Pilar Perales Viscasillas & David Ramos Muñoz[*]

CHAPTER 43

FROM COMPETITION TO SYMBIOSIS

Commercial Context and Commercial Law and their Importance in Legal Education

1. INTRODUCTION

> The ultimate good desired is better reached by free trade in ideas [and] the best test of truth is the power of the thought to get itself accepted in the competition of the market.[1]

This quotation by Oliver Wendell Holmes seems well suited when the purpose is to honour Professor Bergsten and his outstanding role in the advancement of uniform commercial law and its study. For despite his major achievements, either academic (his professorship at Pace University or numerous publications) or institutional (as Secretary General of the UNCITRAL or Chairman of the CISG-Advisory Council) the role we want to emphasize, as we feel it more closely, is his shepherding of the Willem C Vis International Commercial Arbitration Moot from its beginning to the present time, when it has turned into the biggest student competition by international presence[2].

The Vis Moot experience, as well as other moots is based on the assumption that discussion and debate are the best way to teach a subject such as law, since the best ideas are those accepted after a competitive process. This was Holmes'

[*] Professor Dr Perales Viscasillas is Chair of Commercial Law at University of La Rioja and Dr Ramos Muñoz is Assistant Professor at University Carlos III of Madrid. The present work is written under the Research Project of the Ministry of Science and Technology (Spain) (DER2008-02244/JURI): Uniform International Commercial Law and its impact on European Contract Law: UNIDROIT Principles 2004 and International Commercial Arbitration under UNCITRAL. Head of the team: Prof. Pilar Perales Viscasillas.

[1] O.W. Holmes. Dissenting opinion in *Abrams v. United States*, 250 U.S. 616 (1919).

[2] In 2010 there were 251 teams. See http://www.cisg.law.pace.edu/cisg/moot/participants17.html

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dictum, this was also John Stuart Mill's main argument for his passionate defence of freedom of speech[3]. In this regard the competition of ideas in the Moot has been an invaluable tool to expand the teaching and research of uniform law.

And yet the topic of this article points towards an aspect of uniform law where competition (or a "competitive approach") may have had some questionable effects, some which Professor Bergsten's ingenuity has helped to uncover.

In uniform commercial law the principle of party autonomy is paramount. However, the way this principle is contemplated places it in an almost invariably "competitive" relationship with the law. As such, the parties' will must either comply with, or derogate from the legal rules, without any space for it to interact with or supplement them. Such an approach can potentially lead to a vacuum when the parties' will is to some extent inconsistent with legal provisions; but insufficient to fill the gap left by those overridden provisions. It can also lead to the discarding of factual elements that show the commercial context in which the parties operate because they do not fulfil the test to be considered "parties' will", "practices" or "usages".

We believe that the "competitive" solution can perilously lead to the neglect of the commercial context (which is wider than what the legal categories of "will", "practices" or "usages" acknowledge), and the interaction between that context and the law. It is for this reason that, as opposed to what we label the "competitive" approach we offer a "symbiotic" approach, which we describe in general terms in Section II. The relationship between this academic contribution and the role of Professor Bergsten cannot be more evident, since it has been through his creativity in designing the Vis Moot problems that we have realized about some of the ideas that we express in this work; as the practical applications of our approach under section III clearly reflect.

[3] John Stuart Mill, *Utilitarianism, Liberty, and representative Government* (London: J.M. Dent & Sons Ltd.; New York: E.P. Dutton & Co. Inc., 1910), p. 82.

2. COMMERCIAL CONTEXT, COMMERCIAL LAW AND ITS INFLUENCE IN LEGAL EDUCATION – *VIS MOOT* AS A BEGINNING

2.1. Commercial Context and Commercial Relationships

The evolution of commercial law in its origins was closely tied to that of commercial practice; particularly to merchant practice and usages of trade. In those times the practice and usages were was primarily that of traders, who purchased the goods that were transported from port to port, or made at local fairs.

The mass of those commercial transactions were concluded over commodities; whose main characteristic is that they can be easily described. This, in turn, facilitated that parties in very distant spots of the planet could transact over great amounts of those commodities[4]. This standardization allowed the development of "markets" where the whole lot of transactions was simplified in "supply" and "demand", "price" and "quantity". What is equally important, the simplicity of the elements involved made it easy to predict the parties' typical behaviour in the transaction (offer, acceptance, transportation, handing over, examination, notification, etc); and, with that behavioural pattern in mind, to formulate the legal rules accordingly.

With that paradigm in mind classical economics evolved, without paying attention to the phenomenon of corporations; which were also evolving from tiny legal forms to colossal behemoths that encompassed *within* them transactions comparable in volume to those taking place in the market *between* firms. Corporations thus grew as alternative *organizational* forms to the market; the choice depending on the relative level of *transaction costs* between market and non-market transactions[5].

[4] According to Marshall, commodities are

> ...all those things for which there is a very wide market are in universal demand, and capable of being easily and exactly described. Thus for instance cotton, wheat, and iron satisfy wants that are urgent and nearly universal. They can be easily described, so that they can be bought and sold by persons at a distance from one another and at a distance also from the commodities.

Alfred Marshall, *Principles of Economics* (New York: Prometheus Books, 1997), 142.

[5] Ronald Coase, 'The Nature of the Firm', *Economica* 4, 386-405; Ronald Coase, 'The Problem of Social Cost', *Journal of Law and Economics* 3 (1960).

And, in a third step of evolution, traders and businessmen realized that firms and markets were but the opposite poles of a broad spectrum of organizational forms; where the elements of *price*, *hierarchy* and *cooperation* were combined in different ways and quantities to fit the needs of the specific activity undertaken. As products and services grew in variety, complexity and sophistication, so did the different forms that permitted businessmen to suit clients' demands and boost profitability. The market-firm dichotomy had thus given rise to complex and long-term relationships of supply, agency, franchise, consortium, pools, best-friends, etc[6], giving rise to the new concepts such as "network"[7].

Now such an evolution has been well accounted for in the strategic management (and also economics) literature; but the raise of these new forms of cooperation also influences the behaviour and mutual expectations of the parties; and, with that, the disputes that may arise between them. The question, then, must be whether the law has kept up with the demands of its role as a problem-solving tool; or, rather, it has left its structures to stiffen.

In this regard, "typical", "traditional" or "classical" contract law has been, to some extent, shaped by the commodities sale transaction in mind. This is manifest in the common law characterization of a contract as a *promise*[8]. A promise clearly involves what, in the contractual context, has been called "presentiation", which means restricting the expected future effects of the contract to those defined in the present[9]. This element is also present in civil law countries, where the notion of obligation, and the legal definitions of the different contractual types embody the idea of parties committing themselves to do

6 Robert M. Grant, *Contemporary Strategy Analysis 5th ed.* (United Kingdom: Blackwell Publishing, 2005), 404.

7 Ranjay Gulati, Nitin Nohria, Akbar Zaheer, 'Strategic Networks', *Strategic Management Journal* 21(3) (March 2000): 203.

8 Restatement Second (on Contracts) Section § 1:

> A contract is a promise, or a set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

9 Ian R. Macneil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law', *Northwestern University Law Review* 72 (1978): 862.

something in the future[10]. To some extent, this idea is reinforced by the legal requirement that the price be set in the contract[11].

In addition to this idea of "presentiation", some have identified as another feature of "traditional" contract law the idea of "discreteness"; which, to some extent, involves the isolation and commoditization of the exchange involved in the transaction from its context, thereby considering the parties' relationship as irrelevant, as well as the other elements (e.g. parties' identity, expectations) that may have led to the transaction in the first place[12]. It also implies formulating strict rules that determine when a contract exists, and dismissing all other situations as legally irrelevant[13].

The authors that have more fervently advocated the need that modern contract law accounts for the complexities of new forms of business intercourse are Professors Macneil and Macaulay; whose view focuses on the *relationship* of the parties as the legally relevant (flowing) element, which shapes the different orders or requests (and which would otherwise be considered the *contracts*) that may sprout as the milestones in that relationship[14].

[10] See article 1445 of the Spanish Civil code, which defines the contract of sale as one where a party "obliges itself", or binds itself, to deliver a determined thing, and the other to pay a certain price for it. See also article 1582 of the French Civil code.

[11] Article 1445 of the Spanish Civil code for the condition that the price must be "certain".

[12] See Macneil, *supra* note 9, 856:

> To implement discreteness, classical law initially treats as irrelevant the identity of the parties to the transaction. Second, it transactionizes or commodifies as much as possible the subject matter of contracts, e.g., it turns employment into a short-term commodity by interpreting employment contracts without express terms of duration as terminable at will. Third, it limits strictly the sources to be considered in establishing the substantive content of the transaction. [...] Fourth, only limited contracts remedies are available, so that the initial presentation fall to materialize because of nonperformance, the consequences are relatively predictable from the beginning and are not open-ended, as they would be, for example, if damages for unforeseeable or psychic losses were allowed.

[13] See *ibid.*, who says that:

> Fifth, classical contract law draws clear lines between being and not being in a transaction; e.g., rigorous and precise rules of offer and acceptance prevail with no half-way houses where only some contract interests are protected or where losses are shared. Finally, the introduction of third parties into the relation is discouraged since multiple poles of interest tend to create discreteness-destroying relations.

[14] Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study', *American Sociological Review* 28(1) (February 1963): 28; Macneil, *supra* note 9, 863.

