

THE GENERAL PRINCIPLES OF THE UNITED NATIONS CONVENTION FOR THE INTERNATIONAL SALE OF GOODS

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Resumen: En el presente artículo, el autor aborda el estudio del artículo 7° (2) de la Convención de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías, norma que invoca los principios generales en que ella se basa como regla de integración e interpretación del Convenio. El artículo explora algunos de los principios establecidos por la doctrina, tales como la buena fe, la interpretación conforme a la real intención y razonabilidad, la teoría de los actos propios, la libertad de forma y la mitigación de daños, mostrando el alcance que le han dado los tribunales en sus fallos.

Palabras clave: compraventa internacional, principios, interpretación, integración.

Abstract: In this paper the author analyses Article 7 (2) of the United Nations Convention on Contracts for the International Sale of Goods. This regulation cites the general principles on which it is founded as a law of integration and interpretation of the Convention. The paper investigates some of the principles established by the doctrine such as the following: acting in good faith; interpreting the real intention and logical nature of contracts; estoppel theory; the freedom to choose the content and form of the contract, and the mitigation of damages. It also demonstrates the scope of previous court rulings.

Key words: international sale of goods, principles, interpretation, integration.

Sumario: I. Introduction. II. Good Faith in International Business. III. Interpretation as per the Real Intention and Reasonability. IV. Promissory Estoppel. V. The Freedom to Choose the Content and Form of the Contract. VI. The duty to mitigate damages. VII. The Principle of favor contractus. VIII. Conclusions.

I. Introduction

1. The 1980 United Nations Convention for the International Sale of Goods is one of the most important contemporary legal instruments in the field of contract law. Its importance is not only due to the historical nature of its creation, whereby different legal systems were combined, but also because, to date, it has been adopted by seventy-seven countries on all five continents. Moreover, the Convention's influence has been significant in several legislative reforms undertaken since the end of the twentieth century, notably in modern international restatements and in European Community Law. Within these areas, the Convention has demonstrated that although it was drafted to regulate contracts for the international sale of goods, it can also be applied as a model to both modernise and harmonise national laws. Countries' whose Civil Law has been reformed include Germany, the Netherlands, and the Eastern European countries which became independent after the fall of the Soviet Union. Other legal processes that have been undertaken with reference to the Convention include: the Contract Law of the People's Republic of China (1999); the Principles of European Contract Law; the UNIDROIT Principles of International Commercial Contracts; and the Common European Framework of Reference, as in

Directive 199/44/CE from the European Parliament regarding the sale of consumer goods. Moreover, sixteen countries that are members of the Organisation for the Harmonisation of Business Law in Africa (OHADA) have adopted the *Acte Uniforme sur le Droit Commercial Général*, of which one of the principle sources of inspiration is the Convention¹.

2. In Articles 1 – 13 of the Convention rules are stated regarding its sphere of application and general provisions with regards to sources and interpretation. Article 7 (2) establishes the mechanisms to follow in the event of finding a loophole, the purpose of which are to provide a more in-depth understanding of the Convention. The Article contains two parts: the first invokes the general principles on which it is based, and the second states that in the absence of such principles, matters will be expressly settled in conformity with the law applicable by virtue of the rules of private international law².

Regarding this last point, the clarification given by a specific part of the doctrine is of the utmost importance. It details that the legal deficiencies this law refers to are classified as being *praeter legem*, relative to matters that fall under the scope of the Convention, which itself does not regulate what is *intra legem* (corresponding to excluded issues). The latter are regulated by national regulations which will be applied according to the rules of the pertinent conflict. They are in juxtaposition with the former, which aim to find a solution by using the principles of the Convention, stated in the first part of heading 2 in Article 7³.

3. Independently from the different positions that could be taken with reference to the idea of what exactly are ‘principles’ in the field of law, they are understood in this paper as a series of general guidelines. Their purpose is to aide to solve legal deficiencies that will be encountered in the Convention’s rules and to fulfil an interpretative function⁴. The aforementioned legal content effectively implies that principles can be taken into account, not only to understand the body of the Convention (as in the principle which is rooted in Article 7), but also as criteria to interpret the contract that governs it, in relation with what is set forth in Article 8. It should also set up the applicable rule regarding the contracting parties’ behaviour⁵.

It is advisable, nevertheless, that Article 7 is read, which does not constitute a list of principles, reason being that its purpose is to endeavour to determine what these very principles are, and also their implementation in case law as well as their doctrinal recognition⁶. Due to this, it is the objective of this

¹ K. J. ALBIEZ DOHRMANN, «Un nuevo derecho de obligaciones: la reforma 2002 al BGB», *Anuario de Derecho Civil*, vol. 55, n° 3, (2002), p. 1139, 1142, 1144, 1177, 1199, 1210. F. FERRARI, (ed.), *The CISG and its Impact on National Legal Systems*, Munich, Sellier, Munich, 2008, *passim*. A. M. MORALES MORENO, *La modernización del Derecho de obligaciones*, Madrid, Thomson Civitas, 2006, p. 146-147. R. SCHULZE, «Il nuovo diritto tedesco delle obbligazioni e il diritto europeo dei contratti», *Rivista di diritto civile*, 1, (2004), *passim*. I. SCHWENZER; P. HACHEM, «The CISG - Successes and Pitfalls», *American Journal of Comparative Law*, 57, (2009), p. 461-463.

² As stated by FERRARI, the appeal to general principles as a mechanism to make up for legal deficiencies is a method well known in Civil Law. F. FERRARI, «Uniform Interpretation of the 1980 Uniform Sales Law», *Georgia Journal of International and Comparative Law*, V, 24, No. 2, (1994), p. 220. Also stated in, J. ESSER, *Principio y norma en la elaboración jurisprudencial del Derecho Privado*, Eduardo Valenti Fiol (translator), Barcelona, Bosch, 1961, p. 4.

³ See FERRARI, «Uniform Interpretation...», cit., p. 217. D. R. GALÁN BARRERA, «La integración de lagunas en la Convención de las Naciones Unidas sobre los contratos de compraventa internacional de mercaderías», in J. OVIEDO ALBÁN, *Obligaciones y contratos en el Derecho Contemporáneo*, Medellín, Diké – Universidad de la Sabana, 2010, p. 326-329. E. VISSER, «Gaps in the CISG: In General and with Specific Emphasis on the Interpretation of the Remedial Provisions of the Convention in the Light of the General Principles of the CISG», (1998), in <http://www.cisg.law.pace.edu/cisg/biblio/visser.html>, accessed on 18th January 2011, Ch. I. 2.

⁴ A. L. CALVO CARAVACA states that Article 7 regulates two different but related questions: what should be the interpretation of the text itself and the integration of its legal deficiencies. A. L. CALVO CARAVACA, «Artículo 7», in L. Díez PICAZO Y PONCE DE LEÓN, *La Compraventa internacional de mercaderías. Comentario de la Convención de Viena*, Madrid, Civitas, 1998, p. 102-103. Cfr. GALÁN BARRERA, *op. cit.*, p. 342.

⁵ A. L. CALVO CARAVACA, «Artículo 7», p. 103, nt. 3. See VIGO, regarding the functions of the general legal principles. R.L. VIGO, *Interpretación jurídica. (Del modelo iuspositivista decimonónico a las nuevas perspectivas)*, Buenos Aires, Rubinzal Culzoni, 1999, p. 121-122.

