BUYER'S ENABLING STEPS TO PAY THE PRICE: ARTICLE 54 OF THE UNITED NATION'S CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

Alejandro Osuna-González[*]

I. INTRODUCTION

Compared to the obligations of the seller under the United Nation Convention on Contracts for the International Sale of Goods (hereinafter, the "CISG" or the "Sales Convention"),[1] the provisions on buyer's obligations are substantially fewer.[2] The general obligations of the buyer are summed up in Article 53, which restates in very broad language that the buyer must pay the price for the goods and take delivery of them as required under the contract and the Sales Convention.[3] Buyer's duty to pay the price is further elaborated upon in CISG Article 54, which provides that: "[t]he buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made."

This apparent simplicity, however, does not mean that the problems that can arise with regard to a buyer's obligations are simple. The evolution of financial systems and of international methods of payment, along with government intervention in the international transfer of funds, has made out of what used to be a simple conveyance of money a more sophisticated

---

* Alejandro Osuna-González practices law in Tijuana, Baja California, Mexico. He obtained his J.D. degree from the Law School of the Universidad Iberoamericana in Tijuana, State of Baja California, Mexico in 1995. He obtained an LL.M. from the University of Pittsburgh's School of Law in 1998. Mr. Osuna teaches at the Universidad Iberoamericana, Tijuana, where he lectures on International Sales Law, Foreign Investments Law, and Commercial Arbitration. For comments on this presentation you may contact him at P.O. Box 434720, San Ysidro, California 92143, U.S.A., or via e-mail: aosuna@osuna-rivero.com.

1. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18, Annex 1 (Apr. 11, 1980) [hereinafter CISG].

2. CISG Chapter II of Part III on obligations of the seller includes Articles 30 through 52, and describes in great detail his obligations to deliver the goods, hand over documents, and transfer the property to the goods. Chapter III of Part III refers to the buyer's obligations and includes Articles 53 through 65. Article 53 sets out buyer's basic obligations to pay the price for the goods and to take delivery of them as required under the contract and the Convention.

3. *See* CISG art. 53: "The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention."

endeavor.[4] Indeed, the problems related to buyer's obligation to effect payment are not without their own difficulties: they occur frequently and can be very complex.[5] The problems can also involve a broad range of issues such as letters of credit,[6] negotiable instruments,[7] wire transfers,[8] currency of payment and legislation concerning exchange controls,[9] issues that are beyond the scope of the Sales Convention.[10]

---

4. *See* ALEJANDRO GARRO & LUIS ALBERTO ZUPPI, COMPRAVENTA INTERNACIONAL DE MERCADERÌAS 222 (Ediciones La Rocca 1990) (Arg.):

> Conforme a una concepción tradicional del pago, la obligación de pagar el precio se limita a transferir al vendedor una suma determinada de unidades monetarias representativas del precio. La evolución contemporánea del sistema financiero, caracterizado por una creciente intervención estatal en las transferencias monetarias internacionales, ha complicado un poco esta concepción tradicional de la obligación de pagar el precio.

5. *See* Leif Sevón, *Obligations of the Buyer Under the UN Convention on Contracts for the International Sale of Goods*, *in* INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 203 (Petar Sarcevic & Paul Voken eds., 1986), *available at* http://www.cisg.law.pace.edu/cisg/biblio/sevon1.html: "As in many other cases, the first glance is misleading. Problems relating to payment in international sales are both frequent and severe. This does not necessarily mean that these problems are complex from a legislative point of view."

6. *See* ICC CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS, ICC Publication No. 500 (1993).

7. For a comparative perspective on bills of exchange, see UWE JAHN, BILLS OF EXCHANGE: A GUIDE TO LEGISLATION IN EUROPEAN COUNTRIES, ASIA & OCEANIA (1999). For a perspective comparing the negotiable instruments under Mexican Law with the Geneva Uniform Law on Bills of Exchange and Promissory Notes, see RAÚL CERVANTES-AHUMADA, TÍTULOS Y OPERACIONES DE CRÉDITO (Editorial Porrúa, Décimoquinta Edición 2003) (Mex.), and FRANCISCO LÓPEZ DE GOICOCHEA, LA LETRA DE CAMBIO (Editorial Porrúa, Sexta Edición 1981) (Mex.).

8. For an example of credit transfer legislation, see the UNCITRAL Model Law on International Credit Transfers, G.A. Res. 47/34, U.N. Doc.A/47/17 (Feb. 9, 1993). For an excellent work on wire transfers and other related topics, see RAJ BHALA, THE LAW OF FOREIGN EXCHANGE (1997).

9. For a Mexican perspective on exchange controls, see Fernando Vazquez Pando, *Introducción al Estudio Jurídico del Control de Cambios Vigente en México a partir del 20 de Diciembre de 1982*, and F.A. Mann, *El Derecho Internacional Privado en Materia de Control de Cambios*, both in 16 JURÍDICA: ANUARIO DEL DEPARTAMENTO DE DERECHO DE LA UNIVERSIDAD IBEROAMERICANA 227 *et seq.* and 381 *et seq.* (1984).

10. Article 4 of the CISG provides:

> This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
>
> (a) the validity of the contract or of any of its provisions or of any usage;
>
> (b) the effect which the contract may have on the property in the goods sold.

A. Legislative History of Article 54

Much like its predecessor,[11] the early version of CISG Article 54 provided that the buyer had to take steps which were required under the contract, and by the laws and regulations in force or with usage, in order to enable the price to be paid or to procure the issuance of documents assuring payment, such as opening a letter of credit or obtaining a banker's guarantee.[12] At its tenth annual session,[13] UNCITRAL's "Committee of the Whole" reviewed the 1976 Working Group's "Sales" draft which included said provision. During the session, deletion of the "enabling steps" article was proposed, since the Draft Sales Convention already included a provision that talked about the buyer's duty to pay the price.[14] Deletion was also justified on the fact that there was no parallel provision applicable to the seller,[15] and there were also questions as to what documents were envisioned in said article. In opposition to this proposal, it was stated that the "enabling steps" article served a useful purpose in indicating that the buyer's obligation may encompass several steps prior to the date of payment, and also gave an indication of the form in which the obligation to pay the price or assure payment was required from the buyer.[16]

---

11. The origins of Article 54 of the CISG can be traced back to the Uniform Law on International Sales (ULIS) Article 69. ULIS Article 69 provides that:

> The buyer shall take the steps provided for in the contract, by usage or by laws and regulations in force, for the purpose of making provision for or guaranteeing payment of the price, such as the acceptance of a bill of exchange, the opening of a documentary credit or the giving of a banker's guarantee.