The trouble with the "relational" view is somehow its lack of determination and definiteness. It is hard to conclude whether we can talk of a "relational" view of contracts, or of a view applicable only to "relational" contracts; and which would be its consequences in terms of the specific solutions offered for issues of formation, performance, non-performance, remedies, or third party intervention. Furthermore, despite the merit of these views in having spotted the need to adjust to new commercial realities, most of statutory commercial law has not been altered to encompass a more relational view, or to account for it in specific contexts.

In the absence of specific provisions, the travails to adjust current commercial law to commercial reality are even more difficult, since they largely involve an interpretative task. That task requires fitting a business reality of complex relationships into a legal order whose underlying assumptions may often widely diverge from that reality.

2.2. How to Account For Commercial Context in Commercial Law. Is it Enough?

Given that existing statutory rules were drafted with a traditional view of contract (involving presentiation and discreteness) in mind, the process of adjustment will require of all the flexibility that contract law can admit. In this regard, we are lucky, since uniform law; which constitutes our subject of analysis, is rich in legal tools that allow for the necessary flexibility.

First of all, let us take the provisions of uniform texts dealing with the core principle of party autonomy. The 1980 United Nations Convention on Contracts for the International Sale of Goods (hereafter CISG), somehow the flagship text of uniform contract law, provides in its Article 6 that:

> The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

The UNIDROIT Principles split the principle in two, stating, as a more general provision, that *the parties are free to enter into a contract and to determine its content*[15], and then, that this freedom includes the freedom to exclude the application of the Principles, and/or derogate or vary their effect[16]. A similar

[15] Article 1.1 UPIC.
[16] Article 1.5 UPIC.

approach is present in PECL[17]. This suggests that contract law must serve the interests of the parties, rather than the other way around.

Such rules, however, are perfectly suited for cases where the parties have taken the trouble of engaging in a protracted negotiation and drafting process, with long and detailed clauses that regulate their relationship. Conversely, it is often the case that business parties do not to check every step they make with their lawyers, for that would stiffen their dealings. Rather, they rely on the mutual understanding of what the parties consider they must do, and what they are entitled to expect. These expectations may not arise from the letter of the contract; but, rather, from the general context of the parties' economic sector, or the parties' specific course of conduct in their concrete relationship.

Such elements can also be accounted for in the uniform texts. First, because all of the texts considered here embody an anti-formalistic approach, and thereby do not require the written form (or any other type of form) for an act or a statement to be legally relevant[18]. Second, because all uniform texts include comprehensive rules for the interpretation of the meaning and significance of the parties' statements and conduct; which adequately account for the "context" mentioned above.

More specifically, in weighing a party's statements or conduct interpretation rules give primary relevance to the parties' actual intention, provided the other party could not have been unaware of that intention[19]. Seemingly, a contract is to be interpreted pursuant to the common intention of the parties, provided it can be established[20]. If the actual intention cannot be established, the default rule relies on the interpretation that a reasonable person of the same kind and in the same circumstances would make[21]. And, which is even more important for our purposes, to supplement those rules, to help in establishing either the actual intent or the understanding of a reasonable person, regard must be had to *all relevant circumstances*[22].

[17] Article 1.1 (1) and (2) PECL.
[18] See article 11 of the CISG, or article 1.2 UPIC.
[19] Article 8 (1) CISG, article 4.2 (1) UPIC, article 5:101 (2) PECL.
[20] Article 4.1 (1) UPIC, article 5:101 (1) PECL.
[21] Article 8 (2) CISG, articles 4.1 (2) and 4.2 (2) UPIC, and articles 5:101 (3)
[22] Article 8 (3) CISG, article 4.3 UPIC, article 5:102 PECL.

This reference allows to insufflate life into what would otherwise be inert black letter. It places the parties' statements in a context, composed by a wide array of elements, from the more general (usages, and meaning of terms in the trade concerned) to the more specific (parties' practices); accounting for the contract's past events (negotiations), as well as its projection into the future (subsequent conduct)[23]. Even if other rules rely on the contract as a spot transaction, these provisions put that spot within space and time coordinates[24]. As a corollary of this, the "elements" relevant for interpretation also include the "nature and purpose of the contract"[25]. This implicitly assumes that, even if the "contract" is still the legally significant unit in uniform law, it may still form part of a greater design, embedded into a longer and wider relationship that vests it with purpose.

And yet we believe these tools may still be insufficient to address the problem envisaged in this work. If one thinks about it, these rules are perfect if the problem arises in the *way the parties express their intention*. However, they are inadequate when the problem is in the *way the parties' intention interacts with the law*. More specifically, in uniform texts the relationship between the parties' intention and legal provisions is formulated in a discrete, or even *competitive* way: the parties may (1) not express any intention, or express an intention in accordance with CISG/UPIC/PECL, in which case the latter apply (2) express a contrary intention, in which case that intention prevails. This setting is, again, perfect when the parties decide to insert a specific clause that either excludes the uniform text otherwise applicable, or regulates a specific aspect in a way different to that contemplated in that text. In both cases, if we do not apply the CISG/UPIC/PECL we still have a *comprehensive* solution in the domestic law applicable or in the clause carefully drafted by the parties.

What these provisions do not resolve satisfactorily are the cases where the parties' conduct and statements, even when not expressly saying so, are inconsistent with the *pattern* of behaviour envisaged in the uniform law

[23] *Ibid*.

[24] As a consequence of them, in cases where the CISG is deemed applicable (although the conclusion may be extended to the UPIC, or PECL) legal doctrines such as the *parol evidence rule*; which considers evidence not in writing irrelevant to determine the contents of the contract, are inapplicable. See Federal District Court of Illinois, 27 October 1998, *Mitchell Aircraft Spares v. European Aircraft Service* (Pace); and U.S. Federal Appellate Court 11th Circuit, 29 June 1998, *MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino*.

[25] The reference to the "nature and purpose" of the contract is absent from the Vienna Convention, but present in more modern texts, such as the UNIDROIT principles or the PECL. See article 4.3 (d) UPIC, or article 5:102 (c) PECL.

provisions; and yet, since no express derogation or variation is made, no comprehensive alternative solution is provided, thereby making still necessary to resort to the uniform text again. In such cases the task of the judges/arbitrators is to look beyond the specific rules and beyond the specific statements, and understand the background of both the parties' relationship and the law applicable. And it is for that task, i.e. for solving the interaction problems that we propose an approach based on a *symbiotic*, rather than *competitive* relationship between the law and the commercial context.

In this regard, the solution should not limit itself to a properly acknowledge the parties' intention, but should also include a purposive interpretation of the uniform law provisions. Fortunately, uniform law texts include the necessary tools, by providing that matters governed by the text, but not expressly settled therein, shall be resolved in accordance with the principles on which the text is based[26]. This view of the uniform text as a "system" constitutes the necessary supplement to the flexibility in appraising the parties' intention. Thus, provisions on interpretation may help to address not only the "express gaps", i.e. the issues covered but not resolved, but also "implicit gaps", i.e. situations where the structure of the legal rules is unsuited to the parties' intention, but they may not have set forth alternative rules, and the principles underlying the legal text may still be adequate.

2.3. Commercial Context in Legal Education. The Experience of the Vis Moot

Naturally, combining an adequate appraisal of the parties' intention in non-written form with a principles-based interpretation of the CISG/UPIC/PECL is easier said than done. Even if uniform law texts provide the legal tools, it is also necessary to have the "educational tools", or the skills and background necessary to accomplish such a monumental task in a satisfactory way.

It is in regard of this specific aspect that the work of Professor Bergsten has been path-breaking, and deserves our wholehearted praise, but also our scientific focus. In the competition he so successfully organizes, the *Willem C Vis International Commercial Arbitration Moot*[27] he has expanded and promoted the study of the CISG (and also, more tangentially, of the UPIC or PECL) to levels unmatched by any other initiative. He has done so by drafting every year a

[26] Article 7 (2) CISG, article 1.6 (2) UPIC, article 1:106 (2) PECL.
[27] http://www.cisg.law.pace.edu/vis.html

different problem where a hypothetical situation modelled by practice constitutes the basis for the lively discussion and debate by the most promising young commercial lawyers, as well as well known experts in the field of international commercial contracts and arbitration that act as arbitrators. It would be impossible to analyse all the issues involved in the past seventeen editions. But a common element stands out; which connects with the subject matter of this work: the *Vis*, by formulating every problem in the context of a relationship between commercial parties shows the limitations of a purely legalistic approach. But every so often, it also shows the limitations of a *competitive* relationship between legal rules and parties' intention, and the advantages of a *symbiotic* relationship, where the background of the parties' relationship is combined with the principles of the Vienna Convention, or other uniform law texts.

With the idea of contributing to the same goals of which Professor Bergsten's Moot today constitutes the flagship, we have undertaken a parallel initiative, the *Moot Madrid*[28]. This competition, addressed at the Spanish-speaking community, has the same principle as Professor Bergsten's, but has the idea of combining the CISG with other texts of uniform law; including but not restricted to the UPIC or PECL. In the following Sections we will illustrate our points with examples coming not just from the *Vis Moot* but also from the *Moot Madrid.*

3. SPECIFIC ISSUES

3.1. Formation of Contracts

(a) Structure of Offer and Acceptance

One example of the issue we want to discuss can be found in the structure of offer and acceptance. In the tenth edition of the Vis Moot the problem concerned two parties who had subscribed a first contract for the sale of polypropylene[29], where the buyer was told that he would always receive the seller's *best price*. This meant an 8% discount from the list price on the first transaction; which the buyer expected to repeat in the second order, only that he never said that to the seller, who had a 4% in mind.