⁶ It is necessary to indicate that, independently of the manner in which the case law summons in each of the countries in which the rulings were investigated, a uniform manner as been used to identify the name of the court, the date, the country, and the source in which the decision has been examined.

paper to try and identify some of the basic principles that the Convention is based on. Reiterating what has already been stated, these principles should be taken into consideration by both lawyers and judges when stipulating the scope of the contract, the manner in which it should be interpreted, and how its gaps should be filled⁷. The doctrine has established that the following criterion to identify the principles are based on the rules themselves⁸, and also by inductive reasoning which is able to create general principles that could be applied in future situations⁹.

II. Good faith in international business

4. Article 7 (1) establishes that anyone interpreting the Convention must take into consideration the observing of good faith as a prerequisite for international business. It appears, in principle, that Article 7 of the Convention only requires good faith to be observed as a criterion to understand the Convention and not as something imperative by both parties as they embark on fulfilling the contract¹⁰.

5. The topic is a debatable one. On this subject, it should be reminded that when writing the respective rule one is faced with two positions: the first that a general rule should be maintained, and the other that it was rejected by not having permanent significance. In the debates during the diplomatic conference the Italian delegation proposed that the following text be included: «*In the formation (interpretation) and performance of a contract of sale the parties shall observe the principles of good faith and international co-operation*». Thus, good faith should be observed during the formation, interpretation, and contract execution. The suggestion was, however, not ever implemented. In 1978 the commission decided to incorporate good faith as a principle as a way of understanding the provisions of the Convention¹¹.

6. The historic interpretation of Article 7 allows us to arrive at this conclusion, given that the Anglo-Saxon way of thinking has led the Convention to not accepting good faith as criterion of contract interpretation, but only as a criterion for the Convention. This disparity of opinions has created one weak, and one strong idea of what good faith is in international business. According to the first interpretation good faith is only imperative in the Convention, however; in the second it takes on the role of creator of rights; that is to say individual rights will be recognised that are not written in either the convention or the contract¹².

⁷ Perhaps this list can be used by way of example, but not as a limitation. CALVO CARAVACA's comment is, anyhow, pertinent in the sense that he affirms that the doctrine has granted by way of example, but not limited to the establishment of, for example, contractual freedom, the freedom of form, the principle of good faith, the behaviour of a reasonable person, the prohibition of abuse of rights, the principle of proportionality, and legal certainty. A. L. CALVO CARAVACA, «Artículo 7», *cit.*, p. 111-112. See B. AUDIT, *La compraventa internacional de mercaderías*, translation by Ricardo de Zavalía, Buenos Aires, Zavalía, 1994, p. 62-65. U. MAGNUS, «*General Principles of UN – Sales Law*», (1997), in <http://www.cisg.law.pace.edu/cisg/biblio/magnus.html>, accessed on 17th January 2011. It has been contemplated in the doctrine that in the LEGISLATION it is possible to identify and label them. However, this is impossible in the case of the principles as there is no judicial act in which they are included. VIGO, *op. cit.*, pp.135 a 136.

⁸ J. HONNOLD, *Uniform Law of International Sales under the 1980 United Nations Convention*, 3rd edition, The Hague, Kluwer, 1999, p. 152. J. SAN JUAN CRUCELAEGUI, *Contrato de compraventa internacional de mercaderías. Convención de Viena de 1980, y otros textos complementarios*, Cizur Menor, Thomson Civitas, 2005, p. 71.

⁹ VIGO expounds that the principles can discover themselves through inductive reasoning and their clarification will be important for the effects of obtaining a harmonic vision of a positive legal system being implemented in a society. VIGO, *op. cit.*, p. 116. In order for their identification a process that uses inductive as well as deductive reasoning must be implemented. E. BETTI, *Interpretación de la ley y de los actos jurídicos*, José Luis de los Mozos (translator), Madrid, Editorial Revista de Derecho Privado, 1975, p. 282-283.

¹⁰ Cfr. FERRARI, «Uniform Interpretation...», p. 210. CH. KEE; E. MUÑOZ, «In Defence of the CISG», in *Deakin Law Review*, V. 14, No. 1, (2009), p. 104-105.

¹¹ HONNOLD, *op. cit.*, p. 94. A. FRIGNANI; M. TORSELO, *Il contratto internazionale. Diritto comparato e prassi commerciale*, seconda edizione, in *Trattato di Diritto Commerciale e di Diritto Pubblico dell'economia*, Direto da Francesco Galgano, Padova, Cedam, 2010, p. 465.

¹² A. MARTÍNEZ CAÑELLAS, *La interpretación y la integración de la Convención de Viena sobre la compraventa internacional de mercaderías, de 11 de abril de 1980*, Granada, Comares, 2004, p. 142 *et. seq.* Also refer to FRIGNANI; TORSELO, *op. cit.*, p. 465. SAN JUAN CRUCELAEGUI, *op. cit.*, p. 64-67.

This method of thinking differentiates the Anglo-Saxon legal tradition from the tradition in the rest of continental Europe due to the fact that the European and Latin American legal codes establish good faith as a behavioural standard that covers all stages of the perfection of the contract: pre-contractual negotiation, offer and acceptance as well as contract execution and conclusion. Anglo-Saxon law, does however, not accept the same implications of good faith¹³. Despite the fact that, in principle, it is not applicable during the formation of the contract, a duty of good faith can be imposed upon businessmen. This means they must necessarily observe reasonable standards of fair dealing in business¹⁴.

7. One specific part of the doctrine affirms that despite the fact it has not been expressly included it is a principle that governs the entire life of the contract; it is not only applicable on the interpretation of the contract. It does however, constitute an obligation requiring a duty for good conduct that is applicable to all involved in the contractual process¹⁵. The Convention establishes that in its interpretation, within the sphere of international business, good faith must be observed. If the Convention is accepted (the laws and obligations of the parties taking part in the contract of sale are what govern it) then these laws and obligations are subject to the principle of good faith¹⁶.

8. In relation to what has been previously stated, the suggested interpretation is in accordance with the way in which the concept of good faith is understood within Civil Law. As such, the parties involved should not solely observe a certain degree of care and loyalty during the drawing up and execution of the contract. They should also follow what is taught by the application of this principle in the theory of contract law: something that is also included in many of the national legislations, which are the basis of the rights and obligations that need to be adhered to by the parties involved, even if these have not been previously. This is what is understood by «required standards of behaviour both parties»¹⁷.

9. Good faith is implemented in diverse ways in the contractual process. The first is during the pre-contractual phase when good faith is basically a series of obligations, one of which is confidentiality. This guides the execution of the business, and ensures the reciprocal cooperation necessary and information required for the full compliance to all obligations. A Federal German Court ruling expressly stated that the duty of cooperation and information is directly derived from the principle of good faith, in accordance with Article 7 of the Convention. The original case concerned a letter of acceptance from the purchaser that contained standard relinquishment conditions that included a clause exonerating responsibility (not included in the letter) for the goods' defects. The good purchased, a machine, was damaged and thus could only function with the help of experts. The purchaser requested to be reimbursed for all the costs that he had incurred. The court considered that due to fact the applicant had incorporated general rules it

¹³ ATIYAH, P.S., *An introduction to the law of contract*, 5th edition, Oxford – New York, Clarendon law series, 1995, p. 212-213. In United States law the beginnings of the presence of the principle in section §1-203 of the Uniform Commercial Code can be seen. FERRARI, «Uniform Interpretation...», p. 211-212.

