X. The General Principles of the CISG in Case Law

As far as the general principles are concerned, while there are some that can be identified more easily, since they are underlying one or more specific provisions, there are others the identification of which is more difficult, and leads to these principles not enjoying overall acceptance. As for the former category, the most important one is that of party autonomy, as also acknowledged by courts and arbitral tribunals. The importance of this principle can easily be derived from the fact that it is that principle that confers dispositive nature to the CISG and, thus, a subsidiary role to it (which leads to the rules of the CISG to merely be default rules). In this author’s opinion, this means that where there is a conflict between the principle of party autonomy and any other general principle, the former always prevails.

Although doubts have been expressed in the past as to whether the principle of good faith constitutes one of the general principles upon which the CISG is based, nowadays both commentators and courts acknowledge that the principle of good faith is one of the general principles referred to in Art. 7(2) CISG. This does not mean, however, that the principle of good faith can be used to justify any equitable result. Rather, the principle at hand, like all other general principles underlying the CISG, have to be used solely when the gap is one that requires resort to general principles. Thus, as mentioned already, one must criticize a German court for going too far when it stated that an explicit declaration of avoidance of the contract was not nec-essary once the seller had refused to perform its obligations, even though the CISG itself expressly requires such declaration, since to insist on such a declaration would be against the principle of good faith.

Although the principle of good faith has already been resorted to by courts to solve specific matters governed by, albeit not settled in, the CISG, commentators have stated that the principle of good faith is generally too vague to serve any practical purpose, which lead to the identification of general principles that can be traced back to that of good faith, but
which have a narrower scope and may be of more use in practice. Among these general principles, both courts and commentators list that of the prohibition of *venire contra factum proprium* as well as that of estoppel, which some commentators consider to be comparable to one another, and which can be derived from specific provisions of the CISG, such as Artt. 16(2) and 29(2). Furthermore, from the principle of good faith another more specific principles has been derived, namely that pursuant to which parties are required to cooperate with each other, which

 requires, inter alia, parties to exchange Information relevant for the Performance of their respective obligations.

The aforementioned principles (of party autonomy and good faith) are not the only general principles which can be derived from one or more specific CISG provisions. The principle of informality (or freedom from form requirements, which can be derived from Art. 11 CISG) also constitutes such a general principle, as also pointed out by courts; from this principle it follows, among other things, that the parties are also free to modify or terminate their contract in any form be it either in writing or orally or in any other form. Even an implied termination of the contract has been held possible.

Another such general principle is that of mitigation, set forth in Art. 77 CISG, pursuant to which a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach, in order to avoid the party in breach to be entitled to claim a reduction in the damages in the amount by which the loss should have been mitigated.

Similarly, the following general principles underlying a CISG Provision have been identified: the principle - underlying Art. 9 (2) CISG - pursuant to which the parties are bound, unless otherwise agreed, by a usage of which they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned; the principle pursuant to which the creditor is entitled to interest on sums in arrears, irrespective of any notice of default; the principle - of Civil Law origin - pursuant to which damages are limited to foreseeable ones, a principle that, as much as that of full compensation, can be derived from Art. 74 CISG; the principle, laid down in Art. 27 CISG, pursuant to which for the purpose of the effectiveness of a declaration or notice its dispatch is sufficient, unless otherwise stated in the CISG; the principle pursuant to which official holidays or non-business days are included in calculating a period of time which, however, has to be extended where the last day of the period falls on such holiday or non-business day; the principle, to be derived from Art. 84 CISG, pursuant to which the party at fault has to refund the amounts equal to its enrichment; the principle enshrined in Art. 40 CISG acknowledged both by commentators and courts, pursuant to which "a grossly negligent un-knowing buyer appears to be more protection-worthy than a seller acting fraudulently", as well as the principle "impossibilia nulla est obligatio", which underlies Art. 46(1) CISG.

Apart from the foregoing general principles, which all can be traced back to specific provisions, there are other general principles which can be derived by looking at a wider, more comprehensive context, which, however, does not exclude that specific provisions constitute a starting point for determining whether a general principle exist. One such principle is that of "reasonable-ness" to which the CISG often refers, while at times the CISG refers to the parties as having (to have) the qualities of "reason-able persons", at other times, the CISG requires that the parties act within a "reasonable" period of time.