12. *See* JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES: THE STUDIES, DELIBERATIONS AND DECISIONS THAT LED TO THE 1980 UNITED NATIONS CONVENTION WITH INTRODUCTIONS AND EXPLANATIONS 156, 178 (1989) [hereinafter DOCUMENTARY HISTORY].

13. *See Report of Committee of the Whole I Relating to the Draft Convention on the International Sale of Goods* (1977) [hereinafter *Report of the Committee*], U.N. Doc. A/32/17, Annex I, *reprinted in* DOCUMENTARY HISTORY, *supra* note 12, at 318-57. The meeting, which spanned the months of May through June 1977, met under the chairmanship of Mr. Gyula Eorsi (Hungary), and Jorge Barrera-Graf (Mexico) as Rapporteur.

14. *See* CISG art. 53.

15. *See Report of the Committee*, *supra* note 13, *reprinted in* DOCUMENTARY HISTORY, *supra* note 12, ¶ 318, at 341. *But see* JORGE ADAME GODDARD, EL CONTRATO DE COMPRAVENTA INTERNACIONAL 186 (1994), for the proposition that buyer's enabling steps to effect payment has its counterpart in the seller's obligation to make contracts for the shipping and insurance for the goods: "Muchas veces será necesario que el comprador realice contratos con terceros (bancos, compañías de fianzas), lo cual se corresponde con la necesidad que tiene el vendedor de contratar con terceros (transportistas, compañías de seguros) para entregar las mercancías."

16. *See Report of the Committee*, *supra* note 13, *reprinted in* DOCUMENTARY HISTORY, *supra* note 12, ¶ 319, at 341.

The Committee ultimately decided not to retain the provision, opting to draft a new article that would not lend itself to be interpreted to apply to the steps necessary for the buyer to cause his bank to pay the price, but that it was the buyer who had to take steps to assure that the price would in fact be paid.[17] According to the Secretariat's Commentary, the new language in the enabling steps provision meant that the "steps and formalities" were to be considered current and not future obligations, the breach of which could trigger the remedies now included in CISG Articles 61 through 64, and not the rules on anticipatory breach included in Articles 71 through 73.[18] Save for a small change in the English version, this streamlined version of Article 54 was later adopted at the 1980 Diplomatic Conference held in Vienna.[19] It is worth noting that even if all references to letters of credit, bills of exchange, or credit guarantees were deleted from the provisions' text, the Secretariat's Commentary to the 1978 draft retained the reference to them, and thus we should consider them to be "written into" the current text.[20]

II. BUYER'S PERFORMANCE OF HIS ENABLING STEPS TO PAY THE PRICE

Pursuant to Article 54 of the CISG, the buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made. Firstly, we must distinguish between the commercial and the administrative requirements to effect payment.

---

17. *Id.*

18. *See Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat*, U.N. Doc. A/CONF.97/5 (Mar. 14, 1979), *reprinted in* DOCUMENTARY HISTORY, *supra* note 12, at 404-56.

19. Besides the renumbering that took place (CISG Article 54 was Draft Article 50), the expression "any *relevant* laws and regulations" was changed to "any laws and regulations [. . .] ." It is worth noting that the Spanish version retained the expression "*pertinente*" (pertinent), a Spanish word roughly equivalent to the expression "relevant." The Spanish version of Article 54 reads:

> *La obligación del comprador de pagar el precio comprende la de adoptar las medidas y cumplir los requisitos fijados por el contrato o por las leyes o los reglamentos pertinentes para que sea posible el pago.* (Emphasis added.)

On the topic of the different versions of the CISG, see Harry M. Flechtner, *Symposium—Ten Years of United Nations Sales Conventions: The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187 (1998).

20. *See* DOCUMENTARY HISTORY, *supra* note 12, ¶ 2 at 436.

A. Buyer's Compliance with Commercial Requirements

The commercial measures can include, as mentioned in the UNCITRAL Digest,[21] the Secretariat's Commentary,[22] and in the wealth of scholarly opinions,[23] the opening of a letter of credit, establishment of security or obtaining a bank guarantee, or the acceptance of a bill of exchange.[24] When complying with his commercial requirements, the buyer's standard of performance is that he must achieve a specific result.[25] For example, a buyer may be required to obtain a letter of credit (commercial or stand-by), to obtain a demand guarantee, to sign a bill of exchange, to make a check to effect payment, or even to make a promissory note to secure it.[26] These steps to enable payment clearly fall within buyer's control; thus failure to comply with them would be buyer's sole responsibility, and would very likely constitute a fundamental breach.[27] A buyer can most surely control the outcome of taking these steps and thus can very likely achieve the agreed result. Furthermore, even in cases where a buyer requires the services from a bank and is turned

---

21. *See* UNCITRAL Digest on Article 54, *available at* http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html.

22. *See* DOCUMENTARY HISTORY, *supra* note 12, at 436.

23. *See* Sevón, *supra* note 5. *See also* GODDARD, *supra* note 15; FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS (1992); HENRY DEEB GABRIEL, CONTRACTS FOR THE SALE OF GOODS: A COMPARISON OF DOMESTIC AND INTERNATIONAL LAW (2004); ALEJANDRO GARRO & ALBERTO ZUPPI, COMPRAVENTA INTERNACIONAL DE MERCADERÍAS, CONVENCIÓN DE VIENA DE 1980 (Ediciones La Rocca 1990) (Arg.); JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES (1989); ALEJANDRO OSUNA-GONZALEZ, COMPRAVENTA INTERNACIONAL: JURISPRUDENCIA Y PROBLEMAS (2004) (Mex.).

24. Even in some cases, the commercial requirements may intersect with the administrative requirements to effect payment. Professor Uwe Jahn, *supra* note 7, at 15, explains that sometimes parties place the stipulation "payment effective in X-currency," as to exclude drawers right to honour the bill by paying the equivalent sum in the local currency. He explains that: "[T]his stipulation does not solve problems arising from exchange control regulations in force in the country where the place of payment lies. These regulations prevail over any private commercial stipulation and must be strictly observed."

25. Compare with UNIDROIT Principles art. 5.1.4(1), which provides: "To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result."

26. Many legal systems view the obligation to pay the price as an obligation that is part of a *principal* or *main contract* while an undertaking to secure payment would be an *ancillary contract* or an *ancillary undertaking* to secure it.