¹⁴ FARNSWORTH, compares cases in which he applies this criterion. A. FARNSWORTH, «The concept of «Good Faith» in American Law», in *Centro di studi e ricerche di diritto comparato e straniero* (Rome 1993), No. 10, <http://soi.cnr.it/~crdcs/crdcs/farnswrt.htm>, accessed 30th June 2010.

¹⁵ MAGNUS, *op. cit.* M. P. PERALES VISCASILLAS, «Una aproximación al artículo 7 de la convención de las Naciones Unidas sobre los contratos de compraventa mercantil internacional», *Cuadernos de derecho y comercio*, 16, (1995), p. 55-88. M. P. PERALES VISCASILLAS, «El derecho uniforme del comercio internacional: Los Principios de UNIDROIT (Ámbito de aplicación y disposiciones generales)», *Revista de Derecho Mercantil*, 223, (1997), p. 221-297. J. KLEIN, «Good Faith in International Transactions», *Liverpool Law Review*, 15, (1993), p.115-141. On this subject refer to U. MAGNUS, *Remarks on good faith*, in <http://www.cisg.law.pace.edu/cisg/principles/uni7.html#um>, accessed 30th June 2010. Also, N. POVRZENIC, *Interpretation and gap-filling under the United Nations Convention on Contracts for the International Sale of Goods*, (1998), in <http://www.cisg.law.pace.edu/cisg/biblio/gap-fill.html>, accessed 30th January 2011.

¹⁶ M. BRIDGE, *The International Sales of Goods. Law and Practice*, 2nd edition, New York, Oxford, 2007, p. 534. AUDIT has suggested that good faith is a result of several of the Convention's rules, and as such other Articles should be interpreted in the same way, such as, 29.2, 35.3, 38, 44, 46.2, 67.2, 68, 77, 82.2. AUDIT, *op. cit.*, p. 61.

¹⁷ R. ILLESCAS ORTIZ; P. PERALES VISCASILLAS, *Derecho Mercantil Internacional. El Derecho uniforme*, Madrid, Universidad Carlos III de Madrid, Editorial Centro de Estudios Ramón Areces, 2003, p. 117. CALVO CARAVACA clearly details that this legal principle was employed by the writers of the Convention, taken from different national legislation, and that it fundamentally stands for loyalty and care. A. L. CALVO CARAVACA, «Artículo 7», *cit.*, p. 110.

was his duty to make them known to the addressee. He had thus gone against the principle of good faith in international business, as stated in Article 7 (1) of the Convention. The party had also not fulfilled his duty of cooperation by asking the recipient of the goods the general standard conditions and make him responsible for not having questioned. In this case the court stated that one party had the obligation to inform the other of the general conditions, and that it was against the principle of good faith to demand that the party adhere to general conditions of which they had never been informed¹⁸.

10. In other rulings, it has been considered that good faith is the duty for the parties involved to behave in a certain way during the contract execution. An example of this is a ruling of the Grenoble Court of Appeals for a lawsuit that was realised between a French company (the seller) and a North American company (the buyer). The two parties had agreed that the product was to be sent to South America and Africa, however; and despite the demands on behalf of the seller to know where product was being sold, it became evident that the buyer had been distributing the product in Spain. On becoming aware of this fact the seller took the decision to end business relations. The court agreed that the buyer had committed an important breach of contract by not having honoured their prior arrangement. Their behaviour precipitated that they had acted in bad faith by violating Article 7 of the Convention and as such it was necessary for them to pay the seller compensatory damages¹⁹.

A Hungarian Arbitration Tribunal made the decisive decision that good faith is not only an interpretation criterion of the Convention, but also a rule of conduct that should be observed by all parties during the contract execution. The decision was made regarding a dispute that arose between the parties in relation to the delivery of a bank guarantee that the buyer had agreed upon. The buyer returned a guarantee that had expired and thus the vendor declared the termination of the contract due to breach of contract. It was the opinion of the court that the buyer had gone against the principle of good faith – as expressed in Article 7 (1) of the Convention – on returning an expired guarantee. The buyer did also not behave as a reasonable person would have in the same circumstances relating to Article 8 (3) of the same Convention. The court ruled that the buyer pay the price of the product that had already been returned as well as the corresponding interest²⁰.

It is set forth in Article 1.7 of the UNIDROIT Principles of International Commercial Contracts that each party must act in accordance with good faith and fair dealing in international trade. It can be inferred from the principles, therefore, that good faith has been established as the standard behaviour as is suggested in the case of the Convention²¹.

III. Interpretation as per the real intention and reasonability

11. Interpretation in accordance with the real intention is established in Article 8 (1) of the Convention. According to this rule, declarations, as well as other actions of the parties involved, should be interpreted in accordance with their intention when the other party has been privy to information, or unable to ignore it.²² Therefore, in those cases in which the agreement has not been clear, or the

¹⁸ *Bundesgerichtshof*, 31st October 2001, Germany, Clout No. 445, in <http://cisgw3.law.pace.edu/cases/011031g1.html>, accessed on 23rd November 2011.

¹⁹ *SARL Bri Production «Bonaventure» v. Société Pan African Export*, 93/3275, *Cour d'Appel de Grenoble, Chambre de Commerciale*, 22nd February 1995, France, Clout No. 154, in <http://cisgw3.law.pace.edu/cases/950222f1.html>, accessed 23rd November 2011.

²⁰ *Arbitral Award, Hungarian Chamber of Commerce and Industry, Court of Arbitration, Hungary*, 17th November 1995, in <http://www.unilex.info/case.cfm?pid=1&do=case&id=217&step=FullText>, accessed on 23rd November 2011.

²¹ The doctrine accepts that good faith is a general principle of *lex mercatoria*. See F. OSMAN, *Les principes généraux de la lex mercatoria. Contribution à l'étude d'un ordre juridique anational*, Paris, L.G.D.J., 1992, p. 19 *et seq.*

²² Article 4.1 of the UNIDROIT Principles establishes that:

«*Intention of the parties*)

(1) A contract shall be interpreted according to the common intention of the parties.

(2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances».

aforementioned obligations have not been undertaken easily, or there is doubt as to how to interpret the contracting parties' terms, it is advisable to endeavour to discover what was the real intention of the parties involved²³.

12. The contractual acts that are referred to in this article are not solely limited to sale and purchase contracts. They also relate to everything that might arise as a consequence of the executed contract, or what is anticipated²⁴. Previous actions can be used as objective elements through which the interpreting body can endeavour to ascertain the real will of the parties involved. Case Law demands that the intention is manifested objectively in order that it be understood, given that if there is no way to determine its existence it will have no value for the aforementioned effects. An example of a case that demonstrates what has previously been stated is the following: a company selling products filed a lawsuit against the buying company (company X) for payment plus interest. The company had endeavoured to make a binding agreement with a third company (company Y) and on receiving the products it sent the vendor a bill of exchange issued against company Y which they accepted. In accordance with Article 8 the court ruled that the vendor could have no knowledge of what the purchaser was attempting to legally bind company Y with the fact that «company X» was the buyer²⁵.

