THE UNIDROIT PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS AND THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

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1. INTRODUCTION

In two recent articles I paid attention to the UNIDROIT Principles for International Commercial Contracts (hereafter, the Principles), discussing their nature and possible functions\(^1\) and their relationship to the Dutch Civil Code.\(^2\) In this contribution honouring Mika Kokkini-Iatridou, my highly regarded colleague at the Faculty of Law at the University of Utrecht, I will investigate the relation between the Principles and the 1980 Vienna Sales Convention (hereafter, the Convention or CISG) the paramount importance of which to international contract law need not be stressed here. Taking into account the different legal character of the (non-binding) Principles and the Convention, I will pass over in silence...
those provisions on the scope of application of both instruments. Attention will be focussed on the substantive similarities and differences which the two documents present.

According to the drafters of the Principles,³ CISG has been an obligatory point of reference to the UNIDROIT Working Group and a starting point for its discussions, but its solutions have not been followed uncritically. CISG has been deviated from where its rules, restricted as they are to the law of sales, were considered to be ill-adapted for contracts in general (including contracts for services) or were otherwise felt to be amenable to improvement. Another obvious source of divergence is the wider scope of the Principles, which endeavour to cover general contract law as a whole and thus tackle many problems on which CISG is silent. I will review the issues following the order of the Principles.⁴

2. GENERAL PROVISIONS

2.1 Freedom of contract and the binding force of contract

Articles 1.3, 1.4 and 1.6 enunciate some basic policies underlying the Principles. They relate to freedom of contract and the binding force of contract. The parties are free to enter into a contract and to determine its content; a contract validly entered into is binding upon the parties and can only be modified or terminated in accordance with its terms or by agreement (or as otherwise provided under the Principles); the parties may exclude the application of the Principles or derogate from, or vary the effect of, any of its provisions (except as otherwise provided in the Principles). Only the last of these rules may be found explicitly in CISG (Article 6), but it is clear that the other rules can also be reckoned to be among ‘the general principles on which it is based’ (Article 7 paragraph 2).⁵

2.2 Good faith and fair dealing in international trade

Each party must act in accordance with good faith and fair dealing in international trade. The parties may not exclude or limit this duty (Article 1.8). The draft-comments enumerate a number of applications throughout the Principles and note that good faith and fair dealing may be considered ‘to be one of the fundamental ideas underlying the Principles.’ The applications include the process of negotiation and of formation of contracts (for example Articles 2.3, 2.14 and 2.15), validity (for example Articles 3.5 and 3.10), interpretation and the rules on performance and non-performance. The applications indicate that good faith may lead to a restriction or an extension of the rights or duties of a party as compared to the content of these rights and duties according to the literal text of the agreement or of the Principles.

At first glance, CISG attributes a more restricted role to good faith. Article 7 paragraph 1 confines it to the interpretation of the Convention: ‘In the interpretation of this Convention, regard is to be had to . . . the observance of good faith in international trade.’ This rule reflects a solution which is a compromise between those who were opposed to any explicit reference in the Convention to good faith and those who preferred a provision imposing the duty to act in good faith directly upon parties to a contract of sale.

To my mind, in practice it will be impossible to restrict the application of good faith to the mere interpretation of the Convention. Most articles of the Convention directly relate to the rights and duties of the parties; interpreting the Convention in the light of good faith amounts to subjecting the rights and duties of the parties to that standard. Moreover, it would be arbitrary to subject the parties’ behaviour to the standard of good faith and fair dealing only where their rights and duties are directly based on the text of the Convention and not where the parties have included clauses that either supplement or vary the text of the Convention.

Finally, the Convention contains so many articles referring to reasonable conduct that this standard may be considered to be one of the general principles on which the Convention is based. It is hard to see, then, that the more general standard of good faith and fair dealing of which the standard of reasonable conduct is merely the expression, would be excluded from those general principles.