27. *But see* Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT'L L. & BUS. 299, 373 (2004) ("However, despite these opinions, there is no requirement that the buyer needs to succeed in its efforts to comply with contractual formalities. Failure to satisfy required formalities does not constitute a breach.").

down, a buyer will typically have other alternatives to provide the required service by going to another financial institution.[28]

1. A Caveat on the CISG's Non-Distinction Between Principal and Ancillary Obligations to Enable Payment

Many legal systems distinguish between principal and ancillary contracts, i.e., the obligation to effect payment and the undertaking to secure payment, such as signing a promissory note, or opening a stand-by letter of credit. I mention this because a person may be lured—as I admittedly was—to look at the obligation to pay and at the steps to enable payment—or even to secure it—as separate obligations, just as it occurs in the Mexican legal system. If one looks at the CISG under this mistaken perspective, the failure to open a letter of credit would not be a fundamental breach, since the buyer is not breaching his principal obligation of payment. However, this approach would be wrong for at least two reasons. First, we would not be honoring the obligation to interpret the Sales Convention taking into account its international character.[29] Second, these are precisely the types of formalities envisioned in CISG Article 54. According to Professor Jean-Pierre Plantard, these formalities are part of the principal obligation to effect payment; therefore, if a buyer fails to comply with any of these enabling steps he would be in breach of his contractual obligation to pay.[30]

B. Buyer's Compliance with Administrative Requirements

Administrative requirements are those where the buyer must comply with something ordered in a statute, or with a governmental or administrative ordinance, such as applying for authorization to purchase foreign currency or transfer funds abroad. The type of obligation will have an effect on the degree of severity on the assumption of the buyer's contractual obligation. Different from what occurs in a commercial setting, obtaining an administrative authorization is not completely within the buyer's control. It is well known that government authorities in some states act with a greater degree of

28. *See* ENDERLEIN & MASKOW, *supra* note 23, at 207.

29. *See* CISG art. 7(1).

30. Jean-Pierre Plantard, *Las Obligaciones del Comprador según la CVIM*, *in* ANUARIO JURÍDICO X 182 (1983), from a Colloquium on International Trade Law: The United Nation's Convention on the International Sale of Goods, published by the Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México (in Spanish).

discretion than others, and often times refuse to grant or issue a license, such as an authorization to purchase foreign currency or to transfer funds abroad.[31] Still, the buyer must make his best *reasonable* effort to pursue compliance with the legal requirements full heartedly, with a view to actually obtaining the desired result.[32] This should not be interpreted to mean that a buyer is required to pay a "gratification" to any person acting in an official capacity: this would clearly be *unreasonable* and even illegal. As stated in the Commentary to the 1978 Draft Convention, the buyer is obligated to take all appropriate measures to persuade the relevant government authorities to make the funds available and cannot rely on a refusal by those authorities unless he has taken such measures.[33] In cases where a buyer has in fact taken all *reasonable* measures to secure a license, a government's unwillingness to grant a buyer's request will most likely activate the exemption provision contemplated in CISG Article 79,[34] provided the buyer can prove that his failure to obtain the authorization was due to an impediment beyond his

---

31. As Professors Enderlein and Maskow explain: "In a vertical plane, the commercial partners cannot always foresee the prerequisites for the obtainment of the necessary decisions, for they depend on the judgement [sic] of the authorities concerned in accordance with the concrete political or economic situation." ENDERLEIN & MASKOW, *supra* note 23, at 207.

32. *See* UNIDROIT Principles art. 5.1.4(2): "To the extent that an obligation of a party involved a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances."

33. *See* DOCUMENTARY HISTORY, *supra* note 12, at 435 (Secretariat Commentary on the 1978 Draft Convention).

Pursuant to the UNIDROIT Principles, Article 6.1.15 (Procedure for permission) provides:

(1) The party required to take the measures necessary to obtain the permission shall do so without undue delay and shall bear any expenses incurred.

(2) That party shall whenever appropriate give the other party notice of the grant or refusal of such permission without undue delay.

34. CISG Article 79 provides:

(1) A party is not liable for a failure to perform any of his obligations if he proved that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provision of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

control and that it was not reasonably taken into account at the time the contract was concluded. Unlike the case where the buyer must comply with his commercial obligations, when it comes to administrative authorizations, the buyer will not have an alternative.[35]

C. Currency of Payment

The issue concerning currency of payment was raised during the discussion of the draft CISG. At the 24th meeting of the Diplomatic Conference, Argentina, Spain and Portugal submitted a proposal to amend a precursor of Article 54, providing that if payment in the contractual currency were not possible, the seller could require equivalent payment in the legal currency at the buyer's place of business.[36] The reasoning behind the proposal was that some countries with exchange controls could prevent the buyer from paying in the agreed currency and that the text of the provision might not be sufficient to compel the buyer, since he could then invoke the excuse provision to evade his obligations.[37] This provision would then empower the seller to require equivalent payment in the legal currency of the buyer's place of business. The provision was ultimately rejected because it was thought that it could be interpreted to mean that the buyer could only demand payment at buyer's place of business.[38]

III. CLOUT CASES ON CISG ARTICLE 54

Currently, the CLOUT system has eight cases that deal with CISG Article 54, which cover the following issues: (A) buyer's obligation to pay includes enabling steps (Case Nos. 142 and 236); (B) buyer's arrangements for a letter of credit (Case Nos. 176 and 301); (C) buyer's failure to take steps may invoke remedies (Case No. 104); and (D) currency to effect payment (Case Nos. 52, 80 and 281).

---

35. *See* ENDERLEIN & MASKOW, *supra* note 23, at 207.
36. *See* DOCUMENTARY HISTORY, *supra* note 12, at 692.
37. *Id.* at 583.
38. *Id.*

A. Enabling Steps to Effect Payment

1. CLOUT Case No. 142, Russian Arbitration, 1995[39]

CLOUT Case No. 142 involves a German seller and a Russian buyer. The buyer had received the goods but failed to pay the price, arguing that the bank that was responsible for his foreign currency transactions had been unable to transfer the amounts to the seller.[40] The buyer did not have currency that was freely convertible currency in his bank account to pay for the goods.[41] The buyer attempted to have the tribunal declare an exemption, based on Article 79 of the CISG, since the situation—according to buyer—constituted *force majeure*, and thus, he should be discharged from performing his contractual obligations.[42]

During the proceedings, it was established that the buyer had merely sent instructions to the bank, but had not taken measures to ensure that the payment could in fact be made.[43]

Buyer was found in breach for two reasons. First, the contract had a provision that included an exhaustive list on what constituted *force majeure*, and this situation did not fall within its scope.[44] Second, the buyer limited his conduct to sending instructions to the bank but had not taken measures to ensure that the payment could be made.[45]

Comment to CLOUT Case No. 142

In this case, the buyer of goods limited his conduct to sending a letter to his bank asking that payment be made to the seller. He did not make an effort to ensure that he had freely convertible currency to effect payment to the seller, thus falling short of what is expected from a buyer under Article 54. As mentioned before, the commercial steps require that a buyer obtain a specific result, which did not occur. In addition, the buyer may have been required to obtain an authorization from the Russian government, but the

---

39. CLOUT Case No. 142 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, 17 Oct. 1995], *available at* http://cisgw3.law.pace.edu/cases/951017r1.html.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

abstract of the case suggests that the buyer had simply sent instructions to the bank, conduct that clearly falls short for the purpose of effecting payment.