Also, in various different subsections the Convention appeals to the criterion of suitability in order to interpret one of the party's behaviours. Article 8 (2) hereby states:

«(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances».

13. Sometimes Civil Law asks an objective figure for help in making a decision, such as «the good father» or «the honourable businessman». Common Law makes reference to that what is reasonable. This is similar to the Convention's influence; a method of qualifying the standard of behaviour, just like the reasonable person²⁶. Moreover, various rules in the Convention make reference to the expression 'reasonable', more explicitly Articles 16 (2), 18 (2), 25 (2), 33 (c), 35 (2) b), 38 (3), 39 (1), 43 (1), 44, 46 (2), 46 (3), 47 (1), 49 (2) a), b), 60 a), 63 (1), 64 (2) b), 65 (2), 73 (2), 75, 76 (2), 77, 79 (1), 79 (4), 85, 86 (1), 87, 88 (1) and 88 (2). According to VIDAL it is possible to infer that the purpose of such rules is to maintain the parties' confidence in the behaviour of their business partners and as such themselves behave in the same manner²⁷.

It is ENDERLEIN y MASKOW's opinion that the concept in question combines both subjective and objective elements. The subjective element refers to the person or same type of person as the contract. The objective element refers to the situation in which the hypothetical behaviour of the reasonable person in the same predicament as the other party is taken as a determinant criterion²⁸. The standard to determine who the person in the same predicament as the other contracting party would be can

«Article 4.2. (*Interpretation of statements and other conduct*)

(1) The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.

(2) If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances».

²³ M. SCHMIDT - KESEL, «Article 8», in SCHLECHTRIEM; SCHWENZER, *Commentary on the UN Convention on the international sale of goods (CISG)*, 3rd edition, New York, Oxford, 2010, p. 152.

²⁴ M. SCHMIDT - KESEL, *op. cit.*, p. 152.

²⁵ *Landgericht Hamburg*, 26th September 1990, Germany, Clout No. 5, in <http://cisgw3.law.pace.edu/cases/900926g1.html>, accessed 5th November 2011.

²⁶ FERRARI, «Uniform Interpretation...», *cit.*, p. 225. G. WEISZBERG, *Le «Raisonnable» en Droit du Commerce International*, Paris, 2003, in <http://www.cisg.law.pace.edu/cisg/biblio/Reasonableness.html>, No. 33, accessed 20th September 2011.

²⁷ A. R., VIDAL OLIVARES, «La noción de persona razonable en la compraventa internacional», in *Estudios jurídicos en homenaje al profesor Luis Díez - Picazo*, 2, Madrid, Thomson civitas, 2003, p. 3280. Also refer to AUDIT, *op. cit.*, p. 63.

²⁸ F. ENDERLEIN; D. MASKOW, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods; Convention on the Limitation Period in the International Sale of Goods*, New York, Oceana, New York, 1992, p. 65-67. SCHMIDT - KESEL, *op. cit.* p. 155.

be is basically whoever is involved in the same type of business²⁹. MAGNUS interprets it as a standard objective that is based on the point of view of a neutral party who has, theoretically, been put into the same predicament³⁰.

14. Paragraph 3 of the same rule states: some of the criteria necessary to infer the intention of one of the parties or the opinion of a reasonable person as well as the all the circumstances relevant to the case, in particular the negotiations. Also, it states the inter-party practices that should have been established, the uses, and subsequent behaviour that are criterion in the Convention³¹. A Swiss Court made a ruling on a lawsuit filed by an assignee of a vendor against a buyer for not having paid for receiving a load of fruit. One of the subjects discussed in the case was the exact contract content. While the vendor alleged that it was a contract of sale, the purchaser stated that it was an on commission contract and thus had, at no point, agreed to pay a fixed sum to the plaintiff³².

IV. Promissory estoppels

15. It has been recognised both in the doctrine and in Case Law that the principle of promissory estoppel manifested in the observing of coherent behaviour through the entire contractual process is a principle on which the Convention is based³³.

It has been indicated that the principle in question fundamentally relates to, among others, Articles 16.2 b, 29.2, 47 -2, 63.2 and 80³⁴. The first of the aforementioned regulations establishes that the offer is irrevocable if the addressee has acted based on the confidence generated by the applicant pertaining to their irrevocable character³⁵.

Moreover, Article 29 of the Convention sets out a specific application of estoppel theory when it indicates that the clauses included in contracts of sale that limit the possibility of modifying the contract in a non written form must be observed. «However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct».

Article 47.2 of the Convention establishes that if the purchaser has provided the seller with an additional period in which to complete the contractual obligations then, during this period, the buyer may not resort to any remedy for breach of contract. Article 63.2, in the same vein, states that if the seller

²⁹ SCHMIDT - KESEL, *op. cit.* p. 157.

³⁰ MAGNUS, *op. cit.*, as well as MARTÍNEZ CAÑELLAS, *op. cit.*, p. 324.

³¹ As SCHMIDT – KESSEL advises, the list under Number 3 includes, but is not limited to what can be understood as a normative statement that recommends taking into consideration all of the relevant circumstances to infer the intention. SCHMIDT - KESEL, *op. cit.*, p. 152 and p. 155. Cfr. Article 4.3 of the UNIDROIT Principles in which it is stated that in applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including, (a) preliminary negotiations between the parties; (b) practices which the parties have established between themselves; (c) the conduct of the parties subsequent to the conclusion of the contract; (d) the nature and purpose of the contract; (e) the meaning commonly given to terms and expressions in the trade concerned; (f) usages.

³² *Handelsgericht Aargau*, 26th November 2008, Switzerland, in <http://cisgw3.law.pace.edu/cases/081126s1.html>, accessed on 4th November 2011.

³³ AUDIT, *op. cit.*, p. 63-64. FERRARI, «Uniform Interpretation...», *cit.*, p. 225. SAN JUAN CRUCELAEGUI, *ob. cit.*, p. 73-74. SCHWENZER; HACHEM, «Article 7», *cit.*, p. 136. Cfr. Article 1.8 of the UNIDROIT Principles: «(Inconsistent behaviour). A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment». Regarding the origin and significance of estoppel theory, the Anglo-Saxon estoppel, or German *verwirkung*, refer to DÍEZ PICAZO Y PONCE DE LEÓN, LUIS, *La doctrina de los propios actos. Un estudio crítico sobre la jurisprudencia del tribunal supremo*, Bosch, Barcelona, 1963, *passim*. According to the theory of estoppel in a legal proceeding, a person is prohibited from making an allegation –even if it is true– that objectively contradicts a previous declaration or their previous behaviour. DÍEZ PICAZO, *op. cit.*, p. 62. *Verwirkung* means that a person has lost the chance to exercise a right if a certain amount of time has elapsed. This means that the other party will not exercise their right and if they do so it will be seen as «unfair and out of bounds». DÍEZ PICAZO, *op. cit.*, p. 94.

³⁴ AUDIT, *op. cit.*, p. 64. SAN JUAN CRUCELAEGUI, *op. cit.*, p. 73-74. This author states that this principle is also established in article 50.2.