Other principles of the kind at hand include: the principle pursuant to which the party acting in reliance upon a Situation created by opposing party is to be protected, a principle to be derived from Artt. 16(2) and 29(2); the principle of favor con-
tractus, 386 "which means that, whenever possible, a Solution should be adopted in favour of the valid existence of the contract and against its premature termination on the initiative of one of the parties," 387 thus making the avoidance of the contract a remedy of last resort; 388 the principle pursuant to which the avoidance of the contract, where the contract is severable, solely affects the part of the contract the breach relates to; 389 the principle pursuant to which "each party has to bear the costs of its Obligation"; 390 the principle, to be derived inter alia from Artt. 58(1)

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and 71(1), 391 pursuant to which a party is entitled to withhold its Performance in case of the opposing party's breach of contract 392 as well as the principle of simultaneous exchange of Performances. 393 The "functional equivalence approach", too, must be considered a general principle underlying the CISG; 394 this is relevant for the purpose of determining the CISG's relationship with domestic law.

Case law has dealt with the issue of whether a general principle in respect of the place of Performance of monetary obligations exist. One court expressly stated that "since the purchase price is payable at the place of business of the seller", under Article 57 CISG, "this indicates a general principle valid for other monetary claims as well", 396 a view also taken by other courts. 397 Nevertheless, in this author's opinion a general principle cannot be derived from the CISG as to the place of Performance of the monetary Obligation, 398 an opinion also shared by courts. 399

Similarly, this author 400 does not share the view held by some commentators 401 according to which the CISG is based upon the general principle pursuant to which the creditor's place of business controls all questions relating to payment such as currency. Since the issue of currency is not at all governed by the CISG, 402 as courts have often pointed out, 403 it is impossible to identify a general principle upon which the CISG is based. Since, as often stated by courts, 404 set-off is not a matter governed by the CISG

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either, no general principle underlying the CISG can exist. Rather, resort is to be had directly to the applicable law through private international law rules to deal with such issues. 405

According to some courts 406 and commentators, 407 the issue of the allocation of the bürden of proof is not governed by the CISG, which is why resort is to be had to the applicable domestic law to settle that issue. If this were true, it would obviously run counter the wording of Art. 7(2) CISG to attempt to identify a general principle in respect of that issue. In this author's opinion, 408 the foregoing view has, however, to be rejected. The issue of bürden of proof is a matter governed by, albeit not explicitly settled in, the CISG, 409 thus imposing upon the interpreter the need to settle the issue of allocation of bürden proof from within the CISG itself, namely through resort to a general principle, if such principle exist. According to both case law and legal writing, two general principles can be derived from Art. 79(1) CISG 410 and, at least according to one court, Art. 2(a) CISG: the principle pursuant to which the party which wants to derive beneficial legal consequences from a legal provision has to prove the existence of the factual prerequisites of the provision, 411 in other words, ei in-cumbit probatio qui diät, non qui negat, 412 and that according to which the party claiming an exception has to prove the factual prerequisites of that exception. 413 According to one court, this means, e.g., that "a party who claims that the Convention does not apply because the transaction is not international must prove the lack of internationality, and a party who claims that the Convention does not apply because its applicability has been excluded as provided in Art. 6 must prove the existence of the agreement to exclude. There is no doubt that a party who seeks damages for breach by the other party must prove the breach, the damage and the causal nexus between the two, and it has to show that the damages are recoverable under Article 74 of the Convention [...]. Concerning the question of the lack of conformity of the goods in the instant case, the aforementioned general principle yields a result similar to the outcome under Italian and German law - that it is the buyer's responsibility to prove the existence of a lack of conformity." 414

[...]

