A. Introduction

Art. 7(2) CISG is a crucial provision for the uniform interpretation and application of the CISG.¹ Taking a first look at UNILEX,² one can identify 73 decisions from 15 different countries in which this provision has been considered. Under Art. 7(2) CISG, gaps in the Convention are in the first instance filled with the Convention’s general principles. Only if it is impossible to identify a general principle, one can resort to the applicable national law via international private law. Matters not governed at all by the Convention are resolved by direct recourse to domestic law as determined by international private law rules. This basic guideline seems to be easy to understand; however, there are quite a number of difficulties that arise when applying Art. 7(2) CISG. These difficulties result from different aspects: first of all, Art. 7(2) CISG cannot be analysed separately. There is interplay between the interpretation of the Convention as following from Art. 7(1) CISG and the gap-filling provided by Art. 7(2) CISG.³ Moreover, it is sometimes difficult to make a clear distinction between the matters that are governed by the Convention and those which are not. Finally, references are often made to general principles to not only to fill a gap, but also to bring forward arguments when it comes to the interpretation of unclear provisions.

This contribution will first expound when and how Art. 7(2) CISG is to be applied and what general fundamental ideas have to be kept in mind when doing so (see section B.). These preliminary questions are essential for a thorough understanding of this provision and its role for the Convention. After explaining which general principles can be

² See www.unilex.info.
derived from the articles of the Convention and how they have been applied in case law (see section C.), this contribution will in the part thereafter (see section D.) focus on a further and rather remarkable function of general principles besides their function to fill gaps: their use as persuasive arguments to interpret unclear provisions or to settle controversies of how a provision should be understood. Although this function deviates from the clear wording of Art. 7(2) CISG, reference thereto is nevertheless sometimes made.4

B. The Role of General Principles for the Interpretation of the CISG

I. The Need to Fill Gaps for International Uniform Laws in General and for the CISG in Particular

International uniform law always faces the difficulty that not all matters can be considered during the drafting process. No matter how well prepared a convention is, gaps will always remain. This can be due to the complexity of the subject matter, different economic systems, varying legal structures or even political backgrounds. What is also very important is the fact that international uniform law is in some way always the result of compromises that could be agreed upon.5 Moreover, technical improvements are difficult to predict when drafting the provisions so steps have to be taken to ensure that a codification will also be applicable in the future.6 For this reason a provision is necessary that governs how gaps should be dealt with. This applies not only to the CISG, but also to civil codes,7 the UNIDROIT Principles of International

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4 See section D. of this contribution for references.
Commercial Contracts or, for example, to the UNIDROIT Convention on International Factoring. The Principles of European Contract Law (PECL) also provide in Art. 1:106(2) PECL that gaps are to be filled with the ideas underlying the PECL. Likewise the new Draft of Common Frame of Reference (DCFR) contains in Art. I.-1:102(4) DCFR a provision almost identical to Art. 7(2) CISG, Art. 1.6(2) UNIDROIT Principles and Art. 1:106(2) PECL. In the light of the aforementioned necessity to fill gaps and the mutual influences the various codifications had upon another, this is not at all surprising.

II. Terminology

Being aware of the terminology used – and the distinctions from national law connected with it – is generally of decisive significance for the uniform interpretation and application of the Convention. Due to this, before explaining how Art. 7(2) CISG is to be applied, it is first necessary to draw attention to the diverging terminology one encounters when reading articles, commentaries or decisions to this provision. Usually the expression “lacuna intra legem” is used to clarify that a matter is outside the scope of the Convention. The consequence of a “lacuna intra legem” is that the question is

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8 See Art. 1.6(2) UNIDROIT Principles.
10 The DCFR was originally initiated by the European Commission in 2001 (see Communication from the Commission to the Council and the European Parliament on European Contract Law, 11.07.2001, COM(2001) 398 final) and contains principles, definitions and model rules of European private law. The DCFR is an academic text only and will contribute to the (political) Common Frame of Reference (CFR), which will be published in 2009. Up to the present, only the Interim Outline Edition of the DCFR is available, see http://www.law-net.eu/en_index.htm.
resolved by direct recourse to domestic law as determined by international private law rules (of the forum) and general principles are not reverted to at all. A synonym for a “lacuna intra legem” is an “external gap” \(^{13}\) or an “apparent/obvious gap”. \(^{14}\) The opposite of a “lacuna intra legem” is a so-called “lacuna praeter legem”, \(^{15}\) an “internal gap” \(^{16}\) or a “concealed/hidden gap”. \(^{17}\) A further synonym for an “internal gap” is a “true gap”. \(^{18}\) These various terms complicate the correct application of Art. 7(2) CISG. Moreover, the described terminology is disputed as some authors are critical about the expression “external gap”, because if a matter falls under the exceptions in Art. 4 CISG and Art. 5 CISG and is therefore outside the scope of the Convention, this “cannot constitute a gap of the Convention”. \(^{19}\) This explains why the word “gap” is also used for the expression “internal gap”. \(^{20}\) There is no denying the fact that the differing terminology complicates the application of Art. 7(2) CISG. Yet, the expressions “external gap” and “internal gap” are also quite common and should therefore be maintained in order not to complicate matters even more.

In the following, the expression “external gap” is used to clarify that a matter is outside the scope of the Convention. For the matters governed by the Convention, but which are not expressly settled therein, the expression “gap” is employed.

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\(^{13}\) Basedow, Uniform law Conventions and the UNIDROIT Principles of International Commercial Contracts, ULR 2000, 135; Himmen, Die Lückenfüllung anhand allgemeiner Grundsätze im UN-Kaufrecht (Art. 7 Abs. 2 CISG), Gottmadingen 2007, 60 (fn. 172 with further references); Schlechtriem, Internationales UN-Kaufrecht, 4th ed., Tubingen 2007, no. 41.


\(^{16}\) Karollus, UN-Kaufrecht, New York 1991, 16 – expression (“echte Lücke”) translated into English by the authors.

\(^{17}\) Diedrich (op. cit. fn. 14), 354.

\(^{18}\) Karollus (op. cit. fn. 16), 16 (expression translated into English by the authors).