2. CLOUT Case No. 236, Germany, 1997[46]

This case involved an Italian seller who sought to obtain payment from a German buyer under a supply contract.[47] Buyer adduced that the contract was void under German and European antitrust legislation, and that he was not under a duty to perform since the contract was invalid.[48] The buyer also argued that the invalidity of the franchise agreement also invalidated the supply aspect of the contract,[49] but did not prevail because the Court considered the individual sales agreements valid even if the supply contract was not.[50] The Court held the seller was entitled to the price based on Articles 53 and 54.[51]

Comment to CLOUT Case No. 236

This case was decided by the German Federal Supreme Court on July 23, 1997. It is one of the so-called Benetton cases, involving this well-known clothing manufacturer. The issue concerning the enabling steps to effect payment is not fully developed to make any substantial contribution, since the decision merely mentions Articles 53 and 54, but does not dwell on the matter any further.

B. Contractual Obligation to Arrange for a Letter of Credit

1. CLOUT Case No. 176, Austria, 1995[52]

This case involved a German buyer and an Austrian seller. The parties had made an FOB contract for the delivery of propane gas. During negotiations, the parties exchanged communications by fax and discussed by

---

46. CLOUT Case No. 236 [Bundesgerichtsof, Germany, 23 July 1997], *available at* http://cisgw3.law.pace.edu/cases/970723g2.html.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* This statement comes from the case translation published on-line by Pace University.

51. *Id.*

52. CLOUT Case No. 176 [Oberster Gerichtshof, Austria, 2 Feb. 1995], *available at* http://daccessdds.un.org/doc/UNDOC/GEN/V97/274/84/PDF/V9727484/PDF/V9727484..pdf?OpenElement.

telephone the conditions of the contract, including the agreement that payment would be made by means of a letter of credit.

The buyer did not obtain the letter of credit because there was an essential element missing, since the Austrian seller failed to name the port of origin. The German Supreme Court determined that the German buyer was not under an obligation to open a blank letter of credit, and thus buyer was not found to be in breach of contract.

Thus, even if it is true that a buyer has the obligation to take all steps and comply with such formalities under the contract or under any applicable laws or regulations, in certain circumstances the buyer may require seller's collaboration, a principle that is restated throughout the CISG.[53]

Comment to CLOUT Case No. 176

One must consider whether situations such as this case—where the seller fails to provide information for a letter of credit—may allow a buyer to "fill in the blanks" left by the seller's omission, based on a principle that can be deduced from other provisions providing for this type of contractual gap-filling. For example, if the parties had a history of making similar contracts, there could be a practice established between them, which could be binding under Article 9(1) of the CISG; thus a buyer may consider prior dealings. A principle may be deduced either from Articles 55 or 65, allowing the buyer to supply the missing term; thus, the buyer in a case like this could have made the specifications for the letter of credit himself—as it typically occurs—either based on the terms that would have normally been included in a letter of credit for a contract made under comparable circumstances,[54] or based on the requirements that the buyer was aware of.[55] Thus, a buyer could have taken the enabling steps towards payment by supplying the missing terms himself, provided that this gap-filling did not entail changing any of the agreed contractual terms that could have had an impact on the price (i.e., by including in the letter of credit that it is a CIF contract, when the parties had agreed that the sale would be an FOB sale), and did not include terms that were either excessive or difficult to comply with. However, it is important to underline that the principle that a party *may* supply missing terms, should not be read to

53. According to Professor John Honnold, each party must take steps that are related to corresponding steps by the other. Examples can be found in CISG Articles 19(2), 21(2), 32(2) and (3), 48(2), 58(3), 60(a), 65, 68, 71, 73(2), 79(4), 71(3), 72(2), 79(4) and 85-88.

54. This idea is a paraphrase of CISG Article 55 on the open price term.

55. This idea borrows from CISG Article 65.

mean that he must. Nevertheless, in circumstances where buyer could have done this "gap-filling," we must also question whether the seller's breach was in fact fundamental. However, from the decision in CLOUT Case No. 176, it appears that the seller had no intent of providing the missing terms and that these were essential.

2. CLOUT Case No. 301, ICC Arbitration, 1992[56]

This case involves an Italian seller and a Finnish buyer. The seller sued the buyer for damages and interest because the latter had failed to make the third down payment to the seller, and it had failed to notify the letters of credit required under the contract by the agreed upon date.

In dicta the Tribunal said that notifying the letters of credit falls within the broad definition of paying the price.[57] The arbitral tribunal hearing the case also stated that the mere fact that there had been a delay on behalf of a buyer would not in itself amount to a fundamental breach as understood under Article 25, in connection with Articles 53 and 54. However, the Italian seller waited several months before declaring the contract avoided, and the arbitral tribunal construed this as an additional time under Articles 63(1) and 64(1)(b) of the Convention.

Comment to CLOUT Case No. 301

This decision was correct when it stated that "notifying the letters of credit falls within the broad definition of paying the price," since that is precisely the meaning of Article 54. It also raises an interesting issue concerning the performance of the enabling steps: whether delay in opening a letter of credit—or for that matter, with any other enabling step—would constitute a fundamental breach. In CLOUT Case No. 301, it is clear that the answer was in the affirmative, considering that the seller had waited several months for the buyer.

56. CLOUT Case No. 301 [Court of Arbitration of the International Chamber of Commerce, Case No. 7585, 1992], *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=134&step=FullText.

57. *Id.* This comment is included in the version of the case posted by UNILEX.