The conclusion must be that in substance there is no difference between the Principles and CISG.⁶ Good faith, however
the rule is phrased, ‘may be the only undisputed rule of the evanescent lex mercatoria’.7

2.3 Usages

According to Article 1.9, if the parties have not agreed to a usage they may be nevertheless bound by it if it "is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable." This principle, which more or less returns to the solution of Article 9 of the 1964 Uniform Law on the International Sale of Goods (hereafter, ULIS), is more lenient than Article 9 paragraph 2 CISG which requires in addition that parties ‘knew or ought to have known' the usage. This requirement was added in order to protect parties from developing countries against usages unknown to them because they were developed in industrialized countries.8 The Principles seek to accommodate their interest more directly by protecting parties against the application of unreasonable usages. This approach is, it is submitted, in keeping with the modern tendency as regards the effect of general conditions (which may be hard to distinguish from usages): it is preferable to strike out classes deemed unreasonable in the circumstances of the case rather than to exclude the application of the conditions as such an account of more or less subjective considerations relating to a party's knowledge of their contents.

2.4 Receipt and dispatch rules

Article 1.10 embraces the receipt principle as the article provides that a notice is effective when it reaches the person to whom it is given. The rule differs partly from CISG, where an intermediate solution was chosen.

Part II of CISG relating to the formation of contract adopts the receipt rule for offer and acceptance.9 Accordingly, the contract is not yet concluded at the time an acceptance is dispatched. But the dispatch has the effect that the offeror is barred from revoking the offer (Article 16 paragraph 1).

On the other hand, for notices under Part III of the Convention the dispatch rule was preferred. Article 27 provides that if a notice is given by means appropriate in the circumstances, a delay or error in its transmission or its failure to arrive does not prevent its author from relying on it. Thus the risk of such delay, error or failure to arrive must be borne by the addressee. The justification for this must be sought in the fact that the notices under Part III are often prompted by his failure to fulfill any of his obligations. However, since this is not always the case the rule has been subject to criticism10 and the Convention contains a number of exceptions to the rule of Article 27.11

3. FORMATION

3.1 Offer and acceptance

Part II of CISG contains a set of rules relating to the formation of contract through the traditional mechanism of offer and acceptance. Due to the subject-matter of the Convention, the rules are restricted to the contract of international sale of goods but in substance they are perfectly applicable to other contracts as well. It is understandable, therefore, that the drafters of the Principles have been profoundly inspired by CISG. In fact, the rules of CISG are largely identical with the corresponding rules of the Principles' second Chapter.

3.2 Informal formation of contract

Where the two sets of rules differ, it seems that the Principles tend to facilitate a smooth and informal formation of contract even more than CISG. This may be illustrated by two examples.12

The rule of Article 14 Paragraph 1, which requires for an offer to be sufficiently definite that it expressly or implicitly fixes or makes provision for determining the price, does not appear in the Principles. If an offer which is silent on the price meets the test of Article 2.1, that is if a proposal is sufficiently definite and indicates the intention of the offeror to be bound, the offer is valid and after acceptance the price to be paid will be determined according to Article 5.7. In this way, the contradiction between Articles 14 and 55 CISG is avoided.13
Another rule of CISG not adopted in the Principles is Article 19 Paragraph 3. This rule sets out a number of terms which, if contained in an acceptance which differs from the offer, are considered to alter the terms of the offer materially, so that on the basis of this `acceptance' a contract will not be concluded. In the Principles (Article 2.10) this issue is left open. Consequently,

the question which terms amount to a material modification of the offer will have to be decided according to the circumstances of the case.

3.3 Remaining provisions

The Principles deal with a number of subjects on which CISG is silent: see Articles 2.11 (writings in confirmation), 2.12 (conclusion of contract dependent an agreement on specific matters or in a specific form), 2.13 (contract with terms deliberately left open), 2.14 (negotiations in bad faith), 2.15 (duty of confidentiality), 2.16 - 2.19 (standard terms).