III. Gap-filling with the Use of General Principles

The preamble of the CISG determines the Convention’s objective: the adoption of uniform rules for the international sale of goods to promote the development of international trade. This objective has to always be kept in mind when interpreting and applying the CISG. To promote a uniform application of the CISG and to achieve the Convention’s objective as laid down in the preamble, Art. 7 CISG provides judges with some guidelines: “Regard is to be had to its international character” and “questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based (…)”. The wording of Art. 7(2) CISG clearly shows that general principles on which the CISG is based only become important when matters are governed by the CISG but where they are not expressly settled in it. As a first step one thus has to ascertain whether or not a certain matter is governed by the CISG. If a matter is expressly outside the scope of application of the CISG, Art. 7(2) CISG and the Convention’s general principles must not be referred to. This means that questions concerning the property of the goods sold or questions concerning the validity of the contract or of any of its provisions must not be answered with the help of general principles as these questions are – as Art. 4 sent. 2 CISG expressly provides – outside the scope of the Convention. Pursuant to Art. 5 CISG the same applies to the liability of the seller for death or personal injury caused by the goods to any person. Art. 2 CISG and Art. 3(b) CISG also expressly exclude further matters from the scope of the Convention.

 Aside from this, according to Art. 4 sent. 1 CISG only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract are governed. So after having taken a first glance at Art. 4 CISG, one might get the impression that the distinction is easy to draw between matters governed by the Convention and those that are not. But a more thorough glance reveals the difficulties that result from the scope of application as laid down in Art. 4 sent. 1 CISG: the buyer’s and the seller’s rights and obligations arising from a sales contract are not listed
comprehensively, for if they were, there would be no gaps to fill and Art. 7(2) CISG would be superfluous.21

In order to understand and apply Art. 7(2) CISG correctly, it is therefore essential to determine whether or not a specific matter is governed by the Convention. This in return makes it first necessary to interpret a provision and to ascertain its scope of application thereby, as the (extensive) interpretation of a provision might lead to the conclusion that a certain matter is governed by the CISG although this is not expressly provided for in the provision. In other words: it is impossible to clearly differentiate between the interpretation and the gap-filling of the CISG, as at the same time the clarification of a provision fixes its scope of application and therefore answers the primary question whether a gap exists that needs to be filled.22

Of course, each case will have to be examined individually to ascertain whether or not Art. 7(2) CISG can be applied. As a rough guide, one can keep in mind that gap-filling is possible only for questions that are so closely related with a provision of the CISG that recourse to domestic law via international private law would take the question out of context. It must be a matter of sales transactions, on which the Convention is silent.

It must be noted though that after having detected a(n) (internal) gap, it is indispensable to first analyse the parties’ intentions and agreement before resorting to the CISG’s general principles or even the domestic law via private international law rules. This – at least notional – primary step results from Art. 6 CISG, according to which the parties may exclude the application of the Convention or derogate from or vary the effect of any of its provisions. If an analysis of the parties’ intentions reveals that they have reached an agreement on the issue at question, general principles or even the domestic law must not be resorted to. Instead, the issue is to be resolved according to their agreement.23

21 Schlechtriem, in: Schlechtriem/Schwenzer (op. cit. fn. 20), Art. 7, no. 29.
22 Achilles, Kommentar zum UN-Kaufrechtsübereinkommen (CISG), Neuwied 2000, Art. 7, no. 7; Eörsi (op. cit. fn. 5), II-11; Magnus (op. cit. fn. 3), Art. 7, no. 9 and 39; see also Janssen, Die Einbeziehung von allgemeinen Geschäftsbedingungen in internationale Kaufverträge und die Bedeutung der UNIDROIT-und der Lando-Principles, IHR 2004, 198, fn. 17.
IV. Matters not Governed by the Convention (External Gaps)

As explained above, if a matter is outside the scope of the Convention, recourse to general principles is not allowed and the matter is to be solved directly following the applicable national law to be determined via international private law. This applies – besides other aspects\(^\text{24}\) – to the following:

1. Rate of Interest Payment

In practical experience, one very important matter is the question of interest rates. Art. 78 CISG provides that “if a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it (…)”. However, this provision is silent on the rate of interest payment as the delegates on the Vienna Conference could not agree on this point.\(^\text{25}\) As Art. 78 CISG provides that interest must be paid without providing a rule on the rate of interest payment, it is debatable whether an external or an internal gap exists. Court decisions and commentators propose diverging ways: some purport an internal gap and a uniform approach and want to apply the usual rate at the debtor’s place of business.\(^\text{26}\) Others are also in favour of an internal gap and a uniform approach but hold that the creditor’s place of business is decisive.\(^\text{27}\) Although a uniform approach is generally desirable, until today the judicature shows that in the light of the proposed diverging solutions\(^\text{28}\) a uniform application is difficult – or even impossible –

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\(^{24}\) For a more comprehensive list see e.g. Saenger, in: Bamberger/Roth (eds.), Kommentar zum Bürgerlichen Gesetzbuch, vol. I, 2nd ed., Munich 2007, Art. 4, no. 18 et seq.

\(^{25}\) For a detailed account on the history of this provision see Schlechtriem (op. cit. fn. 13), no. 317.


\(^{27}\) Landgericht Stuttgart (Germany), 31 August 1989, RIW 1989, 985; Landgericht Frankfurt a. M. (Germany), 16 September 1991, RIW 1991, 954; Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft Wien (Austria), 15 June 1994, RIW 1995, 591 according to which this gap can be filled with recourse to the general principle of full compensation; Stoll, Inhalt und Grenzen der Schadensersatzpflicht sowie Befreiung von der Haftung im UN-Kaufrecht, im Vergleich zu EKG und BGB, in: Schlechtriem (op. cit. fn. 7), 279 et seq.

\(^{28}\) For further ways to determine the interest rate see the references at Bacher, in: Schlechtriem/Schwenzer (op. cit. fn. 20), Art. 78, no. 27 et seq.; Ferrari, Verzugszinsen nach Art. 78 UN-Kaufrecht, IHR 2003, 156 et seq. For a rather surprising – and not at all convincing – decision see U.S. Court for the Northern
to achieve. There is no (generally approved) general principle of the Convention with regard to the interest rate.\textsuperscript{29} For this reason recourse to the applicable national law seems preferable irrespective of whether or not this is an external or an internal gap. Recourse to the applicable national law also seems to be the prevailing opinion in (international) judicature as well as of commentators and other authors.\textsuperscript{30}

2. Limitation of Claims, Set-off and Representation

One further important issue that is not governed by the Convention is the question of limitation of claims. Aside from the application of the UN Limitation Convention,\textsuperscript{31} the applicable national law is to be determined by conflict rules of the forum. Until today, this solution has been abided by all courts without a single exception.\textsuperscript{32}

\textsuperscript{29} For the diverging approaches on how to determine the interest rate see the text above and the references in fn. 26 et seq.