³⁵ L. DÍEZ PICAZO Y PONCE DE LEÓN, «Artículo 16», in L. DÍEZ PICAZO Y PONCE DE LEÓN, *La compraventa internacional de mercaderías, Comentario de la Convención de Viena*, Madrid, Civitas, 1998, p. 177.

has granted an additional period of time to the buyer for performance of his obligations then during this period he may not resort to any remedy for breach of contract. However, in both of these cases it is established that whoever benefits from being granted the additional period of time must show that they are unable to perform during this time.

Article 80 states that one party cannot invoke the failure of the other party when it has been caused by the first party's act or omission. This means that one party cannot take advantage of an infringement of a duty without necessarily requiring that the failures are contractual obligations³⁶.

Estoppel theory is once again referred to in Article 1.8 of the UNIDROIT Principles. In this article it is indicated that one party cannot act inconsistently or act in contradiction with an understanding or idea it has caused the other party to have and upon which that other party has reasonably acted.

It can also be understood as a duty that is derived for the principle of good faith and as such, in turn, it can be conceived that they constitute a general principle that is the basis of the Convention, and not necessarily limited to what is written in Article 29³⁷.

An Austrian Arbitration Tribunal ruling took into consideration that estoppel theory is one of the principles on which the Convention is based, interpreting it as an expression of the principle of good faith. In a case in which a buyer did not notify the seller about having received the wrong products until six months after the delivery was realised, they tried to argue that it was an untimely claim. The court considered that the seller was unable to defend himself with this argument as his behaviour made the buyer believe that he would not be able to use the product. The court considered that *venire contra factum proprium* is one of the fundamental principles on which the Convention is based³⁸.

Another ruling took into consideration that contradictory behaviour is a violation of the principle of good faith. The case took into consideration the following facts: the parties entered into a sales and installation contract for the furnishing of an ice cream parlour for a certain sum of money. It had been assumed that a partial payment had already been made. The buyer therefore accepted and signed six bills of exchange for the outstanding value. The buyer later filed a claim due to the supposed bad quality of the furnishings. The seller filed a lawsuit against the buyer for the claimable six bills of exchange.

The court assumed that the buyer had accepted the condition of the goods that were the object of the contract on agreeing the outstanding sum to be paid with the seller and drawing the bills of exchange. The court also took the position that the buyer should have examined the goods, in accordance with Article 38 of the Convention. In not doing so Article 39 of the same Convention is applicable whereby the buyer loses the right to rely on lack of conformity of the goods and is not able to allege that the goods were faulty as it would be contradictory behaviour that violated the duty of good faith, stated in Article 7 (1) of the Convention³⁹.

³⁶ SAN JUAN CRUCELAEGUI, *op. cit.*, p. 73. P. SALVADOR CODERCH, «Artículo 80», in L. Díez PICAZO Y PONCE DE LEÓN, *La Compraventa internacional de mercaderías. Comentario de la Convención de Viena*, Madrid, Civitas, 1998, p. 657-658. While explaining that the behaviour of the creditor does not necessarily cause a violation of contractual obligations, the author refers to the case of the person who was used to impede the undertaking of the services corresponded to the debtor executing what was necessary. SALVADOR CODERCH, *op. cit.*, p. 658-659.

³⁷ A. CABANILLAS SÁNCHEZ, «Artículo 29», in L. Díez PICAZO Y PONCE DE LEÓN, *La Compraventa internacional de mercaderías. Comentario de la Convención de Viena*, Madrid, Civitas, 1998, p. 239.

³⁸ Arbitral Award, *Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft*, SCH-4318, 15th June 1994, Austria, Clout No. 94, in <http://cisgw3.law.pace.edu/cases/940615a4.html>, accessed 5th November 2011. Several rulings have established that estoppel is related to good faith. Arbitral Award No. 302/1996, *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry*, 27th June 1999, Russia, in <http://cisgw3.law.pace.edu/cases/990727r1.html>, accessed 5th April 2011. *Oberlandesgericht Karlsruhe*; 1U 280/96, 25th June 1997, Germany, Clout No. 230, in <http://cisgw3.law.pace.edu/cases/970625g1.html>, accessed 5th November 2011. Arbitral Award, *Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft*, SCH-4366, 15th June 1994, Austria, Clout No. 93, in <http://cisgw3.law.pace.edu/cases/940615a3.html>, accessed 5th April 2011. *Hof 's-Hertogenbosch*, 26th February 1992, Netherlands, *Nederlands Internationaal Privaatrecht*, 1992, No. 354, in <http://cisgw3.law.pace.edu/cases/920226n1.html>, accessed 5th November 2011. Also refer to Article 1.8 of the UNIDROIT Principles.

³⁹ *Landgericht Saabrücken*, 26th March 1996, Germany, Clout No. 337, in <http://cisgw3.law.pace.edu/cases/960326g1.html>, accessed on 5th November 2011.

V. The freedom to choose the content and form of the contract

16. The contract for the international sale of goods, in accordance with Article 11 of the Convention need not be concluded in or evidenced by writing. It can instead be consecrated by the general rule of consideration in the formation of contracts⁴⁰. This is the same principle that is stated in Article 1.2 of the UNIDROIT Principles:

«(No form required)

Nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses».

This principle has had an extensive development in the courts, even if the contract was written the parties could either verbally modify it, or they could modify it and end the contract tacitly. The Convention does not stipulate any determined form of concluding a contract.

This is in some way what was stated in a Belgian ruling in 2002. A Belgian businessman filed a lawsuit against a French buyer for breach of contract regarding plastic supports for paging devices. The buyer alleged that the parties had not entered into a contract as they were still in the negotiation stage, information which was contained in a document entitled 'letter of intent'. The General Court did not accept the jurisdiction of the letter, however; the decision was overturned by the Court of Appeals. The decision was based on Article 5.1 of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The court established that the parties had entered into contract despite the document being entitled 'letter of intent', given that the contract had, in virtue, authorised the seller to commence the design and creation of the paging device. Also, in other conversation between the contracting parties it was inferred that there was indeed a contract, for example the payment was to be realised in the buyers' place of business, in accordance with Article 57 of the Convention on Contracts for the International Sale of Goods. It resulted that this was applicable, as, in the letter of intent the parties has chosen the French Law to be the applicable law and France as the contracting state⁴¹.

There is also another similar case that was brought to court regarding the sale of wooden wall panelling. On being delivered it was noticed that it did not adhere to the required specifications. The parties involved agreed on the restitution of the aforementioned product. The day following the delivery of the wooden wall panelling the seller warned that they were damaged. The Supreme Court established that the parties had agreed on a termination of contract that did not require a specific method of termination of contract according to Article 29 of the Convention. Lastly, the court applied Articles 81 and following of the Convention and thus concluded that the buyer had fulfilled his obligations when he made restitution for the products and indicated that the damaged products were not part of the contract⁴².