4. VALIDITY

Article 4 CISG provides that the Convention is not concerned with the validity of the contract or of any of its provisions, leaving the matter of validity to the applicable domestic law. CISG is so rigid in this approach as to leave several issues relating to validity on which ULIS contained provisions unsettled. The only rules on validity are Articles 11 and 29, providing that a contract of sale may, in principle, be concluded, modified and terminated by mere agreement of the parties.

On the other hand, the Principles do contain a chapter on validity. Apart from Articles 3.1 and 3.2 which correspond to Articles 11 and 29 CISG, the chapter is concerned with the so-called defects of consent (mistake, fraud, threat and gross disparity) and settles some effects of invalidity in general (for example, confirmation, partial nullity and damages). Following the example of ULIS, Article 3.6 provides that a party shall not be entitled to avoid the contract on the ground of mistake if the circumstances on which he relies afford, or could have afforded, him a remedy for non-performance. The rules on non-performance prevail also in case of initial impossibility (Article 3.10).

According to Article 3.20 the Principles do not deal with an invalidity arising from lack of capacity, lack of authority, or immorality or illegality.

Elsewhere in the Principles there are some other rules relating to validity; see Articles 5.7 (price determination), 6.1.18 (refusal of public permission affecting the validity of the contract), 7.4.13 (exemption clauses) and 7.4.14 (penal clauses).

5. INTERPRETATION

Article 4.1 of the Principles states that a contract shall be interpreted according to the parties' common intention if such an intention can be established, and, if not, that it shall be interpreted according to the meaning which reasonable persons of the same kind as the parties would give to it in the same circumstances. The same principle applies to the interpretation of statements and other conduct of one of the parties (Article 4.2). The rules are supplemented by an enumeration of relevant circumstances to which due consideration shall be given (Article 4.3).

Article 8 CISG only contains a rule corresponding to Article 4.2 (and 4.3), but the drafting history of the Convention shows that Article 8 is to be applied also to determine the meaning of contract terms. Indeed, it is hard to see how there could be a meaningful difference between the methods for determining whether statements or other conduct of the parties have led to a contract and, if so, the methods for determining the content of their agreement.

In addition to the basic rules an Interpretation mentioned in Article 4.1 - 4.3, the Principles contain some provisions which are absent in CISG: Articles 4.4 (interpretation of unclear terms), 4.5 (contra proferentem rule), 4.6 (reference to the contract as a whole), 4.7 (supplying an omitted term) and 4.8 (linguistic differences).

6. CONTENT
Chapter V of the Principles contains some rather theoretical or pedagogical provisions (Articles 5.1 - 5.5) on a) the concept of express and implied obligations and b) the difference between duties to achieve a specific result and duties of best efforts. As far as b is concerned, the text aptly stresses that a contract and even one obligation may comprise duties of both kinds. The rules as such do not have a counterpart in CISG but traces of them may be found in the Convention. For instance, Article 5.3 (duty of cooperation between parties) gives a general expression to an idea that can be found for a specific case in Article 60 CISG relating to the obligations of the buyer. 

Article 5.7 of the Principles on price determination is inspired by Article 55 CISG but goes beyond its example in several respects. Whereas CISG provides that in the absence of any determination by the parties they are considered to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for goods sold under comparable circumstances in the trade concerned, the Principles continue to state that if no such price is available, a reasonable price will be due. The article also contains other rules which are absent in CISG, for example, that where the price is to be determined by one party whose determination is manifestly unreasonable, then notwithstanding any provision to the contrary, a reasonable price shall be substituted. Under CISG, a clause in an offer according to which the price is to be determined by one of the parties probably would meet the requirements of Article 14 CISG, but it is doubtful, to say the least, whether under Article 7 CISG the test of reasonableness could be applied to that party's determination.

7. PERFORMANCE

Article 6.1.1 on the time of performance corresponds with Article 33 CISG relating to the date at which the seller must deliver the goods. For the time of payment by the buyer Article 58 CISG contains a rule geared to the contract of sale: if the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places the goods (or the documents) at the buyer's disposal. This rule tallies which the more general rule of Article 6.1.5 according to which the performances normally must be rendered simultaneously.