\textsuperscript{31} The United Nations Convention on the Limitation Period in the International Sale of Goods has not been ratified by many (economically important) countries which have ratified the United Nations Convention on Contracts for the International Sale of Goods. For the text of the UN Limitation Convention and the contracting countries see Schlechtriem, in: Schlechtriem/Schwenzer (op. cit. fn. 20), 941 et seq. and 1017 et seq.

Set-off is also not expressly governed by the Convention; as such the prerequisites have to be identified by domestic law as determined by international private law. It has to be noted though that according to some commentators and court decisions recourse to conflict law rules is not necessary where claims shall be offset that result from the contractual relationship governed by the CISG. It is maintained that in such situations (e.g. a claim for damages by the buyer against the seller because of non-conformity of the goods that is offset against a claim for payment of the price by the seller against the buyer) set-off is admissible without any further prerequisites by direct recourse to the Convention.

Representation is also outside the scope of the Convention. The Convention is silent on this matter. Consequently this question is to be answered by the applicable national law determined by conflict law rules.

V. Recourse to Domestic Law

If the matter is governed by the Convention but not expressly settled in it, in the absence of a general principle to fill the gap the issue is to be settled in conformity with the law applicable by virtue of the rules of international private law (of the forum). Following the preamble’s objective as set out above, it is an undisputed fact that recourse to domestic law endangers the uniform application of the Convention. As such, recourse to domestic law via international private law rules is only the last resort and judges should always consider – without pushing the Convention’s scope of application too far –

33 Magnus (op. cit. fn. 3), Art. 4, no. 46.
35 Following Magnus (op. cit. fn. 3), Art. 4, no. 47, this is even a general principle stemming from Art. 84(2) CISG. See also Oberlandesgericht Hamburg (Germany), 26 November 1999, IHR 2001, 22.
37 See section B.III. of this contribution.
whether or not the issue can be solved by liberally interpreting a provision of the Convention or by applying it in an analogous way.\textsuperscript{38}

\textbf{VI. Method of Development and Identification of General Principles}

Although Art. 7(2) CISG refers judges to the Convention’s general principles to fill a gap, the Convention’s general principles are not expressly laid down therein. The question thus arises as to how they can be developed and identified. Case law and scholarly writings have provided long lists of the Convention’s general principles\textsuperscript{39} and thereby facilitated the uniform application of the Convention to a great extent. Nevertheless, instead of simply listing the Convention’s general principles and their references, one should become aware of how general principles can be developed and identified from the Convention. This technique will make already approved general principles more understandable and might even contribute to the identification of further ones (despite the elaborate lists mentioned). Broadly speaking, three different categories of general principles can be identified.\textsuperscript{40} The first category is made up of general principles that can be derived from one single article of the Convention that is a clause with general applicability according to its wording and its systematic position.\textsuperscript{41} For example, Art. 6 CISG (principle of party autonomy) and Art. 7 CISG (principle of observance of good faith) are both regulated within the Convention’s general provisions and apply to the CISG as a whole.

As for the second category, some general principles can be identified by analysing several articles and thereby finding an overarching purpose. These articles may not even be systematically connected in such a way that they stem from a single chapter or even a


\textsuperscript{39} See Ferrari, in: Schlechtriem/Schwenzer (op. cit. fn. 12), Art. 7, no. 48 et seq.; Honnold (op. cit. fn. 7), 139 et seq.; Magnus (op. cit. fn. 34), 480 et seq.; Schlechtriem, in: Schlechtriem/Schwenzer (op. cit. fn. 20), Art. 7, no. 30.

\textsuperscript{40} According to Magnus (op. cit. fn. 34), 477 et seq. even four categories exist as the general principle of pacta sunt servanda is not mentioned at all but nevertheless premised within the Convention.

\textsuperscript{41} Magnus (op. cit. fn. 34), 477.
single section. For example, the very important principle of preservation of the contract can be derived from Art. 25, 49(2) CISG and 82 CISG.42

As a third category, one can ascertain some general principles from a single provision where its ruling can be generalised to similar situations, although this possibility of generalisation does not result from the wording of the provision or its systematic position within the Convention. For example, Art. 57 CISG is not a general provision of the Convention. Nevertheless, from the provision a general principle can be derived with regard to the place of performance for pecuniary claims.43

C. General Principles in Detail

I. General Principles that Can Be Derived from a Clause with General Applicability

1. Autonomy of the Parties44

The undisputedly most important general principle is the principle of party autonomy45 which follows from Art. 6 CISG. As the parties’ agreement always takes priority over the Convention’s provisions, the principle of party autonomy also takes priority over other general principles where they would lead to a different result.46 The principle of party autonomy is widely acknowledged both among scholars and courts.47 According to this principle, the parties are free to choose the law applicable to the contract. Under Art. 6 CISG, the parties can opt out of the Convention as a whole; with the exception of

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42 For details see section C.II.1. of this contribution.
43 For details see section C.III.4. of this contribution.
44 The principle of party autonomy has to be distinguished from the principle of private autonomy. Private autonomy comprises – besides other aspects – freedom of contract, see Grundmann, in: Grundmann/Bianca (eds.) EU-Kaufrechts-Richtlinie, Kommentar, Cologne 2002, 21, no. 1.
45 Ferrari, in: Schlechtriem/Schwenzer (op. cit. fn. 12), Art. 7, no. 48; Schlechtriem, in: Schlechtriem/Schwenzer (op. cit. fn. 20), Art. 7 no. 30.
46 Cf. Ferrari (op. cit. fn. 5), 12; Ferrari (op. cit. fn. 38), 83.
47 Bonell, in: Bianca/Bonell (op. cit. fn. 33), Art. 7 no. 2.3.2.2; Magnus (op. cit. fn. 34), 480; Schlechtriem, in: Schlechtriem/Schwenzer (op. cit. fn. 20), Art. 7 no. 30; Tribunale di Rimini (Italy), 26 November 2002, available on unilex; Hof van Beroep, Gent (Belgium), 15 May 2002, available on unilex.
Art. 12 CISG (see Art. 12 sent. 2 CISG) they can also derogate from single provisions with or without agreeing on substitute provisions.