336 See Adame Goddard, supra note 332, at 8; Bammarany, supra note 237,â€“ at 160; Ferrari, supra note 306, at 11; see, however, Herber/Čzerwen-ἀ€‘ka, supra note 27, at 49, stating that "in the CISG, general principles areἀ€‘hardly identified expressly."
See Achilles, supra note 14, at 30; Bammarny, supra note 237, at 162 ff.; â€“ Burkart, supra note 29, at 194; Dejaco, supra note 14, at 44; Felemegas, â€“ supra note 11,284; Ferrari, supra note 34, at 227; Frigge, supra note 12, atâ€”294; Garro/Zuppi, supra note 265, at 58 note 10; Hackney, supra noteâ€”21, at 478; Hager, supra note 11, at 321; Huber/Mullis, supra note 14, atâ€”34; Richard Hyland, Conformity of Goods to the Contract under the Unitedâ€”Nations Sales Convention and the Uniform Commercial Code, in Einâ€”heilliches Kaufrecht und nationales Obligationenrecht, â€“ supra note 222, 305, 329 ff.; Janssen/Kiene, supra note 307, at 271 ff.; â€“ Karollus, supra note 14, at 16 f.; Kramer, supra note 11, at 149; Kritzer, â€“ supra note 15, at 114; Magnus, supra note 13, at 176; Mather, supra noteâ€”302, at 158 and 165; Melis, supra note 242, at 59; Paal, supra note 306, at â€”78; Perales Viscasillas, supra note 14, at 137; Piltz, supra note 21, at 98; â€“ Reifner, supra note 96, at 54; Saenger, supra note 14, at 441; Schwender/â€™Hachem, supra note 24, at 136; Schroeter, Freedom of contract: Comparâ€”â€™ision between provisions of the CISG (Artide 6) and counterpart provisionsâ€”of the Principles of European Contract Law, 6 Vindobona J. 257, 258â€”(2002); Veneziano, supra note 55, at 514.


For this thesis, see, for example, Honnold/Flechtner, supra note 29, â€”at 4 (stating that "the Convention's rules play a supporting role, supplyingâ€”answers to problems that the parties have failed to solve by contract"); forâ€”a similar conclusion, see Kuzuaki Sono, The Vienna Sales Convention:â€”History and Perspective, in International Säle of Goods, Dubrovâ€”nik Lectures 1,14 (P.Sarcevic & P.Volken eds., Oceana: New York 1986)â€”(stating that "the rules contained in the Convention are only supplemenâ€”tary for those cases where the parties did not provide otherwise in theirâ€”contract").

See, among many, Allen E. Farnsworth, Rights and Obligations of the Seller, in Wiener Übereinkommen von 1980 über den interâ€”nationalen Warenaufkauf 83,84 (Schultess: Zürich 1985) ("[t]he caseofaaâ€”conflict between the contract and the Convention, it is the contract-notâ€”the Convention-that controls").

See Ferrari, supra note 22, at 178; Ferrari, supra note 34, at 227.

For this conclusion, see also Kritzer, supra note 15, at 115.

See Ferrari, supra note 75, at 150.

See Achilles, supra note 14, at 30; Burkart, supra note 29, at 194; Dejaco, â€“ supra note 14, at 44; Diesse, supra note 187, at 58 ff; Herbert /Czerwenâ€”ka, supra note 27, at 49; Melis, supra note 242, at 59; Janssen/Kiene, supra noteâ€”307, at 272; Karollus, supra note 14, at 12; Mather, supra note 302, â€“ at 157; Paal, supra note 306, at 82; Christian Thiele, Erfüllungsort bei derâ€”Rückabwicklung von Vertragspflichten nach Art. 81 UN-Kaufrecht - einâ€”Plädoyer gegen die herrschende Meinung, Recht der internationalenâ€”Wirtschaft 892, 894 (2000); Vogel, supra note 242, at 12; Witz etâ€”als, supra note 19, at 93; but see Loewe, supra note 333, at 33.