Article 6.1.6, stating that the obligee may reject an earlier Performance unless he has no legitimate interest in doing so, finds its counterpart in Article 52 Paragraph 1 CISG, albeit only for earlier performance by the seller. The CISG rule does not contain the qualification relating to a legitimate interest in rejecting an early performance, but it seems to me that the same follows from Article 7 paragraph 1 (good faith).

As to the place of performance Article 6.1.6 prescribes that a monetary obligation must be performed at the creditor's place of business and any other obligation at the obligor's place of business. In both cases, the place of business is meant to be that at the time of performance; a party changing that place after the conclusion of the contract must bear any increase in the other party's expenses caused thereby. In CISG there are separate rules for performance by the buyer and performance by the seller. The buyer must pay at the seller's place of business (at the time of payment) or - if payment is to be made against the handing over of the goods - at the place where the goods are handed over.

8. NON-PERFORMANCE

Chapter VII is the final and most extensive chapter of the Principles: it numbers some 30 articles distributed over four sections (general provisions, right to performance, termination, damages and exemption clauses). In CISG the provisions on non-performance may be found throughout Part III (sale of goods), the most important being Articles 25 (concept of
8.1 Terminology

In the Principles the key concept is 'non-performance', defined as 'failure by a party to perform any of its obligations under the contract, including defective or late performance' (Article 7.1.1). It is immaterial whether the non-performance is excused or not; and it is also immaterial whether the cause of the non-performance existed already at the time of conclusion of the contract or whether it arose afterwards. This does not mean, of course, that all possible non-performances will give rise to all possible remedies. An example of this arises where the right to terminate a contract is restricted to cases of 'fundamental' non-performance (Article 7.3.1); damages may not be claimed where the non-performance is excused (Article 7.4.1); and where a non-performance is caused by the obligee he is not allowed to rely an it (Article 7.1.2).

CISG has adopted the same system but the terminology is different. The Convention uses the concepts of 'breach' (e.g. Articles 25, 49 and 74) and of 'failure to perform' (e.g. Articles 45 and 79) which are identical and, while not being defined in the Convention, convey the same broad meaning as the concept of 'non-performance' in the Principles. To my mind, the latter term is preferable since in the common law the notion of breach of contract is restricted to a specific type of non-performance, that is to say non-performance that is not excused (giving the obligee the right to claim damages). Another terminological difference relates to the concept of termination of the contract for non-performance. (Article 7.3.1 Principles): here CISG employs the concept of 'avoidance', which in the Principles is adopted in Chapter III to indicate the rescission of the contract an account of a defect of consent.

The remaining general provisions of Section 7.1 of the Principles address four issues. For the purposes of this article, the least interesting of these is the right to withhold performance (Article 7.1.3); which in CISG follows from Articles 58 and 71.

8.2 Right to cure

Article 7.1.4 gives the non-performing party the right to cure any non-performance, subject to the aggrieved party's right to terminate the contract. The provision implies that in case of a fundamental non-performance the obligee's right to terminate prevails over the obligor's right to cure, provided that the obligee exercises his right before the obligor makes known his intention to cure; on the other hand, if the obligor makes known this intention before the obligee has terminated the contract, the right to cure prevails.23 The article differs from Article 48 CISG, which seems to subject the seller's right to cure to the consent of the buyer; even if the seller makes known his intention to cure the buyer may refuse the offer and proceed to the termination of the contract.24 According to both provisions, once cure is effected the obligee retains his right to claim damages for delay but he may not resort to other remedies.