17. The freedom of proof was confirmed, and was recognised by the testimonial. As a consequence of this the parties are able to establish the method of proof that they consider is the best one for the contract. As a consequence of this the Convention overrules national laws that require evidence that the parties have entered into a written contract. An example would be a case in which a lawsuit was filed by a shoe factory against the buyer who entered into contract with a company who had, in turn, entered into an exclusive distribution contract with the plaintiff. The plaintiff demanded compensation from the defendant. During proceedings it was established that the parties had not entered into a contract. The court, on considering the facts, established that the Convention did not stipulate that a written

⁴⁰ Cfr. FERRARI, «Uniform Interpretation...», *cit.*, p. 224. MAGNUS, *op. cit.* MARTÍNEZ CAÑELLAS, *op. cit.*, p. 325. SAN JUAN CRUCELAEGUI, *op. cit.*, p.76. Also, OSMAN states that the supremacy of consensualism over form is a principle of *lex mercatoria*. OSMAN, *op. cit.*, p. 84 *et seq.*

⁴¹ *Hof van Beroep Gent*, 15th May 2002, Belgium, in <http://www.unilex.info/case.cfm?pid=1&do=case&id=940&step=Abstract>, accessed 3rd November 2011.

⁴² *Oberster Gerichtshof*, 29th June 1999, Austria, Clout No. 422, in <http://cisgw3.law.pace.edu/cases/990629a3.html>, accessed 3rd November 2011.

contract was necessary, however; if there was one it could be used as evidence to examine the relevant negotiations⁴³.

Article 29 states that a contract may be modified by the mere agreement of the parties without requiring any formalities. In this way, on interpreting Articles 11 and 29 in a collaborative manner, it can be seen that the Convention recognises the principle of consideration during contract formation as well as in its modification or termination. Also, a contract that has been evidenced by writing can be modified verbally and vice versa⁴⁴. The only limitation established by reservation of article 96 states that if the legislation of a member state of the convention demands that the contracts are concluded or evidenced by writing in accordance with article 12 that any provision of article 11, article 29, or Part II of this convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

18. However, the principle of no form required notwithstanding, the parties are permitted to add integration clauses in their contracts that make stipulations through which the contracting parties try to close the previous business and as such state that everything agreed upon is what can be found written in the text of the respective contract, which has been concluded by writing. The purpose of this is to avoid the contract being interpreted, supplemented, or contradicted by means of previous declarations or agreements⁴⁵. In the same vein, by means of the aforementioned clauses, any modification that the contracting parties desire to include in the contract should be completed not devaluing the desired contractual modification that is made by another form, as could be the case in a verbal modification⁴⁶.

United States law applies the parol evidence rule to these type of clauses. According to this rule, if the contract is evidenced in writing and is consented to by both of the contracting parties then pre-existing agreements made between the parties may not be presented as evidence. It is also prohibited to present any extrinsic evidence that modifies or adds elements to the contract that appears to be a whole⁴⁷. Section 2-202 of the Uniform Commercial Code (U.S.) is, however, an exception to this rule. It allows preliminary negotiations, or other agreements made during contract execution to be heard, with the purpose of interpretation and guarantee of the contract⁴⁸.

19. The Convention on Contracts for the Sale of International Goods includes no rule that refers to merger clauses. That is not to say that they are of no value, given that the Convention recognises the autonomy of will, in a material sense, in article 6. However, it is necessary to state that such clauses do not stop previous negotiations from being considered by the contracting parties in order to interpret their will and contractual terms, given that the function of previous deals is clearly recognised by article 8 (3) of the Convention.

With regards to merger clauses, in contrast to the Convention on Contracts for the International Sale of Goods, the interpretation suggested does not include an express rule that refers to them. Article 2.1.17 of the UNIDROIT Principles refers to them thus:

⁴³ FERCUS, S.R.L. v. PALAZZO U.S. *District Court for the Southern District of New York*; No. 98 CIV. 7728(NRB), 8th August 2000, United States of America, Clout No. 414, in <http://cisgw3.law.pace.edu/cases/000808ul.html>, accessed 3rd November 2011. See *Rechtbank van Koophandel Kortrijk*, 4th April, Belgium, in <http://www.law.kuleuven.be/ipr/eng/cases/2001-04-04.html>, accessed 25th February 2011. Also, *LG Memmingen*, 1st December 1993, Germany, in <http://cisgw3.law.pace.edu/cases/931201g2.html>, accessed 3rd November 2011.

⁴⁴ L. P., COMOGLIO, «Libertà di forma e libertà di prova nella compravendita internazionale di merci», *Rivista trimestrale di Diritto e Procedura civile*, Anno XLIV No. 3, (1990), p. 793.

⁴⁵ J. CALAMARI; J. PERILLO, *The law of contracts*, 4th edition, Hornbook series, St. Paul, West publishing Co., 1998, p. 139. E.A. FARNSWORTH, *Contracts*, 3rd edition, New York, Aspen Law & Business, 1999, p. 436. M. P. PERALES VISCASILLAS, «Las cláusulas de restricción probatoria o *merger clauses* en los contratos internacionales», (1997), in <http://www.cisg.law.pace.edu/cisg/biblio/merger.html>, accessed 26th March 2011.

⁴⁶ SCRHOETER, *op. cit.*, p. 481.

⁴⁷ § 213 *Restatement (the second) of contracts*, and § 2-202, UCC. FARNSWORTH, *op. cit.*, p. 427 and following. K. ZWEIGERT; H. KÖTZ H., *An introduction to comparative law*, 3rd edition, translated by Tony Weir, New York, Oxford, 1998, p. 406-408.

⁴⁸ R. HILLMAN, *Principles of contract law*, St. Paul, Thomson West, 2004, p. 241.

«(Merger clauses)

A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing».

The previously cited article 29 (2) of the convention refers to no oral modification clauses when the idea is clear that it permits in principle that the contract is modified or terminated by the agreement of both parties. This requires no formal process and it is established that, «A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement,» allowing no oral modification clauses in principle⁴⁹. In virtue of free will in a material sense, for any particular case, it would mean that the principle of no form required, and the proof evidenced stated in article 11 of the convention should be modified.

It is however true that these clauses are limited within the context of the convention in two ways:

The first, located in article 8 (3) of the Convention states that previous negotiations will have an interpretative value to determine the intention of a party or the sense of a contractual purpose.

In Case Law there have been cases in which an attempt to apply the parol evidence rule has been excluded, based on article 8.3 of the Convention. Please refer to *MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino*, case decision made on 29th June 1998 by the Federal Appellate Court [11th Circuit], United States of America. The issue before the court was whether the parol evidence rule of domestic law applies to the interpretation of a contract governed by the Convention on Contracts for the International Sale of Goods⁵⁰.

Nevertheless, it should be taken into consideration that this is not a unanimously accepted position. There is an argument stating that on making an oral modification to an international sale contract, national law governs the contract and not the Convention as it is not within its scope. This was the position taken in the case of *Beijing Metals Import/Export Corp. v. American Business Center*; decision made on 15th June 1993 Federal Appellate Court [5th Circuit], United States of America. The case was brought forward due to the intention of one of the parties to enforce an oral agreement about one aspect of the contract that had been concluded in writing. The lower court excluded the testimony about oral agreements under the State of Texas' parol evidence rule. Nevertheless, the court stated expressly that the parol evidence rule «applies regardless» of whether Convention on Contracts for the International Sale of Goods applies or not⁵¹.

The other way of mitigating the said clause is to consider promissory estoppel, as is stated in article 29 of the Convention. As such, and despite the clause, if the conduct of one party, for one reason or another, goes against the terms agreed in the contract he can be precluded from asserting the modification in writing to the extent that the other party has relied on that conduct⁵².