C. Buyer's Failure to Take Enabling Steps; Seller's Right to Invoke Remedies

1. CLOUT Case No. 104, ICC Arbitration, 1992[58]

This case involves an international sales contract between a Bulgarian buyer and an Austrian seller.[59] The buyer had failed to open an irrevocable and divisible letter of credit as provided for in the contract, despite an additional period of time allowed by the seller.[60] The seller had to deposit the goods in order to preserve them.[61] The seller filed suit claiming performance of the contract as well as damages. The buyer claimed that the Bulgarian government had ordered the suspension of payments of foreign debts, and that his failure to follow through with the letter of credit was a consequence of such suspension and was thus exempted under Article 79 of the CISG. The buyer's argument failed because the suspension had already been declared at the time the contract had been concluded; thus, the impediment to open the letter of credit was clearly foreseeable, hence the exemption provision of Article 79 would not be triggered.

Comment to CLOUT Case No. 104

This case presents two of the situations envisioned by CISG Article 54: enabling steps of a commercial nature, and potentially, the need to effect enabling steps of an administrative character to obtain authorization from a government to transfer funds abroad. The buyer argued that he had not opened a letter of credit because the government had suspended the payment of foreign debts. However, the case does not discuss whether or not the buyer had sought an exemption from the Bulgarian government. It is likely that this did not happen. Another interesting aspect is the fact that the buyer attempted to claim an Article 79 exemption, but failed since the suspension had already been declared when the contract was made.

---

58. CLOUT Case No. 104 [Court of Arbitration of the International Chamber of Commerce, Case No. 7197, 1992], *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=37&step=Abstract.

59. *Id.*

60. *Id.*

61. *Id.*

D. Currency to Effect Payment

Case law concerning currency of payment has consistently pointed towards the currency at the seller's place of business.[62] The rationale is that because the issue of currency of payment is not within the scope of the CISG, nor can it be deduced from any general principle in the Convention, the rules of private international law come into play pursuant to CISG Article 7(2). So far, the issue of currency of payment has been discussed in at least three CLOUT Cases: CLOUT Case No. 52 (Hungary 1992); CLOUT Case No. 80 (Germany 1994); and CLOUT Case No. 281 (Germany 1993).

1. CLOUT Case No. 52, Hungary, 1992[63]

The first case involves a German company, who filed suit demanding payment of the price and interest for goods sold and delivered to the defendant, a Hungarian company. At first, the defendant disputed the existence of a contract and the delivery of goods.[64] However, the court found that delivery had taken place on the basis of documents obtained from the Hungarian Customs Authority and from the forwarding agent who had delivered the goods upon receipt signed by an employee of the defendant.[65] The court relied upon a sales contract that had previously been concluded between the parties, in order to determine the price of the goods and the other elements of the contract and ordered the defendant to pay (CISG Articles 9(1) and 53).[66] Concerning the payment of interest, which is not regulated by the CISG, the court, on the basis of the Hungarian Act on Private International Law (paragraph 25 of Legal Decree No. 13 of 1973), applied German law as the law of the seat of the seller. In this context, on the basis of Article 352 paragraph (1) of the German Code of Commerce (HGB), the court awarded to the plaintiff interest at the rate of 5% on the amount due as of the day the obligation to pay the purchase price (determined in German currency) became due.[67]

---

62. On this issue, the UNCITRAL Digest, *supra* note 21, Article 54, ¶ 6 states: "[M]ost decisions in case law refer to the law of the place where the seller's place of business is located or to the law of the place where payment is to be made."

63. CLOUT Case No. 52 [Fovárosi Bíróság Budapest, Hungary, 24 Mar. 1992], *available at* http://www.uncitral.org/pdf/english/clout/abstracts/A_CN.9_SER.C_ABSTRACTS_3.pdf.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

2. CLOUT Case No. 80, Germany, 1994[68]

The second case involves an Italian assignee of an Italian seller suing a German buyer for the price. At issue was whether payment was due in German marks as demanded by the seller, or in Italian lira as agreed in the contract.[69] The court found for the buyer because the parties had agreed to this currency, stating that even if they had not agreed to the Italian lira, they would still have to pay in this currency since the place of payment was the place of business of the Italian seller.[70]

3. CLOUT Case No. 281, Germany, 1993[71]

The third case involves a French seller who had entered into a long-term contract with a German buyer, which granted the buyer exclusive distribution rights in Germany for the seller's computer printers and chips. After the contractual relationship had been terminated, the seller sued for outstanding payments of invoices dating back to 1988.[72] The buyer disputed the applicability of the CISG and claimed a set-off. Alternatively, the buyer sought to pay damages in German currency.[73] The court allowed the seller's claim, and awarded the judgment in French francs. Permission to make payment in German currency pursuant to the German Civil Code was not granted, as this was dependent upon the place of performance of the contract being in Germany.[74] According to Article 57(1)(a) of the CISG, the seller's place of business in France was the proper place of performance.[75]

IV. THE ADEQUACY OF THE ENABLING STEPS

One should consider that merely opening a letter of credit or ordering a bank to effect a wire transfer is not enough to meet the obligation of taking

---

68. CLOUT Case No. 80 [Kammergericht Berlin, Germany, 24 Jan. 1994], *available at* http://www.uncitral.org/pdf/english/clout/abstracts/A_CN.9_SER.C_ABSTRACTS_6.pdf.

69. *Id.*

70. *Id.*

71. CLOUT Case No. 281 [Oberlandesgericht Koblenz, Germany, 17 Sept. 1993], *available at* http://cisgw3.law.pace.edu/cases/930917gl.html.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

"enabling" steps to effect payment.[76] Obviously, the *enabling* steps must in fact lead to a seller being *able* to collect the amount that he is due, and in some cases, it should allow a seller to collect even if the buyer defaults with his duty to effect payment directly.[77] Such enabling steps must not function as a mere ploy to get the goods out of the hands of the seller, as indicated by the following cases.

A. The Son Exports Recommendation[78]

This case involved a Mexican seller of garlic and a U.S. buyer. At the time the contract was concluded, the buyer made four checks out to the seller that would be presented to the bank on the 8, 14, 21 and 28 of May 1992. The seller had delivered the goods to the buyer on May 6 of 1992. When the seller appeared before the bank, the bank advised the seller that the account had insufficient funds.

When the seller went to the bank again, he was told that the account had been closed. In this case, the checks were only used to get the goods out of the hands of the seller.

---

76. *See* CLOUT Case No. 142, *supra* note 39. In this case, buyer had merely sent instructions to the bank, but had not taken measures to ensure that the payment could in fact be made.