8.3 Nachfrist

Article 7.1.5 addresses the so-called Nachfrist: in case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance. During the extension time the obligee cannot resort to other remedies (e.g. termination or specific performance), but his right to recover damages is not affected. Up until this point the article concurs with CISG (Article 47). But there is also an important difference. A non-performance which is not fundamental will become fundamental after the expiration of the extension time (provided that the additional period was of a reasonable length), so that the aggrieved Party may then proceed to the termination of the contract. This part of the provision25 differs from Article 49 CISG in that it applies to all cases of non-performance whereas the rule in Article 49 paragraph 1 sub (b) is restricted to the case of non-delivery; consequently, in other cases of non-performance; the question whether after the expiration of the extension period there will be a fundamental breach allowing termination of the contract must be decided on the uncertain basis of Article 25 CISG. As I already indicated elsewhere,26 to my mind
the solution of the Principles is clearly preferable.

8.4 Force majeure

The concept of force majeure. (Article 7.1.6 paragraph 1) corresponds to Article 79 paragraph 1 CISG. The second paragraph of the CISG provision (relating to the liability for third parties engaged to perform the whole of part of the contract), is not taken over in the Principles, but it seems to me that the same rule would follow from the concept of force majeure as defined in paragraph 1.

In the remaining paragraphs of the provisions two differences may be noted. Paragraph 3 in CISG provides for the case of a temporary non-performance that 'the exemption provided by this article has effect for the period during which the impediment exists.' In the Principles (paragraph 2) the rule is framed more flexibly: 'when the impediment is only temporary, the excuse shall have effect for such a period as is reasonable taking into account the effect of the impediment on performance of the contract.'

Paragraph 5 of CISG ('Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention'), which seems to warrant the right to claim performance even if performance has become permanently impossible, has been replaced by a rule specifying that force majeure does not prevent a party from exercising a right to terminate the contract or withhold performance or request interest on money due.

8.5 Specific performance

Section 7.2 of the Principles adopts (subject to some qualifications) the principle of specific performance not only for monetary obligations but also for non-monetary obligations. In CISG, which also grants the right to performance (Articles 46 and 62), the right to obtain a judgment for specific performance is left to the national law of the competent Court (Article 28). Moreover, Article 7.2.4 allows the Court, when ordering a defaulting party to perform, to direct that the party shall pay a penalty if it does not comply with the Order (astreinte).

8.6 Right to terminate the contract

Section 7.3 of the Principles is devoted to the right to terminate the contract an account of non-performance. The regulation is generally in accordance with the rules on 'avoidance' in CISG, but there are some differences. Theoretically, the most interesting difference relates to the definition of fundamental non-performance: in the Principles this concept is set forth in a more flexible way (Article 7.3.1, listing a number of relevant factors) than in Article 25 CISG. In practice, a more important difference is the extension of the Nachfrist (enabling the aggrieved party to transform a non-fundamental non-performance into a fundamental one) to all cases of non-performance; see Article 7.3.1 paragraph 3 and section 8.3, above.

Both Instruments deal with anticipatory fundamental non-performance (Articles 7.3.3, 72) and the right to require adequate assurance of due performance. However, in the Principles this latter right is restricted to the case of an expected fundamental non-performance, whereas in Article 71 CISG it suffices that the other party will not perform a 'substantial part' of his obligations. For this reason, if the assurance is not provided, according to the Principles the party requiring it may immediately proceed to termination of the contract, whereas in CISG this is not the case unless the test of Article 72 is complied with.

As to the articles on the effects of termination (Articles 7.3.5 and 6; 81-84), it is interesting to note that whereas CISG denies the buyer the right to terminate the contract if it is impossible for him to make restitution of the goods, the Principles do not contain such a restriction but provide that upon termination of the contract both parties must make restitution; if restitution in kind is not possible or appropriate allowance should be made in money whenever reasonable (Article 7.3.6). It remains to be seen whether this rule, while certainly well suited to contracts for services, will not be too 'liberal' for contracts aiming at the transfer of goods.
8.7 Damages and exemption clauses

