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LATE PAYMENT DIRECTIVE 2000/35 AND THE CISG

Pilar Perales Viscasillas*

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I. INTRODUCTION

Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on Combating Late Payment in Commercial Transactions¹ is primarily aimed at combating excessive payment periods in the European Union.² The importance of this regulation is self-evident, as it is the first time that the European Community has dealt with this core issue of the

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¹ Parliament & Council Directive 2000/35, 2000 O.J. (L 200) 35 (EC) [hereinafter Directive 2000/35]. A chronological analysis of its records can be found in Marta García Mandaloniz, *La lucha contra la morosidad en las operaciones comerciales: Adaptación del ordenamiento jurídico español a la Directiva 2000/35/CE* [Fight Against the Dilatoriness in Commercial Operations: Adaptation of the Spanish Legal System to the Directive 2000/35/EC], 228 *NOTICIAS DE LA UNIÓN EUROPEA* [News of the European Union] 9, 11 (Jan. 2004).

² See Directive 2000/35, *supra* note 1.

Law of Obligations and Contracts without having to resort to consumer protection³ arguments for justification. While aimed at reducing excessive payment periods in the European Union, this Directive also regulates other basic debtor-creditor concerns of the Law of Obligations and Contracts, such as payment periods,⁴ interest on late payments,⁵ compensation for recovery costs,⁶ unfair contract terms to creditors,⁷ and retention of title clauses.⁸

Even though the Directive may be criticised for some points, other parts of this regulation are to be praised. There is one feature that is regarded as especially significant: the Directive follows the modern trends laid down in the Law of Obligations and Contracts,⁹ which are mainly represented in the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG),¹⁰ and its descendants.¹¹ The Di-

³ See Alessio Zaccaria, *The Relative Directive 2000/35/CE To Fight Against Delays of Payment in the Transaction*, 6-2000/01 EUROPEAN LEGAL FORUM 386 (2001).

⁴ Directive 2000/35, *supra* note 1, art. 3.1(a)-(b).

⁵ *Id.* art. 3.1(c)-(d).

⁶ *Id.* art. 3.1(e).

⁷ *Id.* arts. 3.3-3.5.

⁸ *Id.* art. 4.

⁹ See PATRICK SHAW, TREATISE OF THE LAW OF OBLIGATIONS AND CONTRACTS (1847).

¹⁰ See United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, available at <http://cisgw3.law.pace.edu> [hereinafter CISG]. The Working Paper from the Commission on payment periods in commercial transactions includes a recommendation that all Member States ratify the CISG. See PARL. EUR. DOC. (SEC 92) 2214, 40-41 (1992). Currently, all Member States with the exception of Malta, Portugal, the United Kingdom, and Ireland have ratified the Convention. A total number of seventy States have already ratified the convention (as of Mar. 22, 2007). See United Nations Commission on International Trade Law, *Status: 1980-United Nations Convention on Contracts for the International Sale of Goods*, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Mar. 22, 2007) [hereinafter UNCITRAL].

¹¹ See, e.g., International Institute for the Unification of Private Law, Principles of International Commercial Contracts (Rome 2004) [hereinafter UNIDROIT Principles]; Commission on European Contract Law, The Principles of European Contract Law 1998 Pts. I-II, available at <http://www.jus.uio.no/lm/eu.contract.principles.1998/doc.html> [hereinafter PECL]. Representations of the CISG's influence in other regional and international instruments aimed at achieving a more uniform and harmonized Law of Obligations and Contracts include so-called soft law, such as the UNIDROIT Principles and the PECL (although increasingly less consistent with the concept of soft law).

rective eliminates the need for a reminder before a payment is considered late, thus implying that interest accrues automatically due to a delay in payment. This is a result of the fact that late payment has become a common issue within actions for breach, which covers later payment itself, the interest representing compensation for the delay (which is different from the right to claim damages), and an express right to compensation for costs of recovery. Equally relevant is the express regulation of the retention of title clause, which involves a unification of this matter's basic aspects within the European Community, as well as an express acknowledgement of the effects produced *inter partes*.¹²

This Article analyses how the relationship between Directive 2000/35, its implementation in some Member States, and the Vienna Convention are to be understood when taking into account that both instruments could apply to the same transaction.

II. THE VIENNA CONVENTION OF 1980 AND THE COMMUNITY DIRECTIVES, ESPECIALLY DIRECTIVE 2000/35: THE PRIMACY OF THE CONVENTION AND ARTICLE 90 OF THE CISG

At first glance, it seems easy to determine how the Vienna Convention applies when faced with domestic non-uniform law in the case of a transaction that falls within its scope: the Vienna Convention prevails over non-uniform domestic law.¹³ This also appears to include imperative rules, for example, the rules relating to maximum periods established by domestic law.¹⁴ There can be no other interpretation considering that

¹² See Directive 2000/35, *supra* note 1, art. 4.

¹³ See RAFAEL ILLESCAS ORTIZ & PILAR PERALES VISCASILLAS, *DERECHO MERCANTIL INTERNACIONAL. EL DERECHO UNIFORME* 153-53 (Cersa 2003) (in relation to the Spanish Law on General Conditions on Contracts); see also Miguel Virgós & Francisco Garcimartín, *Article 3*, in *COMENTARIOS A LA LEY SOBRE CONDICIONES GENERALES DE LA CONTRATACIÓN* 149-50, 166 (Aurelio Menéndez Menéndez, Luis Díez-Picazo, Ponce de León & Jesús Alfaro Águila Real eds., Civitas 2002) (in relation to Directive 2000/31 on Electronic Commerce).

¹⁴ Directive 2000/35 has been implemented in Spain by virtue of two regulations: Law 3/2004 on combating late payments in commercial transactions (B.O.E., 2004. 314) [hereinafter Law 3/2004], and Law 7/1996 (B.O.E., 1996. 15), which establishes mandatory maximum periods of payment for certain products. The relationship between both regulations is complementary, the latter being applied first and the former acting as a gap filler.

the requirement of a uniform international law justifies the exclusion of domestic rules otherwise considered essentially imperative, as they would lead to different interpretations and consequences in the application of autonomous international instruments. This explains why, as a rule, when a case is governed by the Vienna Convention, non-uniform domestic law cannot be applied.