[28] http://www.mootmadrid.es
[29] See http://www.cisg.law.pace.edu/cisg/moot/moot10.pdf

The issue that may come to mind, being this an issue about the price, is that of open price contracts; which, in the CISG context, connects with the apparent contradiction between its articles 14 (which requires a determined or determinable price for the offer to be valid) and 55 (which provides a way to set the price when the parties have left it deliberately open)[30]. While several solutions have been proposed the one more widely accepted says that article 55 is applicable (among other situations) to cases where the parties intended to derogate from article 14, pursuant to article 6[31].

Yet the moot problem went even further. Leaving aside cases where the parties have deliberately chosen to derogate from article 14 CISG, and to expressly leave the price open, there may be other cases where the parties may show assent to the existence of a contract, but may still have different ideas as to its contents.

In this context, applying strictly the structure of offer and acceptance would lead to reject the existence of a contract, since the "mirror image" rule, by which an offer has been accepted in its entirety has not been complied with[32]. In the case of the I edition of the Moot Madrid a similar problem arose, but there the parties had begun making the arrangements for the performance of the contract[33]. Thus, the alternative solution would be to rely on such performance as an indication of acceptance, and to consider that the conditions stipulated by the party who sent the last communication (the "*last shot*") prevails. However, this would construct as acceptance of the full set of conditions what in the given circumstances may

[30] Article 14 (1) CISG states:

> A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. *A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.*

Article 55 CISG, for its part, provides that:

> "Where *a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price,* the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

[31] María del Pilar Perales Viscasillas, *La Formacion del Contrato de Compraventa Internacional de Mercaderias* (Valencia: Tirant lo Blanch, 1996), 353 et seq.

[32] María del Pilar Perales Viscasillas, 'Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods and the UNIDROIT Principles of International Commercial Contracts', *Pace International Law Review* 10 (1998): 97-155.

[33] http://www.mootmadrid.es/moot2009/caso/Caso%20Moot%20Español-REV-2.pdf.

just have been an assent to be bound. Finally, we could take the alternative "knock-out doctrine" eliminate conflicting terms, and fill the gaps in accordance with the rest of the contract or the law applicable (be it the CISG, the UPIC, or PECL)[34].

All these possibilities can produce a decent and reasonable solution, but they fail to acknowledge the main issue captured in these cases; which is that the structure of offer and acceptance is but one way in which the parties can express consent to a contract. Even in cases where different communications are identifiable as an "offer", an "acceptance" or a "counter-offer", they may be used as a mere instrument to negotiate the *specific terms* of the contract; but not to express *consent to* the contract, provided that the parties have not conditioned such consent to the acceptance of some minimum terms. In that context, it could be overly simplistic to presume that consent has always to adjust to the offer-acceptance structure, and that otherwise no contract can be concluded.

An even clearer example of this issue was offered by Professor Schlechtriem in a workshop on the CISG[35]. In this example one firm, which has to manufacture a vessel for another firm, makes an invitation to several engine manufacturers to supply the diesel engines, including specifications, and approximate price and delivery dates. Once a manufacturer has expressed an interest, both CEOs sign a letter of intent committing themselves to supply two teams to negotiate the details: a technical team, to negotiate aspects such as the engine's power, weight, inspection periods, etc; and a financial team, to negotiate delivery dates, terms of payment, letters of credit and guarantees, etc. The negotiating procedure is the same in both cases: as the teams reach an agreement on a particular point, they record it in a document. The terms negotiated by the technical and financial teams were each merged into its own memorandum of understanding, signed by all negotiators, and the two memoranda should be merged into a single document to be signed by both CEOs in a ceremony with champagne. Before the signing ceremony the purchaser is informed that the cruise company for which it was

[34] However, there are strong arguments against the applicability of the "knock-out doctrine" in the context of the CISG. See Perales Viscasillas, *supra* note 32. The UPIC and PECL, on the other hand, warmly embrace this idea. See article 2.1.22 of UPIC, and article 2:209 (1) of PECL.

[35] Harry Flechtner (ed.), 'Transcript of a Workshop on the Sales Convention: Leading CISG Scholars discuss Contract Formation, Validity, Excuse for Hardship, Avoidance *Nachfrist*, Contract Interpretation, Parol Evidence, Analogical Application and much more, *Journal of Law and Commerce* 18 (1999): 221-222. Available at http://www.cisg.law.pace.edu/cisg/biblio/workshop.html.

going to manufacture the vessel has filed for bankruptcy; and it cancels the signature[36].

The case shows that the two parties consciously departed from the behavioural pattern of offer and acceptance envisaged in the law. In that context, to argue that there was not an accepted offer, and thereby the seller has no contractual rights would probably be unjust. But to strictly apply a provision such as article 6 CISG would still be insufficient, since the parties may have "derogated" the legal provisions, but they have not stipulated an alternative mechanism to regulate the existence of contractual consent. Thus, a *competitive* relationship between parties' will and the uniform law provisions would imply a circular argument: the parties have, by their conduct, excluded the CISG, but they have not stipulated alternative rules; and thus the issue cannot be resolved with reference to the CISG because the parties have excluded it.

Therefore, the most sensible solution would be to look beyond specific provisions, and make a purposive, principles-based interpretation of the CISG, pursuant to its article 7 (2). It could be argued, for example, that those principles, for a contract to be formed; require, first, the presence of sufficient consent to be obliged; and, second, contract contents that are determined, or can be determined by reference to the parties' context.

More modern uniform law texts, such as the UPIC, make room for this approach within the provisions on contract formation, by accepting that a contract may be concluded *by the acceptance of an offer*, but also *by conduct of the parties that is sufficient to show agreement*[37]. Even more precisely, the PECL omits the reference to the offer and acceptance, by merely requiring (a) intention to be legally bound, and (b) a sufficient agreement[38]. However, the difficult cases may not always find a specifically tailored solution in the law. We believe we have offered an alternative way to reach the same result by resorting to a principles-based interpretation.

(b) Revocation of Offers

Another point in the field of contract formation where the relevance of the relationship between commercial context and commercial law is very present is

[36] *Ibid*., 221-222.
[37] Article 2.1.1. UPIC.
[38] Article 2:101 PECL.

the issue of the revocability of the offer; which was raised in the problem of the fifteenth edition of the Vis Moot[39]. That problem involved the negotiations for the sale of cases of wine that were going to be leading the wine promotion by the purchaser; which was a supermarket chain.

In the case the prospective purchaser made an offer indicating a maximum period of time within which it had to be accepted. Shortly before that date the press in the country of the seller (slightly echoed in the country of the buyer) uncovered some cases where domestic wine manufacturers had been using ethylene glycol, an anti-freezer, to sweeten the wine, turning it into a safety scandal. The issue threatened to break-up in the country of the buyer as well; and, weighing the possible consequences (negative publicity, plunge in sales, putting the whole campaign in jeopardy…) the purchaser decided to cancel the offer.

Immediately at stake in this case was the debate on the revocability of an offer, the diverging approaches in the US (revocability as a general rule) and civil law systems (irrevocability as a general rule), or the elements that may render the offer irrevocable[40]. But we believe that there were further, deeper issues that connect with our subject matter of analysis. That case showed the shortcomings of the limited choice between a revocable and an irrevocable offer in a complex context where commercial reality played a paramount importance. In this regard, from a purely legalistic perspective, the main argument of the purchaser may lie in the language employed in making the offer, to suggest that it was a lapsing offer, rather than an irrevocable offer. But, from the perspective of commercial reality and common sense, the main argument was that, even if the language pointed towards the irrevocability of the offer, the whole order was made in the understanding that the wine purchase would help the marketing of the promotion, not put the whole thing in jeopardy.

In the case the factual premises of this point were also moot (whether both parties had the same understanding, whether the seller had to bear the risk…) but the main difficulty was in how to reconcile this common-sense argument with the

[39] http://www.cisg.law.pace.edu/cisg/moot/moot15.pdf

[40] John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention 3rd ed*. (The Hague: Kluwer Law International, 1999) § 140, p. 159 et seq.; Henry Mather, 'Firm Offers under the UCC and the CISG', *Dickinson Law Review* 105 (Fall 2000): 41 et seq.; Shahdeen Malik, 'Offer: Revocable or Irrevocable. Will Art. 16 of the Convention on Contracts for the International Sale Ensure Uniformity?', *Indian Journal of International Law* 25 (1985): 26-49; and Perales Viscasillas, *supra* note 31, 410 et seq.

structure of CISG provisions. According to CISG, offers are either revocable or irrevocable. Yet hypothetically the parties could draft a clause in a master agreement for their future negotiations, stipulating that, even if an offer is irrevocable, it may still be revoked in exceptional circumstances of substantial detriment for the offeree[41]. And, pursuant to the anti-formalistic principle of uniform law, the parties could, instead of drafting the clause, *behave* as if such clause existed[42].

The trouble, again, is that, in such case, there would be no express language to regulate such "exceptional revocation" causes. But this does not mean that the solution is to discard the argument altogether, and turn again to the legal provisions, applying them strictly. Rather, we suggest that the proper way would be to accept that the parties' behaviour indicates an acceptance of the principle underlying the revocable/irrevocable distinction, i.e. that certain assurances made by one party to another, create a state of mind in the recipient (which may act in reliance to them) that is susceptible to create contractual rights, despite no contract has been concluded. But it is possible that the parties accept that underlying principle; and yet do not accept the strict division between revocable and irrevocable offers. In case of a positive conclusion, the gap would be in establishing the "exceptional" or "specific" revocation causes. But, again, a principles-based interpretation of the uniform law texts can provide with a reasonable solution by resorting to the causes that permit a party to avoid the contract, especially the fundamental breach of that contract by the other party.