Finally, Section 7.4 on damages and exemption clauses (Articles 7.4.1 - 7.4.14) may for the purposes of this article be divided into two groups of provisions: those that have a counterpart in CISG and those that have not. To the first group belong Articles 7.4.1 paragraph 1 (right to damages), 7.4.2 (fall compensation), 7.4.4 (foreseeability of harm), 7.4.5 (proof of harm in case of replacement transaction), 7.4.6 (proof of harm by current price), 7.4.8 (mitigation of harm) and 7.4.10 (damages for failure to pay money). These rules concur nearly entirely with Articles 74-78 CISG. Leaving aside some small differences, a point of substance is the rule on rate of interest (Article 7.4.10), on which Article 78 CISG is silent.

The other group consists of provisions which are new compared to CISG. These are Articles 7.4.1 paragraph 2 (non-pecuniary harm), 7.4.3 (certainty of harm), 7.4.7 (non-performance due in part to the aggrieved party), 7.4.9 (interest on damages), 7.4.11 (manner of monetary redress), 7.4.12 (currency in which to assess damages), 7.4.13 (exemption clauses) and 7.4.14 (agreed payment for non-performance). Some of these provisions are of a technical nature, providing solutions that will also be reached under CISG. Others bring substantive innovations, notably the liability for non-pecuniary harm, the rule against invoking grossly unfair contract terms and the rule that admits penal clauses but allows them to be reduced if grossly excessive.

9. CONCLUDING REMARKS

Our brief survey reveals that while the drafter of the Principles often have followed CISG, there are also substantial differences between the two Instruments. These differences may be divided into two categories.

Firstly, there are the cases where the Principles have deviated from a rule contained in CISG. Referring the reader to the preceding sections I mention the rules on good faith and fair dealing, usages, receipt and dispatch principle, informal conclusion of contract price determination, place of performance, the terminology of breach and non-performance, the right to cure, the Nachfrist, force majeure and restitution. Some of these deviations are prompted by the wider scope of the Principles, but most of them seem to be adopted simply because they were considered to be improvements over CISG. As indicated during the discussion above, subject to one exception (see supra 8.6), I am inclined to prefer the solutions proposed in the Principles.

Secondly, and perhaps even more important, a substantial part of the Principles is new compared to CISG or, for that matter, to other existing uniform law: I refer to the rules on negotiations and standard terms, validity, interpretation, content, performance and hardship, specific performance and astreinte, damages, exemption clauses and penal clauses. Hopefully this achievement will inspire further attempts directed towards a harmonization and unification of contract law, either on a regional level (in Europe by the Council of Europe or by the European Communities) or on a global level (UNIDROIT, UNCITRAL).

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1 A.S. Hartkamp, ‘Principles of Contract Law’, in A.S. Hartkamp, et al., Towards a European Civil Code (1994), pp. 37-50. To put it very briefly, the UNIDROIT Principles are a set of some 120 articles, covering the general part of contract law. In this stage, they are not meant to become binding law, but they may inspire national legislators; they may provide guidance to courts when interpreting existing uniform law and to arbitrators when deciding disputes over international commercial contracts; and they will stimulate together with the Principles of European Contract Law the discussion on a uniform contract law for Europe.


4 The Principles have been published in Am.J.Comp.L. XL (1992), p. 703 et seq. In July 1993, UNIDROIT issued a working paper (Study L - Doc. 40, Rev. 11) which contains some minor modifications which mainly relate to the order of the rules. However, these are not relevant to the purpose of this article and I will refer to the principles as published in the
Am J Comp L. The comments had not yet been published when this contribution was being written.


8 M.J. Bonell, op. cit. n. 6, Art. 9, § 1.4.1.

9 Arts. 15 and 18. Other notices may be subject to the dispatch rule; Arts. 19 and 21 paras. 1 and 2.

10 See, for example, P. Schlechtriem, in Von Cämmérer/Schlechtriem, op. cit. n. 6, Art. 27, Rn. 2.

11 Arts. 47 para. 2, 48 para. 4, 63 para. 2, 65 paras. 1 and 2, 79 para. 4. The parties may of course derogate from the provision.

