both by the diverse structure of the drafting committee and by the pertinent list of the CISG Contracting States. As to the PICC, time will show whether recent UNCITRAL endorsement of the PICC at its 40th Plenary session in the U.N. Commission on International Trade Law (UNCITRAL), *Report of the UNCITRAL on the Work of its Fortieth Session, 52–54, A/62/17* (Part I) (July 23, 2007), will influence the wider application of PICC in the future. In any event, there is already a great number of authors who are advocating for the use of PICC as means to fill the gaps in the CISG, at least when both documents are based on the general principles of comparative law and international trade. See Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG—Alternative or Complementary*

9(2).<sup>201</sup> The tribunal failed to apply either of these two approaches. Instead, the tribunal relied on the abovementioned sets of principles as usages, on the basis of the Serbian Arbitration Law, FTCA Rules of Arbitration, and the 1961 European Convention on International Commercial Arbitration. Furthermore, the tribunal erred in application of these Principles by stating that neither of these documents “determines the interest rate, but rather makes it definable” and using them only as “a safe indicator how to determine such a rate.”<sup>202</sup> The tribunal clearly failed to adhere to the basic “indicators” provided in these Principles by applying the average EURIBOR rate, a bank to bank interest rate,<sup>203</sup> for the relevant time period as the appropriate rate for the “money [currency] involved,” instead of the “short term lending rate to prime borrowers prevailing for the currency of payment at the place of payment” (e.g. a bank to borrower interest rate) as required by the Principles.

#### *4. Interest Rate Calculation Under the CISG General Principles*

In only two out of a hundred FTCA cases the issue of interest rate was resolved by application of the CISG general principles. In award number

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*Instruments?*, 26 UNIFORM L. REV. 26, 36–37 (1996); Magnus, *supra* note 97, at 492; Alejandro M. Garro, *The Gap-Filling Role of the UNIDROIT Principles in the International Sales Law: Some Comments on the Interplay Between the Principles and the CISG*, 69 TUL. L. REV. 1149, 1152 (1995); Pilar Perales Viscasillas, *The Role of the UNIDROIT Principles and the PECL in the Interpretation and Gap-Filling of CISG*, in CISG METHODOLOGY, *supra* note 10, at 288–89; Klaus Peter Berger, *International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts*, 46 AM. J. COMP. L. 129, 133–35 (1998); Jurgen Basedow, *Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts*, 5 UNIF. L. REV. 129, 136–37 (2000); Ferrari, *supra* note 95; John Y. Gotanda, *Using the UNIDROIT Principles to Fill Gaps in the CISG* (Villanova Univ. Sch. of Law Working Paper Series, No. 88, 2007), available at <http://law.bepress.com/villanovawps/papers/art88/>; Harry Flechtner, *The CISG's Impact on International Unification Efforts: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law*, in THE 1980 UNIFORM SALES LAW: OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES 169, 190–97 (Franco Ferrari ed., 2003); Bridge, *supra* note 83, at 249–52.

201. See Viscasillas, *supra* note 200, at 309–14; Michael Bridge, *A Commentary on Articles 1–13 and 78*, in UNICTRAL DIGEST, *supra* note 32, at 235, 255; Emmanuel Gaillard, *La Distinction des Principes Généraux du Droit et des Usages du Commerce International*, in ETUDES OFFERTES À PIERRE BELLER 203 (1991); U.N. Conference on Trade & Dev., *Dispute Settlement: International Commercial Arbitration: Law Governing the Merits of the Dispute*, 25–26, UNCTAD/EDM/Misc.232/Add.40 (2005) (prepared by Jean-Michel Jacquet), available at [http://www.unctad.org/en/docs/edmmisc232add40\\_en.pdf](http://www.unctad.org/en/docs/edmmisc232add40_en.pdf); FTCA, Award No. 229/1996, June 5, 1997; ICC Arbitration Case No. 9333, 10 Int'l Comm. Arb. No. 2 at 102 (1999).

202. FTCA, Award No. T-9/07, Jan. 23, 2008.

203. Euro Interbank Offered Rate (EURIBOR) is the rate at which euro interbank term deposits within the euro zone are offered by one prime bank to another prime bank.