77. Such as when a buyer secures the transaction by involving a third party. This can occur in many ways, for example, by obtaining a performance bond, or a stand-by letter of credit. The other possibility is to make a letter of credit or a promissory note and to have an aval sign the document to secure payment, since in many legal systems this will allow a creditor to collect from the securing party and obtain payment even if a buyer goes bankrupt.

78. *See* Comisión para la Protección del Comercio Exterior de México, Mexico, 4 May, 1993, *published in* DIARIO OFICIAL 17 (27 May 1993), *available at* http://cisgw3.law.pace.edu/cases/930504m1.html.

B. The Dulces Luisi Recommendation[79]

In the *Dulces Luisi Recommendation*, a Mexican seller of sweets, *Dulces Luisi, S.A. de C.V.* (hereinafter *Luisi*), made approximately eight transactions with two South Korean companies during 1996, called Seoul International Co. Ltd., and a second corporation known as Seoulia Confectionery, Co.[80] The initial transactions totaled close to $200,000. In these initial confidence-building transactions, payment was made by means of a letter of credit, without any complications. In early 1997, two new shipments would be requested, one for almost one million dollars-worth of goods and a second shipment for just over $300,000. Because of the trust created between the parties, *Luisi* was complacent to fulfill the new requests for sweets. Indeed, the Mexican seller was now confident that the letter of credit would provide sufficient assurance that they would be paid the price for the goods, as had occurred in the previous transactions. However, things did not go as planned. According to the recommendation, the South Korean buyers requested that *Luisi* place a two-year expiration date on the sweets' packaging. When *Luis* was advised of the letters of credit, the letters included language providing the goods had to show a 12-month expiration date. The recommendation also found that the buyers induced *Luisi* to get the goods out of its hands, since they relied on the representations made by the South Korean buyers that they would amend the instructions in the letters of credit accordingly, something that would never happen. It is obvious that the purpose of taking "enabling steps" is to ensure that the seller will in effect be able to receive his money, and that they not be used as a mere ploy to obtain the goods from a confident seller.

---

79. Dulces Luisi, S.A. de C.V. v. Seoul Int'l Co., Comisíon para la Protecciíon del Comercio Exterior de Mexico, Mexico, 30 Nov. 1998, *published in* DIARIO OFICIAL § 1, at 69-74 (29 Jan. 1999), *available at* http://cisgw3.law.pace.edu/cases/930504m1.html. *See* Alex Osuna, *Dictamen Relativo a la queja promovida por Dulces Luisi, S.A. de C.V., en Contra de Seoul International Co. LTD., y Seoulia Confectionery Co.*, 19 J.L. & COM. 265 (2000). *See* Alejandro Osuna-González, *La COMPROMEX y su aplicación de la Convención sobre la Compraventa Internacional de 1980* (Instituto de la Judicatura, Poder Judicial del Estado de Baja California (2000) (Mex.)). *See* Alejandro Garro, *Some Misunderstandings about the U.N. Sales Convention in Latin America*, *in* QUO VADIS CISG?: CELEBRATING THE 25TH ANNIVERSARY OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 113 (Franco Ferrari ed., 2005).

80. The existence of this corporation was questioned at some point.

C. Hungarian Chamber of Commerce and Industry Arbitration Award of November 17, 1995[81]

The second case comes from the Hungarian Chamber of Commerce and Industry Court of Arbitration.[82] In this case, a Hungarian seller and an Austrian buyer who had had a longstanding relationship made a contract for the sale of various shipments of mushrooms. Pursuant to their agreement, the buyer would obtain a bank guarantee in favor of the seller that would expire at a certain date, but failed to do so. The seller also failed to press for its issuance before the guarantee's expiration date. The seller commenced to supply the goods pursuant to the contract, but as the buyer failed to make payment, seller suspended deliveries until the buyer provided the required guarantee. The parties then agreed that seller would continue to supply the goods provided the buyer obtained the guarantee that was initially requested. But when buyer sent a guarantee, it bore the expiration date that was originally agreed upon and therefore was no longer valid. The frustrated seller commenced arbitral proceedings demanding payment and interest. The arbitral tribunal determined that the buyer had breached the good faith standard of conduct, deriving it from the Convention's Article 7(1). The arbitral tribunal also said that pursuant to CISG Article 8(3), a reasonable person under the same circumstances as the buyer would have understood that the bankers guarantee had to be in effect. Furthermore, according to Article 54 of the Convention, the obligation of the buyer to take the enabling steps to effect payment includes the obligation to secure it.

D. CLOUT Case No. 142, Russian Arbitration, 1995[83]

This case involves a German seller and a Russian buyer. The buyer had received the goods but failed to pay the price, arguing that the bank that was responsible for his foreign currency transactions had been unable to transfer the amounts to the seller.[84] The buyer did not have currency that was freely convertible currency in his bank account to pay for the goods.[85]

---

81. Arbitration Court of the Chamber of Commerce and Industry of Budapest, Hungary, 17 Nov. 1995, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=217&step=Abstract.

82. *Id.*

83. *See* CLOUT Case No. 142, *supra* note 39.

84. *Id.*

85. *Id.*

During the proceedings, it was established that the buyer had merely sent instructions to the bank, but had not taken measures to ensure that the payment could in fact be made.[86]

These cases reflect a principle that should go without saying: that the enabling steps must in effect lead to the seller obtaining payment for the sold goods, a view that is consistent with Article 54 of the CISG, with the principle of collaboration that is expected from parties involved in international sales transactions, and that is indirectly mandated by means of CISG Article 7(1), providing that in its interpretation regard is to be had to its international character, promotion of its uniform application and the observance of good faith in international trade.

V. SUPPLEMENTING CISG ARTICLE 54 WITH THE UNIDROIT PRINCIPLES

CISG Article 54 may be adequately supplemented via the UNIDROIT Principles of International Commercial Contracts 2004. However, we should note that the Principles do not apply automatically in matters governed by the CISG, but would require incorporation by the parties into their contract. Thus, parties to an international sales contract may agree that "matters not governed by the CISG, or by the principles on which it is based, shall be governed by the UNIDROIT Principles." If this is so, the UNIDROIT Principles may serve as an interesting complement to Article 54 on the obligations of the buyer to effect payment.[87]

Concerning buyer's enabling steps to effect payment, the UNIDROIT Principles include provisions on "Payment by cheque or other instrument" (Art. 6.1.7), on "Payment by funds transfer" (Art. 6.1.8); a provision on "Application for public permission" (Art. 6.1.14);[88] "Procedure in applying for permission" (Art. 6.1.15),[89] "the circumstance where permission is neither granted nor refused" (Art. 6.1.16);[90] and on "Permission refused" (Art. 6.1.17).[91] Indeed, Article 54 says nothing as to when the price is to be deemed as paid when payment is effected by check, or by means of electronic fund

86. *Id.*

87. "[T]he UNIDROIT Principles [and the Sales Convention] are not alternatives but complementary instruments." Michael Joachim Bonnell, *The UNIDROIT Principles of International Commercial Contracts*, 36 REVUE JURIDIQUE THEMIS 335, 353 (2002).