However, the relationship between non-uniform domestic law and the Vienna Convention has become more complex, as shown by Law 3/2004,¹⁵ the Spanish implementation of Directive 2000/35.¹⁶ At this stage, some authors have analysed the implications of Article 90 of the CISG¹⁷ when it is confronted with Community Directives related to commercial transactions carried out within the EU.¹⁸ This issue has become especially important, considering that the Community legislator has decided to set aside consumer implications in order to regulate the relationship between undertakings, as in Directive 2000/35 and in part of Directive 2000/31 on Electronic Commerce.¹⁹ This is

¹⁵ Law 3/2004, *supra* note 14.

¹⁶ Directive 2000/35, *supra* note 1.

¹⁷ Article 90 states: "This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement." CISG, *supra* note 10, art. 90.

¹⁸ See Peter Schlechtriem, *Article 90*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 921-22 (Peter Schlechtriem & Ingeborg Schwenzer eds., Geoffrey Thomas trans., Oxford Univ. Press 2d ed. 2005) (1998) [hereinafter Schlechtriem, *Article 90*] (pointing out how some authors consider that EU Law (Directives and Regulations) falls within the scope of Article 90 of the CISG; as a consequence, it prevails over the CISG). Another author seems to share this opinion of a broad interpretation of Article 90 of the CISG in relation to the Directives. Fernando Pantaleon, *Article 74*, in LA COMRAVENTA INTERNACIONAL DE MERCADERÍAS: COMENTARIO DE LA CONVENCIÓN DE VIENA 593 (Luis Díez-Picazo ed., Civitas 1998). Other authors, however, consider that at least the Directives cannot prevail over the Convention. Franco Ferrari, *Universal and Regional Sales Law: Can They Coexist?*, UNIF. L. REV., vol. viii, no. 1/2, 177-89, 181-82 (2003). There are also some authors who demand the application of Article 94 of the CISG, thus requiring an express statement for EU Member States not to be bound by the Convention in the issues that are also regulated by Directives. See Schlechtriem, *Article 90*, *supra*.

¹⁹ ILESCAS ORTIZ & PERALES VISCASILLAS, *supra* note 13, at 166. As already stated, the rule provided by Directive 2000/31 Article 11 on Electronic Commerce that requires acknowledgement of receipt is not applicable to the issues governed by the Vienna Convention. Council Directive 2000/31, 2000 O.J. (L 178) 21 (EC). For a more detailed discussion see Pilar Perales Viscasillas, *CISG Articles 14-24*,

also especially important with regard to the possible connection between Community Directives and the CISG. As long as an issue is governed by the CISG, domestic law, irrespective of its domestic or Community origins, shall not be applied. As with domestic law, Directives apply to a predetermined geographic, industrial, and political area, whereas Uniform International Sales Law is based on the principles of internationality and uniformity, thus implying that interferences shall be reduced to a minimum.²⁰ On the other hand, secondary Community legislation, namely Regulations and Directives, are unlikely to qualify as "international agreements" in the sense of Article 90 of the CISG, especially in the case of Directives, which are implemented through domestic law.²¹

Renowned authors²² have alleged that a final argument justifying minimum interference by Community Law with the Vienna Convention is the position adopted by Community institutions regarding the Vienna Convention, that is considered *quasi-acquis communautaire*.²³ Indeed, not only is the Vienna Convention indirectly considered part of the *acquis communautaire*, as twenty-three of the twenty-seven member

in *The CISG and the Business Lawyer: The UNCITRAL Digest as a Contracting Drafting Tool*, University of Pittsburgh, School of Law, November 4-5, 2005 (in press); see also Peter Schlechtriem, *Introduction to Articles 14-24*, in COMMENTARY ON THE U.N. CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), *supra* note 18, at 182-83 [hereinafter Schlechtriem, *Introduction to Articles 14-24*] (regarding the pre-contractual duty of information and its impact on the Convention).

²⁰ This is consistent with Schlechtriem, *Article 90*, *supra* note 18, no. 12(b) (stating that the CISG should be protected against the indirect influence of Directives, drafted without having regard to the international and uniform scope of the Convention).

²¹ See Ulrich Magnus, *The CISG's Impact on European Legislation*, in THE 1980 UNIFORM SALES LAW. OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES. VERONA CONFERENCE 2003 129, 131 (Franco Ferrari ed. 2003); see also Schlechtriem, *Article 90*, *supra* note 18, no. 13; Günter Hager, *Article 58*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), *supra* note 18, at 640-41 (taking into account that Directive 2000/35 Article 3.1(b) is not applicable thereto); see also Franco Ferrari, *Analysis of Preamble and CISG Articles 1-7, 10, 89-101 [in German]*, in KOMMENTAR ZUM EINHEITLICHEN UN KAUFRECHT 37-139, 153-55, 847-71 (Beck, 3d ed., 2000).

²² See Schlechtriem, *Article 90*, *supra* note 18; see also Magnus, *supra* note 21, at 131.

²³ Schlechtriem, *Article 90*, *supra* note 18, no. 13. See Resolution of the European Parliament on the approximation of civil and commercial Law of the Member States, COM (2001) 398. The term *acquis communautaire* refers to the total body of European Union law.

states have ratified the Convention,²⁴ but also directly by way of Directive 1999/44,²⁵ which governs certain aspects of the sale of consumer goods and associated guarantees,²⁶ particularly regarding the concept of sales,²⁷ the lack of conformity of goods,²⁸ and the structure of rights and actions for breach of contract.²⁹ Without any doubt, the CISG is the model preferred by Community institutions to elaborate the future *acquis communautaire* of the EU.³⁰

²⁴ UNCITRAL, *supra* note 10.