See Oberlandesgericht Celle, 24 July 2009, available on the Internet at
354 See Achilles, supra note 14, at 30; Brunner, supra note 14, at 76; â€¢ Burkart, supra note 29, at 195; Dejaco, supra note 14, at 44; Diesse, â€¢ supra note 187, at 62 and 83; Alfred Escher, VN-Kaufrecht: stillschweigenâ€¢ der Verzicht auf Einwirken einer verspäteten Mängelrüge, Recht der inâ€¢ internationalen Wirtschaft 495, 500 (1999); Felemegas, supra noteâ€¢ 11, at 402; Ferrari, supra note 22, at 179; Nadja Hoffmann, Die Kooâ€¢ ration der Vertrags- und Deliktsrechts in Europa: eineâ€¢ rechtsvergleichende Untersuchung zum Kollisionsrecht, â€¢ Sachrecht und zum UN-Kaufrecht 287 (Mohr: Tübingen 2006); â€¢ Najork, supra note 14, at 105; Niemann, supra note 11, at 64; Sannini, â€¢ supra note 94, at 49; Elisabeth Sauthoff, Lieferverzug als wesentliche Verâ€¢ auckerung und bei Vereinbarung sofortiger Lieferung und wirksame Einâ€¢ beziehung fremdsprachiger AGB, Internationales Handelsrechtâ€¢ 151, 153 (2005); Schwenzer/Hachem, supra note 24, at 136; Teichert, â€¢ supra note 12, at 30; Witz et als., supra note 19, at 84.


356 Schwenzer/Hachem, supra note 24, at 136.

357 See, e.g., Ferrari, supra note 306, at 12; Najork, supra note 14, at 105.


359 See e.g., Audit, supra note 14, at 51; Felemegas, supra note 11, at 285; â€¢ Franco Ferrari, General Principles and International Uniform Commercialâ€¢ Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions, Uniform L. Rev. 451, 464 (1997); Honold, supra note 222, at 140; Honnold/Flechtn, supra note 29, at 145; Magnus, supra note 355, at 483; Melin, supra note 14, at 414; Niemann, supra note, at 63; Plantard, supra note 252, at 333; Rosenberg, supra note 12, at 452; Saenger, supra note 14, at 442; Sannini, supra note 94, at 49; Teichert, supra note 12, at 31; Marco Torsello, Remediesfor Breach of Contract under the 1980 Convention on Contracts for the International Säle ofGoods (CISG), in Quo Vadis CISG?, supra note 252, at 333; Rosenberg, supra note 12, at 452; Saenger, supra note 14, at 442; Sannini, supra note 94, at 49; Teichert, supra note 12, at 31; Marco Torsello, Remediesfor Breach of Contract under the 1980 Convention on Contracts for the International Säle ofGoods (CISG), in Quo Vadis CISG?, supra note 68, 43, 55.

360 Honnold /Flechtn, supra note 29, at 144; Mather, supra note 302, atâ€¢ 157; Witz et als., supra note 19, at 85; contra Magnus, supra note 13, atâ€¢ 179 f.

361 Achilles, supra note 14, at 30; Bammarny, supra note 237, at 167; â€¢ Boneil, supra note 30, at 80; Dejaco, supra note 14, at 44; Felemegas, â€¢ supra note 11, at 285; Ferrari, supra note 280, at 2; Ferrari, supra noteâ€¢ 34, at 228; Herber /Czerwenka, supra note 27, at 50; Huber /Mullis, â€¢ supra note 14, at 34; Janssen/Kiene, supra note 307, at 276 f.; Peralesâ€¢ Viscasillas, supra note 14, at 137; Mather, supra note 302, at 158; Willibaldâ€¢ Posch & Ulfried Terlitza, Entscheidungen des österreichischen Oberstenâ€¢ Gerichtshofs zur UN-Kaufrechtskonvention (CISG), Internationales Hanâ€¢ delrecht 47, 50 (2001); Reinhart, supra note 74, at 32; Schwenzer/Hachem, supra note 24, at 136; Thiele, supra note 346, at 894; contraâ€¢ Janmer Greiner, supra note 14, at 46 f.


364 See Achilles, supra note 14, at 30; Audit, supra note 14, at 52; Berâ€¢ Strandotzenhardt, Die Auslegung des Begriffs der wesentâ€¢ lichen Vertragsverletzung im UN-Kaufrecht 151 (Peter Lang:â€¢ Frankfurt 1998); Enderlein et als., supra note 32, at 64; Ferrari, supraâ€¢ note 22, at 179 f.; Frigge, supra note 12, at 294; Gruber, supra note 24, atâ€¢ 294; Honnold /Flechtn, supra note 29, at 145 f.; Magnus, supraâ€¢ note 355, at 483; Mather, supra note 302, at 157; Peralesâ€¢ Viscasillas, supraâ€¢ note 14, at 137; Sannini, supra note 94, at 49; Karin Sein St Irene Kuli, Dieâ€¢ Bedeutung des UNâ€¢ Kaufrechts im estnischen Recht, Internationalesâ€¢ Edrecht 138,139 (2005); Thiele, supra note 346, at 894;
Westerä"mann, supra note 218, at 2199; Witz et als., supra note 19, at 93.