3.2. Conformity of Goods and Communication of Defects

(a) Conformity of Goods, and the Circumstances in the Buyer's and Seller's Country

On conformity of the goods the approach of the CISG relies on a double test. First, the goods must be in conformity with what the parties have agreed in the contract (article 35 (1) CISG)[43]. Second, in the absence of such agreement, the goods are not conforming to the contract unless they are (a) fit for their ordinary use, and (b) fit for any particular purpose made known to the seller at the time of

[41] Article 6 CISG, and article 1.5 UPIC and article 1:102 PECL would make it possible.
[42] See article 11 CISG, article 1.2 UPIC, and article 2:101 PECL.
[43] The actual reference of article 35 (1) CISG is to the "*quantity, quality and description required by the contract*", and to the packaging required in the contract.

the conclusion of the contract[44] (and are packaged in the manner usual or adequate to preserve such goods; and, in case a sample was given, conform to the sample)[45].

CISG provisions thus cover the issue of conformity from a broad range of perspectives. The trouble, however, of a provision that focuses on "quantity, quality and description" on one side, and on "ordinary and particular use" on another is that it leaves unaddressed the issue of compliance with regulatory standards. This issue has been the subject of much analysis and it is not our purpose to reproduce the arguments here[46]. It is enough to say that *the* major breakthrough on the issue came with a case decided by the German Supreme Court (BGH) on 1995, on a sale of New Zealand mussels by a Swiss seller to a German buyer (also known as the *mussels case*). The mussels had a slight contamination with cadmium[47]. The levels of cadmium of the mussels were permitted under the seller's country safety regulations, but not under the rules of the country of the buyer.

The court had to decide whether the goods were conforming. It decided in the affirmative, holding that the seller does not need to know the contents of safety

[44] Article 35 (2) (a) and (b) CISG.

[45] Article 35 (2) (c) and (d) CISG.

[46] See Harry M. Flechtner, 'Funky Mussels, a Stolen Car, and Decrepit Used Shoes: Non-Conforming Goods and Notice thereof under the United Nations Sales Convention ("CISG")' *Boston University International Law Journal* (Spring 2008): 4-11; Clayton P Gillette & Franco Ferrari, 'Warranties and "Lemons" under CISG Article 35(2)(a)', *Internationales Handesrecht* (1/2010): 2-17; René Franz Henschel, 'Conformity of Goods in International Sales Governed by CISG Article 35: *Caveat Venditor*, *Caveat Emptor* and Contract Law as Background Law and as a Competing Set of Rules', *Nordic Journal of Commercial Law* (2004/1) available at http://www.cisg.law.pace.edu/cisg/biblio/henschel2.html; Peter Schlechtriem, 'Compliance with local law; seller's obligations and liability – Annotation to German Supreme Court decision of 2 March 2005 [VIII ZR 67/04]', available at http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem7.html, and 'Uniform Sales Law in the Decisions of the *Bundesgerichtshof*' (translation by Todd J. Fox), in 50 Years of the *Bundesgerichtshof* [Federal Supreme Court of Germany] Celebration Anthology from the Academic Community available at http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem3.html#iv. See also the case by the German Supreme Court of 8 March 1995 (*New Zealand mussels case*), available at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950308g3.html, or the case by the Netherlands Arbitration Institute (*Condensate crude oil mix case*), available at http://cisgw3.law.pace.edu/cases/021015n1.html.

[47] See the case by the German Supreme Court of 8 March 1995 (the *New Zealand mussels case*), available at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950308g3.html.

regulations of the buyer's country, unless (1) the same rules also exist in the seller's country; (2) the buyer draws the seller's attention to their existence; (3) or the seller should know of those rules due to "special circumstances". Those "special circumstances" include, for example (i) when the seller has a branch in the buyer's country, (ii) when the parties are in a longstanding business relationship, (iii) when the seller regularly exports in the buyer's country, or (iv) when the seller advertises its own products in the buyer's country.

Uniform law rules provide for "context" in their appraisal of conformity; they simply did not do so for the issue of safety regulations. This, plus their broad language allowed the court to make a purposive interpretation without acknowledging the existence of a gap and resorting to article 7 (2) CISG.

And yet the decision by the German Supreme Court left issues unanswered, issues that heavily depend on the commercial context. Two of them are (1) the issue of changing regulations; and (2) the relationship between regulation, public awareness, and conformity. Each and every of them were dealt with in another case by the German Supreme Court[48], and in two separate Vis Moot problems, for the fifteenth edition[49], and for the seventeenth edition[50].

The German case concerned a sale of pork meat from a Belgian wholesaler to a German merchant; who resold the meat to another German trader, who resold it to a final purchaser in Bosnia-Herzegovina. The meat would be directly delivered in three instalments to the second German trader, who would re-dispatch it to Bosnia. Each delivery was to be accompanied by a certificate of suitability to consumption. After the contract was concluded a suspicion arose in both Germany and Belgium that Belgian meat could contain dioxin. This translated into new rules passed *during* the period when the goods were being delivered (June), i.e. after the conclusion of the contract but before delivery, in Germany, the EU and Bosnia[51], resulting on the seizure and destruction of the meat;

[48] Bundesgerichtshof (German Supreme Court) decision of 2 March 2005 [VIII ZR 67/04]. See also the commentary by Professor Peter Schlechtriem. Peter Schlechtriem, 'Compliance with local law; seller's obligations and liability', *supra* note 46.

[49] http://www.cisg.law.pace.edu/cisg/moot/moot15.pdf

[50] http://www.cisg.law.pace.edu/cisg/moot/moot17.pdf

[51] The bottom line of those rules is that meat produced in Belgium during a "suspicion" period was not of merchantable quality *unless* it was accompanied by administrative certificates indicating otherwise.

whereas Belgium did not pass a similar regulation until July, when the goods had been delivered.

As said, this case illustrates two different points of contact between commercial context and commercial law. Take, first, the issue of changing regulations. This issue, addressed in the BGH case, was expanded in the problem for the seventeenth edition of the Vis Moot[52]. In that problem there was a sale of steel pumps that would be employed in an irrigation project in a third country. The contract had a clause stipulating that goods *are* confirming with regulations *for importation* in the buyer's country, and *for use* in the third country[53]. After a period of social unrest there was a *coup d'état* in the third country; and a subsequent legislative modification of safety regulations, prohibiting the use of beryllium in steel alloys. As a result, the authorities cancelled the project, and the buyer tried to avoid the contract.

This is a case where one of the exceptions to the rule that the seller is only concerned with its own country's rules; i.e. a clause was included in the contract. The question is what is the reach of that exception, particularly in a case where regulations change dramatically (and, one could argue, unexpectedly). A rules-based solution would focus on the issue either approaching conformity as a contract matter; thereby focusing on the moment the contract is concluded; or as a matter of risk, thereby focusing on the rules on risk transfer (which focus on delivery). Both approaches would leave out the commercial context in which the issue arose.

On the other hand, a solution based exclusively on the parties intention would draw upon the language of the clause, to decide what the parties meant when they said that the "the goods are conforming with regulations for use in the third country": were they referring to the moment the contract was concluded, or were they projecting the seller's risk assumption into the future? However, there is a limit to what the parties had in mind when they concluded the contract (particularly in light of the fact that further events were unforeseeable); and overstretching the interpretation of their intention can create an artificial solution.

As such, it seems more adequate to conclude that the parties' intention clearly indicated that regulations other than the seller's country's were relevant for the

[52] See http://www.cisg.law.pace.edu/cisg/moot/moot17.pdf.
[53] *Ibid.* p. 12.

issue of conformity; and that they clearly expressed the purpose of the sale. Beyond that, the solution should involve a combination of the interpretation of that intention with the uniform law principles underlying conformity, risk transfer[54], incorporation by reference[55] all in accordance with the cornerstone principle of good faith.

As to the second issue (the influence of public awareness on conformity, and its combination with regulation) the BGH decided that, in the dioxin case, safety regulations did not *per se* determine the conformity of the goods, but constituted a symptom of the actual benchmark for conformity, which was public awareness. Goods produced under certain circumstances were widely considered unfit; and that rendered them unfit. Further regulations only confirmed that, but the non-conformity was already present[56].

The influence of mere "suspicions" or "awareness" in conformity was expanded in the problem of the fifteenth edition of the Vis Moot[57]. There the goods to be sold were cases of wine that would be employed in a wine promotion by a supermarket chain. A scandal erupts in the buyer's country's newspapers, concerning the use by some producers in the seller's country of ethylene glycol, an anti-freezer to sweeten the wine. This prompts the buyer to cancel the order[58], despite the fact that the seller only employed "dyethylene glycol", a substance permitted under the laws of both the seller's and the buyer's country, on the basis that it was unfit to lead a wine promotion, and it would hinder the overall sales. In this case the goods complied with safety regulations. It was a matter of public awareness, and its influence in the conformity of the goods. In the German case safety regulations constituted a proof of non-conformity, not a benchmark, but, still, it was a strong proof. The question is what happens when public awareness is present, but may be unfounded (at least in the particular case) and not accompanied by public regulations.

[54] For example, (1) in the absence of a clear-cut risk transfer clause, should risk transfer *rules* be applied mechanically? Does the notion of "risk" for risk transfer purposes include regulatory risk? Should then the rules on unforeseeability and insurmountability of article 79 CISG apply?