²⁵ See Magnus, *supra* note 21, at 132 ("The CISG played a major role as a model for the Directive.").

²⁶ European Parliament & Council Directive 1999/44, art. 1.1, 1999 O.J. (L 171) 12, 14 (EC).

²⁷ See CISG-AC Opinion No. 4, Contracts for the Sale of Goods to be Manufactured or Produced and Mixed Contracts (Article 3 CISG) 24 October 2004. Rapporteur: Professor Pilar Perales Viscasillas, Universid Carlos III de Madrid, available at <http://cisgw3.law.pace.edu/cisg/CISG-AC-op4.html>.

²⁸ European Parliament & Council Directive 1999/44, art. 2, 1999 O.J. (L 171) 12, 14 (EC).

²⁹ *Id.* arts. 3-5.

³⁰ The EU is known to have been long involved in improving the Community *acquis* in the area of Contract Law. The EU is drafting an instrument, that shall probably be optional, to constitute a common frame of reference ("CFR") for EU Contract Law. The first stone was laid by the passing of the Principles of European Contract Law, followed by the constitution of the *Study Group on a European Civil Code*, which is divided into several working groups in charge of developing the different chapters on certain types of contracts. In 2003, the Commission published the so-called "Action Plan." See *Communication from the Commission to the European Parliament and the Council – A More Coherent European Contract Law – An Action Plan*, (2003/C 63/01), DO C 63, 15.03.2003, p.1 (an examination of the solutions); Council Resolution on "A More Coherent European Contract Law" (DO C 246, 14.10.2003, p.1) (containing several measures that shall be included in the CFR). With regard to the development of the CFR itself, it is logical to assume that, if it is going to take into account the Community's Contract Law *acquis* and the relevant international instruments, especially the Vienna Convention, Directive 2000/35 is going to play a key role. This is because it applies generally to payment obligations in contracts with mutual obligations and, besides, it uses several fundamental principles derived from the Convention, such as the constitution of late payment without the need of any request and the right to payment of interest. The right to interest is expressly mentioned in the structure of the CFR. See *Communication from the Commission to the European Parliament and the Council. European Contract Law and the Revision of the Acquis: The Way Forward*, COM (2004) 651 final (Oct. 11, 2004), available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/com2004_en.pdf [hereinafter, "Revision of the Acquis"].

III. ISSUES GOVERNED BY DIRECTIVE 2000/35 AND THEIR POSSIBLE RELATIONSHIP TO THE VIENNA CONVENTION

As already mentioned, the possibility of Directive 2000/35 interfering with the CISG should be minimized, thereby hindering the Directive from influencing the regulations on payment periods,³¹ compensation for recovery costs,³² and exemption from liability.³³ However, while uniform and autonomous international interpretation (that is, irrespective of domestic law) constitutes a fully accepted principle within Uniform International Sales Law, especially the CISG,³⁴ at some points there may be a confluence of the uniform text and domestic law. Hence, two particular issues may be identified in relation to Directive 2000/35: determination of the interest rate³⁵ and general terms.³⁶

1) *Payment Periods*

The period for payment, defined as the period between either the delivery of the goods or the performance of a service and payment,³⁷ may be determined by the legislature absent a decision made by the parties.³⁸ Late payment starts automatically if the debtor does not pay within the established contractual or statutory date or period.³⁹

Article 3 of Directive 2000/35 seems to refer to the date when interest for late payment shall become payable, rather than to the payment period. Thus, the indicated period of thirty days only serves to determine the *dies a quo*⁴⁰ of the interest to

³¹ Discussed *infra* Part III.1.

³² Discussed *infra* Part III.2.

³³ Discussed *infra* Part III.3.

³⁴ CISG, *supra* note 10, art. 7.1.

³⁵ Discussed *infra* Part III.4.

³⁶ Discussed *infra* Part III.5.

³⁷ See *Commission Working Paper on Payment Periods in Commercial Transactions*, at 7, 40-41, SEC (92) 2214 (Nov. 18, 1992).

³⁸ *Id.*

³⁹ See Directive 2000/35, *supra* note 1, art. 2.2 ("late payment" means exceeding the contractual or statutory period of payment); *id.* art. 3.1(c) ("The creditor shall be entitled to interest for late payment to the extent that: i) he has fulfilled his contractual and legal obligations; and ii) he has not received the amount due on time, unless the debtor is not responsible for the delay.").

⁴⁰ In Civil Law, the term *dies a quo* refers to a "transaction's commencement date; the date from which to compute time, such as a day when interest begins to accrue." BLACK'S LAW DICTIONARY 486 (8th ed. 2004).

be paid for the delay in payment.⁴¹ However, far from being neutral, the Directive ultimately determines the moment of payment. This can be deduced from the determination of the *dies a quo* of interest.⁴² If interest shall become payable only thirty days following the date of receipt of the invoice or the goods, it follows that there is no breach until this moment, so that the period for payment is also being regulated.⁴³ It is not surprising that, in implementing the Directive, some Member States, including Spain, have provided two different rules: one regarding the period for payment and another regulating interest for late payment.⁴⁴ The consequences could hardly be worse, as this regulation has breached one of the basic principles of Contract Law, namely the *synallagmatic* principle,⁴⁵ which is applicable to bilateral contracts.⁴⁶ Unlike Spain and

⁴¹ Directive 2000/35, *supra* note 1, art. 3.1(b) (stating: "1. Member States shall ensure that . . . b) if the date or period for payment is not fixed in the contract, interest shall become payable automatically without the necessity of a reminder . . .").

⁴² See Luigi Mengoni, *La Direttiva 2000/35/CE in tema di mora debendi nelle obbligazioni pecuniary*, in *EUROPA E DIRITTO PRIVATO* 77-78, no. 1 (2000). The author criticizes this rule for not being the best way to combat late payment, but justifies the Directive's deviation from the traditional principles given the necessity of balancing the treatment offered to the debtor in the circumstances stated by Directive 2000/35 Article 3.1(a)-(b), taking into account that the period starts to run after delivery. *Id.* at 79-80.