12 I leave aside the reservation of Arts. 12 and 96 CISG, the restrictive rule on public offers (Art. 14 CISG) and the effects of the dispatch rule in the cases of Arts. 19 and 21 (see n. 9).

13 See on this Problem in CISG and on the proposed solutions P. Schlechtriem, in Von Cämmérer/Schlechtriem, op. cit. n. 6, Art. 14, Rn. 9 et seq.


15 Subject to the reservation of Arts. 12/96 and the rule in Art. 29 para. 2.

16 See E.A. Farnsworth, in Bianca/Bonell, op. cit. n. 6, Art. 8, §§ 1.2 and 2.1; W. Junge, in Von Cämmérer/Schlechtriem, op. cit. n. 6, Art. 8, Rn. 2 and 3.

17 The buyer's obligation to take delivery consists in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery. The duty to cooperate also is one of the ideas underlying Art. 80 CISG, stating that a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission. See H. Stoll, in Von Cämmérer/Schlechtriem, op. cit. n. 6, Art. 80, Rn. 4.

18 See P. Schlechtriem, in Von Cämmérer/Schlechtriem, op. cit. n. 6, Art. 14, Rn. 7 and 8.

19 See also V. Huber, in Von Cämmérer/Schlechtriem, op. cit. n. 6, Art. 52, Rn. 2. The rules of Art. 6.1.6 paras. 2 and 3 will also obtain under the CISG-regime.

20 See for a brief discussion M. Fontaine, 'Content and Performance', Am J Comp L. XL (1992), p. 645 et seq. and

21 The article not only contemplates the case where the non-performance was caused by the obligee's act or omission (cf., Art. 80 CISG), but also the case where the non-performance was caused by another event as to which the obligee bears the risk.

22 M. Will, in Bianca/Bonell op. cit. n. 6, Art. 45, § 2.1.2.

23 Provided that cure is appropriate to the circumstances, is effectuated promptly, and does not cause the aggrieved party unreasonable inconvenience or expense.

24 V. Huber, in Von Cämmérer/Schlechtriem, op. cit. n. 6, Art. 48, Rn. 4, 15; although for a contrasting account see M. Will, in Bianca/Bonell, op. cit. n. 6, Art. 48, § 2.1.1.1.1. The position of B. Audit, op. cit. n. 6, nr. 133 is open to doubt: on the one hand he states (inspired by J.O. Honnold, op. cit. n. 6, §§ 184, 296): 'on peut considérer que l'offre faite par le vendeur de remédier à la contravention est susceptible de retirer provisoirement à celle-ci son caractère de gravité', on the other hand he admits that according to the rest of Art. 48: 'l'acheteur peut s'opposer à la demande d'exécution par le vendeur'. Since the provision in this respect is not very clear, there might be a case here for interpreting the Convention in the light of the Principles; see A.S. Hartkamp, loc. cit. n. 1, Section III, 1.

25 See also Art. 7.3.1 para. 3.

26 A.S. Hartkamp, loc. cit. n. 6, p. 27.

27 Therefore the liberating effect may outlast the period during which the impediment exists, but the rule is not intended to bring about a permanent relief in the sense of Art. 74 para. 2 ULIS (imprévision). In the Principles the Issue is dealt with by the hardship provisions of Arts. 6.2.1-6.2.3.

28 See for a correct attempt to avoid this unsatisfactory consequence H. Stoll, in Von Cämmérer/Schlechtriem, op. cit. n. 6, Art. 74, Rn. 58.

29 Subject to the exceptions of Art. 82 para. 2 (in which cases he may terminate the contract without being obliged to make allowance for the goods in money, but he must account to the seller for all benefits received, Art. 84).

Referring Principles:

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I.1.1 - Good faith and fair dealing in international trade
I.2.2 - Trade usages
IV.5.1 - Intentions of the parties
VI.3 - Force majeure