[55] To what extent should the seller's fortunes be subordinated to the fortunes of the buyer-third party contract and its terms?

[56] Peter Schlechtriem, 'Compliance with local law; seller's obligations and liability', *supra* note 46 at § II.

[57] http://www.cisg.law.pace.edu/cisg/moot/moot15.pdf.

[58] In this case the contract had not been concluded; and the problem also involved whether the buyer's offer was revocable or not. This has been covered in a previous section. *Supra 3.1.(b).*

This shows that the CISG provisions on conformity have a focus on the *characteristics* of the goods; so the question of how to account for *external factors*, in particular the *perception* of the goods does not logically follow from the letter of those provisions. It is a different situation where the commercial context overrides some of the law's underlying assumptions, but does not give all the answers, which makes it necessary to resort to a symbiotic approach, with a principles-based interpretation. Indeed, the combination of this issue with the divergence of conditions between the seller's and the buyer's country creates a gap within a gap (i.e. how to account for the influence of external perceptions in the conformity of the goods, when the provisions are more focused on an objective analysis of the goods' characteristics; in a case where the conditions in the buyer and the seller's country differ, provided the law talks about a *single* "ordinary use", and a *single* "particular purpose"). Still, the flexibility of the provisions on conformity may allow for a purposive, principles-based interpretation without acknowledging expressly the existence of a gap. It is only required that the person operating with the CISG provisions is aware of the problem.

A final point in this regard that was addressed in the problem of the II edition of the Moot Madrid[59] situates the matter of conformity and regulations in a broader context; approaching it even closer to the issue subject-matter of our analysis here. In that case the goods were a machine to process PVC, aluminium and steel. The lessee (for the problem did concern a lease, not a sale) referred to a model of machinery, inquiring that it wanted it, among other things, to manufacture parts for the *automotive industry*, citing some of its clients (auto manufacturers). The supplier responded that the machine suited that purpose, and the machine was delivered. The trouble is that, when processing some hard steel (for pistons) the machine overheated and had to be reset. Upon examination it was discovered that the machine was inadequate to process steel beyond a certain level of hardness; which was the one necessary for the lessee to manufacture some parts. According to some administrative guidelines within the supplier's country, however, steel beyond a certain level of hardness was considered "steel for tools", so the supplier said it could not realize the parts "for the automotive industry" could have those characteristics.

[59] http://www.mootmadrid.es/caso/Caso%20Moot%20Madrid%202010%20con%20aclaraciones.pdf

The several problems illustrated here constitute but different angles of a single problem, concerning an underlying assumption of the law. Since the law is uniform, it presumes that the commercial context is also uniform, hence the single-minded reference to "quality", "description", "ordinary use" or "particular use", presuming that those elements mean the same for both parties. This is the correct approach, since one of the goals of the law is to *promote uniformity* (i.e. the law not as an acknowledgement of reality, but as an instrument of change). But then the rules based on such an approach have to deal with cases where that underlying assumption is not true; as when safety requirements are different in the buyer's and seller's country, when public awareness is different and also changes over time; or when commercial standards vary not only locally, but also between the local and global context (in the case of the second edition of Moot Madrid the guidelines on the use of steel in the seller's country were different to the practice of global car manufacturers). In every case commercial reality provides a lot of input. But it is necessary to take the uniform law principles as parameters to organize that input, and define which is the commercial context relevant to resolve the dispute.

These are aspects that are not covered by uniform law texts; and where the commercial context is inconsistent with the uniform rules. Ignoring the problem will not make it disappear. Ignoring the rules would make the solution unpredictable and incomplete, since the commercial context does not supply the tools to solve the problems. As earlier, the proper solution is to acknowledge the need for a symbiotic relationship between commercial reality and (uniform) commercial law.

(b) Communication of Defects

Regarding the issue of conformity, we must also examine what may be the single most litigated provision (after the one on damages) of the CISG: its article 39, which establishes the duty of the buyer to notify the seller specifying any lack of conformity that the goods may have within a reasonable time after they have been inspected[60]. In case no notice is made, the buyer is prevented from exercising any remedy.

[60] Article 39 (1) CISG states that:

> The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

This provision was the subject matter of analysis in the problem of the ninth edition of the Vis Moot[61]. In that case there was a sale of machinery. Among other issues the seller of the machinery was running into financial difficulties by the time the installation had to be made. This required the presence of several of the seller's employees in the buyer's premises. The seller's financial difficulties did not allow it to send its full team, so there were less people, and stayed for a shorter period. In addition (according to the plaintiff's version) they were quite absent-minded during their stay in the premises (probably more worried about their own jobs than about properly training the buyer's employees). The lack of professionalism was serious enough for the buyer's employees to raise the issue with the seller's employees while they were there, but to no avail. After they left, the machinery could not perform at full capacity, but the seller had entered insolvency proceedings. It was not until several months later that the buyer notified the bank the seller had assigned the receivables from the sale that it intended to seek a reduction in the price.

The immediate issues involved whether several months qualified as a "reasonable period of time" in the light of the circumstances[62] (assignment, insolvency of the seller…) whether the notice was sufficiently specific[63]; whether, pursuant to article 44 CISG, there was a reasonable excuse for the delay[64], etc. But an issue

[61] http://www.cisg.law.pace.edu/cisg/moot/moot9.pdf

[62] This has been an issue hotly debated among scholars and case law; which have discussed whether a consensus can be reached on a specific period, even to be taken as a basis to be later adjusted. The CISG Advisory Council Opinion, after examining a vast array of case law and scholarly writings, seems to have settled the issue, holding that "reasonable" periods can widely vary depending on the circumstances; and thus, the solution of the CISG is not to attempt at establishing a single period. See CISG-AC Opinion no 2, Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39, 7 June 2004. Rapporteur: Professor Eric E. Bergsten, Emeritus, Pace University School of Law, New York, available at http://www.cisg.law.pace.edu/cisg/CISG-AC-op2.html#14, Art. 39 no. 3.

[63] The more authoritative opinion of courts seems to be that in sales of complex machinery the buyer can be expected to give notice of the symptoms, but not to specify their causes. See the decision by the German Supreme Court BGH, 3 November 1999, VIII ZR 287/98, [2000] RIW 381, case presentation and English translation http://cisgw3.law.pace.edu/cases/991103g1.html. See also CISG-AC Opinion no 2, Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39 para. 5.14.

[64] Article 44 CISG states that:

> Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

It has been questioned whether article 44 CISG adds anything to the mechanism of article 39, which already provides with tools to grant sufficient flexibility in taking account of the specific

that, expectedly or not, was the subject of heated debate was *whether the notice was necessary at all*, given that the seller *knew or could not have been unaware* of the non-conformity, pursuant to article 40 CISG, in the light of its reckless handling of the installation and training period.

The relationship between articles 39 and 40 CISG has been the subject of analysis by one of us in an essay; in an attempt to make a specific illustration of the need for a symbiotic approach in addressing the context/law relationship[65]. Article 39 CISG provides for the duty of the buyer to notify the defects to the seller; article 40CISG provides that the seller may not rely on such lack of notice when it knew or could not have been unaware of those defects. And here comes the important thing. Depending on *the moment* until which article 40 operates, its actual role may vary drastically. If we choose the more conservative position, the "knowledge" referred to under article 40 must be established *before* the goods are handed over to the buyer[66]. In that case, the message sent by the law is that the seller cannot rely on the absence of a notice in cases where it wilfully concealed, or recklessly disregarded the defects before the buyer took possession of the goods. It plays as an ultimate safeguard to against misbehaviour.

On the other hand, we can consider that article 40 operates as an exception to article 39; and, therefore, the "knowledge" can be acquired until the very moment when the "reasonable time" set forth in article 39 expires[67]. In that case, article 40 has the potential to become something very different. In that case, both provisions, articles 39 and 40, constitute two different sides, or approaches, to a single problem.

The problem is, clearly, the need for certainty on the side of the seller; who cannot be left indefinitely with a potential problem hanging around its neck, because the buyer has not been quick enough to notify. That could prove disastrous in the context of commercial sales. But then, there are two ways to tackle that problem. Article 39 relies on the "notice" requirement; and so the

circumstances. See CISG-AC Opinion no 2, Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39 para. 4.3.

65 David Ramos Muñoz, 'The Rules on Communication of Defects in the CISG: Static Rules and Dynamic Environments. Different Scenarios for a Single Player', *Pace essay* December 2005. Available at http://www.cisg.law.pace.edu/cisg/biblio/munoz.html.

66 Frizt Enderlein, Dietrich Maskow, *International Sales Law*. See also Landgericht Landshut (Germany) 5 April 1995.

67 Ingebor Schwenzer, in Peter Schlechtriem, *Commentary on the United Nations Convention on Contracts for the International Sale of Goods 2nd ed.* (Oxford University Press: 2002), Article 40 para. 8; Ramos Muñoz, *supra* note 65, note 293 and accompanying text.

analysis on the court must be exclusively on the side of the buyer (whether the buyer notified timely, to the right person, whether it properly specified the defects, etc.) Article 40 CISG relies on "knowledge"; which, one can see, involves an approach that is more vague but also more flexible. For knowledge can be gained by means of a notice, but also by other means; including, for example, a "not proper" notice. This permits an overall assessment of the buyer's and seller's side, one that weighs the parties' diligence[68].