2. Observance of Good Faith

The principle of observance of good faith is also one of the Convention’s general principles. Although the requirement to observe good faith is laid down in Art. 7(1) CISG and therefore expressly only applies to the interpretation of the Convention, it is nevertheless acknowledged that the observance of good faith is also a general principle to fill gaps.48 A French appellate court even ruled that the violation of the principle of good faith entitled the other party to damages.49 This ruling does not seem to be open to generalisation. Moreover, as the general principle of good faith is vague50 and gives little guidance to fill gaps, it is necessary to deduce the following subcategories or aspects from it: the prohibition of contradictory behaviour (prohibition of *venire contra factum proprium*) is a result of the principle of good faith.51 Additionally, the duty to cooperate52 and the duty to supply all the necessary information for the performance of the contract53 can be inferred from it. Finally the principle of estoppel can be concluded from the principle of good faith. In one case an Austrian court held that the seller was estopped from setting up the defence of a late notice according to Art. 39 CISG as the buyer was led to believe that the seller would not raise this defence.54

48 Magnus (op. cit. fn. 34), 480; Schlechtriem, in: Schlechtriem/Schwenzer (op. cit. fn. 20), Art. 7, no. 30. Interestingly, most court decision state good faith in connection with Art. 7(1) CISG. As far as it is possible to survey all court decisions, only in the following good faith was explicitly regarded as a general principle in the light of Art. 7(2) CISG: Arrondissementsrechtbank Arnhem (The Netherlands), 17 July 1997, available on unilex. See also Cour d’appel de Grenoble (France), 22 February 1995, available on unilex. In this decision good faith was regarded as a “principle” (“contraire au principe de bonne foi”), but not as a general principle.

49 Cour d’appel de Grenoble (France), 22 February 1995, available on unilex.

50 See also Zeller in this book.


52 The general principle of a duty to cooperate can also be derived from Art. 32(2) CISG, Art. 34, 37, 48 CISG, Art. 77 CISG and Art. 85, 86 CISG. It is therefore also possible to maintain that the duty to cooperate is a general principle which is independent from the general principle of observance of good faith. See also Bundesgerichtshof (Germany), 31 October 2001, IHR 2002, 16.

53 Cf. Bundesgerichtshof (Germany), 31 October 2001, IHR 2002, 16; Honnold (op. cit. fn. 6), § 100.

Again, it has to be stressed that before resorting to the principle of observance of good faith one should first determine whether or not a gap actually exists and one should also make clear whether the observance of good faith is used for the interpretation of the Convention as following from Art. 7(1) CISG, or as means to fill gaps according to Art. 7(2) CISG. Only a strict distinction between these two functions of the observance of good faith ensures a correct – and comprehensible – application of the Convention. This necessity to distinguish becomes clear when taking a closer look at a decision of a German court.\(^{55}\) The court held that following from the observance of good faith it is not necessary to declare the contract avoided when the right to avoid the contract principally exists and when at the time of the covering purchase it is clear that the debtor will not perform. Without elaborating on the correctness or incorrectness of this decision,\(^{56}\) its ruling could not be based on the gap-filling function of the observance of good faith. This is due to the fact that all articles governing the avoidance of the contract (see Art. 49, 51, 64, 72 CISG and 73 CISG) expressly state that a declaration of avoidance is necessary. In other words, there is no gap which needs to be filled.\(^{57}\)

II. General Principles Derived from Several Articles

1. Principle of Preservation of the Contract

As for the general principles that can be derived from several articles, the principle of preservation of the contract (\textit{favour contractus}) is probably the one most acknowledged.\(^{58}\) It can be derived from Art. 25, 34, 37, 39, 43, 47, 48, 49, 63, 64, 82 CISG. All theses articles impose demanding prerequisites on the remedy of avoidance of the contract. The reasons for these demanding prerequisites have often been explained: the costs arising from the transportation of goods due to the avoidance of the

\(^{55}\) See Hanseatisches Oberlandesgericht Hamburg (Germany), 28 February 1997, available on unilex.

\(^{56}\) See \textit{Magnus} (op. cit. fn. 3), Art. 75, no. 8 with further references to this controversial question.

\(^{57}\) See also \textit{Lookofsky}, Walking the Article 7(2) Tightrope Between CISG and Domestic Law, (2005-2006) 25 Journal of Law and Commerce (J. L. & Com.), 91 et seq.

\(^{58}\) See for example \textit{Koneru} (op. cit. fn. 1), 111 who states that the principle of preservation of the contract is “the ultimate unifying general principle of the Convention”; see also \textit{Magnus} (op. cit. fn. 34), 483; Bundesgericht (Switzerland), 28 October 1998, available at http://cisgw3.law.pace.edu/cases/981028s1.html; Oberster Gerichtshof (Austria), 7 September 2000, IHR 2001, 43; Oberlandesgericht Köln (Germany), 14 October 2002, IHR 2003, 16.
contract shall be avoided. The seller can of course avoid these costs by selling the goods in the buyer’s country, but this only evokes different problems such as storage costs until the time of delivery or even the problem of finding a different buyer in countries that do not have a developed network of dealers.\footnote{Cf. Michida, Cancellation of Contract, (1979) 27 The American Journal of Comparative Law (Am. J. Comp. L.), 280 et seq.; Müller-Chen, in: Schlechtriem/Schwenzer (op. cit. fn. 20), Art. 46, no. 4.}

Despite this general acceptance of the general principle of preservation of the contract, the question arises in which cases recourse to this principle provides assistance. In fact, the court rulings cited above\footnote{See references in fn. 58.} did not mention the preservation of the contract as a general principle to fill gaps. Instead, they simply referred to it as a general notion underlying the Convention. Nevertheless, there are possible areas of application for this general principle: if the seller delivers goods before the date of delivery, following Art. 37 CISG he has a right to cure up to that date provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. Art. 32 sent. 2 CISG provides a similar right to cure in case of defective documents. Despite these provisions, the seller seems to have no (explicit) right to cure where a third party claims ownership of the goods (see Art. 41 CISG) or claims an infringement of patent rights or trademarks (see Art. 42 CISG) although the seller could potentially cure the defect by settling the dispute with the third party.\footnote{Cf. Honnold (op. cit. fn. 6), § 245.1.} The principle of preservation of the contract supports the view that also in these situations the seller should have a right to cure before the date of delivery. This can be achieved by applying Art. 37 CISG and 32 sent. 2 CISG in an analogous way.\footnote{Cf. Honnold (op. cit. fn. 6), § 245.1.}