⁴³ See Directive 2000/35, *supra* note 1, art. 3.2.

For certain categories of contracts to be defined by national law, Member States may fix the period after which interest becomes payable to a maximum of 60 days provided that they either restrain the parties to the contract from exceeding this period or fix a mandatory interest rate that substantially exceeds the statutory rate.

Id.

⁴⁴ See Law 3/2004, *supra* note 14, arts. 4, 7; see also, e.g., *Loi du 2 Aout 2002, art. 4*, Loi concernant la lutte contre le retard de paiement dans les transactions commerciales (Belgium): "S'il n'en a été autrement convenu par les parties dans le respect de l'article 7, tout paiement en rémunération d'une transaction commerciale doit être effectué dans un délai de thirtyjours à partir du jour qui suit celui . . ."; European Communities (Late Payment in Commercial Transactions) Regulations 2002 (S.I. no. 388 of 2002, § 2.1) (Ir.).

⁴⁵ "A contract is bilateral, or synallagmatic, when the parties obligate themselves reciprocally, so that the obligation of each party is correlative to the obligation of the other." LA. CIV. CODE ANN. art. 1908 (2005). In this kind of obligation the delivery and the payment are done simultaneously.

⁴⁶ See Directive 2000/35, *supra* note 1, art. 1 (defining the scope of the Directive: "This Directive shall apply to all payments made as remuneration for commercial transactions"); Directive 2000/35, *supra* note 1, art. 2.1 ("commercial transactions' means transactions between undertakings or between undertakings

those other Member States that have determined that “due” means the same as “payable” after the period of thirty days, other Member States have understood that the *synallagmatic* principle must be respected.⁴⁷ This is also in accordance with

and public authorities which lead to the delivery of goods or the provision of services for remuneration.”).

⁴⁷ See Bürgerliches Gesetzbuch [BGB] [Civil Code] Nov. 26, 2001, Bundesgesetzblatt, Teil I [BGBL. I] 3138, § 286, ¶ 3 (F.R.G.), *translation available at* <http://www.iuscomp.org/gla/statutes/BGB/htm>. The German Civil Code establishes that once payment is due and an invoice or equivalent payment statement has been received, the debtor must perform payment within a period of thirty days, otherwise payment is late. *Id.* If the debtor is a consumer, this rule only applies if he or she has been informed of its existence and consequences in the invoice or other payment statement. *Id.* Notice that the BGB is a simplification of the wording of Directive 2000/35, art. 3, but it does not disrupt the *synallagmatic* principle, as it refers to an obligation that has already become payable thirty days after receipt of the invoice or the goods. See *id.*; Law 3/2004, *supra* note 14. However, according to the Spanish regulation thereof, in case of lack of agreement between the parties, the obligation becomes payable thirty days after receipt of the invoice or of the goods, where appropriate. Law 3/2004, *supra* note 14. Also Lithuania’s Law regarding the issue does not refer to the period for payment, but rather to the payment of interest. See Teises Akta Prieme [Law on the Prevention of Late Payment in Commercial Transactions], No. 1X- 1873 (2003) (Lith.), *translation available at* http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_1?p_id=229607. This is also believed to be the understanding of the Finnish legislature. Interest Act 633/1982, amended by Law 340/2002, *available at* <http://www.finlex.fi/en/laki/kaannokset/1982/en19820633.pdf> (Fin.). Law 633/1982 does not refer to the period for payment, but to the date or period when interest becomes payable, at the same time stating that the debtor is not obliged to pay interests during the period prior to the due date of the debt. *Id.* This rule can only be understood by interpreting that the debt falls due and becomes payable at different times. See Late Payment of Commercial Debts (Interest) Act, 1998, c. 20 § 4(5) (Eng.); Decreto-Lei [Decree Law], No. 32/2003 (Port.). In Portugal, Article 4 of Decreto-Lei 32/2003, refers to the due date of the interest rate. Decreto-Lei n. 32/2003, de 17 de Fevereiro, *available at* http://www.tribunaisnet.mj.pt/injun/LexInjun/pdfs/DecLei_32_2003.pdf. See also Act of 12 June 2003 on Payment Periods in Commercial Transactions, 2003, art. 6 (Pol.), *translation available at* http://www.mg.gov.pl/NR/rdonlyres/887D7045-8F4F-48F6-85A8-1C4E8A39874D/0/ang_act_of_12062003_payment_periods.rtf (stating that if the date or period for payment is not fixed in the contract, payment shall be made on the date or within the period established in the action for payment or specified in the invoice and that the right to claim interest begins thirty-one days after the day on which payment should have been made; also stating if payment is not made, the right to claim interests appears thirty-one days after the date when payment should have been made). In Luxembourg, the period when interest becomes payable is established in Article 3.2. *Loi du 18 avril 2004 relative aux délais de paiement et aux intérêts de retard. Memorial Journal Officiel du Grand-Duché de Luxembourg, 6 mai 2004, A-no.66* (Lux.), *available at* <http://www.legiluz.public.lu/leg/a/archives/2004/0660605.pdf>. Understanding that Article 3.2 refers to the payment period of invoices: THEWES, p.180 and p.182. The Italian legislature is not as clear, since it has replicated the Directive’s word-

the wording of Article 3.1(b) of the Directive, which establishes that interest shall automatically become payable thirty days after the date of receipt of the invoice or of the goods without the necessity of a reminder.⁴⁸ If a reminder is no longer needed, it is because the debt is already due, so that only the moment that the debt becomes payable is deferred.⁴⁹ However, even though there is no theoretical disruption of the *synallagmatic* principle, Directive 2000/35 does create a legal thirty day delay in payment, starting basically on the date of receipt of the invoice, on the date of receipt of the goods, or on the date when the acceptance or verification of the conformity⁵⁰ of the goods or services has taken place.⁵¹ On the contrary, the general rule for contractual obligations in the European Union requires that payment

ing and therefore refers to the moment when interest shall become payable. See Decreto-Legislativo [Decree Law], Oct. 9 2002, n.231, art. 4.2, Gazz. Uff., Oct. 23, 2002, n.249.