Then we must answer to what extent this is relevant to the present work. It is in the sense that CISG rules on communication of defects presume a pattern of behaviour: (1) the goods are handed over (2) they are examined shortly (3) defects are detected (4) a notice is given to the seller. This suits many transactions, particularly spot transactions, where parties are "faceless" and interchangeable, they do not have to work together, and there is no relationship at all. But if there is some interaction between buyer and seller the whole structure wobbles. Because the parties may behave *in a way that is inconsistent* with the need for a notice, or even with the whole handing over-examination-notice pattern.

In such cases the solution must be a specific application of the *symbiotic* relationship between the commercial context and uniform commercial law that we defend here. First, we can take the more flexible view of article 40, and directly make an overall assessment of the parties' diligence, weighing the needs for certainty and good faith. Second, if article 40 were held to its more restricted application, we still cannot ignore that the circumstances, and the parties' behaviour may be inconsistent with the notice requirement. In such cases, the gap left by the notice requirement must be filled with a principled interpretation of the CISG provisions; which, again, would mean a contrast between the need that the seller is duly protected against unreasonable requests, and the need not to forget that it was the seller who delivered non-conforming goods, and the buyer needs to be protected too. The solution would be very close to the one achieved under the first possibility; only the threshold to resort to it would be higher (the buyer would need to prove that the parties' context was inconsistent with the need of notice).

[68] Ramos Muñoz, *supra* note 65.

3.3. Remedies for Breach of Contract

(a) Specific Performance

The issue of specific performance was the subject of debate in the problem of the first edition of the Moot Madrid[69]. In that case there was a sale of digital TVs at a time where the buyer's country was about to experience the switch to digital technology, and the analogical blackout. In that sense, the immediate issue was whether requesting the specific performance of the seller's obligation was justified or not. The buyer would argue that the path-breaking technology of the TVs would provide the buyer with a significant advantage over rivals, allowing it to enjoy some of the "monopoly" benefits similar to the ones enjoyed by the distributor of a patented invention (say, a new drug). The seller would argue that the market provided plenty of substitute goods; at stake would be whether the CISG limits specific performance depending on the availability of replacements, as the UPIC, or PECL do[70].

But beyond that, as the underlying issue, is the issue of whether and to what extent the law should acknowledge the changing nature of the contract. In the problem, the frictions between the parties began when the buyer was threatened with legal action by a competitor in case it attempted to distribute the TVs. The TVs, argued the competitor, had hardware (the TV stand) and software elements that infringed intellectual property rights of the competitor and a software manufacturer. As a result of such threats, the buyer asked the seller to make adjustments accordingly. The seller, after trying to talk the buyer out of that request, resigns itself to do it, but in exchange for payment. The buyer emphasizes that, obviously, it assumed the seller should do the changes at its own expense, for it was its fault.

If we look into the structure of the CISG and other uniform law texts, we see that specific performance is, naturally, under the heading on "remedies": there has been a breach, and the aggrieved party is *entitled to* request performance[71]. Contract modification, on the other hand, *requires mutual consent*[72]. In principle, the distinction is clear-cut in the rules. However, these rules do not acknowledge

[69] http://www.mootmadrid.es/moot2009/caso/Caso%20Moot%20Español-REV-2.pdf.
[70] Article 7.2.2. (c) UPIC, article 9:102 (d) PECL.
[71] See article 46 CISG, articles 7.2.1. and 7.2.2. UPIC, and articles 9:101 and 9:102 PECL.
[72] See article 29 (1) CISG, articles 2.1.1 and 2.1.18 UPIC, articles 2:101 (1) and 2:106 PECL.

the changing nature of a contractual relationship. In this regard, remedies themselves are instruments of change: when a non-conformity in the goods or delay in performance occurs, that changes the contract forever. In each case, the performance in practice will not adjust to the one originally envisaged by the parties: it will involve different goods, or goods + repair, or a different delivery time, plus an adjustment in damages. In cases where no party is responsible for the change in circumstances, the parties will have to agree to a modification. But in any event the sharp distinction between requests of performance and contract modification may differ in practice from the way the parties see their relationship. Sometimes the existence of a breach may not be in their minds when negotiating the solution. Sometimes curing a breach *within* their contract may involve acts that go *beyond* that contract (i.e. settling an issue with a third party). Again, the commercial context may be inconsistent with legal categories.

In this regard, the notion of "breach" to allocate the costs of modification may be insufficient; as well as specific performance rules that provide *when* specific performance can be requested, without focusing on *what* can be requested as "specific performance" (as if that notion were entirely clear). The classification of some acts of repair or adjustment as acts of "performance" of the original obligation; or acts in "modification" of that obligation can be random, or otherwise depend on very subtle nuances. The alternative could be in an interpretation that properly accounts for the commercial context, and goes beyond the rules and focuses on the principles. In this context, the principle of "reasonableness" could play a significant role, together with the provisions that establish the "breach" of contract, to decide in each case what can be requested, and who should bear the burden.

(b) Damages

An issue that clearly illustrates the difficult relationship between commercial context and uniform commercial law was present in the problem of the tenth edition of the Vis Moot. In that case, as a result of the buyer's cancelling of the contract the seller claimed the profit margin it would have made in that transaction[73].

[73] http://www.cisg.law.pace.edu/cisg/moot/moot10.pdf.

In this case the problem was more on the surface than in other cases. It is the case of damages for "loss of volume" of sales[74]; where, as in the problem described above, after the buyer has repudiated the contract (which constitutes a fundamental breach giving rise to the other party's right to avoid) the plaintiff-seller requests the profit margin he would have made in the transaction. The trouble with that request is that it seems inconsistent with the behaviour envisaged in CISG provisions on damages[75]. Article 75 CISG provides that, when the contract has been avoided, the aggrieved party may claim the difference between the contract price *and the price in the substitute transaction*[76]. In cases where the contract has been avoided but no substitute transaction has been effected, article 76 stipulates that damages may be equal to the difference between the contract price and the current price at the time of avoidance[77]. Those two provisions clearly indicate that, in cases of avoidance, the loss must be calculated by reference to a substitute transaction, either *real* (article 75), or *hypothetical* (article 76).

The problem with these provisions is that they presume the existence of a substitute transaction; i.e. the behaviour envisaged in the law is that of a party who goes to the market and buys/sells substitute goods. But then, the question is what happens when not the *parties' conduct*, but the *commercial context*, is inconsistent with that assumption. In the 'lost volume' hypothesis the situation is that of a seller who has spare capacity, i.e. it can perform with the repudiating party, and also, at least, with another party. Typically, if A was going to sell 1000 goods to B, but B repudiates and A ends selling them to C, the A-C transaction is not a *substitute* to A-B; it is an *additional* transaction to A-B. A could have supplied both B and C. Therefore, when B repudiates what A loses is the profit margin it would have made in that sale.

[74] David Ramos Muñoz, 'La perdida de volumen de Ventas como Daño Indemnizable', *CEF Legal Revista Práctica de Derecho* 74 (marzo 2007): 60-68.

[75] Particularly the duty to mitigate. As an early analysis of the issues arising from the apparent contradiction between mitigation and loss volume (in the context of American law), see Robert J Harris, 'A General Theory for Measuring Damages for Total Breach of Contract', *Michigan Law Review* 60 (1962): 600-601. In the CISG context, see David Ramos Muñoz, *supra* note 74, 95-99; and Djakhongir Saidov, 'Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods', available at http://www.cisg.law.pace.edu/cisg/biblio/saidov.html.

[76] See also section § 2-706 of the US Uniform Commercial Code.

[77] See also section § 2-708 (1) of the US Uniform Commercial Code.

Yet the trouble, again, lies in reconciling this commercial reality with the provisions of uniform commercial law; particularly articles 75 and 76 CISG. The solutions range from the more specific to the more general. On the "specific" side, one possibility is to rely on the language of those provisions, which states that the aggrieved party can recover the difference contract price – substitute transaction price/current price, *as well as any further damages*[78], and argue that the lost volume damages are such "additional damages"[79]. However, we respectfully disagree with that, for lost volume damages are not "additional damages" in the case of a substitute transaction: they are contrary to the very existence of a substitute transaction, which constitutes the premise to apply the CISG specific damages provisions.

On the other end of the spectrum would be the default solution that we have articulated in this work: to argue that, in the case at hand, the commercial context (not even the parties' conduct) is inconsistent with the law provisions; which makes it necessary a principles-based interpretation of the uniform law, to fill in the gap. In this case such an interpretation would be based in the core principle of damages: *full compensation*; which indicates that every loss complying with the legal limits (causation, certainty, or foreseeability) must be compensated[80].

In this case, however, we do not believe that the whole solution would need to proceed on the assumption that specific damages provisions have been wiped out. Rather, we believe that the very language of damage provisions for the case of avoidance (articles 75 and 76 CISG) is optional. Article 75 CISG states that *if* the contract has been avoided, and *if* the aggrieved party has made a substitute transaction, that party *may* recover the difference contract price-substitute price. Article 76 CISG states that *if* no substitute transaction has been effected, the aggrieved party *may* recover the difference contract price-current price. But we

[78] Article 75 and 76 (1) CISG.

[79] In this sense, see Harry M. Flechtner, 'Remedies Under the New International Sales Convention: The Perspectives from Article 2 of the UCC', *Journal of Law and Commerce* 8 (1980); Honnold, *Uniform Law for International Sales,* p. 446, 454; Joseph Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods,* in J. Herbots & R. Blanpain (eds), *International Encyclopaedia of Laws - Contracts,* Suppl. 29 (December 2000), 156; Peter Schlechtriem, *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods* (Manz, Vienna: 1986), 98 footnote 398a.