2. Revocability of Statements

A buyer who has declared the contract avoided (e.g. because of a fundamental breach) might be interested in revoking the declaration of avoidance. This situation can arise where the buyer gets the possibility to resell the defective goods for a comparatively high price or where he decides to repair the goods due to the fact that a covering
purchase would take longer than reparation of the goods. In this situation the question arises whether or not the buyer is bound to his declaration of avoidance. The declaration of avoidance can be revoked before it reaches the addressee. In the light of today’s fast communication methods such as e-mail or fax it is of probably more importance whether or not the declaration of avoidance can be revoked after it has reached the addressee. This issue is quite controversial. Some CISG commentators hold the view that a declaration of avoidance is irrevocable. This view is mainly based on the concept that a declaration of avoidance transforms the contract into a contractual restitutionary relationship and therefore – following the German concept of a \textit{\v{G}estaltungserklärung} – this declaration must be clear, unconditional and irrevocable. Taking into account that the CISG is not so much based on thorough dogmatic foundations but rather strives for more or less simple and practical solutions, it can also be maintained that the revocability is not excluded per se. Furthermore, the Convention’s international character (see Art. 7(1) CISG) makes it necessary to loosen oneself from national dogmatic foundations. It can therefore be asserted that the Convention does not expressly settle the revocability of a declaration of avoidance. This gap primarily needs to be filled with the Convention’s general principles. Art. 16(2)(b) CISG expresses the principle that a declaration cannot be revoked if the addressee has relied on the irrevocability and acted in reliance on the declaration. Art. 29(2) sent. 2 CISG also expresses that induced reliance should be protected. For these reasons a declaration of avoidance can be revoked as long as the addressee has not relied on it.

63 In the first instance this question is linked to the controversial issue at what time the declaration of avoidance becomes effective (thereto see \textit{Schlechtriem}, in: Schlechtriem/Schwenzer (op. cit. fn. 12), Art. 27, no. 13). Nevertheless, some commentators who maintain that the declaration of avoidance becomes effective at the time of dispatch also hold the view that it can be revoked before it reaches the addressee (\textit{Magnus} (op. cit. fn. 3), Art. 27, no. 21). For a possibility to revoke the declaration before it reaches the addressee see also \textit{Saenger}, in: Bamberger/Roth (op. cit. fn. 24), Art. 27, no. 10; \textit{Stern}, Erklärungen im UN-Kaufrecht, Vienna 1990, 162.


This is in line with a noteworthy Danish decision in which – without dealing with the above given arguments – it was held that the buyer had the right to revoke the declaration of avoidance.\textsuperscript{67} The view taken here does not lead to unreasonable results as long as the party revoking the declaration bears the burden of proof that the addressee has not relied on it.\textsuperscript{68}

3. Freedom of Form (Art. 11, 29 CISG)

Following Art. 11 CISG contracts of sale need not be concluded in or evidenced by writing. It is not subject to any other requirement as to form. Moreover, Art. 29(1) CISG provides that contracts may be modified or terminated by the mere agreement of the parties. From these two provisions the general principle of freedom of form can be derived.\textsuperscript{69} This general principle can only be restrained by Art. 12 CISG (and correspondingly a reservation under Art. 96 CISG). For this reason a declaration of avoidance, a declaration of price reduction, a notice of lack of conformity\textsuperscript{70} and other kinds of declarations or notices need not follow any form.\textsuperscript{71}

4. Principle of Simultaneous Exchange of Performance and Right of Retention

As laid down in Art. 58 CISG, in the absence of special agreements the buyer must pay the price when the seller places either the goods or documents controlling their


\textsuperscript{68} Krebs (op. cit. fn. 66), 29; Schlechtriem, in: Schlechtriem/Schwenzer (op. cit. fn. 12), Art. 27, no. 14. From a systematic point of view it has to be noted that other declarations of part III of the Convention can also be revoked. If the seller seriously and definitely refuses to perform (and thus commits a fundamental breach which gives the buyer the right to declare the contract avoided), he is nevertheless allowed to revoke this refusal, see Freiburg, Das Recht auf Vertragsaufhebung im UN-Kaufrecht, Berlin 2001, 81; Huber, in: Schlechtriem (op. cit. fn. 64), Art. 49, no. 6.

\textsuperscript{69} Ferrari, in: Schlechtriem/Schwenzer (op. cit. fn. 12), Art. 7, no. 52; Saenger (op. cit. fn. 24), Art. 7, no. 7; Comisión pare la Protección del Comercio Exterior de México (Mexico), 29 April 1996, available at http://ciscgw3.law.pace.edu/cases/960429m1.html; Tribunale di Rimini (Italy), 26 November 2002, available on unilex; see also Oberster Gerichtshof (Austria), 29 June 1999, Beilage zu der Zeitschrift TranspR–Internationales Handelsrecht (TranspR-IHR) 1999, 49 according to which a written contract can be orally changed.


\textsuperscript{71} Cf. Magnus (op. cit. fn. 34), 483.
disposition at the buyer’s disposal. The buyer must nevertheless be given the possibility to examine the goods (Art. 58(3) CISG). Before this relevant time the buyer has a right of retention with regard to the payment of price. From Art. 58 CISG as well as Art. 81(2) CISG and 85 CISG the general principle of simultaneous exchange of performance can be derived. 

Correspondingly, a right of retention exists until the other party is willing and able to perform. It stems from the abovementioned articles as well as Art. 71 CISG and 86 CISG.

5. Burden of Proof (Art. 2(a), 79(1) CISG)

In procedural aspects it is of great importance which of the parties bears the burden of proof; a question that often decides who wins or loses a case. Art. 79(1) CISG is the only provision that explicitly governs the burden of proof (“A party is not liable […] if he proves […]”). Although some authors and judges hold the view that the burden of proof is not governed by the Convention, it is rather widely acknowledged both in scholarly writings as well as court decisions that following from Art. 2(a), 35(2)(b) and 79 CISG a party bears the burden of proof for those prerequisites of a provision that are profitable to him. If a party wants to rely on an exception he too has to prove the factual prerequisites of that exception.