⁴⁸ See Directive 2000/35, *supra* note 1, art. 3.1(b).

⁴⁹ In support of this proposition, authors have stated:

Furthermore, the Directive does not relate to the question when claims become due (in the event of doubt, claims become due at once), but merely determines the point as of which interests are due. As a result, national private law can continue to distinguish between the due date of the principal claim and that of the interests.

Reinhard Schulte-Brauks & Steven Ongena, *The Late Payment Directive: A step towards an emerging European Private Law?*, 4 EUR. REV. PRIV. L. 530 (2005).

⁵⁰ The reference to the term conformity of the goods is noteworthy. It is a clear reference to the "Principle of conformity," which stemmed from the CISG and was incorporated as Community law by means of the Directive 1999/44. Therefore, the logical conclusion would be to assume that when Directive 2000/35 mentions a procedure to ascertain the "conformity" of the goods or services, it is implicitly including the legal significance of the said term, taking into account that the instruments containing that principle (Vienna Convention and Directive 1999/44) include both cases of compensation for apparent or hidden defects and *aliud*. Hence, this is clearly one of those issues within Directive 2000/35 whose interpretation is influenced by the Vienna Convention.

⁵¹ The Directive states:

[I]f the date or period for payment is not fixed in the contract, interest shall become payable automatically without the necessity of a reminder:(i) thirty days following the date of receipt by the debtor of the invoice or an equivalent request for payment; or (ii) if the date of the receipt of the invoice or the equivalent request for payment is uncertain, thirty days after the date of receipt of the goods or services; or (iii) if the debtor receives the invoice or the equivalent request for payment earlier than the goods or the services, thirty days after the receipt of the goods or services; or (iv) if a procedure of acceptance or verification, by which the conformity of the goods or services with the contract is to be ascertained, is provided for by statute or in the contract and if the debtor receives the invoice or the

be performed immediately after handing over the goods or services,⁵² which is also the rule observed by the CISG.⁵³

Therefore, in breaching the *synallagmatic* principle, the creditor ends up as the injured party. It is remarkable to realise that a Directive, which has been adopted as a measure to stop the practice of imposing long payment periods, provides, subsidiary to the parties' agreement, for a disruption of the *synallagmatic* principle, thus imposing deferred payment. Deferred payment cannot be interpreted as the general applicable rule, taking into account that waivable provisions have to follow the "ideal" model regulating certain types of contracts. It is a plain contradiction to impose deferred payment as a waivable statutory model, while at the same time pretending to combat deferred payments. If the legislature considers deferred payment to be a negative practice, the best option should have been to restore the contractual balance of the *synallagmatic* principle.⁵⁴

In this sense, this Article considers that Articles 3.1(a) and (b) of the Directive 2000/35 (Article 4 Law 2004), which deal with the determination of payment periods and establishes a thirty day delay in payment, cannot interfere with the system established by the CISG, based on its own rules that observe the *synallagmatic* principle or the general rule of simultaneous performance of mutual obligations by the parties without the need of any request.⁵⁵ Any other solution would destroy the

equivalent request for payment earlier or on the date on which such acceptance or verification takes place, thirty days after this later date.

Directive 2000/35, *supra* note 1, art. 3.1(b).

⁵² This is confirmed by the *Commission Working Paper on Payment Periods in Commercial Transactions*, at 7, 40-41, SEC (92) 2214 (Nov. 18, 1992).

⁵³ CISG, *supra* note 10, art. 58.

⁵⁴ Even though some authors commenting on the Directive have considered that the objective behind this rule is to preserve the balance, they do not criticize the deferral produced *de facto* by the Directive in establishing the period of thirty days for interest to become payable. See Rosalba Alessi, *Diritto Europeo dei contratti e regole dell scambio*, in *EUROPA E DIRITTO PRIVATO* 994 (2000) ("La predeterminazione di termini di pagamento certi e ravvicinati sembra rispondere piuttosto all'esigenza di preservare la fisiologia del sinallagma nello scambio di beni (o servizi) contro prezzo, sicuramente alterata da un non giustificato divario temporale tra consegna del bene e pagamento.").

⁵⁵ CISG, *supra* note 10, arts. 58-59.

uniformity in the application of the CISG⁵⁶ since, as properly pointed out by Hager⁵⁷ commenting on Directive 2000/35, EU Member States that are also party to the Vienna Convention would have different rules than those Member States that are not party to the Vienna Convention. Regretfully though, the negative impact of the Directive in case law applying the Vienna Convention is becoming noticeable.

An example of this is the case decided by Tribunale di Padova.⁵⁸ This case involved an Italian seller and a German buyer who signed a contract for the sale of pizza boxes for the total price of 14,404.60 Euro. Although the buyer did not claim a lack of conformity of the goods, the buyer refused to pay the price. The contract failed to establish a date for payment. Hence, the Tribunal decided to apply Article 58 of the CISG, thus supporting the application of the *synallagmatic* principle, which calls for concurrence of payment and handing over of the goods, without the need of any request, as established by Article 59.⁵⁹ The goods were handed over on 10 April 2001.⁶⁰ However, together with the goods, the seller later issued an invoice establishing 30 May 2001 as the date for payment.⁶¹ In fact, the seller alleged that payment had to be performed thirty days af-

⁵⁶ The CISG may be deemed superior to domestic federal law. See generally *Juzgado Sexto de Primera Instancia del Partido de Tijuana* [Sixth Civil Court of First Instance, City of Tijuana], Mexico, 30 Aug. 2005, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/050830m1.html> (applying the rule that "International Treaties . . . [a]re to be deemed hierarchically superior to federal law and second only to the federal constitution.").