[80] In this case the trouble would be that the damages for 'loss of volume' cannot be mitigated by definition (once the transaction is avoided, the loss ensues). However, mitigation is not an absolute limit, and it is conceivable that there may be situations where damages may not be mitigated. See Ramos Muñoz, *supra* note 74, 98-99; Saidov, *supra* note 75.

must not read article 76 as covering *all* cases not covered by article 75; and we must not read both provisions as comprehensive, but as giving the aggrieved party an easy way to calculate his damages, but by no means denying the right to other type of damages, provided he can prove them.

In the problem of the twelfth edition of the Vis Moot the issue was the opposite[81]. If above we have analysed the case where there is avoidance but not a substitute transaction; in that case the trouble was that the potentially substitute transaction was accomplished without the contract having been avoided. The question above was whether a different calculation of damages could be made in case of avoidance (i.e. whether articles 75 and 76 were *exhaustive* or *comprehensive* of all the options in case of avoidance). In this other case the question was whether the rule for calculation of damages under articles 75 and 76 can apply in the absence of avoidance (i.e. whether articles 75 and 76 are of *exclusive application*).

In this case the answer does not require an "exclusion" of the rules and an interpretation based on principles. And this because article 74 expresses both a principle and a rule; and both articles 75 and 76 are formulated in positive and conditional terms (*if* there is avoidance, the aggrieved party *may* request damages calculated…) which does mean *by no means* that the exact opposite is true (that *if* there is not avoidance the aggrieved party *may not* request damages calculated in that way). This is supported by scholars such as Professor Schlechtriem[82]; and seems an adequate assessment of the language and spirit of the provisions.

Then the next problem that such situation poses is that the buyer makes several purchases, before and after avoiding the contract with the seller. This is typical in the market for raw materials, or commodities in general, where purchases can be made on a continuous basis. It is also typical that prices fluctuate significantly. Take a situation where prices climb up on the days before the contract is avoided, and go down afterwards. The seller will have incentives to consider the purchase made before as a "substitute transaction", pursuant to article 75 CISG; whereas the seller will argue that the cover purchase is the one made after avoidance, or that damages must be calculated in accordance with the "current price" at the

[81] http://www.cisg.law.pace.edu/cisg/moot/moot12.pdf

[82] Peter Schlechtriem, 'Damages, avoidance of the contract and performance interest under the CISG', *Festschrift Apostolos Georgiades* (Athens 2005). Available at http://www.globalsaleslaw.org/__ temp/Schlechtriem_Damages_Avoidance.pdf.

time of avoidance, pursuant to article 76 CISG[83]. This was also the case in the above-mentioned moot problem[84].

Again, what we see is that, in such cases the multiple possibilities offered by the commercial context roll over the tidy and organized setting described in the uniform law provisions. And, again, the possibilities for applying the law are several: to ignore commercial reality and apply the legal rules as such (this would imply excluding the applicability of article 75 CISG in all cases); to rely exclusively on the parties' intention (which would be difficult, considering that none of them has expressed a desire to exclude the legal provisions); or to let the specificities of the case to the "usages" reference (yet it is hard to characterize the commercial context as a "usage"). Finally, there is the possibility that we propose, to acknowledge that the commercial context has created a situation that requires looking beyond the letter of the law, and applying principles.

In this regard, an interpretation of the principles underlying damages calculation would mean weighing full compensation with the duty of mitigation; which, in the particular case, would reflect upon the reference price to calculate the amount of damages. In principle (1), the aggrieved party has the right to the difference between contract price and current price at the moment of avoidance (article 76 CISG). Then (2), it may happen that the aggrieved party has incurred extra costs, or performed the substitute transaction at a bad moment. In such case, it should still be entitled to the extra loss suffered, provided it can prove that the transaction performed was an *actual substitute* to the transaction that was avoided, no matter whether it was undertaken before or after avoidance. This burden of proof would preclude *specific* damage calculation (i.e. pursuant to the actual purchase) when the facts show that the aggrieved buyer simply continued in the business of making regular purchases, without making a specific one, and is, simply, trying to pick the highest price as a reference. Finally, (3) the *specific* calculation would also be precluded when the conditions of the cover transaction are *unreasonable*[85]. This means that the relationship between the rules of

[83] *Cf Ibid.*, at 7-8.

[84] In the problem the prices of cocoa went up for several months; and down after the contract was avoided. See Twelfth Annual Willem C. Vis International Commercial Arbitration Moot, Vienna, Austria March 18 to 24 2005, available at http://www.cisg.law.pace.edu/cisg/moot/moot12.pdf p. 28.

[85] Article 75 CISG. This also constitutes a specific application of the principle of mitigation of damages. Article 77 CISG states:

calculation of damages according to the cover price and the current price can be more complex than it seems. The rule of the cover price takes preference *in so far* as the price is reasonable; but, in assessing that reasonableness, the current price acts as a benchmark. Thus, the cover price is given preference, but not allowed to widely depart from the current price.

3.4. The Issue of Multi-Party Relationships

The previous examples suggest that a symbiotic approach to the relationship between commercial context and (uniform) commercial can be greatly beneficial in some cases. The examples covered before reflect upon some of the numerous instances in which this is so, in the "bi-dimensional" context of bilateral relationships.

Yet the biggest challenge for the "symbiotic" approach is in tackling the issue of multi-party contexts. In bilateral relationships the specific legal rules may depart from underlying assumptions as to the parties' pattern of behaviour that may be contradicted by reality in specific cases. However, on the issue of multi-party relationships *the whole law of contract* is formulated on the assumption that all relationships are bilateral, and multi-party relationships constitute a mere anomaly that needs to be redirected to the rules crafted to bilateral contracts.

In this regard, the rules on formation of contracts, for example, drafted under the assumption of an offer-acceptance structure, do not account for all the possibilities that commercial reality offers *in bilateral contracts*. When we move to a multi-party setting, the practical possibilities of interaction of different parties at different levels until a consensus (partial or total) is achieved is staggering; and would all fall outside the specific rules. In second place, uniform law does not address the problem of contract conclusion beyond the issue of consent; which fortunately rules out the issues of *causa* and *consideration* from the debate. Those requirements, present in every domestic law of contracts, are one of the clearest manifestations of the assumption of a bilateral setting at the very core of contract law. In common law countries, there was the rule that consideration had to move from the obligee (thereby eliminating the possibility of multi-lateral relationships where each party performed to a party different than

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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 one who performed to it). In civil law countries, the classification of *causa* indicated the assumption of either unilateral (e.g. in a donation) or bilateral relationships. Leaving out the issue in unilateral/gratuitous contracts, the alternative view of *causa* saw it as the reciprocal obligation.

Fortunately, as said, *causa/consideration* is not a requirement under the CISG[86], or the UPIC or PECL[87]; which makes uniform commercial law a better breeding ground to address the issue of multi-party contracts (or contractual relationships).

However, contract rules applicable to multi-party settings are very limited, and reductionist in the sense that they tend to simplify multilateral ties to a bilateral mind-set. Agency provisions, for example, are constructed under the assumption that the third party has a contract *either* with the agent *or* with the principal. Third-party beneficiary rules stipulate that a third party acquires rights under a contract signed by two other parties, but somehow presume that such third party is an outsider, i.e. that the relationship with each of the contracting parties is irrelevant for the purposes of the contract and the rights it acquires. Assignment of rights/obligations/contracts contemplates the multi-party situation as transitional (in the end, the situation evolves towards a two-party relationship). Even the rules for multiple obligors/obligees are drafted under the assumption that the multiple parties are placed on one or the two sides of the relationship (i.e. that there are two sellers and/or two buyers, but still one "selling side" and one "buying side").

The multi-party element creates friction even in cases where the type of relationship is not a problem. Take, for example, the case of the seventeenth Vis Moot[88]. The seller was supposed to supply pumps that would be used for an irrigation project contracted between the buyer and the local authority of a third country. The goods were delivered late and did not comply with domestic regulations of the third country; and it was controversial which party bore the risk of such regulations. Still, as background the seller faced a situation where the

[86] Pursuant to article 23 of the CISG, "A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention". No mention whatsoever is made of other requirements.

[87] Article 2.1.1. UPIC ("A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement"), and article 2:101 (1) ("A contract is concluded if: (a) the parties intend to be legally bound, and (b) they reach a sufficient agreement without any further requirement") PECL.

[88] http://www.cisg.law.pace.edu/cisg/moot/moot17.pdf

contract between the buyer and the third party had been cancelled by the latter; which made the seller-buyer contract lose its purpose.

In this case, there was no multi-party contract or relationship. Furthermore, CISG rules provide that goods are not conforming unless they are fit for a particular purpose made known to the seller. A mechanic application of those rules would lead to conclude that the goods were non-conforming since the contract with the third party had been cancelled. However, if we acknowledge the commercial context it is right to ask whether the mention that the goods would serve a "particular purpose" of the contract with the third party was enough to presume that the seller would relinquish its rights regarding the seriousness of the breach. In other words, if the buyer had not properly questioned the third party right to avoid; should the seller just settle with what the buyer did? Did he, by acknowledging the "particular purpose" waive its right to object the seriousness of the breach? The question is also pertinent in cases of distribution chains where the different contracts are subject to different legal rules. Thus, this is a case where the commercial context may be partially inconsistent with the provisions on avoidance and fundamental breach, but is still insufficient to provide a solution. Again, the solution could be in a symbiotic interpretation of that commercial context together with the principles underlying the conformity rule, the fundamental breach rule, and the rules on incorporation by reference; one that allows to calibrate or graduate the way in which the buyer-third party relationship has become part of the seller-buyer relationship.