T-23/06 of September 15, 2008, the sole arbitrator expressly stated that the interest rate for late payment should be determined on the basis of the CISG general principles. Although the relevant principle itself was not clearly identified, it seems from the wording of the award that the arbitrator had the principle of full compensation in mind. Namely, upon examining the relevant provisions of the CISG and Serbian contract law, the law applicable by means of private international law, the arbitrator concluded that

[I]nterest for failure to pay money, i.e. statutory interest rate, is set as pre-determined amount of damages whose occurrence does not need to be specifically proven. Both CISG and LCT give the right to the creditor to seek further damages if this amount is not sufficient. Hence, the amount of interest rate should correspond to the amount of pre-determined actual damages which the creditor has suffered for debtor's failure to perform its obligation. When creditor does not receive performance of obligation when due it can be presumed that the damages he suffers as a consequence of such failure can be compensated by acquiring bank loan in the same amount as the amount due, at the average interest rate for short-term loans for the currency of payment.<sup>204</sup>

While we agree with the arbitrator's attempt in this case to resolve the issue of interest rate by application of the CISG general principles and agree with the definition of the purpose of interest, compensation for loss of use of money, we disagree with calculation of interest in the described manner. Firstly, had the purpose of interest been full compensation of the creditor, there would have been no reference to the general damages provision in Article 78 of the CISG. Hence, the interest is not there to necessarily fully compensate the creditor, although awarding interest may lead to such an outcome. Second, the application of the average bank lending rate could lead to overcompensation of the creditor. Therefore, the application of somewhat lower savings rate seems more appropriate to serve the needs that the right to interest intends to cover. Had the creditor actually had to borrow the money at the higher rate due to debtor's breach of contract, both Articles 74 and 78 would allow him to recover such amounts as damages provided that all preconditions for application of Article 74 are met, primarily that the creditor can prove with reasonable certainty the extent of his loss.

The proposed approach has been accepted in one FTCA award.<sup>205</sup> In this case Serbian claimant requested a "domicile" Euro rate. The arbitrator first noted that claimant is entitled to interest in accordance with Article 78 of the

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204. FTCA, Award No. T-23/06, Sept. 15, 2008.

205. FTCA, Award No. T-08/08, Jan. 28, 2009, available at <http://cisgw3.law.pace.edu/cases/090128sb.html>.

CISG and that “there is no need to examine [Seller]’s request in the light of any national law, but rather examine whether it is within the checks provided in Article 7 of the CISG,” since “the matter of interest rate is governed but not settled under the CISG.”<sup>206</sup> Consequently, claimant’s request was examined in the light of any checks that might be imposed by Article 7 of the CISG and the principles underlying the Convention, with special reference to international case law supporting such an approach. Two relevant principles were identified: (1) the principle of full compensation and (2) the principle prohibiting overcompensation of the creditor. The request for “domicile” interest rate was found to be in line with the above mentioned principles. The arbitrator further stated that:

[I]n order to determine the 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. After examining interest rate figures and indicators on short-term Euro deposits in Serbia, the Sole arbitrator finds that the appropriate rate would be 6 percent annually.<sup>207</sup>

This approach is, to the best of our knowledge, novel in the international case law but, in our view, provides for uniform solution to the issue of interest rates under the CISG. What is more, this approach has already gained support by some leading scholars.<sup>208</sup>

It is worth mentioning a third case where the sole arbitrator did not resolve the issue of interest rate pursuant to CISG general principles, although he did classify the interest rate issue as being governed but not settled by the CISG.<sup>209</sup> Even though he listed the general principles of the CISG, *bona fides*, party autonomy, the foreseeability rule, the principle of cooperation, etc., the arbitrator did not find them sufficient to resolve the issue. Consequently, he consulted the rules of law applicable by virtue of the rules of private international law. However, in doing so, the arbitrator found that “. . . in accordance with *the principle of full compensation* the creditor is entitled to expect that the interest rate will be set at the rate that he would expect under

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206. *Id.*

207. *Id.*

208. See, e.g., John Y. Gotanda, *When Recessions Create Windfalls: The Problems of Using Domestic Law to Fix Interest Rates Under Article 78 CISG*, 13 VINDOBONA J. INT’L COM. L. & ARB. 229 (2009).

209. FTCA, Award No. T-02/00, Dec. 9, 2002.

the regulations of his country.”<sup>210</sup> It is somewhat surprising that the arbitrator did not opt for application of this principle within the framework of the CISG, given that it is undisputedly one of the general principles on which the CISG is based.