Notice that if Directive 2000/35 or Law 3/2004 prevailed over the Vienna Convention, the sole annulment provision of Law 3/2004, transposing Article 6.2 of Directive 2000/35, would have to be applied. Directive 2000/35, *supra* note 1, art. 6.2 (stating: "Member States may maintain or bring into force provisions which are more favourable to the creditor than the provisions necessary to comply with this Directive."). Consequently, Article 58 of the CISG would be considered a more favourable provision to the creditor than Article 3.1(b) of Directive 2000/35.

⁵⁷ Hager, *supra* note 21, at 39-40.

⁵⁸ *Scatolificio La Perla S.n.c. di Aldrigo Stefano e Giuliano v. Martin Frischdienst GMBH*, Trib. [Ordinary Court of First Instance], Padova, 40446, Mar. 31, 2004 (Italy), available at <http://cisgw3.law.pace.edu/cases/040331i3.html>.

⁵⁹ This principle is established by CISG, *supra* note 10, art. 59.

⁶⁰ *Scatolificio La Perla S.n.c. di Aldrigo Stefano e Giuliano v. Martin Frischdienst GMBH*, Trib. [Ordinary Court of First Instance], Padova, 40446, Mar. 31, 2004 (Italy), ¶ 11, available at <http://cisgw3.law.pace.edu/cases/040331i3.html>.

⁶¹ *Id.* ¶ 12.

ter the end of the month provided in the invoice.⁶² The Tribunal decided “since the invoice was issued concurrently with the shipment of the merchandise to the buyer, and not at a time after its receipt, it must be ruled out that that which was granted to the seller was an additional period of time within the meaning of Article 63 of the CISG.”⁶³

Carefully considered, the Tribunal is clearly applying the rule of the *dies a quo* of interest⁶⁴ to interpret Article 63 of the CISG, even though there is no such difference in the CISG. Apart from that, it is difficult to see why the Tribunal considered this legal position when it finally considered that, since the payment period on the invoice had been determined before the buyer’s breach of contract, the seller was actually modifying the contract (to its own detriment).⁶⁵ Hence, the contract was considered breached on that date.⁶⁶ As mentioned, it is hard to understand the Tribunal’s long and unnecessary reasoning, taking into account that the seller was asking for payment on a date that the buyer did not oppose. It is even harder to understand the *implicit* application of the Directive’s rules to determine the *dies a quo* to a case governed by the CISG when the Tribunal ultimately determined that the legal consequence would be modification of the contract.

2) *Compensation for Recovery Costs*

The same solution should be applied to the issue of compensation for recovery costs, which is established by Article 3.1(e) of Directive 2000/35,⁶⁷ limited by the criteria that are discussed in

⁶² It seems that the Directive is starting to affect the parties’ behavior, even in cases where it should not be applied, such as the one at hand.

⁶³ Scatolificio La Perla S.n.c. di Aldrigo Stefano e Giuliano v. Martin Frischdienst GMBH, Trib. [Ordinary Court of First Instance], Padova, 40446, Mar. 31, 2004 (Italy), ¶ 12, available at <http://cisgw3.law.pace.edu/cases/040331i3.html>.

⁶⁴ Directive 2000/35, *supra* note 1, art. 3.1(b).

⁶⁵ Scatolificio La Perla S.n.c. di Aldrigo Stefano e Giuliano v. Martin Frischdienst GMBH, Trib. [Ordinary Court of First Instance], Padova, 40446, Mar. 31, 2004 (Italy), ¶ 13, available at <http://cisgw3.law.pace.edu/cases/040331i3.html>.

⁶⁶ *Id.* ¶ 14.

⁶⁷ Directive 2000/35, *supra* note 1, art. 3.1(e), stating:

Unless the debtor is not responsible for the delay, the creditor shall be entitled to claim reasonable compensation from the debtor for all relevant recovery costs incurred through the latter’s late payment. Such recovery costs shall respect the principles of transparency and proportionality as regards the debt in question. Member States may, while respecting the

the article. This Article considers that this solution cannot be applied to the international sale of goods, since the CISG provides for its own regulation of compensation for damages.⁶⁸ Hence, these are the rules to be applied to recovery costs. Without prejudice to some costs not being governed by the CISG, this constitutes an issue to be regulated by domestic law.⁶⁹

3) *Exemption from Liability*

Exemption from liability is another aspect to be analyzed, taking into account that, even though Directive 2000/35 provides for the possibility of the debtor not being responsible for payment of interest,⁷⁰ the CISG provides for a different solution. Article 79 of the CISG establishes that a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control that was not foreseeable.⁷¹ However, this only exempts the party in breach from liability regarding damages and does not affect other rights, such as the right to claim interest contained in Article 78.⁷² As a consequence, it is plain to see that there is an

principles referred to above, fix maximum amounts as regards the recovery costs for different levels of debt.

Id.

⁶⁸ CISG, *supra* note 10, arts. 74-77.

⁶⁹ Compensation for recovery costs is especially polemic regarding costs for legal assistance and costs derived from using an agency to recover costs. See RAFAEL ILLESCAS ORTIZ ET AL., DERECHO MERCANTIL INTERNACIONAL. EL DERECHO UNIFORME [INTERNATIONAL COMMERCIAL LAW. THE UNIFORM LAW] (2003) (Spain); see also Hans Stoll & Georg Gruber, *Article 74*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), *supra* note 18.

⁷⁰ Directive 2000/35, *supra* note 1, art. 3.1(c) (stating "the creditor shall be entitled to interest for late payment to the extent that: . . . ii) he has not received the amount due on time, unless the debtor is not responsible for the delay."). Further, Article 3.1(e) states that "unless the debtor is not responsible for the delay, the creditor shall be entitled to claim reasonable compensation." *Id.* art. 3.1(e). The reason for the Directive allowing the debtor to not be responsible for payment of interest under certain circumstances is probably due to using Article 8.108 PECL as a model. See PECL, *supra* note 11, art. 8.108 (allowing an excuse due to an impediment); see also *id.* art. 8.108 cmt. B (pointing out that the excuse also applies to obligations to pay money).