72 Cf. Oberster Gerichtshof (Austria), 8 November 2005, IHR 2006, 90 et seq.
73 Cf. Magnus (op. cit. fn. 3), Art. 58, no. 22 et seq.; see also Kern, Ein einheitliches Zurückbehaltungsrecht im UN-Kaufrecht?, ZEuP 2000, 845 et seq. who advocates for a general right of retention with regard to accessory obligations.
74 Emphasis added by the authors.
75 See Khoo, in: Bianca/Bonell (op. cit. fn. 34), Art. 2, no. 3.2. with further reference to the legislative history; ICC International Court of Arbitration (case no. 7399), 1993, available on unilex; Bezirksgericht der Saane (Switzerland), 20 February 1997, Transp-IHR 2000, 11 (full text only available at CISG-online no. 426; within that document see p. 17).
76 Achilles (op. cit. fn. 22), Art. 7, no. 8 and Art. 4, no. 15; Ferrari, in: Schlechtriem/Schwenzer (op. cit. fn. 12), Art. 7, no. 56; Ferrari (op. cit. fn. 36), 85 et seq.; Huber (op. cit. fn. 5), 235; Magnus (op. cit. fn. 24), 489.
78 Ferrari, in: Schlechtriem/Schwenzer (op. cit. fn. 12), Art. 7, no. 56; Magnus (op. cit. fn. 34), 489; Tribunale di Vigevano (Italy), 12 July 2000, IHR 2001, 76 et seq.
6. Effects of Consensual Termination

The Convention has no provision on the effects of consensual termination. Instead, it governs the effects when a party has declared the contract avoided due to a breach thereof. As explained above, one always first has to consider whether or not the parties have reached an agreement on the effects of such a consensual termination. If there is no such agreement, this gap of the Convention is to be filled by recourse to Art. 81 et seq. CISG as a general principle. That is why – as in the case of avoidance – consensual termination e.g. discharges the parties from their main duties (Art. 81(1) CISG), obliges them to make restitution of performances already received (Art. 81(2) CISG) and entitles the buyer to interest from the date on which the price was paid (Art. 84(1) CISG).

III. General Principles Derived from a Single Article Which Is Not a Clause with General Applicability but Where Its Ruling Can Be Generalised

1. Dispatch Principle (Art. 27 CISG)

If a declaration of avoidance gets delayed or even lost in the mail, it is still effective and the contract is avoided provided that the declaration of avoidance is made my means appropriate in the circumstances. This follows from Art. 27 CISG which constitutes the dispatch principle for notices, requests and other communications. This dispatch principle expressly only applies to communications of part III of the Convention, so e.g. to the notice of non-conformity or of third party claims (Art. 39 CISG and 43 CISG), to requests of specific performance (Art. 46 CISG), the fixing of an additional period for performance (Art. 47 CISG and 63 CISG) and price reduction (Art. 50 CISG). However, from Art. 27 CISG a general principle can be derived. Therefore, also other

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79 Oberster Gerichtshof (Austria), 29 June 1999, TranspR-IHR 1999, 49; cf. also Oberlandesgericht Düsseldorf (Germany), 28 May 2004, IHR 2004, 209 where the court held that Art. 81(2) sent. 1 CISG was to be applied in an analogous way.

80 It has to be noted though that Art. 27 CISG does not provide a clear answer to the point of time at which the communication takes effect, thereto see Schlechtriem, in: Schlechtriem/Schwenzer (op. cit. fn. 12), Art. 27, no. 10, also with references to the dissenting opinion.

81 In the following the word “communication” also comprises notices and requests.
communications are effective despite getting lost unless the Convention requires the communication to actually reach the addressee (e.g. Art. 15(1) and (2), Art. 16(1), Art. 18(2), Art. 48(4) CISG) or where the parties have agreed otherwise.82

2. Receipt Principle (Art. 24 CISG)

Art. 24 CISG defines when an offer, a declaration of acceptance or any other indication of intention “reaches” the addressee. As this provision clearly states, this receipt principle only applies to part II of the Convention, i.e. to the formation of the contract. By doing so, the Convention does not answer when other communications reach the addressee although this can be a prerequisite for the notice to be effective (cf. Art. 47(2), Art. 48(4), Art. 79(4) CISG). This gap can be filled by applying Art. 24 CISG as a general principle.83

3. Maturity without Demand (Art. 59 CISG)

As stipulated by Art. 59 CISG, the buyer must pay the price on the date fixed without the need for any request on the part of the seller. This rule is quite important as with maturity the seller is entitled to claim interest (see Art. 78 CISG). Art. 59 CISG only applies to the payment of the purchase price. However, from this provision the general principle can be derived that all pecuniary claims (e.g. repayment following Art. 81(2) CISG; reduction of the purchase price because of non-conformity following Art. 50 CISG; damages) become due without a request on behalf of the entitled party.84

4. Place of Performance for Pecuniary Claims (Art. 57 CISG) and after Avoidance of the Contract

82 Tribunale di Rimini (Italy), 26 November 2002, available on unilex; cf. also Bonell, in: Bianca/Bonell (op. cit. fn. 34), Art. 7 no. 2.3.2.2.; Magnus (op. cit. fn. 3), Art. 7 no. 51; Schlechtriem, in: Schlechtriem/Schwenzer (op. cit. fn. 12), Art. 7 no. 30.
83 Magnus (op. cit. fn. 34), 487.
84 Ferrari, in: Schlechtriem/Schwenzer (op. cit. fn. 12), Art. 7 no. 52; Magnus (op. cit. fn. 3), Art. 59 no. 10; Schlechtriem, in: Schlechtriem/Schwenzer (op. cit. fn. 20), Art. 7 no. 30; Pretore della giurisdizione di Locarno-Campagna (Switzerland), 16 December 1991, available on unilex; Kammergericht Berlin (Germany), 24 January 1994, CISG-online no. 130.
If a party is entitled to pecuniary claims the question arises where these claims have to be performed by the other party. With the exception of the purchase price, this matter is not expressly settled in the Convention, albeit governed. Therefore, the Convention’s general principles have to be applied to answer this question. Art. 57(1)(a) CISG stipulates that the buyer has to pay the purchase price at the seller’s place of performance. Art. 57(1)(a) CISG can be regarded as expression of the general principle that pecuniary obligations have to be performed at the place of business of the monetary creditor.\footnote{Oberlandesgericht Düsseldorf (Germany), 2 July 1993, RIW 1993, 845 et seq.; Cour d’Appel de Grenoble (France), 23 October 1996, English translation available at http://ciscw3.law.pace.edu/cases/961023f1.html; Huber (op. cit. fn. 5), 234 et seq.; Koneru (op. cit. fn. 1), 105; for a different view see Cour d’Appel de Paris (France), 14 January 1998, available on unilex. Cf. also Ferrari (op. cit. fn. 38), 84 et seq.} Interest, reimbursement of expenses and repayment due to reduction of the purchase price because of non-conformity etc. thus have to be paid at the creditor’s place of business.\footnote{It has to be noted though that this is controversial for damages, see Magnus (op. cit. fn. 3), Art. 74 no. 57 and Saenger, in: Bamberger/Roth (op. cit. fn. 24), Art. 57 no. 6 with further references.}