## XII. EXEMPTION FROM LIABILITY TO PAY DAMAGES

Article 79 of the CISG provides debtor with right to claim exemption from payment of damages if he can prove that his failure to perform is due “to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.”<sup>211</sup>

Given the imposition of economic sanctions on trade with Yugoslavia (Serbia) in the 1990s it was not surprising to find debtors invoking this article in defense to claimant’s claim for damages for non-performance. However, in three out of four cases where a *vis major* defense was invoked, the tribunals erred in determining the appropriate substantive law and applied the provisions of the LCT instead of the CISG.<sup>212</sup> There is only one award where this question has been analyzed from the CISG perspective. However, even this case does not contribute significantly to the understanding of the operation of this article under the CISG. Namely, in award number T-8/06 of October 1, 2007, seller’s assertions justifying its non-performance of the loading of the first consignment and its transportation by occurrence of “the situation that represents *vis maior*” and “the oscillation in the level of the water mark” did not suffice to release the seller from the liability for non-performance. This conclusion was supported by the fact that the situation described by the seller in his letter as an obstacle to the performance of the contractual obligation did not *prima facie* meet the conditions regarding the notice set out in Article 79 of the CISG and the sales contract itself.

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210. *Id.* (emphasis added).

211. See Milutinović Milena, *Oslobodjenje od odgovornosti u međunarodnoj prodaji robe [Exemption from Liability in International Sales of Goods]*, 42 PRAVO I PRIVREDA 442 (2005) (Serb.); V. STOJILJKOVIĆ, *MEĐUNARODNO PRIVREDNO PRAVO [INTERNATIONAL COMMERCIAL LAW, SPECIAL PART]* 179–80 (2001) (Serb.); R. ĐUROVIĆ, A. ČIRIĆ, *MEĐUNARODNO TRGOVINSKO PRAVO—OPŠTI DEO [INTERNATIONAL COMMERCIAL LAW, SPECIAL PART]*, Niš: Centar za publikacije Pravnog fakulteta, 50-2 (2005) (Serb.).

212. See FTCA, Award No. T-07/01, Feb. 21, 2002; FTCA, Award No. T-66/99, Oct. 15, 2001; FTCA, Award No. T-01/00, Dec. 7, 2000.

### XIII. CONCLUDING REMARKS

The survey of application of the CISG before the FTCA confirms both the importance of interpretation of the CISG in the light of its international character and the need to promote uniformity in its application. A great number of the cases we examined dealt with the issues which are neither particularly controversial, nor unique. However, on a few occasions the FTCA practice revealed factual patterns and controversies for which we could not find comparable foreign decisions and awards.

The first hurdle in applying the CISG in the FTCA practice is determining whether it is applicable. The percentage of correct decisions on this point steadily grew over the years. It is still notable, although hardly surprising, that erring tribunals almost always err in favor of the domestic law. Decisions where tribunals mistakenly applied the CISG where it should not have been applied are extremely rare.

A unique problem with respect to the application of the CISG in the region was caused by the need to examine the controversial effects of the dissolution of the SFRY to the succession of former Yugoslav republics to multilateral treaties, such as the CISG. In this respect, a particular tension was noted between the need to protect parties' legitimate expectations, on the one hand, and a country's belated filing of notification of succession to the CISG with retroactive application on the other. The Macedonian example has been given special attention as its notification of succession to the CISG was filed more than a decade after the dissolution of the SFRY.

Once the decision on the application of the CISG was made, there were several more obstacles to the correct application of its substantive provisions. Imprecise translations of the CISG dating back to ratification by former Yugoslavia created some glitches for those who did not consult any of the original versions. Another type of problem, which appears to be universal, was reflected in tribunals' tendency to treat the CISG 'in the spirit' of national law provisions.

Despite these occasional departures from the proper application and interpretation of the CISG, in most of the cases the CISG was correctly applied. Even situations where this has not been the case have usually been of minor importance and did not affect the final outcome. Finally, the increasing trend of invoking foreign case law in the FTCA awards gives reason to expect that the quality in the decision making process before the FTCA will further increase and that consulting FTCA case law will represent a fruitful source for any scholar and practitioner interested in the CISG jurisprudence.