371 Achilles, supra note 14, at 31; Enderlein et als., supra note 32, at 64;ä“ Ferrari, supra note 22, at 180; Frignani, supra note 319, at 318; Maskow,ä“ supra note 99, at 57; Witz et als., supra note 19, at 93.


374 See Ferrari, supra note 22, at 180; Magnus, supra note 13, at 180.

375 Bammarny, supra note 237, at 160; Ferrari, supra note 22, at 180; Herb-ä“er/Czerwenka, supra note 27, at 50;
Whether such a right exists at all is governed by the law applicable by virtue of the rules of private international law. 

Reading the CISG inâ€œFavor of the Contract, in Sharing International Commerciallaw across National Boundaries, supra note 11, at 247; Schwenzer/Hachem, supra note 24, at 137. For a more detailed analysis of the CISG's application, see Antonio Principi, Interpretation and Integration of the Uniform Sales Law, in Sharing International Commercial Law across National Boundaries, supra note 11, at 254 f., 280.

It is worth pointing out, that the CISG at times refers to the Standard of "unreasonableness"; see Art. 86(2); Art. 87; Art. 88(1) and (2); in legal writing see Adame Goddard, supra note 332, at 78; Ferrari, supra note 306, at 13 note 69.

See Art. 8(2); Art. 25; Art. 35(2)(b); Art. 60(a); Art. 79(1); Art. 85; 86(1); 88â€“(2).

See Art. 18(2); Art. 33(c); Art. 39(1); Art. 47(1); Art. 49(2)(a);â€“Art. 63(1); Art. 64(2)(b); Art. 65(1); Art. 65(2); Art. 76.

See Audi, supra note 14, at 51; Bammerny, supra note 237, at 164 f.; Ferrari, supra note 22, at 144; Schlechtriem/Witz, supra note 270, at 64.

See Monika Schwenzer and Pierre-Henri Hachem, supra note 94, at 49; for remarks that are critical of the way to derive general principles underlying the CISG, see Antonio Rizzi, Interpretazione e integrazione della legge unia rather than the sale of goods. In recent case law, see OLG Koblenz, 24 February 2011, Internationales Hansdelsrecht 148, 156 (2012).

See OLG Köln, 21 May 1996, available on the Internet at http://cisgw3.law.pace.edu/cases/980605s5.html. See also Auditi, supra note 14, at 51; Ferrari, supra note 22, at 180; Sannini, supra note 94, at 49; for remarks that are critical of the way to derive general principles underlying the CISG, see Antonio Rizzi, Interpretazione e integrazione della legge unia enrather than the sale of goods. In recent case law, see OLG Koblenz, 24 February 2011, Internationales Hansdelsrecht 148, 156 (2012).

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405 See Ferrari, supra note 401, at 125.


See Ferrari, supra note 402, at 129-130; Graffi, supra note 273, at 244â€“245; Colin, supra note 400, at 44; Ulrich Magnus, Stand and Entwicklung des UN-Kaufrechts, Zeitschrift für Europäisches Privatrecht 202,â€“207 (1995); Müller, supra note 100, at 36.


Referring Principles:

I.1.1 - Good faith and fair dealing in international trade
I.2.1 - Standard of reasonableness
I.2.2 - Trade usages
I.1.2 - Prohibition of inconsistent behavior
IV.4.1 - Freedom of form
IV.5.3 - Interpretation in favor of effectiveness of contract
IV.2.5 - Holidays and non-business days
V.1.4 - Principle of simultaneous performance; right to withhold performance
VII.2 - Principle of foreseeability of loss
VII.4 - Duty to mitigate
VII.6 - Duty to pay interest
XII.1 - Distribution of burden of proof