⁷¹ CISG, *supra* note 10, art. 79.

⁷² Authors unanimously agree on this point. Accord Klaus Bacher, *Article 78*, in COMMENTARY ON THE UN CONVENTION ON INTERNATIONAL SALE OF GOODS (CISG), *supra* note 18, at 794, 797; Pablo Salvador Coderch, *Article 79*, in LA COMPREHENSIVA INTERNACIONAL DE MERCADERIAS: COMENTARIO DE LA CONVENCION DE VIENA [THE INTERNATIONAL MERCHANDISE TRANSACTION: COMMENTARY OF THE CON-

express regulation of this issue in the CISG, which makes Directive 2000/35 inapplicable thereto.

4) *Determination of the Interest Rate*

On the other hand, there are some issues that, while being governed by Directive 2000/35 and once transposed into domestic law, can serve to supplement the CISG in the absence of regulation by the CISG. This occurs when the issues cannot be solved resorting to the general principles on which the Convention is based, but rather need to be settled according to domestic law.⁷³ Determining the interest rate is precisely one of the issues that has generated the most debate among the commentators of the Vienna Convention, since it acknowledges the right to claim interest, but does not settle the interest rate.⁷⁴ This Article does not analyze the application of the general principles of this issue,⁷⁵ but rather assumes the opinion of the major-

VENTION OF VIENNA] 635, 653 (Luis Diez-Picazo & Ponce de Leon eds., 1998); Francesco G. Mazzotta, *CISG Article 78: Endless Disagreement Among Commentators, Much Less Among Courts*, pt. II (Jul. 2004), available at <http://www.cisg.law.pace.edu/cisg/biblio/mazzotta78.html>; Rafael Illescas Ortiz & Pilar Perales Viscasillas, *DERECHO MERCANTIL INTERNACIONAL: EL DERECHO UNIFORME* [INTERNATIONAL TRADE LAW: THE UNIFORM LAW] 245 (2003); Ingeborg Schwenzer & Georg Gruber, *Article 79, in COMMENTARY ON THE UN CONVENTION ON INTERNATIONAL SALE OF GOODS (CISG)*, *supra* note 18, at 806, 832.

⁷³ See CISG, *supra* note 10, art. 7.2.

⁷⁴ See *id.* art. 78; Mazzotta, *supra* note 72. But see Convention Relating to a Uniform Law on the International Sale of Goods art. 83, adopted July 1, 1964, 834 U.N.T.S. 107, 3 I.L.M. 854 (1972), available at <http://www.cisg.law.pace.edu/cisg/text/ulis.html>.

Where the breach of contract consists of delay in the payment of the price, the seller shall in any event be entitled to interest on such sum as is in arrear at a rate equal to the official discount rate in the country where he has his place of business or, if he has no place of business, his habitual residence, plus 1%.

Id.

⁷⁵ See UNIDROIT Principles, *supra* note 11, pmbl. UNIDROIT Principles are regarded as the general principles on which the Convention is based. See CISG, *supra* note 10, Explanatory Note § 2 ¶¶ 2-3. Article 7.4.9(2) of UPIC and Article 9.508(1) of PECL establish that the rate of interest should be the average bank's short-term lending rate to prime borrowers. See UNIDROIT Principles, *supra* note 11, art. 7.4.9(2); see also PECL *supra* note 11, art. 9.508(1). The most important international sale of goods contract models contain interest clauses almost identical to UPIC Article 7.4.9(2), see UNIDROIT Principles, *supra* note 11, art. 7.4.9(2), except for the rate being increased by 2%. See International Trade Centre UNCTAD/WTO, *INTERNATIONAL COMMERCIAL SALE/OF PERISHABLE GOODS: MODEL CONTRACT AND USERS' GUIDE* 5 (1999) (referring to Article 7 of the model contract),

ity of authors and case law on the CISG, which have considered the interest rate an issue that is not settled by the CISG and, therefore, should be decided according to domestic law.⁷⁶

The Spanish legal system provides for two possibilities: the application of Article 7, Law 3/2004,⁷⁷ or the application of an annual interest rate resulting from the guidelines provided by the Spanish national budget law (*Ley de Presupuestos Generales del Estado*). The second solution is the one that has been applied up to the present date.

Once entered into force, Law 3/2004 must necessarily involve a different approach to this issue. According to the specialty rule, Article 7,⁷⁸ and the interest rate provided therein, shall be applicable to determine the interest rate for late payment of contracts for the international sale of goods.⁷⁹ The application of the interest rate, as per Article 7 of Law 3/2004,⁸⁰

available at <http://www.jurisint.org/doc/orig/con/en/2001/2001jiconen0/2001jiconen0.pdf>; see also INTERNATIONAL SALE CONTRACT (MANUFACTURED GOODS INTENDED FOR RESALE) 6 (referring to Part B Article 6.2), available at http://www.law.gmu.edu/academics/syllabus/Fall02/Cavanaugh_IntCom-SC.pdf.

⁷⁶ See CISG, *supra* note 10, art. 7.2.

⁷⁷ This Article corresponds to Article 3.1(d) of Directive 2000/35:

The level of interest for late payment ('the statutory rate'), which the debtor is obliged to pay, shall be the sum of the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question ('the reference rate'), plus at least seven percentage points ('the margin'), unless otherwise specified in the contract. For a Member State which is not participating in the third stage of economic and monetary union, the reference rate referred to above shall be the equivalent rate set by its national central bank. In both cases, the reference rate in force on the first calendar day of the half-year in question shall apply for the following six months.

