SECTION III.

INTEREST

Article 78.

Interest on Sums in Arrears

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A. Legislative History

Preparing rules on interest raised thorny questions that generated sharp differences of view and reversals of position. The UNCITRAL Working Group's Draft Convention (1976) provided that if the buyer delays in paying the price the seller is entitled to interest; the rate was based on a complex two-factor formula -- the higher, in seller's country, of (a) the official discount rate plus 1% or (b) the rate for unsecured short-term credits. The full Commission, in its 1977 review of the sales provisions, tried unsuccessfully to develop a simpler and clearer formula to determine the interest-rate; this technical problem, and the opposition by some countries to dealing with the question, led the Commission to delete the article on interest.¹

The comments of governments and international organizations submitted for the Diplomatic Conference included proposals to reintroduce a provision dealing with interest. However, the Conference (like the Commission) found it difficult to agree on a formula to set the interest-rate. The difficulty resulted, in part, from the different economic and legal status of interest in market, planned and developing economies; in addition, the inclusion of any reference to interest was opposed by representatives from some countries that gave effect to religious rules forbidding the payment of interest. The Conference finally designated an ad hoc working group to seek a compromise; one of the group's alternative proposals was approved, but unhappiness with this decision led, at the very end of the conference, to a more general provision that became Article 78 of the Convention.²

Article 78³

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

It became evident that a general provision on interest was needed to avoid serious divergencies in the application of the Convention. Article 74, as we have seen, laid down a general rule for the recovery of damages resulting from a breach of contract. In some legal systems the concept of damages included interest while other legal systems dealt with interest separately from damages.⁴ And the relationship between the Convention and domestic law was complicated by the
provision in Article 84(1), infra at §450, that a buyer may recover interest when the seller is bound to refund the price. Consequently, even in settings where it is understood that "damages" include interest it could be argued that the Convention's provision for interest in this one setting excluded the recovery of interest in all other situations. Such basic divergencies of application are avoided by the brief statement in Article 78 that an aggrieved party "is entitled to interest" on a "sum that is in arrears."

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B. The Rate of Interest

As was noted above, the Diplomatic Conference could not agree on a formula for calculating interest. On the other hand, the Conference rejected a proposal that the question be remitted to applicable domestic law.6

As a consequence, the provision that in stated circumstances the party "is entitled to interest" would supersede domestic law that denies interest or (it would seem) that permits only a token recovery.7 This leaves two choices for the application of Article 78. One approach would refer to the rate provided by applicable domestic law, if that rate was designed fairly to compensate for the loss of the use of the money. Under a second approach the tribunal would determine the aggrieved party's loss because of the delay in receiving the funds.

Under the second approach, should the tribunal look to the current cost of credit in the place where the aggrieved party does business or should the tribunal inquire whether the delay in fact required the aggrieved party to borrow substitute funds? This latter approach seems inconsistent with the unqualified statement of Article 78 that the aggrieved party "is entitled to interest," and with the commercial fact that the failure to receive funds is always a loss.

The choice is not easy, but an approach that is not tied to domestic law has advantages since it avoids difficult problems of ascertaining which domestic law is applicable to the international transaction and also avoids difficult and sensitive questions as to whether domestic law is consistent with the objectives of the Convention.8

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C. Situations Calling for Interest

The provisions on interest in ULIS and in the Draft Convention approved by the Working Group were confined to recovery by the seller when the buyer delays paying the price of the goods. This situation seemed to be in the forefront of the discussions at the Diplomatic Conference, but Article 78 of the Convention is cast in broader terms and extends to the failure to pay any "sum that is in arrears". Interest has traditionally been limited to delay in paying "liquidated" sums; this tradition probably underlies the phrase "sums in arrears" so that Article 78 would not apply to delays in compensating the other party for consequential damages that result from breach of contract or (probably) to damages under Article 76 based on "current" (or market) levels.9

On the other hand, jurisdictions that are accustomed to allowing interest in a wide variety of situations might consider that there is failure to pay a "sum in arrears" when damages are established by a substitute transaction (Art. 75), or when an aggrieved party is entitled to reimbursement for his "reasonable expenses" in preserving goods for a party in breach (Arts. 85, 86(1)).10 Questions lying along the margins of Article 78 must await the development of an international jurisprudence under the Convention. See Article 7, supra at §92. The contribution of Article 78 is to make the open questions marginal rather than fundamental.

[...]

1 W/G 7 Annex I (text of 1976 Draft:Art. 58), Annex II (Secretariat Commentary on 1976 Draft; Art. 58), VII Yearbook 95, 136-137; UNCITRAL X Annex I paras. 492-500, VIII Yearbook 60 (discussion leading to deletion of Art. 58).
2 Analysis of Comments and Proposals, A/CONF.97/9:Art. 60, para. 5; Art. 69, para. 2; Art. 70 para. 1; Com. I Art. 69, paras. 3, 4, 6, 7 (proposals of ad hoc Working Group); SR. 29 paras. 1-43; SR. 34 paras. 1-52; SR. 37 paras. 70-78. (The
3 As has been noted, the 1978 Draft contained no provision on interest. ULIS 83 provided that "delay in the payment of the price" created an obligation to pay interest based on the official discount rate in the seller's country plus 1%.

4 On damages and interest for failure to pay the price see Hellner, Contracts and Sales, Intro. Swedish L. 201, 217-218; Goldstajn, The Law of Sales in Yugoslavia, 14 E. Eur. 125, 181 (liability for interest on money debt even if delay was beyond debtor's control; in some circumstances damages may also be imposed).

5 On the conflicting views on whether a right to "damages" includes interest see Treitel, Remedies § 114-115. No such problems are presented by statutory requirements for the payment of interest following the entry of a judgment. See also Benjamin § 1276-1278; 5 Corbin §§ 1045-1052; Palandt §288 at 1.

6 The U.K. proposed the following: "This Convention does not affect any right of the seller or buyer to recover interest on money." Com. I Art. 69, para. 4(v).

7 Art. 4 states that the Convention "is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage." Art. 4, of course, does not preserve rules of domestic law that are inconsistent with the Convention, for that would nullify the Convention. Cf. Art. 7(1): interpretation "to promote uniformity."

8 U.K. legislation in some circumstances gives the court discretion to fix the rate of interest. Benjamin § 1276 n.43.

9 Legislation in the U.K. has allowed interest on damages. Benjamin §1276 n.42.

10 A suggestion that the obligation to pay interest must be based on a failure to carry out an express promise to pay a fixed sum would be inconsistent with Art. 84(1), which states that a seller must pay interest when he "is bound to refund the price."

Referring Principles:

VII.6 - Duty to pay interest