The rule regarding the restriction of modification when a party may be precluded by its conduct can be found in the UNIDROIT Principles, article 2.1.18. It is stated in the following terms:

⁴⁹ Article 96 of the Convention allows a state to make a declaration if their legal system demands that contracts of sale be concluded or evidenced by writing then article 29 does not apply in the event that one of the parties has his place of business in that state.

⁵⁰ *MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino*, Federal Appellate Court [11th Circuit], No. 97-4250 29th June 1998, United States of America, Clout No. 222, in <http://cisgw3.law.pace.edu/cases/980629u1.html>, accessed 30th October 2011.

⁵¹ *Beijing Metals v. American Business Center*, Federal Appellate Court [5th Circuit], 15th June 1993, United States of America, in <http://cisgw3.law.pace.edu/cases/930615u1.html>, accessed 30th March 2011. Also refer to FRIGNANI; TORSELO, *op. cit.*, p. 467, for a discussion of the above ruling.

⁵² The relevant doctrine, M. COCA PAYERAS, «Artículo 11», in *La Compraventa internacional de mercaderías. Comentario de la Convención de Viena*, (Director), Civitas, Madrid, 1998, p. 154-155. CABANILLAS SÁNCHEZ, ANTONIO, «Artículo 29», in L. DIEZ PICAZO AND PONCE DE LEÓN, *La Compraventa internacional de mercaderías. Comentario de la Convención de Viena*, Madrid, Civitas, 1998, p. 239. Refer to the Case Law: *Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft Tribunal Arbitral*, SCH-4318, 15th June 1994, Austria, Clout No. 94, *cit.*

«(Modification in a particular form)

A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct».

VI. The duty to mitigate damages

20. The duty to mitigate damages can be found in article 77 of the Convention:

«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. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated».

The mitigation of damages can be understood to be one of the principles on which the Convention is based⁵³. It is also considered to be based as much on the principle of good faith in international business⁵⁴ as it is a question of economics, and is intended to provide disincentives for passive conduct that allows the aggravation of damages that could have been avoided⁵⁵.

Article 7.4.8 of the UNIDROIT Principles also includes the following:

«(Mitigation of harm)

(1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps.

(2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm».

21. This rule is of Anglo-Saxon origin and can be located in §350 of the Restatement (Second) of Contracts, United States of America⁵⁶. It states that damages are not recoverable for loss that the injured party could have avoided. This, however, does not mean that the injured party is not precluded from recovery by the rule to the extent that he has made reasonable but unsuccessful efforts to avoid loss.

The doctrine states that the mitigation of damages is both positive and negative in aspect. It is positive in the respect that the creditor can adopt the means necessary to reduce or avoid the losses that breach of contract would incur, but negative however in the way that he could refrain from acting, which could in turn increase the losses that the debtor will incur⁵⁷.

⁵³ AUDIT, *op. cit.*, p. 64. FERRARI, «Uniform Interpretation...», *cit.*, p. 225. HONNOLD, *op. cit.* p. 101. MAGNUS, *op. cit.* SAN JUAN CRUGELAEGUL, *op. cit.*, p. 77-78. SCHWENZER; HACHEM, «Article 7», *cit.* p. 138.

Also, I. SCHWENZER, INGEBORG, «Article 77», in SCHLECHTRIEM; SCHWENZER, *Commentary on the UN Convention on the international sale of goods (CISG)*, 3rd edition, New York, Oxford, 2010, p. 1462. The courts understand it as a principle on which the convention is based. *Landgericht Zwickau*, 19th March 1999, Germany, in <http://cisgw3.law.pace.edu/cases/990319g1.html>, accessed 30th June 2011. *Arbitral Award CCI 8817*, *ICC International Court of Arbitration Bulletin*, Vol. 10, No. 2, Fall 1999, p. 75. *Al Palazzo S.r.l. v. Bernardaud di Limoges S.A.*, *Tribunale di Rimini*, 26th November 2002, Italy, Clout No. 608, in <http://cisgw3.law.pace.edu/cases/021126i3.html>, accessed 6th April 2011.

⁵⁴ SCHWENZER, *op. cit.*, p. 1042.

⁵⁵ A. SOLER PRESAS, *La valoración del daño en el contrato de compraventa*, Universidad Pontificia Comillas, Pamplona, Aranzadi, 1998, p. 64-65.

⁵⁶ AMERICAN LAW INSTITUTE, *Restatement of the law (2nd)*, 3, St. Paul, American Law Institute Publishers, 1981, p. 126.

⁵⁷ V. KNAPP, «Article 77» in BIANCA; BONELL, *Commentary on the International Sales Law*, Milano, Giuffrè, 1987, p. 560. T. VÁZQUEZ LEPINETTE, *La conservación de las mercaderías en la compraventa internacional*, Valencia, Tirant lo Blanch, 1995, p. 181-183.

The determination of reasonable measures to mitigate damages depends as much upon the usage as they do on the practices established between the parties, and also on the conduct that a party would engage in, according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. This conforms what is stated in articles 9 and 8.2 respectively, without implying disproportionate costs⁵⁸. Case Law has considered that conducts that mitigate damage are, for example: getting another supplier to replace what is damaged⁵⁹, contracting a third party to deliver the goods that were not delivered on time (at the convenience of the buyer)⁶⁰, or the sums of money assumed by the seller for the transport and storage of product that was not received by the buyer⁶¹. The doctrine also states that as a consequence of the duty to mitigate damages there is a duty to compensate the cost of the damages that excludes the indemnity payment of the losses that could be avoided⁶².

22. This principle can be applied in two specific situations: those which are stated in articles 85 and 86 relating to the preservation of the goods, which applies as much to the buyer as it does to the seller in the specified cases. According to the first article, if the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them.

In accordance with the second article, if the buyer has received the goods and intends to exercise any right under the contract, or to reject them due to a breach of contract on the behalf of the seller; for example when the goods have shortcomings in quality or quantity, or they are shipped to a place, or at a time that is different from what has been agreed either in the contract or the Convention (as stipulated in articles 45 – 52) reasonable measures should be taken. These measures should, depending on the circumstances, result in the preservation of the goods. They may be deposited in a warehouse of a third party: a possibility stated in article 87 of the convention, or they may be sold to a third party

⁵⁸ F. ENDERLEIN; D. MASKOW, *op. cit.*, p. 308. KNAPP, *op. cit.*, p. 560. SCHWENZER, *op. cit.*, p. 1045.

⁵⁹ In a case in which the buyer alleged non-compliance for some air compressors, the seller (the manufacturer) was ruled to pay compensation that covered the expenses incurred by the buyer in order to correct the damages. Also, compensation was to be paid to incur the costs of hiring air compressors from a third party for the purpose of mitigating the buyer's losses as the plaintiff could not satisfy his orders due to the defendant's breach of contract. Compensation was also awarded for the buyer's nonconforming handling and storage costs of the goods, as well as the loss of potential profit brought about by the loss of sale of the aforementioned goods to third parties. *Delchi Carrier SpA, v. Rotorex corp.*, Federal District Court, Northern District of New York, 9th September 1994, United States of America, Clout No. 85, in <http://cisgw3.law.pace.edu/cases/940909u1.html>, accessed 6th April 2011. The appeal upheld the ruling and also added some additional indemnities that had been rejected in the first ruling, for example, shipping costs, and customs duties relating to nonconforming air compressors. *Delchi Carrier SpA, v. Rotorex corp.* Federal Court of Appeals for the Second Circuit, 6th December 1995, United States of America, Clout No. 138, in <http://cisgw3.law.pace.edu/cases/951206u1.html>, accessed 6th April 2011.