88. *See* UNIDROIT Principles art. 6.1.14.

89. *See* UNIDROIT Principles art. 6.1.15.

90. *See* UNIDROIT Principles art. 6.1.16.

91. *See* UNIDROIT Principles art. 6.1.17.

transfers,[92] two topics that are covered though in very broad terms[93] by the UNIDROIT Principles.[94] The CISG also does not elaborate much on the issue of the procedures to apply for a governmental authorization. As stated in its Preamble, the Principles can serve as a means of interpreting and supplementing international uniform law instruments, such as the Sales Convention.

A. Payment by Check or Other Instrument (UNIDROIT Principles Article 6.1.7)[95]

Under the UNIDROIT Principles, payment may be made in any form used in the ordinary course of business at the place of payment.[96] Said payment can take the shape of cash, check, banker's draft, a bill of exchange, credit card or any other form, including electronic means of payment.[97] When a payment is effected by check, or any other means of payment, there exists a presumption that the seller accepts on the condition that it will be honored,[98] either by a financial institution or another person, or even by the seller.[99] The UNIDROIT Principles also provide that in some countries, delivery of certified checks, banker's drafts and cashiers checks are considered as being equivalent to payment by the buyer, thus transferring the risk of insolvency of the bank to the seller.[100] Of course, in countries that recognize the *aval* as a form of providing security, the note could be paid by either the person that

---

92. For legislation on wire transfer law, see the United States' U.C.C. art. 4-A. For an international law, see United Nation's Model Law on International Credit Transfers, U.N. GAOR, 47th Sess., Supp. No. 17, at Annex 1, p. 48, U.N. Doc. A/47/17 (1992).

93. Comment to UNIDROIT Principles' Article 6.1.7 provides that: "[w]ithout attempting to provide a detailed regulation, which would not be compatible with the very rapid evolution of techniques in this field, Arts. 6.1.7 and 6.1.8 establish some basic principles which should be of assistance in regard to international payments."

94. The internationally accepted Uniform Customs and Practices (UCP) 500, *supra* note 6, covers the issue of letters of credit. Many countries have also enacted legislation on this topic to a greater or lesser extent.

95. UNIDROIT Principles Article 6.1.7 reads:

(1) Payment may be made in any form used in the ordinary course of business at the place of payment.

(2) However, an obligee who accepts, either by virtue of paragraph (1) or voluntarily, a cheque, any other order to pay or a promise to pay, is presumed to do so only on condition that it will be honoured.

96. UNIDROIT Principles art. 6.1.7(1).

97. *See* Comment 1 to UNIDROIT Principles art. 6.1.7.

98. UNIDROIT Principles art. 6.1.7(2).

99. *See* Comment 2 to UNIDROIT Principles art. 6.1.7.

100. *Id.*

made the note or even by the person that *avalized* the document given by the debtor.[101]

Because Article 54 of the CISG makes reference to the buyer's compliance with the contractual requirements or formalities to enable payment to be made, UNIDROIT Principles Article 6.1.7 provides assistance in clarifying and interpreting the Convention in two ways. First, it would provide a more predictable rule as to what is expected of the buyer when effecting payment, by taking into account the ordinary course of business at the place where payment is to be made. Second, it would create a predictable presumption that instruments given as payment are accepted on condition that the instrument will be honored, unless there is a contrary usage to that effect.

B. Payment by Funds Transfer (Article 6.1.8)

Under the UNIDROIT Principles, unless the obligee has indicated a particular account, a buyer may effect payment by transferring funds to the financial institution of the seller known to the buyer.[102] A buyer's discharge of his obligation would be deemed to have occurred when the transfer to the sellers' financial institution becomes effective,[103] and does not require knowledge of the seller. The reason this is so, is because the seller's bank would be deemed to be his agent. It also means that payment will not be effective simply because the buyer gives an order to the transferor's bank and said amount has been debited from it: the money would need to be credited to seller's bank in order for payment to be deemed effective. As Professor Raj Bhala explains:

> The concept of discharge is tricky in two senses. First, its legal importance is not always clearly understood. The crucial point is that until a wire transfer is completed, which occurs when the beneficiary's bank accepts a payment order for the beneficiary, the originator [buyer] is legally liable on this obligation—it is not discharged.[104]

---

101. For a comparative analysis of Bills of Exchange Law, see JAHN, *supra* note 7.

102. The UNIDROIT Principles Article 6.1.8 reads:

(1) Unless the obligee has indicated a particular account, payment may be made by a transfer to any of the financial institutions in which the obligee has made it known that it has an account.

(2) In case of payment by a transfer the obligation of the obligor is discharged when the transfer to the obligee's financial institution becomes effective.

103. CLOUT Case No. 236 [Oberlandesgericht München, Germany, 9 July 1997], *available at* http://cisgw3.law.pace.edu/cases/970709g1.html.

104. BHALA, *supra* note 8.

Because international contracts depend so heavily on international fund transfers,[105] having a uniform international rule to apply to this issue would be beneficial to all parties involved in international trade. The UNIDROIT Principles would seem to provide such a supplemental rule.

C. Currency for Payment, Rate of Exchange, Failure to Express a Currency and Costs of Performance (Articles 6.1.9, 6.1.10 and 6.1.11)

Pursuant to the UNIDROIT Principles, in cases where the payment obligation is expressed in a currency other than that of the place for payment, it may be made by the buyer in the currency of the place for payment.[106] There are, however, two exceptions under the Principles: when the currency is not freely convertible, or when the parties have included an *effectivo* clause. There may be circumstances where it may be impossible for the buyer to make the payment in the agreed currency.[107] In this case, the seller may require payment in the currency of the place for payment, even if there is an *effectivo* clause.[108]

With regard to the rate of exchange, the UNIDROIT Principles provide that the rate shall be the prevailing rate of exchange at the place for payment

---

105. According to Profesor Raj Bhala:

> [t]he foreign exchange market is the worlds largest financial market. Average daily turnover exceeds on trillion dollars [and] the most active participants in the market are roughly 200,000 active foreign exchange traders employed by commercial and investment banks, treasury officials in corporations, and institutional investors like mutual and pension funds.