The CISG is also silent on the place of performance after the avoidance of the contract. For this reason it is unclear where restitutional obligations (i.e. the obligation of the seller to pay back the purchase price and the obligation of the buyer to make restitution for the goods received) have to be performed. According to one court decision this gap of the Convention is to be filled with a general principle according to which the place of performance for the obligations concerning restitution should mirror the place of performance for the primary contractual obligations.\footnote{Oberster Gerichtshof (Austria), 29 June 1999, TranspR-IHR 1999, 49.} In other words: if the place of performance for the delivery of the goods were (according to Art. 31(a) and (b) CISG) the seller’s place of business, the place of performance for reimbursement of the goods is now at the buyer’s place of business. Likewise, the place of performance for repayment of the purchase price is at the buyer’s place of business, if the buyer originally had to pay it at the seller’s place of business (according to Art. 57(1)(a) CISG).\footnote{This is in line with the predominant opinion both in judicature and literature, see Landgericht Gießen (Germany), 17 December 2002, IHR 2003, 276 et seq.; Oberlandesgericht Karlsruhe (Germany), 19 December 2002, IHR 2003, 126 et seq.; Huber, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch (op. cit. fn. 19), Art. 81, no. 15; Piltz, Neue Entwicklungen im UN-Kaufrecht, NJW 2003, 2063; Saenger, in: Bamberger/Roth (op. cit. fn. 24), Art. 81, no. 5. For a different view see Thiele, Erfüllungsort bei der}
from Art. 57(1)(a) CISG according to which the place of performance for pecuniary claims is the creditor’s place of business.

5. General Principle of Full Compensation

According to some court decisions the principle of full compensation is also a general principle in the light of Art. 7(2) CISG. In case the buyer does not pay the purchase price, the seller is entitled to interest (Art. 78 CISG). But following the general principle of full compensation the seller is also entitled to damages for those sums that he had to pay due to higher credit costs that were customary in the particular market. This principle can be derived from Art. 74 CISG.

D. The Role of General Principles to Solve Disputes or for the Interpretation of the CISG in Concreto

Besides their function to fill gaps, general principles are also very often used where controversies exist or where it is unclear how a provision should be interpreted.

I. Subsequent Performance versus Right of Avoidance

This first applies to the question what effect (a possible) subsequent performance has on the right of avoidance and a fundamental breach. This controversial issue has been discussed very often and need not be repeated here in detail. To recall it quickly, it

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Rückabwicklung von Vertragspflichten nach Art. 81 UN-Kaufrecht – ein Plädoyer gegen die herrschende Meinung, RIW 2000, 894 et seq.

89 Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft Wien (Austria), 15 June 1994, RIW 1995, 591; Tribunale di Rimini (Italy), 26 November 2002, available on unilex. Cf. also Oberster Gerichtshof (Austria), 9 March 2000, IHR 2001, 49 where this was seen as a “principle” but not as a “general principle”.

90 Landgericht Hamburg (Germany), 26 September 1990, RIW 1990, 1019; ICC International Court of Arbitration (no. 7197/1992), 1992, available on unilex; Handelskammer Zürich (Switzerland), 31 May 1996, available on unilex; Landgericht Saarbrücken (Germany), 25 November 2002, IHR 2003, 71; Colligan (op. cit. fn. 12), 50 et seq.

originates from the unclear wording of Art. 48 C. and 49 C. Following Art. 48 C. “the seller may, even after the date of delivery, remedy at his own expense any failure to perform his obligations (…)”. But this right to subsequent performance is “subject to article 49”. The question is to what extent the buyer’s right to avoidance prevails over the seller’s right to subsequent performance. The prevailing opinion seems to be that the right to subsequent performance must not be undermined too much. That is why a breach of contract is considered to be not fundamental where the seller is capable and willing to remedy the defect without unreasonable delay and unreasonable inconveniences for the buyer. It is argued that where a subsequent performance is possible without an unreasonable delay and without unreasonable inconveniences for the buyer, he does not fundamentally lose what he is entitled to expect under the contract. The conflicting opinion either wants to regard the possibility to remedy the defect not at all or only in rare circumstances.

It is not the aim of this paper to again balance the different reasons and arguments for the opinions outlined above. The authors of this contribution simply want to focus the controversy on one rather remarkable aspect. It is held that the necessity to consider the possibility of subsequent performance in the determination of a fundamental breach follows from the fact that the preservation of contract is a general principle in the light of Art. 7(2) C. At a first glance, stating the general principle of preservation of contract in this context seems to be incorrect in methodical aspects. Following Art. 7(2) C., general principles may only be used to fill gaps. But the controversy

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92 C. Advisory Council, C. Advisory Council Opinion No. 5, The buyer’s right to avoid the contract in case of non-conforming goods or documents, IHR 2006, 39; Huber, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch (op. cit. fn. 19), Art. 49, no. 28 et seq.; Müller-Chen, in: Schlechtriem/Schwenzer (op. cit. fn. 20), Art. 48, no. 15; Oberlandesgericht Koblenz (Germany), 31 January 1997, IHR 2003, 175; Landgericht München (Germany), 27 February 2002, IHR 2003, 235; Oberlandesgericht Köln (Germany), 14 October 2002, IHR 2003, 16; Handelsgericht Aargau (Switzerland), 5 November 2002, IHR 2003, 179 et seq.