Directive 2000/35, *supra* note 1, art. 3.1(d); see also *id.* art. 2.4:

[I]nterest rate applied by the European Central Bank to its main refinancing operations' means the interest rate applied to such operations in the case of fixed-rate tenders. In the event that a main refinancing operation was conducted according to a variable-rate tender procedure, this interest rate refers to the marginal interest rate which resulted from that tender. This applies both in the case of single-rate and variable-rate auctions.

Directive 2000/35, *supra* note 1, art. 2.4.

⁷⁸ Law 3/2004, *supra* note 14, art. 7. This Article corresponds to Directive 2000/35, *supra* note 1, art. 3.1(d).

⁷⁹ Law 3/2004, *supra* note 14.

⁸⁰ *Id.* art. 7. This Article also corresponds to Directive 2000/35, *supra* note 1, art. 3.1(d).

under no circumstances implies the application of the *dies a quo* of the interest, or period for payment according to Law 3/2004, as established by Directive 2000/35, because this would have as a consequence a thirty day minimum delay in the date when interest shall become payable after receipt of the invoice or of the goods.⁸¹ The CISG mandates the application of the *synallagmatic* principle whenever the parties have not agreed otherwise, to establish the date of breach of the obligation of payment and, *ergo*, the date when interest shall become payable.⁸²

5) Control of Unfair General Terms

The use of general terms and the control of unfair general terms have been widely discussed among the CISG's commentators and in case law. Even though most of the authors and case law are in favor of controlling the inclusion of general terms by means of the CISG,⁸³ the same consensus has not been achieved as to the control of the content of these general terms, as there are obvious differences of opinion, though case law shows a

Some EU legislators have also chosen the margin of 7%. See Loi du 2 Aout 2002. Loi concernant la lutte contre le retard de paiement dans les transactions commerciales [Law of Aug. 2, 2002. The Law Concerning the Fight Against the Delay of Payment in Commercial Transactions] art. 5 (Belg.); C.Com art. L441-6 ¶3 (Fr.); Interest Act 633/1982 amended by Act 340/2002 § 4.1 (Fin.); European Communities (Late Payment in Commercial Transactions) Regulations 2002 (S.I. No. 388 of 2002) (§ 5(1)) (Ir.); Decreto Legislativo 9 ottobre 2002, n.231, art. 5.1, Gazz. Uff. No. 231 (Oct. 9, 2002) (Italy); Law of Obligations Act §§ 113(1), 415(1) (Apr. 2004) (Est.); Law No. IX-1873, Law on the Prevention of Late Payment in Commercial Transactions, art. 2.3 (Dec. 9, 2003) (Lith.); Commercial Code of Portugal, art. 102.4 (1888, as amended by Decree Legislative No. 32/2003, art. 6 (Feb. 17, 2003)), in DIARIO DA REPUBLICA-I SERIE-A No. 40, 1053, 1053-1056 (Feb. 17, 2003) (Port.); Loi du 18 avril 2004 relative aux delais de paiement et aux interest de retard [Law of Apr. 18, 2004 relating to the terms of payment and the post maturity interest], art. 1(b) (Apr. 18, 2004), in MEMORIAL JOURNAL OFFICIEL DU GRAND-DUCHE DE LUXEMBOURG, A-no. 66 (May 6, 2004) (Lux.).

Other legislators have chosen a higher margin. See German Civil Code (BGB) §§ 288.1, 288.2 (stating that when no consumers are involved, the margin is 8%. If a consumer is part of the transaction, the margin is 5%) (F.R.G.); see also Civil Code of Hungary (PTK.) art. 301.2 (Hung.) (8% margin); Business Promotion Act, pt. VII ch. 325 art. 50(3) (July 5, 1988 amended 2001) (Malta).

⁸¹ See Directive 2000/35, *supra* note 1, art. 3.1.

⁸² See CISG, *supra* note 10, art. 58.

⁸³ See Pilar Perales Viscasillas, *Comments on the Draft Digest Relating to Articles 14-24 and 66-70*, in CILE STUDIES: THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS, AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 259, 265-70 (Franco Ferrari et al. eds., 2004).

clear trend to consider this issue governed by the Convention. This is a core matter, since allowing non-uniform domestic law to control unfair general terms could result in the application of Article 9 of Law 3/2004.⁸⁴ As already stated on several occasions, this Article considers that both the control of inclusion as to the content and the issue of battle of forms are all governed by the CISG,⁸⁵ which implies that Article 9 of Law 3/2004⁸⁶ cannot be applied thereto.

⁸⁴ See Schlectriem, *Introduction to Articles 14-24*, *supra* note 19, no.1; Miguel Virgós & Francisco Garcimartín, *Article 3*, *supra* note 13, art. 3. (These Spanish authors consider the application of Article 8.1 of Spanish Law on general contract terms – although taking into account Article 7 CISG in order to regard general terms as unfair). Article 9 of Law 3/2005 corresponds to Article 3.3 of Directive 2000/35.

Member States shall provide that an agreement on the date for payment or on the consequences of late payment which is not in line with the provisions of paragraphs 1(b) to (d) and 2 either shall not be enforceable or shall give rise to a claim for damages if, when all circumstances of the case, including good commercial practice and the nature of the product, are considered, it is grossly unfair to the creditor. In determining whether an agreement is grossly unfair to the creditor, it will be taken, *inter alia*, into account whether the debtor has any objective reason to deviate from the provisions of paragraphs 1(b) to (d) and 2. If such an agreement is determined to be grossly unfair, the statutory terms will apply, unless the national courts determine different conditions which are fair.

Directive 2000/35, *supra* note 1, art. 3.3.

⁸⁵ See Maria del Pilar Perales Viscasillas, *"Battle Of The Forms" Under The 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison With Section 2-207 UCC And The UNIDRIOT Principles*, 10 PACE INT'L L. REV. 97, 138-40 (1998).

⁸⁶ This Article corresponds to Directive 2000/35, *supra* note 1, art. 3.3.