Id.

106. The UNIDROIT Principles Article 6.1.9 (*currency of payment*) reads:

(1) If a monetary obligation is expressed in a currency other than that of the place for payment, it may be paid by the obligor in the currency of the place for payment unless
   a. That currency is not freely convertible; or
   b. The parties have agreed that payment should be made in the currency in which the monetary obligation is expressed.

(2) If it is impossible for the obligor to make payment in the currency in which the monetary obligation is expressed, the obligee may require payment in the currency of the place for payment, even in the case referred to in paragraph (1)(b).

(3) Payment in the currency of the place for payment is to be made according to the applicable rate of exchange prevailing there when payment is due.

(4) However, if the obligor has not paid at the time when payment is due, the obligee may require payment according to the applicable rate of exchange prevailing either when payment is due or at the time of actual payment.

107. *See* UNIDROIT Principles art. 6.1.9(2).

108. *Id.* An "*effectivo* clause" is one which stipulates that payment must be made in the expressed currency.

when payment is due.[109] In cases where a buyer does not pay the seller when payment is due, the seller may require payment either at the rate of exchange prevailing either when payment was due or at the actual time for payment.[110]

Admittedly, I can envision very few circumstances where parties to a contract will not agree to the currency in which payment is to be effected. The UNIDROIT Principles Article 6.1.10 addresses this issue, and states that the applicable currency shall be the currency of the place where payment is to be made.[111] The cost of performing the payment obligation is to be borne by the buyer.[112] This has already been stated in at least one case applying the CISG.[113]

D. Application for Public Permission, Procedure in Applying for It, and the Response to the Application (Articles 6.1.14, 6.1.15, 6.1.16 and 6.1.17)

As has been discussed throughout this paper, pursuant to CISG Article 54, a buyer must take enabling steps of a commercial and administrative nature. The following provisions supplement the scope of buyer's obligation in obtaining the required authorizations when applying for a license to purchase or export currency abroad.

Under the UNIDROIT Principles, when the state requires a public permission affecting the validity of the contract or its performance and neither that law nor the circumstances indicate otherwise, if only one party has its place of business in that state, that party shall take the measures necessary to obtain the permission.[114] In any other case the party whose performance requires permission shall take the necessary measures.[115]

With regard to the procedure to apply for the permission, the UNIDROIT Principles provide that such a party is required to take the necessary steps to

---

109. *See* UNIDROIT Principles art. 6.1.9(3).

110. *See* UNIDROIT Principles art. 6.1.9(4).

111. *See* UNIDROIT Principles art. 6.1.10.

112. *See* UNIDROIT Principles art. 6.1.11.

113. *See* Landgericht Duisburg, Germany, 17 Apr. 1996, *available at* http://cisgw3.law.pace.edu/cases/960417g1.html (cited in the UNCITRAL Digest, *supra* note 21, on CISG art. 54).

114. The UNIDROIT Principles Article 6.1.14 (Application for public permission) provides:

> Where the law of a State requires a public permission affecting the validity of the contract *or its performance* and neither that law nor the circumstances indicate otherwise
>
> (a) if only one party has its place of business of that State, that party shall take the measures necessary to obtain the permission;
>
> (b) in any other case the party whose performance requires permission shall take the necessary measures. (Emphasis added.)

115. *Id.*

obtain the permission, and that this must be done without delay and that the applicant shall bear the costs incurred.[116] Under the Principles, whenever appropriate the applicant must give notice to the seller of the grant or refusal of such a permission without undue delay.[117]

The UNIDROIT Principles include a rule regarding the circumstance in which an administrative authority neither grants nor refuses an authorization, in spite of the fact that the party responsible for such has taken all measures.[118] In this case, within the agreed period, or where no period has been agreed, either party is entitled to terminate the contract.

A situation can be envisioned where notwithstanding the buyer's application for a license to purchase or export currency, the authority simply remains motionless, leaving all parties in limbo.

In cases where permission is refused and renders the contract's performance impossible,[119] the UNIDROIT Principles provide that the rules on *force majeure* apply.[120] In our case, and analyzing whether the requirements are met, a buyer could be exempt under Article 79 of the CISG.

VI. CONCLUSION

So far, the courts that have interpreted CISG Article 54 have done a fairly good job at it, and have been able grasp that its broad scope was intended to serve as a "catch-all" to include all those steps involved in discharging the

---

116. The UNIDROIT Principles Article 6.1.1 (Procedure in applying for permission) provides:
(1) The party required to take the measures necessary to obtain permission shall do so without undue delay and shall bear any expenses incurred.
(2) That party shall whenever appropriate give the other party notice of the grant or refusal of such permission without undue delay.

117. *Id.*

118. The UNIDROIT Principles Article 6.1.16 (Permission neither granted nor refused) provides:
(1) If, notwithstanding the fact that the party responsible has taken all measures required, permission is neither granted nor refused within an agreed period or, where no period has been agreed, within a reasonable time from the conclusion of the contract, either party is entitled to terminate the contract.
(2) Where the permission affects some terms only, paragraph (1) does not apply if having regard to the circumstances, it is reasonable to uphold the remaining contract even if the permission is refused.

119. The UNIDROIT Principles Article 6.1.17 (Permission refused) provides:
(1) The refusal of a permission affecting the validity of the contract renders the contract void. If the refusal affects the validity of some terms only, only such terms are void if, having regard to the circumstances, it is reasonable to uphold the remaining contract.
(2) Where the refusal of a permission renders the performance impossible in whole or in part, the rules on non-performance apply.

120. *See* UNIDROIT Principles art. 7.1.7 (tracing part of the language of CISG art. 79).

payment obligation, which, as has been repeatedly stated, may include steps of both a commercial and an administrative nature.

When the enabling steps are of a commercial nature, they must be adequate so that they enable payment to be made, and must not serve as a lure to get the goods out of the hands of the seller.

When the enabling steps involve administrative authorizations, the buyer must pursue them with a view to actually obtaining the authorization. Furthermore, a buyer should not be allowed to profit from a claim that he cannot pay because the government has suspended all payments, particularly in cases where the suspension had been in place from the very moment the parties entered into the contract.

Finally, the UNIDROIT Principles on International Commercial Contracts are playing a greater role in the constant development of international trade law and have provided invaluable assistance, not only in interpreting the CISG, but also in complementing it.