⁶⁰ The case was brought to court by a Canadian company (seller) against a U.S. company (buyer) regarding a contract that was entered into for the manufacturing and shipping of moulds used in the production of plastic auto parts. The seller was delayed in the manufacturing of these parts and consequently the buyers felt that they had no other option but to find another mould shop who could deliver the mould on time. The buyer made a successful for the extra costs incurred for the price that they paid to the third party to complete the job as well as damages for breach of contract and repair costs for previously received faulty moulds. *Nova Tool & Mold Inc. v. London Industries Inc.*, Ontario Court, General Division, 16th December 1998, Canadá, en <http://cisgw3.law.pace.edu/cases/981216c4.html>, accessed 6th April 2011. Appeal: *Nova Tool & Mold Inc. v. London Industries Inc.*, Ontario Court of Appeal, 26th January 2000, Canada, in <http://cisgw3.law.pace.edu/cases/000126c4.html>, accessed 6th November 2011.

⁶¹ An example of this as case regarding a claim brought to court by the seller for breach of contract by the buyer regarding compensation for interest and non-payment. The court accepted the seller's declaration of termination of contract due to the fact that payment had not been made in a reasonable additional period of time, as stated by articles 63.1 and 64.1.b of the Convention. It was also ruled that the buyer had the right to claim interest, as is stated in article 78, and compensation from the seller for the maintenance of the machine even though it had not been distributed (in accordance with article 74). It was accepted that the seller had mitigated damage, in accordance with article 77, for shipping and storing the product that was not received by the buyer. Arbitration Award CCI 7585, 1992, Clout No. 301, *ICC International Court of Arbitration Bulletin Vol.6/N.2 - November 1995*, p. 60.

⁶² ENDERLEIN; MASKOW, *op. cit.*, p. 308-309. SOLER PRESAS, ANA, «Artículo 77», in L. Díez Pícazo y Ponce de León, *La Compraventa internacional de mercaderías. Comentario de la Convención de Viena*, Madrid, Civitas, 1998, p. 77-78. Also in paragraph 2 of article 7.4.8 of the *UNIDROIT Principles*: «The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.»

in the event of the situation expounded in article 88 if there has been an unreasonable delay in taking possession of the goods, in taking them back, or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party⁶³.

It is also accepted that the duty to mitigate damages does not only relate to the last stage of the contractual process: breach of contract. Before the undertaking of the contract, while the contract is being executed, it is one party's duty to inform the other of the risk of loss before there is any actual breach of contract. They have the possibility of declaring a prior fundamental breach of contract as stated in article 71 (1) of the Convention⁶⁴.

VII. The principle of *favor contractus*

23. The doctrine recognises that the Convention promotes the Contract conservation principle, to the extent that it restricts the causes that could lead to its termination, based on the concept of fundamental breach of contract, as is stated in articles 14, 18.1, 18.3, 25, 34, 37, 47, 48, 49, 51, 55, 63 y 64⁶⁵. It can also be stated that this principle is demonstrated in the rules which restrict the possible of inefficiency of a contract by not observing the valid regulation, a subject that is excluded from the Convention by article 4, and also by the requisites for the formation of the contract, as is stated in article 19 which reduces the rigidity of the mirror image rule⁶⁶. Also, article 53 determines the viability of the contract even though the price has not been agreed upon, in which case the usage of the goods has been agreed upon.

The same occurs through the rules on breach of contract that allow the debtor to amend the situation (articles 34, 37, and 38) as in the case of noncompliance the replacement of a good, or the reduction in price is allowed. The resolution of the contract can be applied when fundamental breach of contract occurs, although even in this case it is allowed to substitute the one product for another.

VIII. Conclusions

24. The main conclusions drawn from what was expounded in this paper can be summarised in the following way:

- a) The general principles set forth by the United Nations Convention on Contracts for the International sale of Goods can be employed, as much to understand the Convention itself as they can the contract which it governs.
- b) Primarily these principles can be assumed from the Convention itself and understood as general rules of regulations that govern specific points. When interpreting them inductive and deductive reasoning should be used as well as their verification through doctrine and Case Law.
- c) Despite the tendency, which looks to limit the principle of good faith with regards to the interpretation of the Convention, in the doctrine and courts' decisions progress has been made. This implies that rules governing behaviour with regards to contracts are applicable from the very beginning stages of the contract and with these rules come obligations, such as confidentiality that both parties need necessarily observe.

⁶³ HONNOLD, *ob. cit.*, p. 101. V. MONTES, «Artículo 86», in L. DÍEZ PICAZO Y PONCE DE LEÓN, *La Compraventa internacional de mercaderías. Comentario de la Convención de Viena*, Madrid, Civitas, 1998, p. 689.

⁶⁴ KNAPP, *op. cit.*, p. 566-567. SCHWENZER, «Article 77», *cit.*, p. 1043.

⁶⁵ Cfr. FERRARI, «Uniform Interpretation...», *cit.*, p. 225. MAGNUS, *op. cit.* MARTÍNEZ CAÑELLAS, *op. cit.*, p. 326. M. P. PERALES VISCASILLAS, *La formación del contrato en la compraventa internacional de mercaderías*, Valencia, Tirant Lo Blanch, 1996, p. 641-642. SAN JUAN CRUCELAEGUI, *op. cit.*, p. 76-77. SCHWENZER; HACHEM, «Article 7», *cit.*, p. 138. A. R., VIDAL OLIVARES, «El incumplimiento contractual y los remedios de que dispone el acreedor en la compraventa internacional», *Revista Chilena de Derecho*, Vol. 33 No. 3, (2006), p. 453.

⁶⁶ MARTÍNEZ CAÑELLAS, *op. cit.*, p. 326.

- d) According to the principle of real intention, the agreements that the contracting parties make should be carried out objectively in all stages of the contract, during its preliminary negotiations, undertaking, and execution.
- e) The purpose of the principle of reliability, which is both subjective and objective, is to compare the behaviour of each of the two parties with the hypothetical behaviour of the ideal subject who works in the same field as the contract that was signed.
- f) The principle of adhering to estoppel is inferred by several rules of the Convention and demands coherent behaviour during the entire contractual process, including the preliminary contractual phase.
- g) *The freedom to choose the content and form of the contract* is shown in two different ways: the freedom to show free will and the method of proof. This principle, in harmony with the principle of good faith means that the restrictive clauses for contractual modification and integration allow that, despite them, the contracting parties can look to previous behaviour in order to ascertain the real intention. According to this behaviour the terms of the contract can be modified.
- h) The duty to mitigate damages means that the creditor must adopt reasonable measures to reduce the loss that is derived from the other party's breach of contract: something that should be clear in the preliminary stage of the contract. Reasonable measures undertaken to mitigate damages depends on the uses and practices that have been established by the parties as well as the way a reasonable person would behave in a similar situation.
- i) Lastly, without assuming that this list is exhaustive, it is necessary to acknowledge maintaining the contract as a general principle. This should be thought of in such a way as to restrict potential causes that could lead to a settlement for breach of contract, or for ineffective undertaking of the contractual obligations.