Then, take the problem for the I edition of the Moot Madrid[89]. The performance of the sale of digital TVs was jeopardized by the threats of legal action by a third party, who claimed the infringement of intellectual property rights, his and also of a software manufacturer. First of all, the way the issue is addressed under the CISG, the focus is on the of intellectual property *law* of the buyer's country, and whether the seller should have been aware or not. It does not consider the dimension of the *party* making the claim, and how it may affect the buyer-seller relationship. Furthermore, as part of its request of specific performance the buyer requested the seller to settle the matter of potential infringement with the software manufacturer, by obtaining a letter or public statement certifying that the software was different; which raises the question of how the remedy of specific performance works when third parties are involved.

[89] http://www.mootmadrid.es/moot2009/caso/Caso%20Moot%20Español-REV-2.pdf.

In third place, take the problem of the ninth edition of the Vis Moot[90]. It was an (apparently straightforward) relationship of assignment, were the receivables under the contract of sale had been transferred to a bank by the seller. The "pure" assignment issues were not too problematic: there was no gap in the rules. Yet there was also the issue of notification of defects. The CISG requires that, in order for the buyer to exercise its remedies, it must notify *the seller* specifying the defects within a reasonable time[91]. In the case, it was arguable whether the buyer communicated the defects properly to the seller. But there was no doubt that the buyer had not notified the assignee, at least not in time. Since the CISG is drafted under the assumption of a buyer-seller relationship it does not cover buyer-assignee matters. On the one hand, there is the reference to the "seller", plus the principle of debtor protection, i.e. that the assignment cannot result in a higher burden for the debtor[92]. On the other hand, it could be argued that the policies underlying the duty to notify (to give the other party an opportunity to cure, to permit the other party to request evidence to decide whether it was its responsibility and or allow it to prepare for further litigation…) could not be properly fulfilled unless the notice was given to the assignee (for the seller had become insolvent). None of these issues is addressed under uniform contract rules.

Finally, if the above are cases where the relationship is properly characterized in the law, but the legal rules are unsuited to solve the problems, there are cases where not even the relationship can be properly characterized. The Vis Moot problem of the sixteenth edition[93] involved a sale of cars. The seller was the subsidiary of a multi-national car manufacturer, and signed the contract in its own name. Then, however, the cars began malfunctioning; and the buyer requested repair. At that moment, the parent company of the seller stepped in, and the communications were primarily maintained with it. After the subsidiary became insolvent the buyer sued the parent.

[90] http://www.cisg.law.pace.edu/cisg/moot/moot9.pdf.

[91] Article 39 (1) CISG.

[92] Article 15 of the UNCITRAL Convention on the Assignment of Receivables in International Trade provides that

> Except as otherwise provided in this Convention, an assignment does not, without the consent of the debtor, affect the rights and obligations of the debtor, including the payment terms contained in the original contract.

[93] http://www.cisg.law.pace.edu/cisg/moot/moot16.pdf.

The immediate discussion focused on whether the case complied with the test to establish a third-party benefit, or whether it was a case of undisclosed agency, or a contract with a plurality of obligors. But the really troubling matter was that it could be characterized as *any of those relationships*. It could be argued that parent and subsidiary had an implicit understanding by which when problems arose with the latter, the former stepped in; a contract for the benefit of third parties. It could be characterized as an agency relationship, probably an undisclosed one. Also as a case of plurality of obligors, etc. At the same time, it had distinct elements of its own. Regarding third-party rights, it was hard to show the existence of a prior "contract" between the seller and its parent that created the rights in favour of the buyer. For agency it was problematic that the "agent" did not say anything about the principal, then the principal entered the stage, but the agent did not vanish, but was also put in copy in subsequent communications. From the perspective of "plurality of obligors" rules, the problem was that the seller and its parent did not perform the same obligation. They did different things, but to achieve a single purpose.

In such case the "principled" interpretation we propose would lead to assess the existence of a multi-party relationship from the perspective of consent, without being influenced by the categories contemplated in the law; each embodying its own set of assumptions (and, consequently, prejudices). Beyond that, establishing the rights and obligations of the parties in such setting is a matter that exceeds the scope of this work.

In this regard, even in cases where the uniform law legislator has attempted to codify the parties' rights in multi-party contexts the combination of a proper appraisal of the commercial context with a symbiotic approach that combines this with a principles-based interpretation is necessary. Take the case of the II edition of the Moot Madrid[94]. That case involves a lease, where the supplier is a manufacturer of machinery, the lessee is a manufacturer of car parts (among other things) and the lessor is a leasing company, not financial, and with a different approach. This approach is seen in the fact that it does not uncritically accept the selection of a supplier by the lessee, but gives its opinion; and is kept updated on the development of the relationship, and intervenes with some exchange of communications with the supplier. These elements are sufficient to question the characterization of the relationship as a financial lease. Yet on the

[94] http://www.mootmadrid.es/caso/Caso%20Moot%20Madrid%202010%20con%20aclaraciones.pdf

other hand, the Ottawa Convention on Financial Leasing 1988[95], and the UNIDROIT Model Law on Leasing 2008[96]; both potentially applicable in the case, are based on that sharp distinction. However, neither the lessor's attitude does not correspond to the "aloofness" presumed under the rules on financial leases, nor does the supplier vanish from the picture (as presumed of non-financial leases).

Furthermore, a triangular relationship such as the one envisaged in this case, creates all sorts of problems for the existing law. The most evident is in the lessee's rights against the supplier. In a financial lease, the lessee can supposedly exercise all rights as if it were the lessor[97]. Supposedly its obligations towards the lessor are independent from the relationship with the supplier[98]. Yet when it comes to avoidance, the lessee cannot avoid the supply contract unilaterally (even in case of fundamental breach) without the lessor's permission. Then, what happens in case there is a fundamental breach but the lessor does not give permission? And what avoidance would look like in such tri-lateral setting? Is there room for the lessee to exercise, or request a retention of payment as a means to put pressure on the supplier?

All of these matters can hardly be contemplated under a single set of rules; at least for the time being. Yet the complexity and sophistication of modern commercial transactions makes it predictable that these problems (or other problems we cannot even envisage yet) will present themselves without prior warning. In all these cases we anticipate that the "symbiotic" solution proposed here should be the guideline.

[95] See UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988). Available at http://www.unidroit.org/english/conventions/1988leasing/main.htm. In particular, see article 1 (2) for the definition of financial lease employed by the Convention.

[96] See UNIDROIT Model Law on Leasing. Available at http://www.unidroit.org/english/modellaws/2008leasing/main.htm. In particular, see the definition of "Financial Lease" in Article 2; and articles 7, 9-14, 16 and 17 for the effects of the distinction between financial and non-financial lease

[97] Article 10 (1) of the Convention on Financial Lease; and articles 7 and 14 (1) of the UNIDROIT Model Law on Leasing.

[98] Article 8 (1) (a) Convention on International Financial Leasing, article 10 (1) (a) UNIDROIT Model Law on Leasing.

4. CONCLUSIONS

In the present work we have presented the current state of uniform law for commercial contracts as it is now. The law allows for much flexibility and gives much room for the parties' will to operate. Yet we believe that the way it does so suffers from two main limitations. First, it does not acknowledge the "commercial context" unless it can be characterized as a "usage", a "practice" or "the parties intention". Second, it embodies a "competitive" relationship between the parties' intention, within their commercial context (the latter rebranded as usage, practice, etc) on one side, and the legal rules on the other. The traditional interpretation of uniform law provisions has tended to enhance this view, restrictive on one side, and competitive on the other.

We believe this fails to grasp the complexity of modern commercial relations. In particular, it fails to account for the innumerable occasions where the commercial context shows some friction, or plain inconsistency with the assumptions made in the legal provisions; and yet such context does not supply sufficient elements to make a just and reasonable decision, i.e. it is incomplete.

Instead, in this work we propose a "symbiotic" approach. Its first implication is that commercial context must be acknowledged in its full measure. Second, once that context is acknowledged, and given that its inconsistency with the legal assumptions underlying specific provisions prevents a mechanic application of the rules, the factual input from the context must be processed under a principles-based interpretation of uniform law. Whenever the uniform law provisions are flexible enough, this can be done without departing from such provisions. Whenever it is not possible, a gap can be acknowledged, and the principles-based approach would be based on the gap-filling rules that call for an autonomous interpretation.

As can be seen, neither the importance of elements outside the legal provisions, nor the autonomous, principles-based interpretation are new. What we believe our approach offers is a joint mechanism to tackle these two great issues of uniform law, and link them together to create more flexible solutions without losing predictability. It is for that reason that we have made a particular emphasis on the practical applications of this mechanism.

Naturally, this approach cannot be possible without the proper players at the helmet, hence the importance of legal education, to ensure that lawyers and judges do not only understand the law, and acknowledge the importance of the

commercial context, but to that they can also combine both in a proper way. In this regard, the task of Professor Bergsten as conductor of the Willem C Vis International Commercial Arbitration Moot for seventeen years has greatly exceeded its original mandate. From a mechanism to spread the study of the CISG it has turned into an agent for changing the way it can be applied; and that through discussion and debate, by asking the question nobody has asked before. In this sense, this work would not have been possible without the inspiration that the Moot cases provide. Nor would the cases of our Moot Madrid exist without this great precedent, which set such a high bar.

It is for these reasons that this article is dedicated to Professor Bergsten. For being a great teacher, for challenging the boundaries of the law, and for helping our ingenuity with new sources of inspiration, in the past and for the years to come.