93 Müller-Chen, in: Schlechtriem/Schwenzer (op. cit. fn. 20), Art. 48, no. 15.

94 Koch (op. cit. fn. 91), 323; Vahe (op. cit. fn. 64), 66 et seq.; Welser, Die Vertragsverletzung des Verkäufers und ihre Sanktion, in: Doralt (ed.), Das UN-C. Kaufrecht im Vergleich zum österreichischen Recht, Vienna 1985, 125; ICC International Court of Arbitration, 1 January 1994, C. online no. 565; Landgericht Berlin (Germany), 15 September 1994, C. online no. 399.

95 Cf. Freiburg (op. cit. fn. 68), 104 et seq. who holds that the buyer might act contrary to good faith if he prevents the seller from subsequent performance; see also Holthausen, Die wesentliche Vertragsverletzung des Verkäufers nach Art. 25 UN-Kaufrecht, RIW 1990, 104.

96 Gruber, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch (op. cit. fn. 19), Art. 25, no. 25.

97 For details see section C.II.1. of this contribution.
outlined above is not a gap that needs to be filled by general principles. It is (in methodical aspects) nevertheless possible to resort to the Convention’s general principle. This follows from the fact that they are based on the Convention. They must be derived from one or several articles. That is why recourse to the Convention’s general principles for solving controversies or interpreting unclear statutes is simply a kind of systematic interpretation.

II. Equalisation of Benefits Forgone (Art. 84(2) CISG)

A further example of this use of general principles can be observed in the context of Art. 84(2) CISG. Following this provision, if the buyer makes restitution of the goods he also must account to the seller for all the benefits that he has derived from them. It is controversial whether or not the buyer must also account to the seller those benefits that he “could reasonably have been expected to receive in the normal course of business, but in fact did not.” One commentator supports such a view with an express reference to the general principle to mitigate losses that can be derived from Art. 77 CISG. Again, in methodical aspects this reference to the Convention’s general principles is possible as it can be seen as a kind of systematic interpretation. The view taken here nevertheless refers to the clear wording of Art. 84(2) CISG, which provides that the buyer has to account to the seller those benefits “which he has derived”. Due to this the buyer is not obliged to account the seller for those benefits which he has not derived.

III. Interpretation of “Reasonable Time” within Art. 39(1) CISG and Art. 49(2)(b)(i) CISG

98 For details see section B.VI. of this contribution.
99 Hornung, in: Schlechtriem/Schwenzer (op. cit. fn. 20), Art. 84 no. 22.
100 Hornung, in: Schlechtriem/Schwenzer (op. cit. fn. 20), Art. 84 no. 22; see also Salger, in: Witz/Salger/Lorenz, International Einheitliches Kaufrecht, Heidelberg 2000, Art. 84 no. 3 who holds that a claim for damages exists in such cases.
101 See also the French ("qu’il a retire") and the Spanish text ("que haya obtenido") of the Convention.
102 Achilles (op. cit. fn. 22), Art. 84 no. 3; Karollus (op. cit. fn. 16), 154; Krebs (op. cit. fn. 66), 74 et seq.; Saenger, in: Bamberger/Roth (op. cit. fn. 24), Art. 84 no. 4; Schlechtriem (op. cit. fn. 13), no. 332.
Finally, recourse to the general principle of preservation of the contract can also facilitate the interpretation of the term “reasonable time” within Art. 39(1) CISG and Art. 49(2)(b)(i) CISG. Both the notice of non-conformity of the goods (Art. 39(1) CISG) as well as the declaration of avoidance (Art. 49(2)(b)(i) CISG) have to be given within a “reasonable time” after the buyer “has discovered or ought to have discovered” the lack of non-conformity and after “he knew or ought to have known of the breach” respectively. In case of non-conformity of the goods, both reasonable times (i.e. the reasonable time for notice of non-conformity of the goods and the reasonable time to declare the contract avoided) start to run after the period for examination of the goods (Art. 38 CISG). For this reason it is sometimes maintained that both time limits are of the same length.\textsuperscript{103} This is not convincing because it would force the buyer to give notice of non-conformity and at the same time declare the contract avoided. This is contrary to the general principle of preservation of the contract.\textsuperscript{104} That is why, the reasonable time to declare the contract avoided as provided by Art. 49(2)(b)(i) CISG must be longer than the reasonable time to give notice of non-conformity as stipulated by Art. 39(1) CISG.\textsuperscript{105}

**E. Conclusion**

The methodical aspects concerning Art. 7(2) CISG are theoretically relatively easy to understand. Moreover, as shown above many general principles of the Convention have been identified and are more or less widely acknowledged.\textsuperscript{106} Lists of the Convention’s general principles thus facilitate a flawless application. For a correct understanding of these general principles one should nevertheless become aware of how they can be identified and developed.\textsuperscript{107} Moreover, it can be very important to make it clear whether or not the interpretation of a provision actually stems from the gap-filling function of

\textsuperscript{103} Heilmann, Mängelgewährleistung im UN-Kaufrecht, Berlin 1994, 477; Huber, UN-Kaufrecht und Irrtumsanfechtung, ZEuP 1994, 589; Will, in: Bianca/Bonell (op. cit. fn. 34), Art. 49 no. 2.2.2.1; Landgericht Oldenburg (Germany), 9 November 1994, NJW-RR 1995, 438.

\textsuperscript{104} Thereto see section C.II.1. of this contribution.

\textsuperscript{105} See also – without recourse to the general principle of preservation of the contract – Magnus (op. cit. fn. 3), Art. 49 no. 38; Achilles (op. cit. fn. 22), Art. 49 no. 11; Müller-Chen, in: Schlechtriem/Schwenzer (op. cit. fn. 12), Art. 49, no. 32; Salger, in: Witz/Salger/Lorenz (op. cit. fn. 100), Art. 49 no. 7.

\textsuperscript{106} See section C. of this contribution.

\textsuperscript{107} Thereto see section B.VI. of this contribution.
Art. 7(2) CISG with the help of the general principles. This is especially necessary when it comes to good faith as the observance of it can result from Art. 7(1) CISG and from Art. 7(2) CISG. The decision from a German court\textsuperscript{108} cited above can be seen as a plausible example for this necessity.

Finally, the use of general principles to solve controversies should also be kept in mind. This function deviates from their primary purpose of filling gaps in the Convention. In methodical aspects it is nevertheless possible to resort to the general principles as their use to solve disputes can be seen as a kind of systematic interpretation.

\textsuperscript{108} See Hanseatisches Oberlandesgericht Hamburg (Germany), 28 February 1997, available on unilex. See also section C.I.2. of this contribution.